HOME ON THE RANGE: FAMILY AND CONSTITUTIONALISM IN AMERICAN CONTINENTAL SETTLEMENT

Mark E. Brandon[*]

[*] Professor of Law, Vanderbilt Law School. Thanks to John Min Kang and Stacy Howlett for assistance with research; to Greg Alexander, James Booth, Robert Covington, James Ely, John Goldberg, Ann Lin, David Meyer, Wayne Moore, and Bob Rasmussen for helpful conversations about the Article; and to the American Society for Legal History, Vanderbilt Law School, and Vanderbilt's Department of Political Science for forums permitting me to talk about this Article. I'm grateful also to the Rackham School of Graduate Studies, the Office of Vice President for Research, and the College of Literature, Science and the Arts (all at the University of Michigan) and Vanderbilt Law School for financial support for research.

ABSTRACT

For more than a century the Supreme Court of the United States has championed family as an institution of constitutional significance. The Court recently affirmed this position in Troxel v. Granville, 530 U.S. 57 (2000). *How to make sense of the Court's invocations? This Article is part of a larger study that attempts to answer that question. The Article proceeds along two fronts. The first is constitutional theory. Might family play an institutional and normative role—like federalism, rights, or divided national power—that serves as a kind of "Madisonian check" in a constitutionalist order? The second is history—social, political, and legal. Specifically, what were the family's form and functions in the westward settlement of the United States in the nineteenth century?*

The argument essentially is this: To solve basic problems of power and authority, constitutionalism requires institutions of three general types. Substantively, it needs institutions that can span three dimensions of human experience: political, economic, and moral. Functionally, it calls for institutions capable of creating, maintaining, and dissolving (or transforming) authority. Procedurally, it expects institutions that, in aggregate, promote "reflection and choice." Conventional wisdom has held that American constitutional order—through text, formal institutions, and socio-economic diversity—solved the problems of power and authority. Alexis de Tocqueville, however, was not convinced. He worried that American institutions and ethos made the order vulnerable to the centralization of political authority and that the absence of intermediary institutions, like aristocracy, only enhanced this vulnerability. Might Tocqueville have overlooked something?

Through an examination of national policy, judicial doctrine, and the experience of families in the westward territorial expansion of the United States in the nineteenth century, this Article argues that family was constitutionally useful. Substantively, family contributed to the political, economic, and moral constitution of the expanding realm. Functionally, family assisted in maintaining the order by helping it consolidate and extend authority westward across the continent. On the moral front, family's role was, in important respects, dictated by national and territorial policies. Decisions of the Supreme Court—on issues of common law, statute, and Constitution—reinforced these policies. Specifically, the order aimed to use a particular kind of family to settle the West: nuclear, monogamous, and mostly

white. With respect to political economy, however, family's constitutional utility was caught in a conflict over the formal commitments of the order. One conflict involved national policy that vacillated between a liberal-capitalist (Hamiltonian) conception of political economy and an agrarian-republican (Jeffersonian) conception. For reasons of interest and sheer numbers, many families inclined in the agrarian-republican direction. This inclination had political and social implications of two sorts. First, cutting against Tocqueville's concern, western families served as a kind of intermediary institution that aimed to resist the centralist tendencies of Hamiltonian political economy. Second, those families contributed to a substantial revision of the social, economic, and political roles of women, providing them a larger domain for action than had typically existed elsewhere. This revision would lead eventually to women's suffrage, at first in the West, then eastward, back to "civilization."

I. FAMILY AND AMERICAN CONSTITUTIONALISM

More than a century ago in a decision approving a legislative divorce obtained ex parte in the Oregon Territory, the Supreme Court of the United States ironically pronounced the marital family to be "a relation the most important, as affecting the happiness of individuals, the first step from barbarism to incipient civilization, the purest tie of social life, and the true basis of human progress."[1] Irony aside, I suspect that most observers today are inclined to dismiss this kind of talk as a rhetorical anachronism. The problem with such a dismissal is that we see encomiums to family repeated across the twentieth century among an array of otherwise incompatible justices.[2] It is not

[1] Maynard v. Hill, 125 U.S. 190, 211-12 (1888) (quoting from Adams v. Palmer, 51 Me. 481, 483 (1863)).

[2] There are many twentieth-century cases involving constitutional issues directly implicating the family. *See, e.g.*, Troxel v. Granville, 530 U.S. 57 (2000) (O'Connor, J., announcing the judgment of the Court; Souter, J., concurring; Stevens, J., dissenting); M.L.B. v. S.L.J., 519 U.S. 102 (1996) (Ginsburg, J., for the Court; Kennedy, J., concurring); Hodgson v. Minnesota, 497 U.S. 417 (1990) (Stevens, J., announcing the judgment of the Court; Marshall, J., concurring in part and dissenting in part; Kennedy, J., concurring in part and dissenting in part); Michael H. v. Gerald D., 491 U.S. 110 (1989) (Scalia, J., announcing the judgment of the Court; Stevens, J., concurring; Brennan, J., dissenting; White, J., dissenting); DeShaney v. Winnebago County Dept. of Soc. Serv., 489 U.S. 189 (1989) (Rehnquist, C.J., for the Court; Brennan, J., dissenting; Blackmun, J., dissenting); Clark v. Jeter, 486 U.S. 456 (1988) (O'Connor, J., for the Court); Rivera v. Minnich, 483 U.S. 574 (1987) (Stevens, J., for the Court; O'Connor, J., concurring; Brennan, J., dissenting); Turner v. Safley, 482 U.S. 78 (1987) (O'Connor, J., for the Court); Bowers v. Hardwick, 478 U.S. 186 (1986) (White, J., for the Court); Roberts v. United States Jaycees, 468 U.S. 609 (1984) (Brennan, J., for the Court; O'Connor, J., concurring); Palmore v. Sidoti, 466 U.S. 429 (1984) (Burger, C.J., for the Court); Lehr v. Robertson, 463 U.S. 248 (1983) (Stevens, J., for the Court; White, J., dissenting); Pickett v. Brown, 462 U.S. 1

simply that family is an arena for legal conflict with constitutional implications. Family has also become a basis for constitutional judgment.

What could possibly account for family's ostensible constitutional status, apart from the fact that the Supreme Court has pronounced it so or that family is an institution widely used and sometimes liked? That question is the impetus for this Article, which is part of a larger study of the constitutional status of the family. I am not interested here in defending any particular tenet or doctrine of the Court's jurisprudence; I want merely to consider whether the general strategy of treating family as "constitutional" can make sense.

The standard tools and methods of the constitutional lawyer will not supply a satisfying answer. It is unlikely, for example, that the text that calls itself "the Constitution" is adequate, notwithstanding the efforts of Justices Harlan[3] and Douglas[4] to employ it. Nor can original meaning—still less, framers'

(1983) (Brennan, J., for the Court); Mills v. Halbuetzel, 456 U.S. 91 (1982) (Rehnquist, J., for the Court; O'Connor, J., concurring); Santosky v. Kramer, 455 U.S. 745 (1982) (Blackmun, J., for the Court); Lassiter v. Dept. of Soc. Serv. of Durham County, 452 U.S. 18 (1981) (Stewart, J., for the Court; Blackmun, J., dissenting); Little v. Streater, 452 U.S. 1 (1981) (Burger, C.J., for the Court); H.L. v. Matheson, 450 U.S. 398 (1981) (Burger, C.J., for the Court; Powell, J., concurring; Stevens, J., concurring); Parham v. J.R., 442 U.S. 584 (1979) (Burger, C.J., for the Court; Stewart, J., concurring); Caban v. Mohammed, 441 U.S. 380 (1979) (Powell, J., for the Court; Stewart, J., dissenting; Stevens, J., dissenting); Zablocki v. Redhail, 434 U.S. 374 (1978) (Marshall, J., for the Court; Stewart, J., concurring; Powell, J., concurring); Lalli v. Lalli, 439 U.S. 259 (1978) (Powell, J., announcing the judgment of the Court; Stewart, J., concurring; Blackmun, J., concurring; Brennan, J., dissenting); Quilloin v. Walcott, 434 U.S. 246 (1978) (Marshall, J., for the Court); Moore v. East Cleveland, 431 U.S. 494 (1977) (Powell, J., announcing the judgment of the Court; Brennan, J., concurring); Trimble v. Gordon, 430 U.S. 762 (1977) (Powell, J., for the Court); Mathews v. Eldridge, 424 U.S. 319 (1976) (Powell, J., for the Court); Vill. of Belle Terre v. Boraas, 416 U.S. 1 (1974) (Douglas, J., for the Court); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974) (Stewart, J., for the Court); Gomez v. Perez, 409 U.S. 535 (1973) (per curiam); Wisconsin v. Yoder, 406 U.S. 205 (1972) (Burger, C.J., for the Court); Stanley v. Illinois, 405 U.S. 645 (1972) (White, J., for the Court); Labine v. Vincent, 401 U.S. 532 (1971) (Black, J., for the Court; Harlan, J., concurring; Brennan, J., dissenting); Boddie v. Connecticut, 401 U.S. 371 (1971) (Harlan, J., for the Court; Douglas, J., concurring); Levy v. Louisiana, 391 U.S. 68 (1968) (Douglas, J., for the Court); Loving v. Virginia, 388 U.S. 1 (1967) (Warren, C.J., for the Court); Griswold v. Connecticut, 381 U.S. 479 (1965) (Douglas, J., for the Court; Goldberg, J., concurring); Poe v. Ullman, 367 U.S. 497, 523 (1961) (Harlan, J., dissenting); Prince v. Massachusetts, 321 U.S. 158 (1944) (Rutledge, J., for the Court); Skinner v. Oklahoma, *ex rel* Williamson 316 U.S. 535 (1942) (Douglas, J., for the Court); Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925) (McReynolds, J., for the Court); Meyer v. Nebraska, 262 U.S. 390 (1923) (McReynolds, J., for the Court). This list is not exhaustive. It excludes, for example, most of the cases involving the right to abortion as well as those involving sexual equality, divorce, testimonial privilege, jurisdiction, confrontation of witnesses, enforcement of judicial orders, and removal of children from foster care, despite the fact that such cases frequently have implications for familial life.

[3] *See* Poe v. Ullman, 367 U.S. 497, 539, 549 (1961) (Harlan, J., dissenting) (locating a right of marital privacy in, inter alia, the Third and Fourth Amendments).

[4] His famous use of "penumbras" and "emanations" proceeds initially from "specific guarantees in the Bill of Rights." Griswold v. Connecticut, 381 U.S. 479, 482-86 (1965). On his account, the First

intentions—comprehensively do so.[5] As I consider below,[6] common law has something to offer, but it too seems insufficient standing alone.[7] These inadequacies may incite some scholars to conclude that the Court's jurisprudence of family has been illicit. I think such a rejection is too quick. For one thing, other sources of constitutional meaning are available, any one of which might make its own claim to authority. Possible sources include tradition,[8] retroduction of principle from doctrine,[9] structure (institutional[10] or textual[11]), "spirit" (or purpose),[12] contemporary ethos,[13] norms of civilized nations,[14] and natural law (or right).[15] I do not critically evaluate these sources and methods here, although I acknowledge the need eventually to do so.

Amendment's right of assembly connotes association, including intimate associations, one of which is marital family; and the Third Amendment's prohibition of quartering soldiers in time of peace, the Fourth Amendment's prohibition of unreasonable searches and seizures, and the Fifth Amendment's Self-Incrimination Clause all presuppose "the sanctity of a man's home," which presumably might house not only "a man" but a family as well. *Id.* at 484.

[5] I have argued elsewhere that at least some of the Constitution's proponents viewed "republican family" as part of a social order on which the successful operation of the order depended. *See* Mark E. Brandon, *Family at the Birth of American Constitutional Order*, 77 TEX. L. REV. 1195, 1221-26 (1999). The evidence, however, is not voluminous.

[6] *See infra* Part III.C.1.

[7] *See* Michael H. v. Gerald D., 491 U.S. 110, 124-26 (1989); Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

[8] See Justice Scalia's plurality opinion in *Michael H. v. Gerald D.*, 491 U.S. at 110. For a defense of tradition generally as an interpretive source, see Anthony Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029 (1990). Justice Douglas's final paragraph in *Griswold v. Connecticut* may implicitly rest on intuitions of the sort that Kronman expresses. 381 U.S. at 486. Marriage, wrote Douglas, is "older than the Bill of Rights—older than our political parties, older than our school system." *Id.* It promotes "a way of life," which is one reason he called it "noble." *Id.*

[9] Palko v. Connecticut, 302 U.S. 319 (1937) (Cardozo, J., for the Court). The term "retroduction" comes from Walter F. Murphy, *An Ordering of Constitutional Values*, 53 S. CAL. L. REV. 703, 763 (1980).

[10] CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969).

[11] JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

[12] *Griswold*, 381 U.S. at 484 (invoking "penumbras" and "emanations" for purposes behind particular textual guarantees of rights). *Cf.* Jacobson v. Massachusetts, 197 U.S. 11 (1905) (asserting that "the spirit . . . is to be collected chiefly from [the] words" (quoting from Sturges v. Crowninshield, 17 U.S. (4 Wheat) 122, 202 (1819))).

[13] William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L.J. 433 (1986).

[14] Trop v. Dulles, 356 U.S. 86, 100 (1958) (invoking "civilized standards" of "decency" and "the dignity of man"); Rochin v. California, 342 U.S. 165, 176 (1952) (Frankfurter, J., for the Court) (specifying the values of "English speaking peoples"); United States v. La Jeune Eugenie, 26 F. Cas. 832 (D. Mass. 1822) (No. 15,551) (Story, J.).

[15] Calder v. Bull, 3 U.S. (3 Dall.) 386, 388, 398 (1798); Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 715-16 (1975) (discussing natural rights as a source for higher law); Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277, 286 (1985). *Cf.* United States v. Marshall, 908 F. 2d 1312, 1331, 1335 (7th Cir. 1990) (Posner, J., dissenting) (noting common characteristics of natural law and pragmatism).

Instead, I assert that, if there is to be a satisfying justification for family's constitutional status, it must ultimately press on two fronts, one normative, the other empirical. Without claiming to offer a comprehensive answer to the question of family's status, this Article proceeds on both fronts.

On the normative front, it is useful, perhaps essential, to take up the theory that underwrites the constitutional enterprise in the first place: constitutionalism. What problems does it aim to address? What are its elements? What norms and practices does it require? On the empirical front, we should examine family, not merely as an idea but also as a working institution. What forms does it take? What relations does it entail? Do its functions make it useful for a constitutionalist order?

Briefly, my analysis unfolds in the following way: Constitutionalism is concerned with problems of power and authority. To solve those problems, it needs institutions of three general types. *Substantively*, it requires institutions that can span three dimensions of human experience—political, economic, and moral. *Functionally*, it calls for institutions capable of creating, maintaining, and dissolving (or transforming) authority. *Procedurally*, it expects institutions that, in aggregate, promote "reflection and choice."

Conventional wisdom (or hubris) has held that American constitutional order—through its Constitution, its institutional arrangement, and its socio-economically diverse society—solved the problems of power and authority. Alexis de Tocqueville, however, was not convinced.[16] He claimed, among other things, that simultaneous commitments to liberalism and democracy in the United States made the order especially vulnerable to the centralization of political authority. One reason for this vulnerability was the scarcity of "intermediary" institutions—like an aristocracy—capable of resisting a concentration of power. This tendency threatened the order's ability to sustain itself as a constitutionalist enterprise.

Might Tocqueville have overlooked something? Might family perform in ways that reinforce constitutionalism? From the standpoint of *procedure*, it is not clear that family has much to contribute. With respect to *substance*, however, family can span all three of the posited dimensions of human experience—political, economic, and moral. This is not to suggest that any particular iteration of family will necessarily do so, nor that a constitutionalist order must include a particular form of family. It is only to propose that if

[16] *See infra* Part II.B.

family is capable of promoting some version of the three substantive dimensions, it might be constitutionally useful.

Can it do more? Specifically, can it also meet constitutionalism's *functional* requirements—to create, maintain, and dissolve (or transform) authority and power? In previous work, I examined how a new form of family arose in eighteenth-century British North America, antagonistic to and subversive of aristocratic privilege and practices, and how it contributed to political events and ideologies that led North American colonies to secede from Britain and establish a republican political system.[17] In short, in the colonial context, eighteenth-century families functioned in creative and transformative ways, helping to dissolve relations with an old political order and create a new one.

In the present Article, I examine a later time and in some respects a different sort of family. I focus, specifically, on families in the westward territorial expansion of the United States in the nineteenth century.[18] I conclude that these families did two significant things. Substantively, they contributed in fundamental ways to the political, economic, and moral constitution of the expanding realm. Functionally, too, they performed a constitutionally useful role. They differed, however, from their colonial forebears, for their role was neither creative nor directly transformative, but a maintaining role that helped the regime consolidate power and extend its geographic range across a continent.

Here, briefly, is the evidence for these claims: National policy profited from family's political, economic, and moral dimensions. On the political and economic fronts, however, there was a complication: Nineteenth-century American culture housed at least two distinct conceptions of political economy—one agrarian-republican (espoused by Thomas Jefferson), the other liberal-capitalist (whose articulate early proponent was Alexander Hamilton).

---

[17] Brandon, *supra* note 5, at 1206-10.

[18] There is a problematic ambiguity in the word "westward," not least because the West has been a moving target in the history of the United States. There was a time, of course, when upstate New York and the rolling hills of Virginia and most of Pennsylvania were West. Thereafter, as Frederick Jackson Turner famously recited, the West progressed beyond the Alleghenies to Kentucky and Tennessee, into the Ohio Valley and the Old Northwest, beyond the Chattahoochee River in the deep South, past the Mississippi River to a vast prairie, and so on until the nation devoured much of a continent. See the essays collected in FREDERICK JACKSON TURNER, THE FRONTIER IN AMERICAN HISTORY (1996). Generalizing about such a sizable space and time is tricky, but I hope here to hold onto an ambiguous "West" in order to try to tease out some themes related to constitutional structure and change. One thing I do not consider in this Article is the implication of national policy of territorial settlement for native tribes. That issue is part of the larger study.

