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Elizabeth G. Patterson

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# UNINTENDED CONSEQUENCES: WHY CONGRESS SHOULD TREAD LIGHTLY WHEN ENTERING THE FIELD OF FAMILY LAW

Elizabeth G. Patterson \*

## INTRODUCTION

In the last thirty-five years Congress has become increasingly willing to legislate directly on matters related to families, though these traditionally have been regarded as primarily, if not exclusively, state concerns. Just in the most recent two-year session of Congress, numerous bills were introduced that directly addressed issues of family law and policy. In addition to the highly publicized Marriage Protection Amendment (Marriage Amendment), a proposal to amend the Constitution to prohibit same-sex marriage,<sup>1</sup> bills were introduced regarding promotion of responsible fatherhood,<sup>2</sup> paid family medical leave,<sup>3</sup> protective programs for abused adults,<sup>4</sup> parental notification when contraceptives are provided to minors,<sup>5</sup> and protection for breast feeding mothers, among other things.<sup>6</sup>

During debate on an earlier version of the Marriage Amendment, some senators expressed concern about that effort to federally mandate a particular approach to family law.<sup>7</sup> Their statements

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\* Professor of Law at the University of South Carolina School of Law and former State Director of the South Carolina Department of Social Services. Prior to attending law school, she worked with the Head Start program and with poverty programs of the Office of Economic Opportunity.

1. Marriage Protection Amendment, H.R.J. Res. 89, 110th Cong. § 2 (2008); Marriage Protection Amendment, S.J. Res. 43, 110th Cong. § 2 (2008); see Aaron Leichman, *Federal Marriage Amendment Re-introduced in Senate*, CHRISTIAN POST, July 2, 2008, available at <http://www.christianpost.com/article/20080702/federal-marriage-amendment-re-introduced-in-senate.htm>.

2. Responsible Fatherhood and Healthy Families Act of 2007, S. Res. 1626, 110th Cong. § 101 (2007).

3. Healthy Family Act, H.R. Res. 1542, 110th Cong. § 3(1) (2007).

4. Elder Justice Act, H.R. Res. 1783, 110th Cong. § 102(a) (2007).

5. Parent's Right to Know Act of 2007, H.R. Res. 2134, 110th Cong. § 2(a) (2007).

6. Breastfeeding Promotion Act of 2007, H.R. Res. 2236, 110th Cong. § 101(b)(2) (2007). This list is exemplary only, and does not include all bills introduced during the 110th Congress that directly address family law and policy. Further, many bills contain provisions that affect family law and policy although the primary objective of the bill lies elsewhere.

7. See, e.g., Craig Broffman and Ed Henry, McCain: Same-sex Marriage Ban is Un-Republican

reflected a longstanding recognition throughout American government that family issues, with their heavy infusion of local norms, can be coherently dealt with only at the local level. The one-size-fits-all approach of federal rule-making cannot accommodate the cultural variations of a nation of 296 million persons<sup>8</sup> with different histories, religions, and national backgrounds. Thus, of all areas traditionally allocated to state control, family law evokes the strongest localist sentiment from both state and federal officials. The Supreme Court's statement in the 1979 case of *Hisquierdo v. Hisquierdo* sums up the prevailing posture: "The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States."<sup>9</sup>

Despite these avowals and admonitions, Congress has in the last fifty years shown an increasing willingness to involve itself in family law matters, not only as a facilitator and supporter of state initiatives, but also as a rule-maker in its own right. The Constitution does not authorize Congress to legislate on family matters. However, using its authority to condition the receipt of federal funds, Congress has exercised a quasi-regulatory authority to shape a broad array of family law rules.<sup>10</sup> Major federal enactments in the areas of child abuse,<sup>11</sup> adoption,<sup>12</sup> child support,<sup>13</sup> paternity establishment,<sup>14</sup> and

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(July 14, 2004), <http://www.cnn.com/2004/ALLPOLITICS/07/14/mccain.marriage/>; Log Cabin Republicans, GOP Opposition to the Federal Marriage Amendment, [http://www.logcabin.org/logcabin/fma\\_quotes\\_GOP\\_senators.html](http://www.logcabin.org/logcabin/fma_quotes_GOP_senators.html) (last visited July 21, 2008); Susan Milligan, *Granite State's Sununu Often Goes Against GOP*, BOSTON GLOBE, July 18, 2004, available at [http://www.boston.com/news/nation/articles/2004/07/18/granite\\_states\\_sununu\\_often\\_goes\\_against\\_gop\\_grain/](http://www.boston.com/news/nation/articles/2004/07/18/granite_states_sununu_often_goes_against_gop_grain/).

8. U.S. POPClock Projection, [www.census.gov/population/www/popclockus.html](http://www.census.gov/population/www/popclockus.html) (last visited July 18, 2008).