Each conception posited its own values and its own place for family.[19] The U.S. policy of territorial expansion embodied the tensions between these two conceptions, though it did not attempt to reconcile them.[20] In short, Congress pursued both conceptions simultaneously. This ecumenical embrace, however, did not suppress conflict entirely, even if it did dampen it. For one thing, there was a persistent political cleavage between homesteaders and speculators. This division, which grew out of competing material interests that were tied to conflicting notions of political economy, pitted an image of the familial farm against an image of an individualist market in free labor. The cleavage was visible not only in Congress, but also on Western turf.[21] For another, national policy toward settlement was inextricably bound to growing sectional conflict over the status and fate of slavery in the order. On the frontier, this conflict pitted two versions of the agrarian family against each other. One was the slaveholding household, which viewed its landed entitlement as prior to the nation. The other was a white, non-slaveholding household that traced its landed entitlement to the national government.[22]

Even on the eve of the Civil War, members of Congress and the president were engaged in political pugilism on both the class-based front and the sectional front.[23] Despite the adoption of the Republican Party's Homestead Act after Abraham Lincoln's election in 1860, which would seem to have been a victory for white homesteaders against both speculators and slavery (or, if not slavery, against black settlement), Western agrarians criticized national policy as wed to capitalism.[24] Amid all the commotion, however, Congress was clear and consistent about one thing: Family's function was to maintain (and extend) political dominion into the territories and across the continent.

Would family comply with Congress's expectations? First, would the experience of families on the frontier exhibit the maintaining function presupposed by congressional policy, or would it reveal attempts to challenge the order through acts of creation or dissolution, as occurred around the time of the American Revolution? Second, would these families not simply authorize power, but constrain it as well, particularly against the tendencies Tocqueville saw as endemic to American constitutional order?

---

19 *See infra* Part III.A.
20 *See infra* Part III.B.1.
21 *See infra* Part III.B.1.
22 *See infra* Part III.B.2.
23 *See infra* Part III.B.3.
24 *See infra* Part III.B.4.

Answers to these questions would depend partly on family's function along other dimensions of constitutionalism—especially the moral dimension. We see the family's moral dimension on two fronts. One, grounded in the ethos and practices of the culture at large, involved the role of women in the domestic sphere. In short, women's work was not only to maintain the household in a material sense, but to exercise responsibility for the education of children. This responsibility was both intellectual and moral. Combined with assumptions about women's innately superior capacity for moral judgment and behavior, the educative function pictured wives and mothers as guardians of civilization in society.[25]

The second front on which the moral dimension was implicated was in the courts, specifically, for my purposes here, the Supreme Court. The Court's decisions, in a variety of doctrinal domains, wrote family into the Constitution of the nation. They did so, in part, by formalizing and in some ways nationalizing the commitment to common law. A substantial portion of this commitment, of course, entailed norms regulating the options of women—especially married women—in the economic sphere. Legal constraints on wives' economic capacities tended to reinforce their educative role as mothers. Thus, growing out of these economic concerns were two basic issues, both of which appeared in cases arising from settlement of the frontier. One was whether the proper constitutional conception of family was as a prepolitical, prelegal institution or as a civil institution created by and subject to law. The second involved polygamy. This latter set of cases enabled the Court to reflect on the form and function of family. The proper form, the Court insisted, was monogamous. The function, which grew out of this form, was moral. The morality of family concerned not only the internal dynamics of familial life, but also family's role in reinforcing a particular kind of morality in the larger society.[26]

Family's moral and economic dimensions integrated into the political, especially in the territories and new states of the West.[27] Western families did help maintain and extend the authority of the nation across the continent. They were both essential and useful to this task. They were essential for two reasons. First, agriculture was the primary mode of production on the frontier; second, the means for pursuing agriculture made family, not the individual, the

---

[25] *See infra* Part III.C.2.

[26] *See infra* Part III.C.1.

[27] *See infra* Part III.D.

basic unit capable of material self-sufficiency. Families were useful to the task, because connections among families created communities, which were the basis for a rudimentary form of politics, which in turn was the foundation for political control of the territories and their admission into the union.

If families helped maintain the order, however, they also changed it. There were several reasons they did so. Environmental exigencies, the weakness of law, and the paucity of established social ties permitted (in some respects required) changes in family. Among the changes were subtle alterations in relations between wives and husbands. It would be a mistake to make too much of the significance (or longevity) of some of these alterations, but it is fair to say that they helped produce two consequences that were relevant to constitutional order. First, families in the Western territories helped produce a political movement whose aim was to challenge the Hamiltonian conception of political economy. Tocqueville would have been interested in this development, but he would not have been surprised that the movement ultimately failed. Second, alterations of roles within the Western family helped revise people's conception of who could be a political member of the constitutional order. In short, Western women exploited their moral role, expanded their economic role, and were much less excluded from a political role than were their sisters back East. As a consequence, women began to acquire some basic rights of citizenship. This Western innovation would eventually echo eastward, beyond the frontier, back to "civilization."

II. CONCEPTUAL CONSIDERATIONS

A. Constitutionalism

Constitutionalism is a concept capable of various meanings. As I use the term, it is not equivalent to explanations or descriptions of doctrinal glosses that judges have placed on a constitution; for it is not an analytic account of the practice of judicial review. Nor, on the other hand, is it essentially an attempt "to remedy a central problem of liberal political theory by constraining the judiciary sufficiently to prevent judicial tyranny."[28] Nor, to press the point further, is it restricted to liberal forms of government, though many liberal polities would qualify in various respects as constitutionalist.[29]

---

[28] Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 784-85 (1983).

[29] *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977) (defining constitutionalism as "the theory

Constitutionalism is a political theory concerned with the architectural structure and basic values of society and of government. It aims to make the world comprehensible and, to some degree, controllable. Historically, it is preoccupied with the problem of power, particularly the power of those who would rule others, especially when that rule might be arbitrary. To solve these problems, constitutionalism has three sets of needs or requirements.

First, in *substantive* terms, it requires institutions that span three dimensions of human experience. One dimension is political, implicating the allocation of benefits and burdens among people in society, the articulation of norms for human behavior, and the processes by which formal decisions are made. Another is economic. This dimension is concerned with the production, distribution, and exchange of material goods and materially consequential services. The third dimension is moral. It pertains to the norms by which people evaluate the substantive value or rightness of human action. In conjunction with one another, these dimensions—political, economic, and moral—are concerned with "ways of life." There might be many such ways—for societies, for groups, or for individuals—consistent with constitutionalism.[30]

Second, in *functional* terms, constitutionalism needs institutions capable of doing three things: creating, maintaining, and dissolving (or fundamentally altering) constitutional orders.[31] This set of needs makes a written constitution

---

that the majority must be restrained to protect individual rights"); *cf.* AMERICAN CONSTITUTIONAL INTERPRETATION 45-47 (Walter F. Murphy et al. eds., 2d ed. 1995) (for whom constitutionalism resembles a system of liberal rights, whose grundnorm is human dignity, to check democracy).

[30] For present purposes, we may hold open the question of whether constitutionalist ways must be compatible with a comprehensive vision of "the good life," in Aristotelian, Thomistic, or other terms. *Compare* SOTIRIOS A. BARBER, ON WHAT THE CONSTITUTION MEANS (1984), *with* ROBERT P. GEORGE, MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY (1993). My intuition is that they need not be; in fact, there may be advantage in incompatibility.

[31] One might imagine that creation and dissolution are essentially about change, while maintenance is about preservation. This view, however, is too narrow. For example, one might create or dissolve for purposes of preservation; moreover, for reasons both Edmund Burke and Charles Darwin understood, in order to preserve, one sometimes must change. Burke was a "conservative" political theorist in at least two respects: He insisted that the aim of politics should be to preserve the existing order; and he was skeptical of systematic philosophies that advocated revolutionary change. *See* EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE (Conor Cruise O'Brien ed., 1969). Burke perceived, however, the need for political orders to change in order to preserve themselves. Hence, he supported moderate reform and viewed the practice of politics as a kind of adaptation. *See* SELECTED LETTERS OF EDMUND BURKE 5-6 (Harvey C. Mansfield, Jr. ed., 1984). Darwin's theory of evolution, of course, posited that the survival of a species depended on an innate drive to reproduce, which, unconsciously over time, promoted the adaptation of the species to environmental and other exigencies. *See* CHARLES DARWIN, ON THE ORIGIN OF SPECIES (New York

especially useful, maybe essential. It also explains the utility of a theory positing sovereignty in "the people," as distinct from government.[32] But constitutionalism might require other, more ordinary institutions that can perform one or more of the three functions.

Third, in terms of *method* or *procedure*, it aims at authorizing and constraining power through what Alexander Hamilton called "reflection and choice."[33] This aim suggests the primacy of principle and the deficiency of mere force as bases for political action, and it implies the importance of authority and respect for limits. "Authority" connotes the justified exercise of power. "Limits" may entail the exercise of power through established, rational procedures, through the rational pursuit of specified ends, or through respect for rights; it may also make institutional balance desirable. The preoccupation with authority and limits makes law an attractive, perhaps essential, element of any constitutionalist regime. But constitutionalism and rule of law are not coextensive, for reasons that Vladimir Putin's proclaimed aspiration for a "dictatorship of law" may help clarify.[34]

B. An American Dilemma

As indicated above, a constitutionalist order may configure institutions, norms, and practices in a variety of ways.[35] We can quickly recite some of the conspicuous institutions that the Constitution of the United States crafted or presupposed. First, political authority resided ultimately in the people. As a matter of constitutional creation or dissolution, this notion was consistent with

---

University Press, 1988) (1859). Consequently, preservation and change (even transformative change) are elements of or possibilities in all three constitutionalist functions.

[32] From a written constitution and popular sovereignty, a working definition of constitutionalism might follow: a theory of the institutions and values of a type of political "enterprise" in which "(1) people, or 'a people,' (2) self-consciously attempt (3) to conceive the design for a new political world, (4) to embody that design in some sort of text, and (5) to implement it in the world." MARK E. BRANDON, FREE IN THE WORLD: AMERICAN SLAVERY AND CONSTITUTIONAL FAILURE 10 (1998). My primary concern in this Article is with institutional structure, not texts; that shift in focus is not an implicit repudiation of my claim that constitutionalism requires some sort of text.

[33] THE FEDERALIST NO. 1, at 1 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

[34] *See* JEFFERY KAHN, FEDERALISM, DEMOCRACY AND THE RULE OF LAW IN RUSSIA 607 (2002).

[35] I do not attempt here to catalogue or classify particular orders as constitutionalist (or not). Suffice it to say that the United States is such an order, though one that tends toward liberalism in important but contestable respects. Plainly, the United States is not the only model, but it is one from which we might draw tantalizing lessons, even as we should be cautious about generalizing from any conclusions we reach. With respect to the family, one thing is worth noting: To the extent that the United States is a liberal regime, we might expect family's constitutional role (as compared, say, with the role of individuals) to be circumscribed, especially in light of the thin textual foundation for family in the Constitution itself.

the sovereignty of the people (as opposed to God or monarch or state).[36] As a matter of constitutional maintenance, the notion embodied the republican principle that rulers derive their authority, directly or indirectly, from those who are ruled.[37] Second, aristocratic modes of social organization and political entitlement were expressly repudiated, at least to the extent that such modes entailed privileges of citizenship or other formal entitlements.[38] Third, and following from the first two, the basic mode of political decision was democratic (or relatively so), both in the system of electoral representation and in the operation of legislative bodies.[39] Fourth, formal political power was divided between the states and nation; and, within the national government, functions were divided among distinct institutions, whose interconnected authority and functions were finely specified and calibrated.[40] Fifth, the Constitution imposed express limits on actions of the United States[41] and the several states.[42] Sixth, the order was a "legal" system in at least three respects: Its binding norms were produced by authoritative, representative institutions; those norms were enforced by judges possessing comprehensive judicial powers; and the system of legal enforcement was guarded by a partially autonomous professional class: lawyers.[43] Seventh, at least for James Madison, a sprawling, diverse, and dissonant population reinforced restraint in the national system by making agreement on national policy more difficult.[44]

Since the founding, many Americans have been satisfied that this system—putting liberalism and democracy in tense union with each other—solved the problems of power and authority, producing a balanced order capable of vigor, constraint, stability, and long life. Without denigrating many of the advantages of the American order, Alexis de Tocqueville worried. The basic problem he saw was the tendency, inherent in the operational logic of any democratic political system, toward centralization of power in the nation-state. This problem was exacerbated by two distinctive characteristics of American society: the absence of significant intermediary institutions and an excessive tendency among Americans to "privatize" their lives. Thus, he worried that

---

36 U.S. CONST. pmbl; *id.* amend. X.

37 *Id.* art. I; *id.*, art. II; THE FEDERALIST NOS. 37, 39 (James Madison).

38 U.S. CONST. art. I, § 9, cl. 8; *id.* art. I, § 10, cl. 1; *id.* art. IV, § 4.

39 *Id.* art. I; *id.* art. II.

40 THE FEDERALIST NOS. 39, 51 (James Madison).

41 U.S. CONST. art. I, § 9. The Bill of Rights, added later, enhanced substantially the rights one could claim against the national government.

42 U.S. CONST. art. I, § 10, cl. 1; *id.* art. IV.

43 *Id.* art. III; THE FEDERALIST NO. 78 (Alexander Hamilton).

44 *See, e.g.*, THE FEDERALIST NO. 10 (James Madison).

even the baroque architecture of the American system might not suffice to resist democracy's centralizing tendency. "Complicated systems repel [a democratic people, who are] pleased to imagine a great nation in which all of the citizens resemble a single model and are directed by a single power."[45]

On Tocqueville's account, the mechanism for centralization is twofold. The first is the potency of the concept of equality undergirding democracy—equality at least among those who count as full citizens. Second, and related to the first, is the normative and emotional power of individualism. Thus, Tocqueville rejected the conventional story Americans told about themselves: that the Constitution presides over an uneasy marriage of liberalism and democracy, spawning a system in which competing interests of collective and individual are balanced and the power of government is diffuse and constrained. The marriage of democracy and liberalism is not tense at all, he claimed, for the two share a basic tendency.[46]

One characteristic of aristocratic systems, said Tocqueville, is the presence of "secondary" or "intermediate" powers. The social virtue of these powers is that they mediate the relation between the state and its subjects or citizens. Democracy, for reasons of history and principle, rejects aristocratic privilege. This rejection inclines the mind of the democratic citizen to a jealous antagonism toward any policy that treats people differently. The version of law this calls for is a general law of uniform application. The kind of society it tends to produce is a mass society, composed of free and equal individuals.[47]

This state of affairs might seem to suggest a regime of happy rights-holders, governed by law, but, on Tocqueville's account, it does not. For one thing, in such a society the individual, "having become like all the others, is lost in the crowd, and one no longer perceives [anything] but the vast and magnificent image of the people itself."[48] For another:

> This immortal hatred, more and more afire, which animates democratic peoples against the slightest privileges, particularly favors the gradual concentration of all political rights in the hands of the sole representative of the state. The sovereign [state], being necessarily above all citizens and uncontested, does not excite the

---

[45] 2 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA pt. iv, ch. 2 (Harvey C. Mansfield & Delba Winthrop eds. & trans., 2000).

[46] 2 *id.*

[47] 2 *id.* at 640-43.

[48] 2 *id.*

> envy of any of them, and each believes he deprives his equals of all the prerogatives he concedes to it.[49]

Any residual sovereignty the people ostensibly possess is no check against this tendency. "Americans believe that in each state the social power ought to emanate directly from the people; but once that power is constituted, they imagine so to speak no limits to it; they willingly recognize that it has the right to do everything."[50] Nor does a system of general laws of uniform application supply a sufficient check. "[E]very central government adores uniformity; uniformity spares it the examination of an infinity of details with which it would have to occupy itself if it were necessary to make a rule for men, instead of making all men pass indiscriminately under the same rule." For these reasons, "[e]very central power . . . loves equality and favors it; for equality singularly facilitates the action of such a power, extends it, and secures it."[51]

Two ironies follow from Tocqueville's critique. From the standpoint of liberalism, a society of individuals threatens to submerge individuals. From the standpoint of democracy, a political system whose authority ostensibly rests on the collective people challenges the very limits that, on a constitutionalist understanding, were an impetus for creating the system, thus undermining the aims of the sovereign (people, not state) and weakening its residual power. The moral and material economies of egoistic competition and acquisition, which were unusually well developed in the United States, only make matters worse. The equal inhabitants of democratic countries, said Tocqueville, "willingly fall back on themselves and consider themselves in isolation."[52] They are so preoccupied with self and private gain that "hardly any energy or leisure remains to each man for political life."[53] Hence, they find it difficult "to tear themselves away from their particular [private] affairs to occupy themselves with common [public] affairs; their natural inclination is to abandon the care of the latter to the sole visible and permanent representative of collective interests, which is the state."[54] The ethos of competition that underwrites private activity tends in the same direction. Because "no one is obliged to lend his force to those like him . . . each is at

---

49 2 *id.* pt. iv, ch. 3, at 645

50 2 *id.* pt. iv, ch. 2.

51 2 *id.* pt. iv, ch. 3, at 645.

52 2 *id.* at 643.

53 2 *id.*

54 2 *id.* at 643. As I suggested above, Madison saw these same aspects of social life as virtues, from a constitutionalist perspective. THE FEDERALIST NO. 10 (James Madison).

once independent and weak."[55] This conflict has psychological ramifications. Independence engenders a sense of "confidence and pride."[56] Weakness, on the other hand, incites a desire for "outward help," which he cannot expect from his fellows because they are his constant competitors; thus, "he naturally turns his regard to the immense being that rises alone in the midst of universal debasement. His needs and above all his desires constantly lead him back toward it, and in the end he views it as the unique and necessary support for individual weakness."[57]

This is a bleak picture. Tocqueville himself conceded that these tendencies were not inexorable. "I only maintain that in our day a secret force constantly develops them in the human heart, and that not to stop them is enough for them to fill it up."[58] But he did not see the means for overcoming the tendencies. Perhaps, however, he underestimated an institution in which he was actually quite interested: the family. Tocqueville himself noted that, while "[d]emocracy loosens social bonds . . . it tightens natural ones. It brings relatives together at the same time that it separates citizens."[59] He could comprehend how this cohesion might be socially useful as a vehicle for promoting "good morals," as a refuge from the alienation incited by American economic order, or as indirectly promoting material prosperity,[60] but he did not conceive that, as an intermediary association, it might have constitutionalist uses as well.

C. Family

It is difficult (perhaps because it is too easy) to speak of "family" generically. As a sociological matter, there are many forms of family in the world, across a variety of continua—marital and nonmarital, nuclear and extended, reproductive and childless, monogamous and plural, heterosexual and same-sex, patriarchal and egalitarian. It is possible, however, to identify particular aspects of human experience that have fallen linguistically within the term "family" and have marked it as significant.

One such aspect is reproduction, which is essential to the survival of the species. Until recently in human history, all that has been required to

---

55 2 TOCQUEVILLE, *supra* note 45, at 644.
56 2 *id.*
57 2 *id.* pt. iv, ch. 3.
58 2 *id.*
59 2 *id.* pt. iii, ch. 8.
60 2 *id.* pt. iii, chs. 10-11; 2 *id.* pt. ii, ch. 2.

perpetrate reproduction has been a copulative act that produces a zygote (then embryo, then fetus), a successful birth, and the presence of one or more persons willing and able to care for the child until s/he is mature enough to do so.[61] Thus, while it presupposed a kind of heterosexual union, if not a heterosexual orientation on the part of both partners, it did not require a perpetuation of the union, much less exclusivity; certainly, it did not require a continuing, formally monogamous, nuclear family of the sort that includes a mother, father, and child. Although some people in our own time may doubt that mere sex rises to the level of a constitutional interest, surely it is constitutive of the species and of social life in nontrivial ways. To say this, of course, is not to resolve the question of whether procreation should be subject to social regulation, exempt from such regulation, or both.[62]

Beyond the physical survival of the species, there are other ways in which family has been constitutionally consequential—ways that map the three substantive dimensions of constitutionalism.[63] One, as we have seen, is economic: not sexual reproduction but material production. Long before Friedrich Engels reminded us of this aspect of familial life,[64] Aristotle noted that a central function of the household—consisting of a man, one or more women, children, and slaves—was to promote material well being. Its organization and purpose aimed at satisfying its members' daily needs.[65] Hence, the ancient Greek name for household, *oikos*, became the root for the English word "economy."[66] Although women had a critical role in maintaining the Aristotelian household and were superior to children and slaves, it was clear that Aristotle posited man as superior to all three.[67]

---

[61] Today, reproductive technologies permit dispensing with copulation as a trigger for procreation.

[62] The Supreme Court has embraced the third option, but did not begin to focus systematically on this aspect of familial life until well into the twentieth century. This timing places the Court's treatment of this issue beyond the scope of this Article.

[63] In this section, I consider ideas of Aristotle and John Locke. I do so, not to reify or entrench their conceptions (which in any event conflict with one another), but because they dealt with family in ways that are relevant to constitutionalism. My discussion here draws on notions explored in Brandon, *supra* note 5, at 1202-06.

[64] FRIEDRICH ENGELS, THE ORIGIN OF THE FAMILY, PRIVATE PROPERTY, AND THE STATE IN THE LIGHT OF THE RESEARCHES OF LEWIS H. MORGAN (International Publishers 1972) (1891).

[65] ARISTOTLE, THE POLITICS, at I.ii (Benjamin Jowett trans., Max Lerner ed., 1942).

[66] For a nice treatment of the political economy of the ancient Greek conception of household, see WILLIAM JAMES BOOTH, HOUSEHOLDS: ON THE MORAL ARCHITECTURE OF THE ECONOMY 1-93 (1993).

[67] ARISTOTLE, *supra* note 65, at I.ii (quoting Homer: "Each one gives law to his children and to his wives"); *id.* at I.xii ("[T]he male is by nature fitter for command than the female."); *id.* at I.xiii (quoting Sophocles: "'Silence is a woman's glory,' but this is not equally the glory of man").

Philosophically, temporally, and culturally closer to American nationhood, John Locke retained, revised, and rejected various aspects of Aristotle's theory. Locke had a substantially more complex (and ambivalent) conception of political economy. One reason for this fact may be that he stood at a critical juncture in the development of the English system. Looking in one direction, he could see a long tradition of agrarianism, whose fate had been recently sealed by the policy of enclosure. Looking in another direction, he could see emerging—from English colonialism, from her mercantile policy of the previous century, and from the unconscious development of domestic shops and enterprises—new forms of commercial enterprise that constituted the crude foundation for capitalist norms and institutions.[68] Regardless of his conflict on this score, family was not a prominent part of Locke's conception of economy.

Locke focused instead on a different dimension of familial life: the moral education of children. Aristotle had argued, "inasmuch as every family is part of a state, and these relationships [between husband and wife, parent and child] are the parts of a family, and the virtue of the part must have regard to the virtue of the whole, women and children must be trained by education with an eye to the constitution." That is, women and children must be educated so as to integrate them and their relevant "virtues" harmoniously into the state.[69] Locke did not disagree substantially with this way of framing the matter, nor even with the specification of virtues.[70] He did disagree, however, about who would control the education through which the relevant virtues would be instilled.

Aristotle had posited that, because the purpose of education was to prepare citizens and others to take their proper place in the constitution of the state, it must be the province of the state.[71] Locke had a different idea. The state that Locke presupposed was a limited government. It was limited by the purposes for which it was established (the protection of life, liberty, and estate);[72] by its commitment to the rule of law (which required that government legislate

---

[68] One can see this conflict in modern scholarship on Locke. *Compare, e.g.*, NEAL WOOD, JOHN LOCKE AND AGRARIAN CAPITALISM (1984), *with* C.B. MACPHERSON, THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBES TO LOCKE (1962).

[69] ARISTOTLE, *supra* note 65, at I.xiii.

[70] For Aristotle, the virtues relevant to citizenship included temperance, courage, and justice. *Id.* at I.xii. In sum, these virtues involved the preeminence of the rational and deliberative faculties over the nonrational. *Id.* at I.xiii.

[71] *See id.* at V.ix, VIII.

[72] JOHN LOCKE, SECOND TREATISE OF GOVERNMENT §§ 123, 131 (C.B. Macpherson ed., 1980).

generally, for the public good, and in accordance with the majoritarian principle);[73] by its presumption that state and society were distinct (with society possessing a residual power to resist arbitrary government);[74] and by its distinction between public and private (with respect to the ownership and use of property and with respect to the function of family).[75] Locke's notion of familial privacy focused on the child. Family's primary function, said Locke, was to nurture the child: to protect him physically, to provide for him materially, and to educate him intellectually and morally. It was the business of parents to bring the child into reason, to make him a self-sufficient, self-limiting creature.[76] This was an enterprise in which both father and mother shared. At one point, Locke insisted that each had an "equal" share in the business.[77] Plainly, however, he did not intend this equality to be enforced rigorously, as he preserved Aristotle's primacy of the patriarch.[78]

The purpose for family's educative function was not simply for the child's profit. The purpose was also political, for the advantage of society. This aim was to prepare the child for citizenship in a regime characterized by a kind of democracy and liberty under law.[79] Here, as with his discussion of parental authority, Locke embraced masculine superiority, as his citizens were uniformly male. Patriarchy aside, this arrangement reinforced Locke's limited government in two ways. First, it made for citizens who were capable, knowledgeable, and not beholden to others—citizens who were, in short, self-governing. Second, the delegation of educative authority to parents meant that the state could not over determine the values of society that served as a check on the power of the state.

III. NINETEENTH-CENTURY AMERICAN EXPERIENCE

A. *Political Economies: Jeffersonian Republicanism and Hamiltonian Liberalism*

As we saw above, James Madison claimed that the proper structure of government and constitution of society in the United States would promote the

---

73 *Id.* §§ 96-98, 124-25, 131.
74 *Id.* §§ 240-43.
75 *Id.* §§ 25-95.
76 *Id.* §§ 55-65.
77 *Id.* § 52.
78 *Id.* §§ 82, 86.
79 *Id.* §§ 55-65. *See also id.* §§ 87-90, 92-93, 95, 127-31.

common good.[80] He did not conceive, however, that the system would run smoothly or that threats to the stability of the order would be absent. One of the chief threats involved the relation between property and government. It was not that Madison disbelieved in the desirability of private ownership of property. Nor was it that he conceived of no role for government in the protection of ownership. But Madison lived at a time that permitted him to see some of the fruits of Lockean liberalism. He saw the development of commerce from a simple mercantile system to one that was dynamic and complex. Even in its rudimentary form, the capitalism that Madison saw by the end of the eighteenth century was marked by material diversification and social differentiation.

Thus, while Locke could see in property a reason for drawing people together into political society for mutual advantage, Madison saw property driving them apart:

> The diversity in the faculties of men from which the rights of property originate, is not less an insuperable obstacle to a uniformity of interests. The protection of these faculties is the first object of Government. From the protection of different and unequal faculties of acquiring property, the possession of different degrees and kinds of property immediately results: and from the influence of these on the sentiments and views of the respective proprietors, ensues a division of the society into different interests and parties.[81]

Such divisions, said Madison, inflame passion, promote injustice, produce instability, and threaten to extinguish popular government itself. His familiar solution was not to posit a vision of the good life, but, as we have seen, to construct a political apparatus that could mitigate the debilitating effects of faction. Madison understood that structure alone would not prevent conflict over the ownership and regulation of property. Nor would it preclude competition among various forms of property. He imagined, however, that the extended republic could knit together a diverse country full of tensions.

But divisions ran deep. One reason for their depth was that certain forms of property or of enterprise were integral to ways of life that in turn bore upon the political constitution of the nation. And family was implicated in all three. One constitutive division—which has persisted for much of the life of the nation—was that between agriculture on the one hand and commerce and

---

[80] *See supra* Part II.B.

[81] THE FEDERALIST NO. 10, at 43 (James Madison) (George W. Carey & James McClellan eds., 2001).

industry on the other. The stakes of this division were apparent, from the earliest years of the republic, in the political thought of Thomas Jefferson and Alexander Hamilton. A comprehensive comparison of the two is beyond the scope of this Article, but a sketch of themes and tendencies can help lay the groundwork for comprehending the conflicted character of national policy of westward settlement.

As many scholars have pointed out, Thomas Jefferson was a progenitor of a strand of American ethos known as agrarian republicanism.[82] At its heart was the Aristotelian notion that the foundation for political order was social. That is, the form and character of society were constitutive of polity. For that reason, republican government could flourish only under social conditions congenial to the virtues that collective self-government required. Principal virtues were independence and self-sufficiency. Frequently, these traits were combined under a single rubric: manliness. Almost always in this context, a "man" was not a detached individual but a person bound to soil and community, usually through the institution of the family. A man needed enough land to support himself and his family.[83]

But this was a particular sort of family—republican, not aristocratic—that suggested a particular relation to the land. In *A Summary View of the Rights of British America*, Jefferson depicted the historical roots of this theme.[84] "[O]ur ancestors," he said, like "their Saxon ancestors" before them:

> possessed a right which nature has given to all men, of departing from the country in which chance, not choice, has placed them, of going in quest of new habitations, and of there establishing new societies, under such laws and regulation as to them shall seem most likely to promote public happiness.[85]

The Normans and their progeny destroyed that freedom, imposing instead a yoke of feudal burdens. "Our Saxon ancestors held their lands . . . in absolute dominion, disencumbered with any superior . . . ."[86] Feudal relations were imposed by "William, the Norman," but they did not negate the original, allodial ground for landed tenure in England, which remained at common law

---

[82] Frederick C. Prescott, *Introduction to Alexander Hamilton and Thomas Jefferson*, *in* ALEXANDER HAMILTON AND THOMAS JEFFERSON lxii (Frederick C. Prescott ed., 1934).

[83] Brandon, *supra* note 5, at 1215-16; Prescott, *supra* note 82, at lxii.

[84] THOMAS JEFFERSON, *A Summary View of the Rights of British America*, *in* THOMAS JEFFERSON: WRITINGS, 105-22 (Merrill D. Peterson ed., 1984).

[85] *Id.* at 105-06.

[86] *Id.* at 118.

even as subsequent kings and Parliaments attempted to usurp it. In any event, "America was not conquered by William the Norman, nor its lands surrendered to him, or any of his successors."[87] "America was conquered, and her settlements made . . . at the expence of individuals . . . ,"[88] not of the Crown or Parliament or "the British public."[89] If Americans have seemed to acquiesce in the notion that the Crown dispensed their land, it is merely because they were "farmers, not lawyers."[90]

Two years later as a member of Virginia's legislature, Jefferson sponsored two measures designed to shed the Norman yoke. One abolished entail, a condition on property that restricted its descent to a particular class of persons and not to all heirs. The other abolished primogeniture, under which, Thomas Paine later observed, aristocratic families "exposed" most of their children. "Aristocracy has never but *one* child. The rest are begotten to be devoured."[91] In tandem, Jefferson's proposals, which the legislature adopted, aimed to throw off feudal burdens, revive the ancient common law, and hence recover the notion of freehold, which alone could sustain free government. They also would redistribute land more equitably, so that families could support themselves as households.[92]

It was important that these households be engaged in a particular type of enterprise: agriculture. "Cultivators of the earth are the most valuable citizens. They are the most vigorous, the most independent, the most virtuous, & they are tied to their country & wedded to it's liberty & interests by the most lasting

---

87 *Id.* at 118-19.

88 *Id.*

89 *Id.* at 106. The phrase "at the expence of" connotes something like "through the energy of," not, as modern usage would imply, "to the disadvantage of."

90 *Id.* at 119.

91 THOMAS PAINE, *Rights of Man, Part One*, *in* THOMAS PAINE: COLLECTED WRITINGS 433, 478 (Eric Foner ed., 1995).

92 *See* THOMAS JEFFERSON, *Autobiography*, *in* THOMAS JEFFERSON: WRITINGS, *supra* note 84, at 32-33, 38-39, 44.

> In the earlier times of the colony when lands were to be obtained for little or nothing, some provident individuals procured large grants, and, desirous of founding great families for themselves, settled them on their descendants in fee-tail. The transmission of this property from generation to generation in the same name raised up a distinct set of families who, being privileged by law in the perpetuation of their wealth were thus formed into a Patrician order, distinguished by the splendor and luxury of their establishments. . . . To annul this privilege, and . . . to make an opening for the aristocracy of virtue and talent . . . was deemed essential to a well ordered republic.

Id. at 32. *See also* 1 DUMAS MALONE, JEFFERSON THE VIRGINIAN 247-60 (1948).

bonds."[93] Because of the domestic benefits that farmers bestowed, because fishing the oceans risked international conflict and war, and because commerce in general entailed similar risks, Jefferson advocated converting the energy of as many citizens as possible to farming.[94] Thus, in reflecting on the proposed Constitution, Jefferson approved, but conditionally:

> After all, it is my principle that the will of the majority should always prevail. If they approve the proposed Convention, in all it's parts, I shall concur in it cheerfully, in hopes that they will amend it whenever they shall find it work wrong. I think our governments will remain virtuous for many centuries; as long as they are chiefly agricultural; and this will be as long as there shall be vacant lands in any part of America. When they get piled upon one another in large cities, as in Europe, they will become corrupt as in Europe.[95]

Given these commitments, Jefferson's quarrel with Alexander Hamilton's fiscal proposals during Washington's administration was unsurprising. Jefferson did not despair, however, for he hoped that the people would repudiate Hamilton's "corrupt" policy.[96] When, a decade later, Jefferson's people elected him President, he repeated his commitment to the primacy of agriculture. Among "the essential principles of our Government," he said in his First Inaugural, was "encouragement of agriculture, and of commerce as its handmaid."[97]

---

[93] Letter from Thomas Jefferson to John Jay (Aug. 23, 1785), *in* THOMAS JEFFERSON: WRITINGS, *supra* note 84, at 818. He recapitulated this position in Query XXII of his Notes on the State of Virginia, *in* THOMAS JEFFERSON: WRITINGS, *supra* note 84, at 301.

[94] Letter from Thomas Jefferson to John Jay (Aug. 23, 1785), *in* THOMAS JEFFERSON: WRITINGS, *supra* note 84, at 818-19. *See also* Notes on the State of Virginia, *in* THOMAS JEFFERSON: WRITINGS, *supra* note 84, at 300-01:

> Young as we are, and with such a country before us to fill with people and with happiness, we should point in that direction the whole generative force of nature, wasting none of it in efforts of mutual destruction . . . . And, perhaps, to remove as much as possible the occasions of making war, it might be better for us to abandon the ocean altogether, that being the element whereon we shall be principally exposed to jostle with other nations: to leave to others to bring what we shall want, and to carry what we can spare.

[95] Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), *in* THOMAS JEFFERSON: WRITINGS, *supra* note 84, at 918.

[96] Letter from Thomas Jefferson to George Mason (Feb. 4, 1791), *in* THOMAS JEFFERSON: WRITINGS, *supra* note 84, at 972. Jefferson wrote: "The only corrective of what is corrupt in our present form of government will be the augmentation of the numbers in the lower house, so as to get a more agricultural representation, which may put that interest above that of the stock-jobbers."

[97] Thomas Jefferson, First Inaugural Address (Mar. 4, 1801), *in* THOMAS JEFFERSON: WRITINGS, *supra* note 84, at 494-95.

The upshot of Jefferson's philosophy, for purposes of political operation, was distinctly democratic. The upshot, for purposes of political structure, was decentralist. And the upshot, for purposes of principle, was libertarian.[98]

Within the world of republican thought, Alexander Hamilton opposed Jefferson at almost every turn. To begin, Hamilton's deepest instincts were anti-Aristotelian. He rejected the need for or presumption of an organic unity between society and state. His assumption and aim, with respect to the emerging political order after the Revolution, were that a constitutional machine could (and must) rework society in its own image. Thus, although he shared Locke's individualist intuitions in matters of economy and his attachment to material prosperity as a fundamental value, Hamilton did not embrace Locke's felicitous conception of the social and natural orders antecedent to the creation of government. Hamilton's image of stateless society was Hobbesian, in which chaos reigned. The purpose of government, then, was to cure those defects and to force people to behave, even against their baser native inclinations.[99]

The problem with relations among the states under the Articles of Confederation, he said, was that they were in utter disarray, each state going its own way, for its own purposes, with little regard for the rest. The dangers here were akin to the Hobbesian dangers that plagued societies without any government at all.[100] But how to correct this condition? Hamilton's answer was twofold.

First, because he distrusted republican governments dependent on the virtue of their citizens (further, he discredited popular government[101]), Hamilton espoused a vigorous national government possessing power

---

[98] *See, e.g.*, Letter from Thomas Jefferson to P.S. Dupont de Nemours (Apr. 24, 1816), John Jay (Aug. 23, 1785), *in* THOMAS JEFFERSON: WRITINGS, *supra* note 84, at 1384. "[E]xperience has proved it safer, for the mass of individuals composing the society, to reserve to themselves personally the exercise of all rightful powers to which they are competent. . . . I believe with you that morality, compassion, generosity, are innate elements of the human constitution." *Id.* at 1385, 1386-87. For a brief and old but still useful overview of Jefferson's agrarianism, see VERNON L. PARRINGTON, THE ROMANTIC REVOLUTION IN AMERICA, 1800-1860, at 9-19 (Harcourt, Brace & World, Inc., 1954) (1927).