9. *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979) (quoting *In re Burrus*, 136 U.S. 586, 593–94 (1890)).

10. See *infra* notes 22–28 and accompanying text for discussion of the evolution of congressional authority under the Spending Clause.

11. E.g., Adoption and Safe Families Act of 1997 (AFSA), Pub. L. No. 105-89, 111 Stat. 2116 (1997) (codified at 42 U.S.C. § 675(5)); Adoption Assistance and Child Welfare Act of 1980 (AACWA), Pub. L. No. 96-272, 94 Stat. 500 (1980) (codified at 42 U.S.C. §§ 620–28, 670–79(a)); Child Abuse Prevention and Treatment Act (CAPTA), 42 U.S.C. § 5101 (2000).

12. E.g., Adoption and Safe Families Act of 1997; Adoption Assistance and Child Welfare Act of 1980; Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901–1963 (2000); 42 U.S.C. § 1996b (2000) (transracial adoption).

13. E.g., Family Support Act of 1988, Pub. L. No. 100-485, 102 Stat. 2343 (1988); Personal

marriage<sup>15</sup> have significantly affected the rules and policy directions of family law.<sup>16</sup>

Some federal activity in the family law realm is unavoidable and even desirable. Federal legislation on issues such as the foregoing brings needed attention and resources to bear on serious social problems affecting families. Moreover, social problems that exist separately in families and communities throughout the nation can become so pervasive or interconnected as to require a nationwide response or can begin to affect issues of national concern such as economic stability or military readiness. In cases such as these, federal attention to the relevant family issue is both understandable and desirable.

The federal attention can become pernicious, however, if federal program requirements demand changes in state law that could disrupt the fabric of family law and policy in a state. Because family policy is closely connected to community norms and local social cohesion, such disruptions can have deleterious social effects that were neither anticipated nor desired by Congress. These disruptions can be, and sometimes are, avoided by a less prescriptive federal approach that allows states to achieve legislative objectives in a manner consistent with local family policy.<sup>17</sup>

Federal program mandates also can become counterproductive if they stifle state creativity in fashioning solutions to complex and multifaceted social problems such as child abuse and the economics

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Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), Pub. L. No. 104-193, 110 Stat. 2105 (1996).

14. *E.g.*, Family Support Act of 1988, Pub. L. No. 100-485, 102 Stat. 2343 (1988).

15. *E.g.*, Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996).

16. Federal courts also have been active in the family law arena, and have been the source of some of the most controversial federal family law rules. *See, e.g.*, Janet Dolgin, *The Constitution as Family Arbiter: A Moral in the Mess?*, 102 COLUM. L. REV. 337 (2002); *Developments in the Law—The Constitution and the Family*, 93 HARV. L. REV. 1161 (1980). Judicially created rules, while beyond the scope of this article, raise many of the same issues discussed herein.

17. For instance, the federal Child Abuse Prevention and Treatment Act (CAPTA), which requires a system of reporting and investigating child abuse and neglect, allows the states to define what constitutes child abuse and neglect. 42 U.S.C. § 5101 (2000). Similarly, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), which requires states to have numerical guidelines for determining the amount of a noncustodial parent's child support obligation, allows the states to determine the formula to be used. Pub. L. No. 104-193, 110 Stat. 2105 (1996).

of divided families. Just at the moment that Congress provides states with the impetus, the resources, and the guidance to attack thorny social problems within their borders, it often deprives them of flexibility to experiment with potentially viable approaches to addressing them.

Although the federal government possesses the power to legislate broadly in the family law area, it should exercise this power sparingly and carefully to avoid disrupting the integrated body of each state's family law. This article will begin with an overview of federal power under the Constitution's Spending Clause, which has opened the door to federal family law enactments. It will then discuss the basis for the tradition of federal deference to the states in this area, demonstrating that local control of family law continues to play an important role in maintaining the social fabric and protecting individual autonomy and community health. This will be followed by an exploration of how the structures and processes of Congress limit its competence to legislate effectively in regard to matters affecting family law and policy. Two examples from federal child support enforcement legislation will illustrate the unintended effects on families and family policy that can result from these limitations. The article concludes with a cautionary note about the potential costs of piecemeal tinkering with family policy by ill-informed federal lawmakers.