[99] Prescott, *supra* note 82, at xvii-xxvi, xxxix.

[100] *See* ALEXANDER HAMILTON, *The Continentalist No. I*, *in* 2 THE PAPERS OF ALEXANDER HAMILTON 649, 649-52 (Harold C. Syrett ed., 1961); ALEXANDER HAMILTON, *The Continentalist No. IV*, *in* 2 THE PAPERS OF ALEXANDER HAMILTON, *supra*, at 669-74; Alexander Hamilton, Letter to James Duane (Sept. 3, 1780), *in* 2 THE PAPERS OF ALEXANDER HAMILTON *supra*, at 400-18.

[101] *See, e.g.*, Letter from Alexander Hamilton to John Jay (Apr. 26, 1775), *in* 1 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 100, at 176-78 (worrying about the "anarchy" that follows when "the minds of [an unthinking populace] are loosened from their attachment to ancient establishments").

sufficient to unify, stabilize, and strengthen the nation and to override the discordant "passions . . . of avarice, ambition, interest." What, though, of the states? Frankly, he suggested, "if they were extinguished, . . . great economy might be obtained by substituting a general Govt." States, he said, "are not necessary for any of the great purposes of commerce, revenue, or agriculture," though he conceded that "subordinate authorities" would be required for efficient administration. Regardless of the role of states in the day-to-day administration of government, "[t]wo Sovereignties can not co-exist within the same limits." Ultimate authority must reside in the nation. In this regard, the British model of government "was the best in the world. . . . [I]t is the only Govt in the world 'which unites public strength with individual security.'" For these and other reasons, the national will should supercede the local.[102]

Second, the general government must attend to the nation's economic health. It should do so in two ways. One was to solidify the fiscal condition of nation by securing and centralizing national credit and by tying the interests of public creditors and banks to the national government.[103] The other was to encourage domestic manufacture, especially among "infant industries." Doing so, he said, would encourage development of the nation's resources, promote economic and political independence, and provide protection in time of war.[104] Although he advocated "leav[ing] industry to itself,"[105] the system that Hamilton imagined was not a scheme of *laissez faire*. In this respect, therefore, his thinking deviated from both the Physiocratic ideas that informed Jefferson's agrarianism and the new libertarian economics of Adam Smith. What Hamilton required, again, was an active, paternalist central government, capable of directing material development and enforcing disciplined obedience by citizens.[106] What he required, in short, was a Leviathan.

---

[102] See Hamilton's remarks in the Constitutional Convention, as recorded in JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 129-39 (Adrienne Koch ed., 1987). Madison's *Notes* present many difficulties, not least that they are incomplete and that Madison himself was skeptical of their public utility. Many scholars, moreover, have doubted the propriety of using them to discern the meaning of the Constitution. For the limited purpose of fleshing out Hamilton's ideas of political economy, however, they are apt enough.

[103] Alexander Hamilton, Report Relative to a Provision for the Support of Public Credit, *in* 6 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 100, at 51, 51-168. See also the letters and papers on the national bank that are collected in 3 WORKS OF ALEXANDER HAMILTON 319-495 (Henry Cabot Lodge ed., 1936).

[104] Alexander Hamilton, Report on the Subject of Manufactures, *in* 10 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 100, at 230, 230-340.

[105] *Id.* at 232.

[106] Prescott, *supra* note 82, at xxxii-xxxiii.

As for the role of family in the mechanical beast the Constitution created, Hamilton was conflicted, at least on the surface. At one point, he seemed to embrace the Aristotelian notion that ties of kinship and affection would play an important role in limiting the power of the nation:

> 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 . . . .[107]

There is reason to believe, however, that this was primarily a rhetorical move, aiming to defuse antifederalist opposition to a strong central government; instead, Hamilton's political commitments lay with the nation, disencumbered from parochial interests. His economic commitment resided with commerce and capital. Although his conception of commerce was not anti-agrarian,[108] his political economy was unfettered from traditional (including familial) ties and hence contained none of the romantic localism of Jefferson's republicanism. In fact, one aim of the complex configuration of institutions in the new order, on his account, was to inhibit familial influence over the operation and output of government.[109] The bottom line, for Hamilton, was that the nation's government should not concern itself with family, except to counter its potentially dangerous tendencies.

B. Political-Economic Cleavages and the Frontier

1. Homesteaders and Speculators

If Jefferson and Hamilton embodied distinct strands of American ethos, the strands were entwined in the fabric of the politics and policy of the new nation. One area in which the strands were both visible and fraying involved the acquisition and settlement of new territory.

---

[107] THE FEDERALIST NO. 17, at 81 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

[108] See, for example, his qualified embrace of agriculture in Hamilton, Report on the Subject of Manufactures, *supra* note 104, at 231, 235 (citing an argument extolling agriculture as an instrument for occupying "uninhabited and unimproved" territory and for securing "advantageous . . . employment for capital and labour").

[109] For a brief discussion of this notion, see Brandon, *supra* note 5, at 1222-24.

From the inception of American constitutional order, national policy aimed at extending political dominion across the southern half of North America. There were at least two problems in this regard. The first was that portions of the continent were already occupied by native tribes. One strategy for solving the "Indian problem" was to negotiate with the tribes for land and peace. This strategy, however, was inefficient, so the nation adopted a two-step solution: (1) if the tribes would not move voluntarily from desirable land, then the United States would conquer them militarily; (2) after conquest, the nation would remove the tribes to reserved territory, integrate their members into civilized society, or exterminate them.[110]

The second problem was to extend political dominion into the vacated land. Competition between agrarian republicanism and liberal capitalism was an impediment to formulating an effective national policy of settlement. In fact, much rhetoric during the first half of the nineteenth century—especially among agrarians—implied that the central cleavage in disputes over the national policy of settlement was between the settler-farmer and his family, on the one hand, and the capitalist-speculator, on the other. There is much to this picture.[111] But matters were more complex than appeared on the face of the image.

Disputes over territorial settlement antedated the Constitution. Even before the Revolution, one of the substantial conflicts between Crown and colonists involved British resistance to settlement on the western frontier after the defeat of French and Indian forces in 1763.[112] During the Revolution, the Continental Congress adopted a resolution calling on the various states to cede their

[110] It is not my aim here to defend these claims in detail. For discussions of national policy toward the native tribes, see WILLIAM T. HAGAN, AMERICAN INDIANS 39-131 (3d ed. 1993); William T. Hagan, *The Indian in American History*, 3d ed. revised, *AHA Pamphlets*, No. 240 (American Historical Association, 1985), at 6-9, 10-14; Walter L. Williams, *American Imperialism and the Indians*, *in* INDIANS IN AMERICAN HISTORY 231-49 (Frederick E. Hoxie ed., 1988); *see also generally* DEE BROWN, BURY MY HEART AT WOUNDED KNEE: AN INDIAN HISTORY OF THE AMERICAN WEST (1970); IRVIN M. PEITHMANN, BROKEN PEACE PIPES: A FOUR-HUNDRED-YEAR HISTORY OF THE AMERICAN INDIAN (1964).

[111] *See, e.g.*, PAUL W. GATES, LANDLORDS AND TENANTS ON THE PRAIRIE FRONTIER (1973); PARRINGTON, *supra* note 98; GEORGE M. STEPHENSON, THE POLITICAL HISTORY OF THE PUBLIC LANDS: FROM 1840 TO 1862 (Russell & Russell, 1967) (1917).

[112] *See, e.g.*, JOHN A. GARRATY, THE AMERICAN NATION: A HISTORY OF THE UNITED STATES 111-14 (2d ed. 1971).

western lands to the national government.[113] Virginia complied soon after the Peace of Paris was signed.[114]

One of the first pieces of business in the post-Revolution Congress was to plan for territory "ceded by individual states" or "purchased of the Indian inhabitants." Jefferson introduced a proposal to do just that. As revised and adopted by a special committee in Congress, the plan's primary aim was to install settlers in the territories. The method proposed for pursuing this aim would in turn promote three purposes, one strategic, one political, and one fiscal. First, the physical presence of settlers would help to secure the land. Settlers not only would stake their claims to individual ownership, but would serve as surrogates for the nation's claim to sovereignty over the territory. Second, settlers would comprise the basic ingredient for "establishing a temporary government," including townships, counties, and a legislature. Once the population in each territory was large enough, these institutions in turn would provide the means for establishing "permanent governments" that were "republican" in character and for integrating the territories into the existing constitutional order. Third, because the method for installing settlers would be for Congress to sell parcels of land, the plan would shore up the national treasury.[115]

The resolutions did not commit to a particular model of political economy. Perhaps, given the character of the existing economy and because Jefferson had authored the proposal that was the impetus for the resolutions, he (and others) assumed the agrarian-republican model would hold. Events would complicate matters.

The Land Ordinance of 1785, for example, provided for surveys and sales of western lands.[116] In the precision of the directions for surveying the territories, one can see the hand of Jefferson. And a particular provision underscored the Jeffersonian ambition to supply the means by which settlers might establish communities in which to raise families: One lot in each township was reserved for maintaining public schools. But other provisions,

---

[113] Resolution of Continental Congress on Public Lands (Oct. 10, 1780), *in* 18 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 915 (Gaillard Hunt ed., 1910).

[114] Virginia Act of Cession (Dec. 20, 1783), *in* 2 FEDERAL AND STATE CONSTITUTIONS 955-56 (F.N. Thorpe ed., 1909).

[115] Report of Government for the Western Territory (Apr. 23, 1784), *in* 26 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 275 (Gaillard Hunt ed., 1928).

[116] Land Ordinance of May 20, 1785, *in* 28 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 375-406 (J.C. Fitzpatrick ed., 1933).

concerning the sales themselves, suggested an alternative orientation, more congenial to Hamilton's favored classes. At $1.00 per acre, the minimum price seemed accessible enough even to persons and families of meager means. Congress, however, set an entire section of land, or 640 acres, as the minimum size for purchase. The effect was to promote sales not to individual or familial settlers, but to speculators who had the cash or credit to buy such sizable lots.[117]

"Encouragement" from speculators, in fact, was an impetus for enactment of the Northwest Ordinance.[118] Though it, too, followed Jefferson's model for surveying and organization (including his proposal, which Congress had rejected in the Ordinance of 1785, to prohibit slavery in the territory), speculators typically were the conduit through which lands were distributed. The Land Act of 1796 raised the minimum price to $2.00 per acre. While this policy was not overtly pro-speculator, it did intensify speculators' relative advantage as compared with prospective settlers; even more, the Act suggested that raising revenue was superior to both settlers and speculators in the Congress's hierarchy of interests.[119]

None of this is to imply that settlers as a group were repositories of virtue (Aristotelian or otherwise). The Ordinance of 1785 and subsequent acts disposing of lands prohibited settlement in territories until after the lands had been surveyed.[120] Among the reasons for this restriction were to ensure the orderly transfer of title to land and to encourage the establishment of communities. Greed and the absence of meaningful governmental authority, however, undermined these purposes, as squatting was a significant problem from the beginning. It only grew worse over the course of the nineteenth century. In an early effort to deal with the problem, Congress adopted the Anti-Trespassing Act of 1807, punishing squatting on the public domain with fine and imprisonment.[121]

This Act reinforced a sentiment among potential settlers and even among those already established that Congress was concerned more with protecting

---

[117] GATES, *supra* note 111, at 141.

[118] Act of the Congress of the Confederation for the Government of the Territory of the United States, North-West of the River Ohio (July 13, 1787), *in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 114, at 957-62. The Ordinance was reenacted after the Constitution was ratified. An Act to Provide for the Government of the Territory Northwest of the River Ohio, ch. 8, 1 Stat. 50-53 (1789).

[119] *See* THE READER'S COMPANION TO AMERICAN HISTORY 877 (Eric Foner & John A. Garraty eds., 1991).

[120] This policy ended with the Pre-Emption Act of 1841. *See* HILDEGARD BINDER JOHNSON, ORDER UPON THE LAND: THE U.S. RECTANGULAR LAND SURVEY AND THE UPPER MISSISSIPPI 64 (1976).

[121] DANIEL FELLER, THE PUBLIC LANDS IN JACKSONIAN POLITICS 126-27 (1984).

revenue and speculators than with promoting settlement and the welfare of settlers. In fact, however, Congress was increasingly responsive to pressure from settlers throughout the nineteenth century. The Land Act of 1800 had aimed to attract settlers by reducing the minimum size for sale to 320 acres and by providing for sales on credit over a period of four years, with a down payment of only $160.00.[122] The Land Act of 1820 liberalized the requirements even further, lowering the minimum size to eighty acres and the minimum price to $1.25 per acre.[123] Although this Act rescinded provisions of the Act of 1800 concerning sales on credit, the Relief Act of 1820 aimed to give purchasers relief from debt. Specifically, the Relief Act permitted anyone who had made the first payment on four quarter-sections (640 acres) to retain title to one of the quarters by relinquishing the other three to the United States. Alternatively, if such a debtor wanted to try to hold onto all four quarter-sections, the Relief Act extended credit for up to ten years.[124]

Beginning in the 1830s, moreover, Congress began flirting with a policy that was a logical corollary to the Jeffersonian ambition to make land easily available to settlers.[125] At the same time, however, the policy effectively subverted the sort of ordered settlement that, on the Jeffersonian ideal, would have facilitated the development of republican communities in which families could flourish. The policy was preemption. Its purpose was to ratify squatters' premature seizures of public land. Its effect was essentially to quiet title to such land, permitting squatters to sell their homesteads to a new wave of settlers.[126] Congress's first formal foray into preemption came in 1830. The Act was tentative in that it operated prospectively and expired after one year.[127] Congress wrestled with extensions to this temporary Act,[128] but a more enduring commitment to preemption was not long in the wing.

Reflecting on the Whigs' victory in the national election of 1840, George M. Stephenson claims that it was fundamentally a response to "a great change in sentiment relative to the public domain." More strongly, he suggests, the election marked the victory of preemption as national policy.[129] Even if these

---

122 Land Act of May 10, 1800, ch. 55, 2 Stat. 73.
123 Land Act of Apr. 24, 1820, ch. 51, 3 Stat. 566.
124 FELLER, *supra* note 121, at 35.
125 On the Jeffersonian origins of the policy of cheap land, see GATES, *supra* note 111, at 140.
126 TURNER, *supra* note 18, at 20.
127 STEPHENSON, *supra* note 111, at 25.
128 *Id.* at 40-42.
129 *Id.* at 43.

claims exaggerate our capacity to interpret elections,[130] they are defensible enough. The election produced a Congress that quickly enacted, with President John Tyler's blessing, the Pre-Emption Act of 1841.[131] The Act aspired comprehensively to resolve conflicts over both settlement and revenue. With respect to settlement, the Act permitted squatters—heads of families, widows, and single men over the age of twenty-one—to settle on a quarter-section (160 acres) of land, with the right to purchase at the minimum price once the land was put up for sale. With respect to revenue, proceeds from sales were to be distributed in this way: ten percent of revenues to states in which the land sat, remainder to the rest of the states, except in time of war or if tariffs were levied above twenty percent on any given import.[132]

With these political developments in mind, Daniel Feller argues that "the dichotomous images of settler and speculator were essentially fallacious."[133] For one thing, says Feller, the moral qualities depicted in the stereotypes—settler as virtuous and productive, speculator as vicious and idle—were not simply exaggerated but wrong. The speculator was not an idler, extracting wealth from others' productivity, but "a doer, a booster," who promoted growth in the West through "cities, farms, roads, [and] canals." For another, and more importantly, "[t]he interests of settler and speculator actually joined at many points." Often, the speculator was not an Eastern (nor a foreign) capitalist, but a Westerner, like the settler. Both settler and speculator had an interest in cheap land, with rising prices spurred by growth and development. And the conventional distinction—"that the settler wanted to work the land, while the speculator acquired it only as a commodity to be held for profit"—is erroneous. Farmers, says Feller, "habitually claimed more land than they could farm." In fact, "the purchase of land for resale was commonplace throughout the West."[134] It is also true that farmers frequently were not the civic-minded husbands of the soil depicted in romantic republican rhetoric, but enterprisers, many of whom worked the soil until they depleted it and then moved on, abandoning both communities and large expanses of exhausted land.[135]

---

130 Compare, for example, STANLEY KELLEY, JR., INTERPRETING ELECTIONS (1983).

131 STEPHENSON, *supra* note 111, at 45-62. Tyler had been elected Vice President in 1840. He ascended to the office of President when William Henry Harrison ("Old Tippecanoe") died one month after taking office.

132 Pre-Emption Act of Sept. 4, 1841, ch. 16, 5 Stat. 453 (repealed 1891).

133 FELLER, *supra* note 121, at 29-30.

134 *Id.* at 29-31, 196.

135 *Id.* at 81.

There is value in correcting the demonic image of the speculator. Even so, and notwithstanding the suspicious way in which Feller's rehabilitation transforms speculators from rapacious demons to model citizens, it requires a stretch to attribute to them the same interests and capacities as farmers. For speculators tended to have resources and access to credit that most farmers could but dimly imagine.[136] Thus, most speculators could easily purchase land out from under squatters, even after the rise of preemption as national policy.[137] Moreover, because the early land acts lacked ceilings on the amount of land one could purchase, speculators frequently could reconnoiter a vast domain and buy the most desirable land. In some places, like the Yazoo Tract in what is now Mississippi, they could corner the market, if not through legitimate purchase, then through bribery.[138] Frequently, then, potential settlers had to go through speculators to acquire land. These conditions not only put speculators generally at a competitive advantage, but permitted some to operate as predators.

Andrew Jackson's Specie Circular did address some of these excesses. Specifically, it aimed "to repress alleged frauds, and to withhold any countenance or facilities in the power of the Government from the monopoly of the public lands in the hands of speculators and capitalists, to the injury of the actual settlers in the new States." The circular required (1) that payment for public land be made only in gold, silver, or, with respect to certain lands, Virginia land scrip; and (2) that other, less solid modes of payment would continue to be accepted from any "purchaser who is an actual settler or bona fide resident in the State where the sales are made," but only on plots of fewer than 320 acres.[139] The circular did in fact suppress the sale of lands, but its effect in this regard was temporary. Its longer-term effect was to concentrate financial control over sales to Eastern banks, whose terms were frequently usurious. And, as an indication of how powerful Hamiltonianism was becoming as a description of the logic of American political economy, the collapse in sales contributed to an economic panic in 1837, forcing many who were deeply invested in land to liquidate and hence lose it.[140]

---

136 *See* GATES, *supra* note 111, at 6-22.

137 FELLER acknowledges this, *supra* note 121, at 31.

138 *See* Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810). For a narrative recounting of *Fletcher*, see C. PETER MCGRATH, YAZOO: LAW AND POLITICS IN THE NEW REPUBLIC (1966).

139 Circular from the Treasury, No. 1548 (July 11, 1836), *in* 8 AMERICAN STATE PAPERS, PUBLIC LANDS 910 (1861). *See also* Andrew Jackson, Eighth Annual Message to Congress (Dec. 5, 1836), *in* 3 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 249 (James D. Richardson ed., 1903).

140 *See* GATES, *supra* note 111, at 14-15.

2. *Sectionalism and Slavery*

Regardless of the persistent plausibility of less-than-flattering images of speculators, however, Feller is correct that political divisions over national policy toward settlement cannot be explained entirely by competition between settlers and speculators. One powerful alternative explanation is sectionalism—specifically, the overlapping and divergent interests and values of North, South, and West.[141] Sectionalism at bottom was a generic surrogate for considerations of political economy, public morality, and ways of life. Although tensions between farmers and speculators were present in all three considerations, sectionalism was never reducible to them, nor to any simple explanation from class-based antagonism. Nonetheless, policy over westward settlement was one arena in which regional differences sometimes became open hostilities. This was so at least as early as the crisis over the tariffs of 1828 and 1832.[142] As the elaborate provisions of the Pre-Emption Act of 1841 demonstrated, moreover, Jackson's nationalist resolution of the crisis did not unify regional preferences.[143]

After 1841, sectionalism became increasingly visibly connected with the status of slavery in the nation and under the Constitution. But debates over slavery were rarely isolated from debates over the Western territories and hence did not remain battles simply between North and South. Divergent conceptions of the agrarian family were always just beneath the surface, for the conflict pitted two types of agrarian family against each other: the Southern slaveholding household and the Northern white nuclear family.[144] The subterranean presence of family as a political issue was nowhere stronger than in the new states of the Old Northwest. And, as it happened, issues of the status and stakes of the territories were nowhere joined more publicly or systematically than between two politicians of the Old Northwest: Stephen A. Douglas and Abraham Lincoln.[145] The opportunity for their debates was a race

---

[141] This theme is an important element of the accounts of Frederick Jackson Turner and his intellectual heirs. *See* STEPHENSON, *supra* note 111; TURNER, *supra* note 18; RAYNOR G. WELLINGTON, THE POLITICAL AND SECTIONAL INFLUENCE OF THE PUBLIC LANDS 1828-1842 (1914).

[142] *See* WELLINGTON, *supra* note 141, at 12-48.

[143] For accounts of the roles of regional division and national policy toward public lands in the election of 1840 and the Pre-Emption Act, see STEPHENSON, *supra* note 111, at 19-37; WELLINGTON, *supra* note 141, at 75-113.

[144] For a discussion of some of the ways in which conflicts over slavery were implicated in policies of territorial expansion, see BRANDON, *supra* note 32, at 66-74.

[145] For one edition of the debates between Lincoln and Douglas, see 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN (Roy P. Basler ed., 1953).

for one of Illinois's seats in the U.S. Senate. The impetus for and persistent theme of the debates, however, was the U.S. Supreme Court's decision in *Dred Scott v. Sandford*.[146]

Apologists for slavery frequently displayed a penchant for the classical, especially the Aristotelian. John C. Calhoun was probably the most prominent exemplar of this inclination, but he was not the only one.[147] Proslavery ethos was heavily influenced by Aristotle, not least in its conception of the family. As we have already seen, Aristotle posited that the familial household, not the individual, was the basic unit of political economy. The members of that unit included everyone who made it economically (and biologically) viable: a man, one or more women, children, and slaves.[148] Slaveholders employed this same conception.[149] Their doing so permitted them to ignore the ways in which the slaveholding household subverted slaves' capacity to maintain their own familial ties.[150] Thus, it was no accident that the slaveholders' ethos was characterized as "paternalism." Although it is tempting to dismiss their doing so as pretextual or merely rhetorical, there is evidence—from judicial decisions, statutes, and cultural sources—that these invocations of family were not merely shams, no matter how perverse they appear to us today. The familial trope performed real work in constructing and maintaining slaveholders' (and others') worldviews.[151] A prominent proslavery critique of capitalism was that it undermined the organic unity of society by, among other things, destroying ties of familial affection and interest. Free labor in a capitalist order, according to this critique, was oxymoronic, for capital devoured its laborers as free individuals.[152]

Slavery would have been controversial had its proponents not wished to expand its domain. Some proslavers, however, did wish to do so.[153] Given a wide range of political, economic, climatic, and cultural realities, such ambitions were largely quixotic, especially by the middle of the nineteenth

---

146 60 U.S. (19 How.) 393 (1857).

147 John C. Calhoun, *A Disquisition on Government*, *in* THE WORKS OF JOHN C. CALHOUN (Richard K. Cralle ed., 1883).

148 *See supra* Part II.B.

149 The Supreme Court ratified it as well. *See* United States v. Boisdore, 52 U.S. 63, 94 (1850) (adopting the Aristotelian view of slaves as members of the slaveholder's family).

150 *See* PEGGY COOPER DAVIS, NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES (1997).

151 *See, e.g.*, EUGENE D. GENOVESE, ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE (1974).

152 *See* GEORGE FITZHUGH, SOCIOLOGY FOR THE SOUTH, OR THE FAILURE OF FREE SOCIETY (1854).

153 *See, e.g.*, EUGENE D. GENOVESE, THE SLAVEHOLDERS' DILEMMA: FREEDOM AND PROGRESS IN SOUTHERN CONSERVATIVE THOUGHT, 1820-1860 (1992).

century. But with one stroke in *Dred Scott*, the Supreme Court made these ambitions seem not only possible but irresistible—at least on one reading of the Court's opinion. That was precisely the reading that Abraham Lincoln gave it.

The image by which he is now best known appeared in a speech in Springfield before his formal debates with Douglas began:

> "A house divided against itself cannot stand." I believe this government cannot endure, permanently half *slave* and half *free*. I do not expect the Union to be *dissolved*—I do not expect the house to *fall*—but I *do* expect it will cease to be divided. It will become *all* one thing, or *all* the other. Either the *opponents* of slavery, will arrest the further spread of it, and place it where the public mind shall rest in the belief that it is in the course of ultimate extinction; or its *advocates* will push it forward, till it shall become alike lawful in *all* the States, *old* as well as *new*, *North* as well as *South*.[154]

Although this move suggested a distinct policy toward territorial settlement, Lincoln's commitments were complex and conflicted throughout the debates. At bottom, however, his position seems to have been this: The territories should be open to settlement by free labor, to the exclusion of slave labor; on petition for admission to the Union, the citizens of each prospective new state could decide whether slavery would be permitted.[155]

Underlying this position were two sentiments: a belief that free labor was the wave of the future and an aversion to opening the territories to settlement by blacks, slave or free. Lincoln united these sentiments in a depiction of the republican family. The territories, he insisted, should be reserved for "free white laborers, who want the land to bring up their families upon." He affirmed the proposition that Douglas had pressed in an earlier speech, "that this government was made for white men." "[N]o one," said Lincoln, "wants to deny it." Thus, free families in the territories should be racially pure: "[A]s

---

[154] Abraham Lincoln, Speech at Springfield, Illinois (June 16, 1858), *in* 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 145, at 461-62.

[155] See the following speeches by Abraham Lincoln: Speech at Springfield, Illinois (July 17, 1858), *in* 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 145, at 507-08; First Debate at Ottawa, Illinois (Aug. 21, 1858); *in* 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 145, at 18-19; Second Debate at Freeport, Illinois (Aug. 27, 1858), *in* 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 145, at 40-42; Third Debate at Quincy, Illinois (Oct 13, 1858), *in* 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 145, at 116; Sixth Debate at Quincy, Illinois (Oct. 13, 1858), *in* 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 145, at 127; Seventh Debate at Alton, Illinois (Oct. 15, 1858) *in* 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 145, at 311-12.

God made us separate, we can leave one another alone, and do one another much good thereby. There are white men enough to marry all the white women, and enough black men to marry all the black women, and in God's name let them be so married." This policy, he said, would preclude the racial "amalgamation" that Douglas feared. "Why, Judge [Douglas], if we do not let [the races] get together in the Territories; they won't mix there."[156] With characteristic liberality, however, Lincoln extended Jefferson's Saxon liberty to persons of "German, Irish, French, and Scandinavian" ancestry.[157]

3. *Cross-Cutting Cleavages and National Expansion*

Lincoln, of course, did not manufacture slavery and sectional division as political issues. He merely exploited them. The sources of sectionalism in which slavery was implicated were many and longstanding. One source, which altered fundamentally the terms on which sectional battles were fought, was the Mexican War. Although the Mexican cession perfected the nation's continental aspirations, it also provided extensive new turf for politicians and others to fight over.[158] These battles were not always explicitly over slavery's expansion, but slavery was lurking persistently in the background.

One famous battle involved the construction of a transcontinental railroad. The most visible conflicts involved the railroad's location: Would the Congress endorse (and finance) a northern or a southern route? Thanks largely to the acumen of Stephen A. Douglas, the northern route prevailed, but not without piquing sectional jealousy.[159] Less visible than the fight over the railroad's route was resentment over the fact that Congress chose to subsidize construction through grants of land to the railroad corporations. The Hamiltonian logic behind these grants was that government would fulfill its obligation to underwrite prosperity, but would also protect the treasury by ensuring that settlers who followed the railroads would pay a higher price ($2.50/acre, compared with $1.25) for public land. Even among Westerners who coveted internal improvements, this logic seemed perversely to tax agriculture for the benefit of corporations. A better policy, some reasoned,

---

[156] Abraham Lincoln, Speech at Chicago (July 10, 1858), *in* 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 145, at 498.

[157] *Id.* at 499.

[158] Treaty of Guadalupe Hidalgo (signed Feb. 2, 1848, ratified May 30, 1848), *in* 1 TREATIES, CONVENTIONS, INTERNATIONAL ACTS, PROTOCOLS, AND AGREEMENTS BETWEEN THE UNITED STATES OF AMERICA AND OTHER POWERS 1107 (William M. Malloy et al. eds., 1910).

[159] For a brief discussion, see BRANDON, *supra* note 32, at 80-81.

would be to open the land to homesteading (at the lower price) and permit the corporations—which had the means and incentive to pay their own way—to follow the settlers.[160]

Another battle, also pitting homesteaders against monied interests, grew out of the Mexican War. Congress became decidedly generous in offering land as a bounty to soldiers who had served in the War. On its face, this policy would not have seemed especially controversial, but many settlers opposed it. Fueling their opposition was the fact that soldiers frequently neither wanted nor were able to resettle in the West, and so sold their bounty to speculators, who were able to purchase extensive tracts for a pittance.[161]

A similar antagonism grew out of the Graduation Act of 1854. The policy of graduation was straightforward: Land that had gone unsold for more than thirty years would be offered for sale at 12.5 cents/acre.[162] The policy was attractive to the national government mainly for fiscal reasons. Selling these "problem" lands would generate a small amount of revenue, but, more importantly, would permit the government to shut down land offices, which were expensive to maintain even when relatively inactive. The states of the Old Northwest tended to favor the policy, because it meant that empty land, when sold, would finally be taxable. Many Northeasterners, however, opposed the policy. Their argument, pressed forcefully by Horace Greely, was that bargain-basement prices would reward "thriftlessness and improvidence" and would send westward persons who were ill-fit to suffer the rigors of pioneering life, much less to flourish in it.[163] The material motivation for this position was an endemic Eastern antagonism to any policy that might soften the supply of labor. Western homesteaders opposed graduation because they said it rewarded laggards (sometimes with very desirable parcels), while effectively penalizing the industry and perseverance of the first families of pioneers, who had endured hardship and uncertainty. Graduation, they argued, might lower the price of all land and not merely that of the parcels for sale. Southerners tended to support the policy, perhaps at bottom because Easterners opposed it. With Southern support, the policy prevailed.[164]

---

160 *See* STEPHENSON, *supra* note 111, at 122-24.
161 *Id.* at 118-22.
162 *Id.* at 186-88.
163 *Id.* at 129.
164 *Id.* at 126-30.

century. But with one stroke in *Dred Scott*, the Supreme Court made these ambitions seem not only possible but irresistible—at least on one reading of the Court's opinion. That was precisely the reading that Abraham Lincoln gave it.

The image by which he is now best known appeared in a speech in Springfield before his formal debates with Douglas began:

> "A house divided against itself cannot stand." I believe this government cannot endure, permanently half *slave* and half *free*. I do not expect the Union to be *dissolved*—I do not expect the house to *fall*—but I *do* expect it will cease to be divided. It will become *all* one thing, or *all* the other. Either the *opponents* of slavery, will arrest the further spread of it, and place it where the public mind shall rest in the belief that it is in the course of ultimate extinction; or its *advocates* will push it forward, till it shall become alike lawful in *all* the States, *old* as well as *new*, *North* as well as *South*.[154]

Although this move suggested a distinct policy toward territorial settlement, Lincoln's commitments were complex and conflicted throughout the debates. At bottom, however, his position seems to have been this: The territories should be open to settlement by free labor, to the exclusion of slave labor; on petition for admission to the Union, the citizens of each prospective new state could decide whether slavery would be permitted.[155]

Underlying this position were two sentiments: a belief that free labor was the wave of the future and an aversion to opening the territories to settlement by blacks, slave or free. Lincoln united these sentiments in a depiction of the republican family. The territories, he insisted, should be reserved for "free white laborers, who want the land to bring up their families upon." He affirmed the proposition that Douglas had pressed in an earlier speech, "that this government was made for white men." "[N]o one," said Lincoln, "wants to deny it." Thus, free families in the territories should be racially pure: "[A]s

---

[154] Abraham Lincoln, Speech at Springfield, Illinois (June 16, 1858), *in* 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 145, at 461-62.

[155] See the following speeches by Abraham Lincoln: Speech at Springfield, Illinois (July 17, 1858), *in* 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 145, at 507-08; First Debate at Ottawa, Illinois (Aug. 21, 1858); *in* 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 145, at 18-19; Second Debate at Freeport, Illinois (Aug. 27, 1858), *in* 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 145, at 40-42; Third Debate at Quincy, Illinois (Oct 13, 1858), *in* 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 145, at 116; Sixth Debate at Quincy, Illinois (Oct. 13, 1858), *in* 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 145, at 127; Seventh Debate at Alton, Illinois (Oct. 15, 1858) *in* 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 145, at 311-12.

maximum price of $1.25/acre or, if a family had settled the entire parcel continuously for five years, for free.[169] Agrarian romantics at the time might have dreamed that this policy signified an unambiguous victory for Jeffersonian republicanism as against Hamilton's political economy. As if to squelch such sentiment Congress passed the Pacific Railway Act two months later.[170]

4. Agrarian Discontent

Thus, the ambivalent national embrace of homesteading families and speculators persisted into the last half of the century. Some observers have argued, however, that the Hamiltonian strand of American ethos was actually victorious in the end. For one thing, the Homestead Act did not succeed unequivocally on Jeffersonian terms. George W. Julian, a devoted Republican of the day, offered three reasons for this failure. First, the Act lacked adequate safeguards against speculation. This meant that speculators could often gain through the back door what they could not through the front. Second, under a new policy concerning the disposition of lands formerly held by various tribes, these lands were not conveyed to the United States but were released directly to monopolists, railroad corporations, and speculators. Viewed through an agrarian lens, this policy engendered corrupt ties between capital and the national government. Third, the land grants to railroads placed in corporate hands massive amounts of land, which, again through an agrarian lens, should have gone to settlers.[171]

With respect to the last point, Hildegard Johnson points out that "fewer acres were passed on to settlers under the Homestead Act than were sold by the railroads for four dollars an acre."[172] Similar patterns appeared in Texas and the lands of the Mexican Cession, where large-scale ranching overwhelmed smaller-scale familial farms.[173] In parts of the Far West, national policy ensured that vast amounts of land and resources found their way to

169 *Id.*

170 Pacific Railway Act of July 1, 1862, ch. 120, 12 Stat. 489.

171 GEORGE WASHINGTON JULIAN, POLITICAL RECOLLECTIONS, 1840-1872, at 216-18 (1884).

172 JOHNSON, *supra* note 120, at 66 (citing H.N. SMITH, VIRGIN LAND: THE AMERICAN WEST AS SYMBOL AND MYTH 190 (1950), and J.F. HART, *The Middle West*, 62 ANNALS OF THE ASS'N OF AM. GEOGRAPHERS 258 (1972)).

173 *See* LEWIS ATHERTON, THE CATTLE KINGS (1961); DAVID MONTEJANO, ANGLOS AND MEXICANS IN THE MAKING OF TEXAS, 1836-1986 (1987).

corporations and speculators.[174] In 1875, Congress resumed the policy of accepting payment for land by specie.[175]

These considerations aside, however, the Homestead Act intensified a trend that the earlier preemption acts had provoked: the diffusion of agricultural settlement.[176] Although diffusion promoted the national ambition to secure sovereign claims to territory, it undermined agrarian-republican goals of assuring settlement through families in nuclear communities and therefore of extending a polity knit together through webs of communitarian attachment.[177]

An agrarian republican might have predicted that diffuse settlement would generate diffuse political attachments, which in turn would undermine the capacity of people to sustain any sort of political life. For reasons that Tocqueville implied and Hamilton understood, however, this aspect of the organic account of the character of politics would not hold in the American case, for it could not anticipate the presence or function of the nation-state. Weak local attachments might not lead to the dissolution of politics if there were a nation-state sufficiently powerful to sustain political forms in the absence of such attachments. Although correlation does not establish causation, there was such a nation-state in the United States, at least where matters of political economy were concerned.

In the preceding century, Alexander Hamilton had posited that the development of a market-based economy required a vigorous national government. Jeffersonians had opposed this view, in part because they feared the consequences of a strong central state. Daniel Feller claims that the abolition of the credit system, the policy of preemption, and the Homestead Act were ultimately unsuccessful because the Hamiltonian logic of the political economy—including the ethos that underwrote the commodification of land—was too powerful to resist.[178] Perhaps the only way Jeffersonian policy could have prevailed was through a government strong enough to make the policy stick. That condition, of course, was incompatible with certain premises of Jeffersonian thought.