## I. STATE DOMINANCE IN THE FAMILY LAW AREA

### A. *The Tradition of Federal Deference*

Federal deference to the states in the area of family law is evident in both case law and practice going back at least to the mid-nineteenth century.<sup>18</sup> Even in an era when federal power was viewed as generally circumscribed, the degree of restraint exercised in regard to family law was notable. For instance, the Supreme Court, without bothering to give a reason, carved out of federal courts' diversity

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18. *E.g., Ex parte Burrus*, 136 U.S. 586 (1890); *Barber v. Barber*, 62 U.S. 582 (1859).

jurisdiction an exception for all domestic relations matters.<sup>19</sup> In recent years, when the Court has sanctioned expansions in the scope of federal authority that seem virtually limitless,<sup>20</sup> it continues to single out family law as an area in which state authority should dominate.<sup>21</sup> Nonetheless, its expansive view of the constitutional prerogatives of Congress has opened the door to an increasing federal presence in family law and policy.

### 1. *Growth of Federal Power to Mandate Family Law Rules*

Because the Constitution gives Congress no express authority to legislate in the family sphere, any authority it has in this area must be derived from its power to collect taxes and expend revenues “for the common Defence and general Welfare of the United States . . . .”<sup>22</sup> For almost 150 years after the Constitution was ratified, it remained unclear whether this clause authorized congressional spending outside the areas of authority enumerated elsewhere in the Constitution.<sup>23</sup> This question was resolved by the Supreme Court’s 1936 decision in *United States v. Butler*,<sup>24</sup> holding that the provision authorized spending for any aspect of the general welfare. Under *Butler*, however, a federal spending measure would nonetheless be unconstitutional if it intruded into the realm of authority reserved to the states by the Tenth Amendment,<sup>25</sup> including family law.

Subsequent to *Butler*, the breadth of Congress’s spending power and the judicial deference to it have expanded, and the strength of the Tenth Amendment limitation has diminished. One product of this evolution has been a broad expansion of the types of conditions that

19. *Barber*, 136 U.S. at 584; see also *Ankenbrandt v. Richards*, 504 U.S. 689, 694 (1992).

20. See *infra* notes 24–28 and accompanying text.

21. The Court continues to recognize the domestic relations exception to diversity jurisdiction; applies strict scrutiny in preemption cases involving state family law enactments; and otherwise gives state sovereignty particular deference in the area of family law. See, e.g., *Ankenbrandt*, 504 U.S. 689; *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979); *United States v. Yazell*, 382 U.S. 341 (1966).

22. U.S. CONST. art. I, § 8, cl. 1.

23. The debate went back to a dispute between James Madison, who advocated the narrower position that Congress could tax and spend only in furtherance of its enumerated powers, and Alexander Hamilton, who argued for the broader federal power. *United States v. Butler*, 297 U.S. 1, 65 (1936).

24. *Id.*

25. *Id.* at 68–70.

can be attached to federal grants to the states. *Butler* had recognized Congress's authority to condition receipt of federal funds on adherence to conditions meant to assure that the funds were being spent to accomplish the objective of the federal spending program.<sup>26</sup> The Supreme Court gradually expanded the power to condition to a point at which it virtually eclipsed contrary Tenth Amendment considerations. In the 1987 case of *South Dakota v. Dole*, the Court upheld congressional conditions that were at best only indirectly related to the purpose of the federal spending program.<sup>27</sup> A parallel development was a dramatic decline in the Court's discussion of whether the "welfare" sought to be furthered through a federal spending program was national rather than local, as deference to Congress in this area had become virtually conclusive.<sup>28</sup>

The spending power, as thus interpreted, allows Congress to create rules and programs in any policy area so long as they are framed as conditions on receipt of federal funds. Moreover, the power can be exercised in ways that limit state autonomy and that utilize state powers and institutions to serve ends determined at the federal rather than the state level.

## 2. *Current Validity of the Rationales for Federal Deference*

The reasons for singling out family law for special treatment in the federal system were never clearly articulated in the primary legal sources.<sup>29</sup> In a 1930 opinion, Justice Holmes suggested that state

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26. *Id.* at 73. *Butler* involved grants to private entities; however, the following year the Court applied the same principle in a case where the grantees on which conditions were imposed were states. *Charles C. Steward Mach. Co. v. Davis*, 301 U.S. 548, 593–98 (1937).

27. 483 U.S. 203 (1987). *Dole* involved a provision conditioning the receipt of federal highway funds on enactment of state legislation establishing twenty-one as the minimum age at which alcoholic beverages could be legally consumed. Justice O'Connor's dissent noted the tenuous relationship between the condition and the objectives of the federal spending program. *Id.* at 213–18.

28. Compare *Charles C. Steward Mach. Co.*, 301 U.S. at 586–87, and *Helvering v. Davis*, 301 U.S. 619, 640–42 (1937), with *Dole*, 483 U.S. at 208.