---

174 *See, e.g.*, Timber and Stone Lands Act of 1878, ch. 151, 20 Stat. 89; and the Desert Lands Act of 1877, ch. 107, 19 Stat. 377; the Timber Culture Act of 1873, ch. 277, 17 Stat. 605.

175 Specie Payments Act of Jan. 14, 1875, ch. 15, 18 Stat. 296.

176 *See* JOHNSON, *supra* note 120, at 64.

177 *See id.* at 38.

178 FELLER, *supra* note 121, at 198.

Notwithstanding agrarian pessimism about the trajectory of national policy, however, there is reason to think that principles of agrarian republicanism persisted, if not in formal national policy, then in disparate settlements on the frontier. But, as we shall see, the fruit of those settlements would be surprising.

C. Economy, Family, and Morality

1. Family in the Supreme Court

Congress was not the only institution concerned with matters that implicated family. By the end of the nineteenth century, the Court had persistently affirmed the importance of the marital family in all three substantive domains—economic, moral, and political. The Court's jurisprudence touched on three related themes. One was the intimate doctrinal connection between economy and family. The second was a growing dissonance over the proper conception of family—whether it was an institution created and regulable by law or was a prepolitical institution exempt from some sorts of regulation. The third was the importance of the role of a particular form of family in promoting and preserving a kind of moral order.

Many of the Court's decisions involved applications of common law or other sources of local law. Neither the existence nor the number of these cases is especially surprising, given the Court's function in the nineteenth century as common-law court of last resort. The content of some of the issues the Court addressed, however, might well be striking from our present perspective, which tends to see the Court's primary function as engaging weighty and abstract matters of individualist rights and collective powers. This perspective, I think, is misguided in at least two respects: it overlooks the ways in which many of the things most fundamental to people's lives—personal or political—are frequently quite mundane, and it presumes a fairly bright line between common law and constitutional law. This presumption is problematic, not only because it overlooks the constitutive power of mundane things, but also because it ignores the importance, especially in the nineteenth century, of common law to the constitution of the order.[179]

---

[179] In *Fletcher v. Peck*, for example, Chief Justice Marshall decided the case in part through an application of the doctrine protecting bona fide purchasers for value who had no notice of a defect in title. 10 U.S. (6 Cranch) 87 (1810). This was significant, not merely because it resolved doubts about settlement of the Mississippi territory, but also because it helped knit considerations of property and contract into the fundamental law of the nation. *Id.* I am grateful to John C.P. Goldberg for clarifying thoughts on the

The roots of the Court's common-law jurisprudence of family extended to England, of course, but the Court sometimes took pains to distinguish the American law from that of England (or the European continent). A familiar trope was that the English and European models were rooted in feudal or aristocratic regimes that tended to concentrate wealth in a few families or in a few hands within families. This way of thinking about family, the Court reasoned, was inappropriate in the United States, where norms and institutions were republican in character.[180] One arena in which republican norms did not hold, of course, was that of slavery; on this front, the Court occasionally took up cases involving the status of families as slave or free, though it rarely paused to consider potentially knotty questions about a difference of status between parents and children.[181]

Unsurprisingly, most of the Court's decisions involved matters of contract and property. The contexts varied in which these matters arose. One involved the duty of a father to support his wife and family.[182] Another involved the privilege against adverse spousal testimony.[183] Still other cases addressed a

---

constitutional status of the common law. *See* John C.P. Goldberg, *Rights and Wrongs*, 97 MICH. L. REV. 1828, 1846 (1999).

[180] *See* Bates v. Brown, 72 (5 Wall.) U.S. 710, 714-16 (1866); Croxall v. Shererd, 72 U.S. (5 Wall.) 268, 284-86 (1866); McDonogh's Ex'rs v. Murdoch, 56 U.S. (15 How.) 367, 408 (1853); Bosley v. Wyatt, 55 U.S. (14 How.) 390, 397-98 (1852); Gardner v. Collins, 27 U.S. (2 Pet.) 58, 93 (1829). In two cases—one involving a right to livelihood, the other involving the protection of families against creditors—justices cited English common law approvingly. *See* Cent. Nat'l Bank of Wash. v. Hume, 128 U.S. (16 Wall.) 195, 211-12 (1888); The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 103-06 (1872) (Field, J., dissenting).

[181] *See, e.g.*, Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857); Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842); Menard v. Aspasia, 30 U.S. (5 Pet.) 505 (1831).

[182] *See Cent. Nat'l Bank of Wash.*, 128 U.S. at 211 (extending the duty to support after death, to insulate against claims of creditors the estate of a deceased father); Hoyt v. Hammekin, 55 U.S. (14 How.) 346, 350 (1852) (holding that, under civil law, property purchased for a minor daughter by her mother could not be conveyed away by the father, even with the mother's consent); Williamson v. Berry, 49 U.S. (8 How.) 495, 555-56, 560 (1850) (Nelson, J., dissenting) (observing that "[i]f the father is not able to maintain his children, the court will order maintenance out of their own estate"); Thurlow v. Massachusetts, 46 U.S. (5 How.) 504, 507 (1847) (upholding state statute regulating the liberty of "any person [who] shall, by excessive drinking of spirituous liquors, so misspend, waste, or lessen his estate as thereby either to expose himself or his family to want or indigent circumstances, or the town to which he belongs to expense for the maintenance of him or his family").

[183] Stein v. Bowman, 38 U.S. (13 Pet.) 209, 220-23 (1839).

> This rule [forbidding testimony of a wife against her husband] is founded upon the deepest and soundest principles of our nature. Principles which have grown out of those domestic relations, that constitute the basis of civil society, and which are essential to the enjoyment of that confidence which should subsist between those who are connected by the nearest and dearest relations of life. To break down or impair the great principles which protect the sanctities of husband and wife, would be to destroy the best solace of human existence.

range of issues, including the general status or contractual capacity of women,[184] the protection of a wife from liability for innocently promulgating fraudulent misrepresentations of her husband,[185] the insulation of property from access by creditors,[186] the permissibility of transfers of property between members of a family,[187] and the status of illegitimate children or heirs.[188] One

---

Id.

[184] *See* Hamilton v. Rathbone, 175 U.S. 414 (1899) (involving effect of married women's property act on wife's capacity to dispose of property); Ankeney v. Hannon, 147 U.S. 118 (1893) (wife's contract with creditor can not bind her separate property acquired after the contract); Marchand v. Griffon, 140 U.S. 516 (1891) (concerning wife's capacity to enter into contracts); Brodnax v. Aetna Ins. Co., 128 U.S. 236 (1888) (concerning wife's capacity to pledge her separate property to cover husband's debt); Stringfellow v. Cain, 99 U.S. 610 (1878) (concerning widow's capacity, as head of family, to continue an adverse possession commenced by her husband); Jackson v. Jackson, 91 U.S. 122 (1875) (raising questions in action for divorce about title to property purchased with money wife had prior to the marriage); Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1872) (upholding state's prohibition against licensing women to practice law); Silver v. Ladd, 74 U.S. (7 Wall.) 219, 224, 227-28 (1868) (holding that a widow with children was a "head of family" for purposes of congressional statute concerning disposition of lands in the territories); Wallingsford v. Allen, 35 U.S. (10 Pet.) 583 (1836) (concerning wife's authority to manumit a slave transferred to her for her use by her husband).

[185] Sexton v. Wheaton, 21 U.S. (18 Wheat.) 229, 239 (1823) ("All know and feel . . . the sacredness of the connection between husband and wife. All know that the sweetness of social intercourse, the harmony of society, the happiness of families, depend on that mutual partiality which they feel, or that delicate forbearance which they manifest, towards each other.").

[186] *See* Shauer v. Alterton, 151 U.S. 607 (1894) (involving intrafamilial transfers that made creditors vulnerable); *Cent. Nat'l Bank of Wash.*, 128 U.S. at 211 (finding payment under life insurance policy to widow not reachable by creditors of husband: the "public policy which . . . recognizes the support of wife and children as a positive obligation in law as well as morals, should be extended to protect them from destitution after the debtor's death"); Huntington v. Saunders, 120 U.S. 78 (1887) (holding that conveyance from husband to wife not reachable by creditors to satisfy husband's debt); Fink v. O'Neil, 106 U.S. 272, 275-76 (1882) (upholding the power of a state to exempt homesteads from levy and execution: "These laws are founded in a humane regard to the women and children of families"); P.H. Allen & Co. v. Ferguson, 85 U.S. (18 Wall.) 1, 4 (1873) ("Neither the supreme will, so far as we can ascertain it, nor the laws of the land, require that a debtor whose family is in need . . . should prefer a creditor to his family."); Drury v. Foster, 69 U.S. (2 Wall.) 24 (1864) (holding a mortgage not binding on the estate of a *feme covert*); Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 283, 289-90 (1827) ("[S]ociety has an interest in preserving every member of the community from despondency—in relieving him from a hopeless state of prostration, in which he would be useless to himself, his family, and the community.").

[187] *See* Garner v. Second Nat'l Bank of Providence, 151 U.S. 420, 431 (1894) ("[H]usband and wife, . . . could treat each other as lender and borrower, and . . . such a contract would carry with it the usual incident of interest, the same as with other parties."); Taylor v. Taylor, 49 U.S. (8 How.) 183, 199-201 (1850) (finding that intrafamilial transfers of property, as for example between parent and child, are subject to a fiduciary obligation); *Wallingsford*, 35 U.S. at 594 ("Agreements between husband and wife, during coverture, for the transfer from him of property directly to the latter, . . . [though] void at law. . . . [may be sustained] when a clear and satisfactory case is made out, that the property is to be applied to the separate use of the wife.").

[188] *See* Conley v. Nailor, 118 U.S. 127, 134 (1886) (involving a challenge to deeds executed by an elderly man to his mistress, for whom he had abandoned his marital family: "It is not now open to question that a deed made by a father for the benefit of his illegitimate child, is upon good consideration, which will support the conveyance."); Gay v. Parpart, 106 U.S. 679, 686-87 (1883) (finding conveyance by father of illegitimate

case held that marriage was sufficient consideration to support a transfer of property,[189] but more typical were cases that considered marriage to be a distinctly different, noncommercial sort of contract, partaking of a kind of status, specially governable under the civil law.[190]

Dissenting in an antebellum case, for example, Justice Daniel emphasized the sweeping power of states to regulate familial life. "This power [of regulation]," he said, "belongs exclusively to the particular communities of which those families form parts, and is essential to the order and to the very existence of such communities."[191] At the same time, however, he could talk about families in libertarian terms that seemed to anticipate the notion of a private sphere for familial life, though he confined this trope to denying regulatory authority to the national government:

> It is not in accordance with the design and operation of a Government having its origin in causes and necessities, political, general, and external, that it should assume to regulate the domestic relations of society; should, with a kind of inquisitorial authority, enter the habitations and even into the chambers and nurseries of private families, and inquire into and pronounce upon the morals and habits and affections or antipathies of the members of every household.[192]

---

children to the children's mother permissible as against the father's marital family: "in executing and delivering [that assignment] to her he did a meritorious act, honorable and just, as the only atonement he could make for the deception he practised upon her, and as placing in her hands the means of supporting the children of whom he was the father"); Blackburn v. Crawford's Lessee, 70 U.S. (3 Wall.) 175 (1865) (involving descent of intestate property to illegitimate heirs); Stevenson's Heirs v. Sullivant, 18 U.S. (15 Wheat.) 207 (1820) (raising the question of whether illegitimate children are entitled to property that their mother held through the father of her legitimate children).

189 Magniac v. Thompson, 32 U.S. (7 Pet.) 348, 393 (1833) (noting that marriage "is a consideration of the highest value; and from motives of the soundest policy").

190 *See, e.g.*, Maynard v. Hill, 125 U.S. 190, 210-11 (1888) ("[W]hilst marriage is often termed by text writers and in decisions of courts as a civil contract—generally to indicate that it must be founded upon the agreement of the parties, and does not require any religious ceremony for its solemnization—it is something more than a mere contract."); Jewell's Lessee v. Jewell, 42 U.S. (1 How.) 219, 233-34 (1843) (finding that though a marriage might have been prohibited under the religious law of one of the parties, marriage is a "civil contract," and access to it is governed by the civil law).

191 Barber v. Barber, 62 U.S. (21 How.) 582, 602 (1858) (Daniel, J., dissenting). *See also Ogden*, 25 U.S. (12 Wheat.) at 289-90 ("[W]hy may not the community also declare that, . . . 'we have an interest in the happiness, and services, and families of this community, which shall not be superceded by individual views?'").

192 *Barber*, 62 U.S. at 602.

After the Civil War, of course, the states' control of at least one aspect of domestic relations was abolished.[193] The abolition of slavery and the Fourteenth Amendment's concomitant reconfiguration of liberty and governmental power might have suggested a couple of innovations. One, against Justice Daniel, was an expansive new national power over domestic relations, even beyond dismantling the relations entailed in slavery. The Court, however, intimated that the states' pre-War authority over the marital family persisted after the War.[194] The second, exploiting Daniel's libertarian trope, might have imagined family either as a repository of privilege or immunity against certain sorts of regulation by states or as a contractual relation whose obligations states were constitutionally prohibited from impairing. Typically, though not consistently, the Court resisted this reading.

In *Maynard v. Hill*, for example, the Court held that marriage was "not . . . a contract within the meaning of the clause of the Constitution which prohibits the impairing the obligation of contracts," but was "the creation of the law itself."[195] This implied that the marital relation "cannot be dissolved by the parties when consummated, nor released with or without consideration. The relation is always regulated by government."[196] Further,

> The relation once formed, the law steps in and holds the parties to various obligations and liabilities. It 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.[197]

If marriage were a subject for intensive scrutiny and regulation by states, however, there was evidence by the last half of the nineteenth century that the marital family was emerging as an institution partially autonomous from

---

193 U.S. CONST. amend. XIII.

194 Nat'l Bank v. Kentucky, 76 U.S. (9 Wall.) 353, 362 (1869). In other contexts, two justices claimed that post-War amendments to the Constitution authorized Congress to protect African-American families; significantly, however, both suggestions appeared in dissents: United States v. Cruikshank, 92 U.S. 542, 559-60 (1875) (Clifford, J., dissenting) (reading the Fourteenth Amendment and the Enforcement Act as authorizing Congress to prohibit "threats of violence" against a newly enfranchised African-American citizen or his family); Blyew v. United States 80 U.S. (13 Wall.) 581, 598-99 (1871) (Bradley, J., dissenting) (reading the Thirteenth Amendment and the Civil Rights Act of 1866 to include a right to assist in criminal prosecutions: "To deprive a whole class of the community of this right . . . is to brand them with a badge of slavery; . . . is to leave their lives, their families, and their property unprotected by law").

195 125 U.S. 190, 211 (1888).

196 *Id.* at 213.

197 *Id.* at 211.

government. Challenging the view of *Maynard*, the Court in *Meister v. Moore* declared that although "[m]arriage is everywhere regarded as a civil contract" whose formal prerequisites are regulated by statutes, those statutes "do not confer the right." Marriage, the Court maintained "is a thing of common right," and may be created through means other than those permitted by statute.[198]

Another line of cases suggested that family might actually constrain the exercise of governmental power. These cases concerned the ostensible right of livelihood. Justices (not always the Court) frequently traced it to common law, but the Fourteenth Amendment expanded opportunities for applying the right.[199] Some of the earliest of the Court's decisions in this vein, though not grounded in the Fourteenth Amendment, involved disbarments of attorneys.[200] Most cases in which the Court linked family to livelihood, however, involved allegations of monopoly or restraint of trade.[201] The point of the Justices' reasoning in this context was that some forms of capital threatened one of the polity's fundamental social units—the family. This logic could be converted from a shield against government to a justification for the exercise of governmental power against family-threatening monopolies.[202] It might also justify, on one Justice's account, treating corporate and individual incomes differently, for purposes of a national income tax.[203]

---

198 96 U.S. 76, 78, 80-81 (1877).

199 *See, e.g.*, The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 102-06 (1872) (Field, J., dissenting) (linking the constitutional right to the common law).

200 *See Ex parte* Wall, 107 U.S. 265, 318 (1883) (Field, J., dissenting) ("To disbar him having such a practice . . . would often entail poverty upon himself, and destitution upon his family."); Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 355 (1871) ("To most persons who enter the profession, it is the means of support to themselves and their families."); *Ex parte* Bradley, 74 U.S. 364, 376 (1868) (justifying issuing a writ of mandamus to reinstate an attorney, for reason inter alia that he is "suddenly deprived of the only means of an honorable support of himself and family").

201 *See* Gibbs v. Consol. Gas Co. of Baltimore, 130 U.S. 396, 409 (1889) (affirming the doctrine of *Winsor*, 87 U.S. (20 Wall.) at 64); Butchers' Union Slaughter-House & Live-Stock Landing Co. v. Crescent City Live-Stock Landing & Slaughter-House Co., 111 U.S. 746, 761-62 (1884) (Bradley, J., concurring) (upholding Louisiana's new constitution, which abolished all monopolies, including the Crescent City Co. of Slaughter-House fame: Monopolies violate common-law rights that "enable men to maintain themselves and their families"); Or. Steam Navigation Co. v. Winsor, 87 U.S. (20 Wall.) 64, 68 (1873) (noting that the doctrine under which agreements in restraint of trade are illegal is supported by "the injury to the party himself by being precluded from pursuing his occupation and thus being prevented from supporting himself and his family"); *The Slaughter-House Cases*, 83 U.S. (16 Wall.) at 104 (noting that the source of the common law's antipathy to monopolies was "their interference with the liberty of the subject to pursue for his maintenance and that of his family any lawful trade or employment") (Field, J., dissenting).

202 United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 323-24 (1897).

203 Pollock v. Farmers' Loan & Trust Co., 158 U.S. 601, 694 (1895) (Brown, J., dissenting) (arguing that differential treatment was justified inter alia by the protection of families).

Three features of the Court's treatment of the relationship between family and the right to livelihood stand out. First, a conventional rights-oriented view of livelihood—that it might impose limits on governmental action—was not the predominant theme of the Court's general jurisprudence of the family. Even when that theme was present in particular opinions, its reach was quite constrained. It did not (yet) support a view of family as partially autonomous from governmental control, a view that would emerge in the next century.

Second, when Justices linked the right of livelihood to family, they consistently did so with the pregnant presumption that the right was a concomitant of the common-law duty to support one's family. In short, it was a right (and obligation) of men, not women. Hence, despite the Court's exquisite sensitivity to the value of practicing law in other contexts, the Court upheld the power of a state to deny categorically to women licenses to practice law;[204] Justice Bradley's notorious concurrence invoked the domestic function of women to justify this result: "The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases."[205] Implicit in Bradley's conception was the role of woman as moral guardian and educator.

Third, preserving this place for women was one reason the Court acknowledged—even cheered—a power in Congress, the territories, and the states to prohibit polygamy on the frontier:

> Bigamy and polygamy are crimes by the laws of all civilized and Christian countries. They are crimes by the laws of the United States, and they are crimes by the laws of Idaho. They tend to destroy the purity of the marriage relation, to disturb the peace of families, to degrade woman, and to debase man. . . . To extend exemption from punishment for such crimes would be to shock the moral judgment of the community.[206]

---

[204] Bradwell v. Illinois, 83 U.S. 130 (1870). It is also worth noting that the Court was willing to permit discrimination on the basis of race, nationality, and/or marital status where the right of livelihood was concerned. The Court did so, moreover, for reasons related to familial form. *See, e.g.*, Chae Chan Ping v. United States, 130 U.S. 581, 594-95 (1889) (justifying restrictions on Chinese laborers: "Not being accompanied by families, except in rare instances, their expenses were small; and . . . [t]he competition between them and our people was for this reason altogether in their favor").

[205] *Bradwell*, 83 U.S. at 141-42.

[206] Davis v. Beason, 133 U.S. 333, 341 (1890).

Plainly, protecting women was only part of the Court's calculus. Also integral was an express desire to reinforce a particular moral view of the relation between spouses. Coupled with this moral view was a political notion: Family—specifically, the monogamous nuclear family—was essential to the well-constituted society. "[P]olygamy," said the Court with no apparent sense of irony, "leads to the patriarchal principle, . . . which, when applied to large communities, fetters the people in stationary despotism, while that principle [of despotism] cannot long exist in connection with monogamy."[207]

> [C]ertainly no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth, fit to take rank as one of the co-ordinate States of the Union, than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement.[208]

We have already seen that such sentiments were not confined to cases involving plural marriage. The thrust of the Court's reasoning in *Maynard v. Hill*, for example, was that marriage

> is not so much the result of private agreement as of public ordination. In every enlightened government it is pre-eminently the basis of civil institutions, and thus an object of the deepest public concern. In this light, marriage is more than a contract. . . . It is a great public institution, giving character to our whole civil polity.[209]

Nor, of course, was such reasoning confined to the Court. Kent's *Commentaries* affirmed that the nuclear family was the best instrument for the transmission of social values to succeeding generations.[210] But the

---

[207] Reynolds v. United States, 98 U.S. 145, 166 (1878).

[208] Murphy v. Ramsey, 114 U.S. 15, 45 (1885) (upholding an act of Congress denying polygamists the right to vote). See also *Reynolds*, 98 U.S. at 165-66, which states:

> Marriage, while from its very nature a sacred obligation, is, nevertheless, in most civilized nations, a civil contract, and usually regulated by law. Upon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal. In fact, according as monogamous or polygamous marriages are allowed, do we find the principles on which the government of the people, to a greater or less extent, rests.

[209] 125 U.S. 190, 213 (1888) (citations omitted).

[210] 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 195 (O.W. Holmes, Jr., ed., 12th ed. 1884).

constitutional significance of family was intensified by the radical challenge polygamy posed to social convention and by Congress's perception that a particular form of social order must underwrite the establishment of constitutional order in the territories. Family, properly conceived, helped generate those "natural sentiments and affections" that tie people to home and country.[211]

In sum, the Court's approach to family exhibited four characteristics. First, it embraced all three of constitutionalism's substantive domains—economic, moral, and political. Second, the Court integrated its conceptions of the three domains in a way that confined its affirmation of family to a particular form—monogamous and (despite the Court's occasional self-description) patriarchal. Third, the Court was occasionally conflicted about the character of family's importance. The claim in *Meister v. Moore*, for example, that marriage was "a thing of common right," antecedent to the Constitution and positive law, created by agreement of the parties,[212] could not easily be squared with that of *Maynard v. Hill*, that the marital family was "a creation of law," "always regulated by government," and "not so much the result of private agreement as of public ordination."[213] Fourth, despite the conflict, the principle of *Maynard* proved more enduring and potent than *Meister*'s, with respect to both conventional and nonconforming families, at least in the nineteenth century. The Court's tendency, therefore, was to treat family not so much as a private sphere as a relationship whose finest aspects were constituted and regulated by law.

2. *Women As Educators and Moral Guardians*

The Court's unabashed embrace of monogamy and a version of patriarchy reinforced traditional notions of familial relations long embedded in common law.[214] It also confirmed family's moral function in at least two respects: (1) forms of family that deviated from the Court's model were considered dangerous to social morality and political order and therefore were punishable

---

211 Virginia v. Tennessee, 148 U.S. 503, 524 (1893).

212 96 U.S. 76, 81 (1877).

213 125 U.S. at 211, 213.

214 On this aspect of the common law's content, at least, we may trust William Blackstone. For discussion of the common law's commitment to monogamy, see 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND *424 (Stanley N. Katz ed., 1979) (1765) (noting that a contract for marriage in which one of the parties had "another husband or wife living" was not only void, but a felony). For the common law's commitment to patriarchy, see 1 *id.*, at 430-33, 440-42 (describing the doctrine of coverture and the husband-father's authority over both children and wife).

as crimes; (2) restrictions on women's economic capacity fortified a conception of their role as moral guardian and educator. This latter consideration supplied a bridge between ancient common-law tropes and an emerging bourgeois sense of both family and women.

Carl N. Degler argues that the "modern American family emerged first in the years between the American Revolution and about 1830."[215] In fact, this change was under way before the Revolution.[216] But whatever its temporal origins in North America, "modern" families exhibited at least three characteristics. First, they tended to be initiated by the free choice of the prospective partners and maintained through "affection and mutual respect" between them. In short, the relationship partook of individualism, contract, and love. Over the course of the nineteenth century, these elements increasingly implied the legal freedom to leave the marriage.[217]

Second, modern marriage began to deviate from patriarchy to this limited extent: men and women occupied separate spheres of life—husbands over work and production and politics, wives over home and reproduction and morality.[218] Plainly these spheres were not entirely distinct, not least because the husband inhabited both, the wife typically only the domestic. The husband's presence in the domestic domain usually meant that the wife's authority was circumscribed. But, if the ethos of domesticity mattered, "the wife, as mistress of the home, was perceived by society and herself as the moral superior of the husband, though his legal and social inferior."[219]

---

215 CARL N. DEGLER, AT ODDS: WOMEN AND THE FAMILY IN AMERICA FROM THE REVOLUTION TO THE PRESENT 8 (1980).

216 *See* Brandon, *supra* note 5, at 1206-10.

217 *See* DEGLER, *supra* note 215, at 8-15, 168.

218 Tocqueville, among others, noted that Americans maintained distinct spheres for men and women and that both were viewed as equally worthy. *See* 2 TOCQUEVILLE, *supra* note 45, pt. 3, at 576 stating:

> Thus Americans do not believe that man and woman have the duty or the right to do the same things, but they show the same esteem for the role of each of them, and they consider them as beings whose value is equal although their destiny differs. They do not give the same form or the same employment to the courage of woman as to that of man, but they never doubt her courage; and if they deem that man and his mate should not always employ their intelligence and reason in the same manner, they at least judge that the reason of one is as sure as that of the other, and her intelligence as clear.

See also 2 *id.* pt. 3, at 565-73. For a more recent (and less enthusiastic) account of the doctrine of separate spheres and the domestic mission of women, see Barbara Welter, *The Cult of True Womanhood: 1820-1860*, 18 AM. Q. 151, 151-74 (1966). For a discussion that extends the notion of women's domestic and civilizing mission westward, see DEE BROWN, THE GENTLE TAMERS: WOMEN OF THE OLD WILD WEST (1958).

219 DEGLER, *supra* note 215, at 8, 28.

Third, children began to occupy a new and special place in the life of the family. Adults began to perceive of the child as a different sort of creature, "more innocent." Children were valuable in themselves and not simply as vessels for the transmission of wealth, as instruments of production, or as devices for extending familial influence. And "childhood itself was perceived . . . as a period of life not only worth recognizing and cherishing but extending." In a way that John Locke would have applauded, a basic function of family was now to care for and nurture children, to educate them in practical industry and morals. And the person in charge of this function, according to the doctrine of separate spheres, was the wife and mother.[220]

This doctrine cut against two traditional common law notions. First, the husband-father possessed comprehensive authority over the home, including the care of children; this authority grew out of his primary legal responsibility as provider and caretaker (though it also entitled him to the benefits of his children's labor). Second, the wife-mother was "entitled to no power [over her children], but only to reverence and respect."[221]

If the doctrine of separate spheres was, from the perspective of many women, an advance over the common law, it too was problematic, in part because it had such a powerful hold on the popular imagination. One reason for this was that it integrated seamlessly into emerging cultural conceptions of the proper role of "the modern woman." In an essay that has engendered a large amount of scholarship on the subject, Barbara Welter mined various forms of nineteenth-century popular American literature—especially novels and the new genre of women's magazines—to uncover a consistent ideal depiction of women's role. Welter characterized the depiction as "the Cult of True Womanhood."[222] Rooted in religion, the Cult itself was quasi-religious in character. It depicted women as saints of society. Their virtues were "piety, purity, submissiveness, and domesticity." Their principal role was to preserve civilization, whose moral roots were divinely sanctioned.[223]

---

220 *Id.* at 9, 66, 144.

221 *See* 1 BLACKSTONE, *supra* note 214, at *434-41, *453. One more ancient notion was sacrificed. Upon dissolution of a marriage, the father was traditionally presumed to be the fit custodian of his children. In the early-to-mid-nineteenth century, however, this presumption began gradually to give way to a countervailing presumption—that the mother by nature was the fitter parent, at least with respect to children of tender years. *See* Helms v. Franciscus, 2 Bl. Ch. 544 (Md. 1830).

222 *See* Welter, *supra* note 218.

223 *Id.* at 151-52.

This was no small burden. That fact aside, the doctrine of separate spheres (including the Cult that it underwrote) was susceptible to two sorts of criticism. For one thing, it functioned as a kind of nineteenth-century version of *Leave It to Beaver*. That is, it was too neat and clean to describe the experience of many families, especially those that were not of a certain class. For another, the image conjured by the doctrine, liberalizing though it was, was confining. Hence, at mid-century Margaret Fuller could invoke biblical sources and extol women's domestic virtues, while insisting on "the emancipation of Woman from the burdens and disabilities" that tend "to merge her individuality" into family.[224] She urged, therefore, that all occupations be opened to women and argued that promoting women's independence would strengthen their connection to men, because doing so would reinforce the interests the sexes hold in common.[225] She suggested that women's emancipation, their "liberty" as she also called it, would come through law.[226]

Both sets of criticisms were apt, even in the East, where the rhetorical tropes of liberalism and civilization were most potent. But the criticisms would acquire special force in the West, and their normative vitality would derive not, as Fuller had hoped, principally through law, but from the harsh experience of families on the frontier.

D. The Political Fruit of Homes on the Range

1. Families, Law, and Constitution

Lawrence M. Friedman argues that westward settlers carried the law with them. Thus, on the journey, although they "were outside any formal institutions of law and order . . . the wagon trains and emigration companies were surprisingly lawful in behavior."[227] "Out in the trackless wilderness, hundreds of miles from police, courts, and judges, the fundamental rules of property and contract were followed, just as they were in Illinois or Massachusetts." The persistence not simply of a legal sensibility but of concrete legal norms, he says, was a function of habit and necessity. In transit "and in the midst of strangers, there was hardly an opportunity for new 'customs' to develop. The 'law' that prevailed was 'the taught, learned,

---

224 MARGARET FULLER OSSOLI, WOMAN IN THE NINETEENTH CENTURY, AND KINDRED PAPERS RELATING TO THE SPHERE, CONDITION, AND DUTIES OF WOMAN 5-9 (Lohn P. Jewett & Co. 1855).

225 *Id.* at 169-76.

226 *Id.* at 14.

227 LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 363 (2d ed. 1985).

accepted customs' of the people; it was part of the baggage they brought with them."[228] Even more strongly, Friedman argues that "[t]he immigrants were Americans, who 'tacitly' brought common law with them to an empty country."[229] Once settled, he argues, the new inhabitants rigged a rough combination of old and new legal norms. The persistence of old norms in new settlements may have been due partly to the settlers' ethical "baggage," but other explanations may be even more powerful. For one thing, Congress had authority to establish policy in the territories and to regulate the admission of territories into the Union as states.[230] For another, some territories were carved from existing states, whose enactments were transplanted onto the territories. Finally, territorial settlement attracted lawyers. If they did not always meet the highest standards of the profession—in terms of ethics or ability—they nonetheless practiced modes of thought and argument that reinforced the reach of law in territories.[231]

The theme of Friedman's picture is that westward settlement and the establishment of law were coextensive and simultaneous. The point, where family is concerned, is that migrant families strongly resembled their Eastern counterparts, both because of the ethical habits of immigrants and because of the normative constraints of law. There is much to these claims; but it would be a mistake to make too much of them, especially where family is concerned.

In fact, as we shall see, families on the frontier frequently looked different from those back East. This was the case not only in transit but also after settlement. One reason is that the frontier's harsh conditions posed challenges that defied solution through habitual modes of behavior or established categories of law. In short, necessity incited innovation. Another reason is that, if law accompanied or even preceded the immigrants, its influence on the frontier was comparatively diffuse. This was because, in many places, effective formal institutions of law were weak or nonexistent. Both environmental exigency and the inadequacy of law permitted—in some

---

228 *Id.* at 364 (citing JOHN PHILLIP REID, LAW FOR THE ELEPHANT: PROPERTY AND SOCIAL BEHAVIOR ON THE OVERLAND TRAIL 362 (1980)).

229 *Id.* This claim is problematic on three fronts: its assumption that the land was "empty" overlooks the presence of Indians and others who inhabited much of the territory; the claim that migrants were "Americans" overlooks the sometimes complex allegiances and identities that many settlers brought with them; and the claim that they carried the common law may assume too much about the precise content of the norms to which they adhered.

230 U.S. CONST. art. IV, § 3. Congress exercised such authority, even before the Constitution's adoption, through the Northwest Ordinance.

231 *See* FRIEDMAN, *supra* note 227, at 163-65, 365.

respects compelled—families to make their way in their own way, as best they could, in a sometimes hostile world. If this were not a state of nature (of either a Hobbesian or a Lockean variety), neither was it a condition comprehensively ordered by law. This condition produced subtle shifts in relations and expectations within the marital family. Those shifts involved the respective roles of wives and husbands; and they suggested a view of marriage rooted less firmly in legal status, more strongly in contract.

2. *Unconventional Roles*

People's motives for moving West were many.[232] For men at least, a prominent motive was economic: They wanted their own land from which to support themselves and their families.[233] For women, motivations were less straightforward, sometimes more conflicted. Certainly, some wanted to go for economic reasons, to pursue prosperity or flee failure. Some sought a better, healthier climate. A few—some men, too—may have harbored romantic visions of life in the West. Many, perhaps most, went to preserve their families. The aim in this respect was not entirely altruistic, for many, faced with husbands bent on going, mistrusted their untethered mates or feared their own loneliness. Some, no doubt, were propelled by affection for their spouses. Wives of ministers frequently accompanied their husbands with an appropriately missionary zeal, to claim the West for God and goodness.[234] In general, however, women were far less enthusiastic than men about moving.[235] Some wives blocked their husbands' plans to emigrate. One suspects, however, that most did not, even if they had wanted to do so. Some apparently used resistance as a means for negotiating terms for emigration, including the husbands' accepting "familial responsibilities" as part of the bargain.[236]

One thing is certain: Women went West in large numbers. Census data indicate that many men went first on their own, soon followed by wives or fiancées. Single women, too, went West, especially after the first wave of settlement; few who wanted to marry found themselves single for long. But wives frequently accompanied their husbands and brought their children. One reason for all of these trends was that men could not fulfill their economic

---

232 I confine my focus here to agrarian settlement in what we now think of as the greater Midwest. Hence, I do not attend to urban settlement, mining communities, the "fur frontier," or the explorers' frontier.

233 JOHN MACK FARAGHER, WOMEN AND MEN ON THE OVERLAND TRAIL 16 (1979).

234 JULIE ROY JEFFREY, FRONTIER WOMEN: "CIVILIZING" THE WEST? 1840-1880, at 40-47 (1998).

235 *See* DEGLER, *supra* note 215, at 47.

236 *See* JEFFREY, *supra* note 234, at 42.

ambition alone. They needed help. In Aristotelian terms, the household, not the individual, was the smallest economic unit capable of self sufficiency on the frontier. The sensible assumption was that "married persons are generally more comfortable, and succeed better, in a frontier country, than single men; for a wife and family, so far from being a burden to a western farmer, may always prove a source of pecuniary advantage in the domestic economy of his household."[237] Much more frequently than not, then, migration was a familial affair, often an extended familial affair.[238]

For those who journeyed as a family, the westward trek was a severe test of established roles in the marital relationship and of the marriage itself. The trek both reinforced and challenged aspects of the Eastern template for familial roles. Certain obligations that had been the province of women before the journey—like cooking, making and mending clothes, caring for children, and of course giving birth—remained so in transit.[239] But harsh conditions impelled departures from convention. Some duties that women took on, as when they performed presumptively masculine tasks like pitching tents, yoking cattle, and loading, unloading, and driving wagons, positively defied convention; and a few of the new responsibilities, like collecting buffalo chips for fuel, were not only unfeminine but distasteful.[240] Men, too, flouted a few conventions—by washing clothes and cooking, for example—but, on the evidence available, most men seem to have done so irregularly and out of a masculine sense of courtesy.[241] On the surface, these changes were so subtle as to seem insignificant, but they bespoke an altered sense of the marital family, not simply as a status, but as a kind of partnership, whose members' roles were somewhat fluid, set partially through pragmatic accommodation.

After settlement, some of these unconventional practices persisted, especially during the earliest years, sometimes longer. As on the trail, if the diaries are accurate, women were more likely than men to take on new roles.[242]

---

237 GLENDA RILEY, FEMALE FRONTIER: THE COMPARATIVE VIEW OF WOMEN ON THE PRAIRIE AND THE PLAINS 18 (1988) (quoting JOHN B. NEWHALL, GLIMPSE OF IOWA IN 1846, at 62 (1957)).

238 *See* JEFFREY, *supra* note 234, at 39; GLENDA RILEY, THE ORIGINS OF THE FEMINIST MOVEMENT IN AMERICA (1973).

239 JEFFREY, *supra* note 234, at 51-52.

240 *Id.* at 54, 56; GLENDA RILEY, WOMEN ON THE AMERICAN FRONTIER 3 (1977).

241 *See* JEFFREY, *supra* note 234, at 57. There were other changes *en route*, with respect to both the mundane and the sublime. For example, most women eventually modified or abandoned Eastern standards of feminine dress; some took to wearing bloomers. *Id.* at 50-51, 55-56. And many families were forced to sacrifice ritual and leisure on the Sabbath, which Jeffrey argues "had become by mid-century a symbol of women's religious and moral authority." *Id.* at 54-55.

242 *Id.* at 78; SANDRA L. MYRES, WESTERING WOMEN AND THE FRONTIER EXPERIENCE, 1800-1915, at 171

To be sure, much of what women did on the homestead remained recognizably women's work. They washed and cooked and cared for children.[243] But they also hunted, chopped wood, plowed fields, and carried guns—all of which distinguished them from most of their more civilized sisters back East.[244] When their husbands were away, which was not infrequently, wives assumed responsibility for managing the entire homestead, not merely the home.[245]

Women assumed responsibilities outside the home as well. Teaching was one job that fit the conventional feminine responsibility for educating the young. But other activities, like commercial entrepreneurship (of the *petit-bourgeois* variety) or substitute preaching, were distinctly nontraditional.[246] As Deborah Fink puts it, "farm wives' labor placed them in the thick of the production economy,"[247] rudimentary though that economy was. This did not mean that women were developing a mentality (or status) resembling that of men;[248] but women's labor did reinforce relationships of mutual dependence and partnership between husbands and wives, relationships at odds with the Eastern model of strictly segregated spheres and domesticated wives.[249] Both within and outside the family, women pursued new outlets for labor while retaining one important responsibility that Locke had prescribed and that

---

(1982).

243 Elizabeth Jameson, *Women As Workers, Women As Civilizers: True Womanhood in the American West*, *in* THE WOMEN'S WEST (Susan Armitage & Elizabeth Jameson eds., 1987). John Mack Faragher argues that, with few exceptions, labor on the frontier was strictly segregated by sex. "Midwestern society," he says, "had a developed sense of gender distinction. The existence of a strict division of labor and separate cultural character models for men and women suggests that significant portions of men's and women's time were spent in the company of their own sex." FARAGHER, *supra* note 233, at 110. While there is no denying the sexual segregation of much labor on the frontier, Faragher overstates its strictness. Moreover, as I try to show below, he claims too much (or too little) when he asserts that "women played no part in public life." *Id.*

244 RILEY, *supra* note 237, at 53.

245 JEFFREY, *supra* note 234, at 78.

246 *Id.* at 78-80.

247 DEBORAH FINK, AGRARIAN WOMEN: WIVES AND MOTHERS IN RURAL NEBRASKA, 1880-1940, at 60 (1992); MARY ELLEN JONES, DAILY LIFE ON THE NINETEENTH-CENTURY AMERICAN FRONTIER 193 (1998).

248 *Compare* JEFFREY, *supra* note 234, at 81-84, 90-93, *with* RILEY, *supra* note 237, at 53.

249 *See* Katherine Harris, *Homesteading in Northeastern Colorado, 1873-1920: Sex Roles and Women's Experience*, *in* THE WOMEN'S WEST, *supra* note 243, at 165-67. Harris recites three classic "pre-industrial" familial forms: evangelical (rigidly hierarchical and male-dominated), genteel (hierarchical, but with a functional role for women), and moderate (less hierarchical, with greater sharing of roles). She claims that familial variation was even more complex in the nineteenth-century United States, but suggests that Eastern families (at least of certain classes) tended toward the model of gentility, while families on the frontier tended toward the moderate model. *Id.* at 175-76. I suspect that Harris exaggerates the level of sexual equality in homesteading families, but the tendencies she observes seem accurate. *See also* Joann Vanek, *Work, Leisure, and Family Roles: Farm Households in the United States, 1920-1955*, 5 J. FAM. HIST. 422, 423 (1980) ("[S]tudies . . . show that a kind of symmetry [between husbands and wives] had occurred . . . in the household mode of production of preindustrial economies and in an agrarian past.").

Eastern notions of domesticity had delegated to wives: the practical, intellectual, and moral education of children.[250]

3. *Western Families and Constitutionalist Functions*

Homesteads on the frontier seemed to vindicate the agrarian-republican conception of the constitution of politics. Households provided the means for material subsistence; connections among households created communities; communities produced what came to resemble a collective way of life; that way of life, in turn, was the locus for an incipient form of politics. This was a politics with a difference, however, for its ultimate aim was not the organic creation of an autochthonous state but the formation of bonds of a particular, preordained sort with a preexisting nation-state. This aim and the means for achieving it made Westerners directly reliant on the nation, not least because the very presence of homesteads and homesteaders was due to the largesse—not to mention the military, economic, and imperial ambition—of the United States. If homesteaders were dependent on the nation, however, they also found themselves in conflict with it, especially with the Hamiltonian tendencies of its political economy. This ideological antagonism would become a political movement, which traced its roots to Jeffersonian republicanism.[251] One catalyst for this conversion was the frontier family.

What might explain family's participation in the movement to challenge the dominant political economy in the latter half of the nineteenth century? Perhaps women's contribution to material production on the homestead permitted wives to "relegate their second-class status to the fringes of their reality," thus converting economic power into familial power and then into political power.[252] Alternatively, perhaps "sharing between the sexes," especially with respect to the rearing of children, promoted an intrafamilial equality that "enhanced female status and autonomy," which underwrote

---

250 *See* JEFFREY, *supra* note 234, at 87-90; MYRES, *supra* note 242, at 182-85.

251 There were both commonalities and differences between Western agrarianism and the variety of agrarian republicanism that had traditionally resided in the South. One common element was a distrust of capital. In Southern agrarianism, this distrust was connected to Locke's notion of property: a property in one's person was primary; abstract or artificial forms of property were secondary. *See* ANNE NORTON, ALTERNATIVE AMERICAS: A READING OF ANTEBELLUM POLITICAL CULTURE 124-27 (1986). One notable exception to the principle of property in one's person, of course, was slavery.

252 FINK, *supra* note 247, at 60-61 (extrapolating from a twentieth-century study of agrarian households: Sarah Elbert, *The Farmer Takes a Wife: Women in America's Farming Families*, *in* WOMEN, HOUSEHOLDS, AND THE ECONOMY 173, 191-95 (Lourdes Beneria & Catharine R. Stimpson eds., 1987)).

women's public activity in the community.[253] Each of these accounts is problematic. For one thing, with respect to women's power, status, and autonomy, the accounts seem too happy to be entirely accurate. For another, they rest too heavily on a single causal element; social change is typically more complex, multifaceted, and multidirectional than any single variable can explain. But, if we weaken the assumptions and complicate the causal connections, it does seem true that subtle shifts in women's roles produced political consequences of some significance.

As noted above, there was in "modern" America an ethos that acknowledged a role for women in maintaining morality in society.[254] According to the doctrine of separate spheres, this role was confined within the home. In the West, however, the role extended beyond those bounds. This extension was not simply a function of the fact that women on the frontier became (properly) teachers.[255] It grew, moreover, from a sentiment that women had a general responsibility for "civilizing" society and for doing so even outside the confines of the home.[256]

Second, therefore, the process of creating communities on the frontier was one in which women were intimately involved. In part, this involvement was a natural outgrowth of the fact that creating community entailed establishing connections among families, in which women had an undeniable role. But even in established communities, women had an active and visible role in the communities' associational life. This was certainly the case for informal activities like dances, barn raisings, quilting bees, and communal butcherings.[257] It was also true for more formal institutions and voluntary associations, especially those, like schools and churches that fell within women's acknowledged ambit.[258] But, especially after the Civil War, it was true even of associations residing within more conventionally masculine domains like farming and politics. Among these associations were the Grange and the Farmers' Alliance, whose aims included promoting agriculture, as an economic venture and a way of life, and protecting it against what the

253 Harris, *supra* note 249, at 167.
254 *See* JEFFREY, *supra* note 234, at 107-08.
255 *See* MYRES, *supra* note 242, at 182-85.
256 *See* JEFFREY, *supra* note 234, at 98.
257 *See* JONES, *supra* note 247, at 204.
258 JEFFREY, *supra* note 234, at 98, 107-23.

organizations saw as the predations of capital in general and the railroads in particular.[259]

Typically, women's connection to men's associations was through auxiliaries of the principal organization. Thus, women occupied a separate space for social and other appropriately feminine pursuits.[260] But the Grange and the Alliance admitted women as members, officers, and delegates to conventions. Elizabeth Jameson notes that the Alliance encouraged women's membership "because they had a direct economic interest in reform."[261] The source of that interest, of course, was the microeconomy that was the familial household. The Alliance, in fact, presented itself as an extension and embodiment of the farming family. "And like the farm family, the Alliance offered a productive role for every member of the household. Its leaders assumed that mothers, fathers, sons, and daughters would reproduce within the . . . organization the cooperative model of family labor found on the farm."[262] The goal was not simply to reform national policy, but to transform the family itself. "If the family was a microcosm of the country, then the family had to be transformed, 'improved,' and all its members remade into model citizens." The instrument for this transformation was education—for all the family's members.[263]

As Michael Lewis Goldberg points out, although the Alliance's rhetoric and its metaphorical uses of family insinuated sexual equality, the association was not able to sustain the insinuation. Egalitarian commitment was compromised most profoundly, he argues, in the move to the Populist Party as a vehicle for political action in the late 1880s and early 1890s. In short, men controlled the party.[264] This control made a certain sense, in light of the party's strategic emphasis on electoral politics; women, after all, could not vote in most places and times that were relevant. But the effect was to exclude women from the central mission of the organization—a mission that implicated one of the basic duties of citizenship.[265] Perhaps as important, the Populists altered the Alliance's familial metaphor from one of equality and inclusion to one of masculine supremacy, to which the husband's common-law duty of support

259 Jameson, *supra* note 243, at 157.

260 JONES, *supra* note 247, at 209.

261 Jameson, *supra* note 243, at 157.

262 MICHAEL LEWIS GOLDBERG, AN ARMY OF WOMEN: GENDER AND POLITICS IN GILDED AGE KANSAS 130 (1997).

263 *Id.* at 131-52 (citing KANSAS FARMER, Sept. 4, 1889).

264 *Id.* at 142, 160-63.

265 *Id.* at 168.

was central. The reason that corporate exploitation and governmental corruption were so dangerous, the new argument went, was that they undermined the ability of husbands and fathers to provide for their families.[266] Thus, the party's strategic aim and method tended to push women back to an auxiliary role.

The Populist Party also compromised agrarian republicanism's traditional orientation toward localism. Although the party had "grassroots," its agenda was nationalist. This made sense for at least three reasons. First, as noted above, homesteaders west of the Mississippi were connected directly to the nation in ways that settlers in older states back East had not been. According to the Constitution, congressional statute, and the explicit acquiescence of states, the territories belonged to and were subject to regulation by the nation.[267] Thus, the policies that permitted, even encouraged, western settlement were national in origin and purpose. Second, the principal levers of political economy were national. This was due in no small part to the power of Hamiltonianism as a description of and prescription for many aspects of the regime, especially after the Civil War. To put a sharper point on it, if Populism's enemies were national corporations possessing substantial economic power, the remedies must be national as well. Third, the circumstances that propelled Populism as a political movement in the late 1880s and early 1890s—high interest rates, falling prices for farm products, failed farms and foreclosures on mortgages, and the Panic of 1893—were beyond local control.

Populism's platform rested on this central premise: Primary authority over the political economy was vested not in enterprise (the "millionaires") but in "the people." The political justification for this position was that democracy demanded it. The people presupposed by this version of democracy, however, were not merely a local (nor necessarily an agrarian) people, but a national people, rural and urban. The economic justification returned to John Locke's labor theory of ownership, but turned it against Hamilton's abstract political economy. Wealth, the platform stated, is created by labor and "belongs to him

---

266 *Id.* at 165.

267 This proposition had been thrown into question by the Kansas-Nebraska Act of 1854 and by *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856). The former enacted Stephen A. Douglas's theory that the people of each territory were sovereign and should be permitted to legislate (with respect to slavery, for example) free from Congressional interference. The logic of *Dred Scott*, in contrast, implied that neither Congress nor the territories could interfere with a slaveholder's right to take his property wherever he pleased. Union victory in the Civil War implicitly but effectively overturned both notions. For a discussion of these claims, see BRANDON, *supra* note 32, at 80-81, 109-18.

who creates it." Capitalists, who siphon wealth from its creators, commit "robbery," straight and simple.[268] Almost all the remedies the Populists proposed aimed to enhance governmental presence in the economy—through nationalization of crucial industries, federally-financed low-interest loans, postal savings banks, a graduated income tax, and monetary policies like unlimited coinage of silver.[269]

Populism's cause would be coopted by the Democrats, most vividly in the elections of 1896, in which William Jennings Bryan was crucified. After this, the movement's war against capital and the railroads went moribund.[270] There is reason to believe, however, that the agrarian movements that gave rise to Populism helped Western women enjoy at least two important entrees into traditionally masculine preserves. The first concerned higher education. Western territories and states embraced coeducation far sooner than those back East, though it is also true that most coeducational institutions prescribed segregated courses of study for women and men—the former being directed to courses related to teaching and the economy of the home, the latter to other, broader studies.[271]

The second entree involved suffrage. Partly through women's associational activities (including their work in the prosuffrage Women's Christian Temperance Union) and partly through the active agitation of the Populists, women first acquired the right to vote in the West.[272] The reasons for these successes are complex. Jameson argues that support for suffrage came not from among men of the "genteel upper classes" but from "farmers and miners who endorsed political philosophies that supported equality."[273] Although there is something to this position, the record is actually more tangled and, in some respects, less idealistic. In Wyoming, for example,

---

268 Populist Party Platform (July 4, 1892), *in* 1 DOCUMENTS OF AMERICAN HISTORY 593-94 (Henry Steele Commager & Milton Cantor eds., 1988).

269 *Id.* at 594-95.

270 Certain tenets of the movement were later revived in two forms. Socialist parties and organizations, which were a presence in parts of the Midwest in the first forty years of the twentieth century, picked up part of the Populist mantle. And New-Deal liberalism pursued and enacted some policies that the Populists had originally embraced.

271 JEFFREY, *supra* note 234, at 227, 234-36.

272 Women acquired suffrage soon after the Civil War—first in Wyoming (1869), then in Utah (1870). For a brief discussion of legislative battles over suffrage in the West, see MYRES, *supra* note 242, at 213-37. By 1914, women had acquired the right to vote in ten of eleven Western states, but only one state in the East.

273 Jameson, *supra* note 243, at 157. She points out, for example, that the Populists in the 1890s successfully promoted suffrage in Colorado and Idaho, but failed in California and Kansas where "the countryside voted for suffrage, but urban voters defeated it." *Id.*

proponents had a variety of motives: some wanted to embarrass the Republican governor, who they mistakenly thought would veto the measure; others argued that the measure would attract more women to the territory (which at the time had 6,107 males and 1,049 women over the age of 10).[274] In Utah, extending the suffrage was promoted most zealously by a member of Congress from Indiana, who argued that if women had the right to vote in the West, they would discourage sexual promiscuity and outlaw polygamy.[275]

Perhaps the most we can confidently say is that, in the states that were manufactured from the frontier, certain political actors saw their interests to be congruent with women's. These were not always high-minded motives, to be sure. But two possible lessons stand out, one concerning constitutional values, the other concerning the constitutionalist function of family. First, it is notable that actors—men, for the most part—who wanted something for themselves pursued their own gain by promoting a version of constitutional liberty and equality for others. Second, and more modestly, perhaps the fact that these actors perceived women to be worthy or useful political partners—on the model of the marital family on the frontier—was something of an achievement in itself.

CONCLUSION

Frederick Jackson Turner argued that the driving forces and political legacy of westward settlement were individualism, democracy, and nationalism.[276] Their importance is undeniable, even if we might quibble over what they entail. There was, however, another force whose constitutional legacy Turner undervalued. Family on the frontier was an intermediate association, neither liberal nor democratic, that refined both liberalism and democracy, while extending the authority of the nation.

In functional terms, nineteenth-century families on the frontier did not play the subversive and radically creative roles their eighteenth-century colonial counterparts had played. Perhaps this should come as no surprise; for, despite the presence of familial forms and practices that deviated from what was increasingly considered the conventional norm, families by the nineteenth century were fairly well rationalized as part of constitutional order. Even on

274 MYRES, *supra* note 242, at 220-21.
275 *Id.* at 221-23.
276 TURNER, *supra* note 18, at 35.

the frontier—where environmental challenges were substantial and legal and social constraints were thin—these were *republican* families, emulating their eighteenth-century prototypes. Their arduous role was not to revise the political world, but to secure the United States' military conquests over Indians and Mexicans. They would accomplish this purpose by serving as social and political instruments for extending the nation's political authority over the conquered territories.

For many reasons, these families were largely ineffective in limiting the Hamiltonian elements of American political economy. This failure was not for lack of trying. Many families on the frontier, especially in parts of what we now call the upper Midwest and the Great Plains, were active participants in social and political movements whose aim was to challenge, in the name of an agrarian republicanism identified with Jefferson, the individualist and centralizing tendencies that Tocqueville feared. By the end of the century, however, the Hamiltonian logic of political economy was too powerful to resist successfully.

If Western families failed in this respect, they succeeded in another unexpected direction, and did so in ways that challenged the masculine presuppositions of the common law and the Supreme Court. To be sure, the West did not liberate women. But it did work substantial change, largely without the aid of law, as environmental and ethical conditions impelled women to take on new roles in families, communities, and the larger society. At first, these roles were informal and social in character. Later, they were formal and overtly political. Eventually, they solidified two entitlements of significance for Western women: expansive access to higher education and the right to vote. As a matter of constitutional text and doctrine, the question of women's status in the nation as a whole would not be fully joined until well into the twentieth century, long after the frontier ceased to be. But, even if the West did not liberate women, the experience of families on the frontier was something of a start.