29. In a 1992 opinion recognizing the domestic relations exception to federal diversity jurisdiction, the Court pointed to the existence of specialized expertise and institutions at the state level as the reason for avoiding federal involvement in family issues. *Ankenbrandt v. Richards*, 504 U.S. 689, 703–04 (1992). A dissenting opinion by Justice Rehnquist in an earlier case attributed federal deference regarding family law to the importance of allowing states room to experiment with innovative responses to complex problems. *Santosky v. Kramer*, 455 U.S. 745, 770–73 (1982).

control of the domestic relations between husband and wife and between parent and child is simply derived from the common understanding at the time the Constitution was adopted.<sup>30</sup> Although Holmes may have been referring to common understandings related to the federal system, it is reasonable to suppose that the common understandings to which he alluded also related to the interdependence of families and their local communities, and their combined role in creating and maintaining the social fabric upon which liberty and order depend.

### *B. Communities, Families, and the Social Order*

The Supreme Court has long recognized the importance of family as a building block of society. In case after case, the Court has protected parental prerogatives, stating that parents have a duty, as well as a right, to prepare children for the obligations of adulthood.<sup>31</sup>

#### *1. The Individual Interest in Family*

The family is not, however, a mere convenience of the state, protected because of its child-rearing role. It also has profound importance to the individuals of which it is comprised. Matters of choice in marriage and family life are considered a vital aspect of constitutional liberty.<sup>32</sup> It is within the family that the essential

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Neither of these is an adequate explanation for the deep and time-honored federal reluctance to enter the family law arena. Justice Rehnquist's experimentation rationale is too broad to explain the extraordinary deference in the area of family law, as it is equally applicable to many other areas of law. The existence of state expertise and institutions cannot explain the thinking that gave rise to those very institutions and expertise.

30. *Ohio ex rel. Popovici v. Agler*, 280 U.S. 379, 383–84 (1930). On this basis, the Court held that constitutional provisions requiring that all proceedings against ambassadors and other representatives of foreign countries be heard in federal and not state courts was inapplicable to a suit for divorce and alimony. *Id.*

31. *E.g.*, *Troxel v. Granville*, 530 U.S. 57 (2000); *Parham v. J.R.*, 442 U.S. 584 (1979); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510 (1925).

32. *E.g.*, *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Loving v. Virginia*, 388 U.S. 1 (1967); *Meyer v. Nebraska*, 262 U.S. 390 (1923). See generally Elizabeth G. Patterson, *Health Care Choice and the Constitution: Reconciling Privacy and Public Health*, 42 RUTGERS L. REV. 1, 9–22 (1989).



identity of the individual is formed and where it finds its clearest expression. The importance of family to the individual was underlined by the Supreme Court in *Planned Parenthood v. Casey*: “Our precedents ‘have respected the private realm of family life which the state cannot enter.’ These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.”<sup>33</sup>

## 2. *The Community Interest in Family*

Neither the individual nor the collective interest in families can be fully realized separate and apart from the surrounding community. Families exist within and receive support and structure from their local communities. In many ways, healthy communities function as extended families—participating in the education and upbringing of children, marking and supporting family milestones such as birth, marriage, and death, and enhancing family functioning through informal sanctions based on shared norms and values. Protection of the individual and societal interests in family thus radiates beyond the family itself to encompass the community which nurtures and supports the family. Under this analysis, federal deference to the states in the area of family law rests on recognition that families and family functioning are critical to the social and moral health of communities and thus should be determined at the local level.<sup>34</sup>

There is thus a symbiotic relationship among individuals, families, and communities. Together, they produce a system of norms and institutions that supports the aspirations of individuals and their families and instills community values in the next generation. This “social fabric” is not uniform among communities. The size of each community, its religious traditions, geographical location, economic structure, and countless other variables, create in each community its

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33. 508 U.S. 833, 851 (1992) (quoting *Prince*, 321 U.S. at 166 (1944)); see also *Lawrence v. Texas*, 539 U.S. 558 (2003).

34. For an extended discussion of the communitarian basis for deference to state sovereignty over family law, see Anne C. Dailey, *Federalism and Families*, 143 U. PA. L. REV. 1787 (1995).

own distinct culture.<sup>35</sup> Between and among communities with many divergent characteristics, the cultural differences can be dramatic. As a result, their social structures and norms relating to families are similarly diverse.

### 3. *Families and Social Capital*

The community as a whole has its own stake in preserving the norms and practices that shape and support family life, which transcends the value of families as socializers of the next generation. A variety of desirable social indicators—such as school quality, economic growth, and low crime rates—are correlated with the existence of what modern scholars label “social capital.”<sup>36</sup> The term “social capital” refers to aspects of social organization such as networks, norms and trust that facilitate coordination and cooperation for mutual benefit.<sup>37</sup> Social capital is enhanced by strong families, whose members participate in community institutions, networks, and other aspects of social organization.

An important ingredient of social capital is community members’ sense of control over important aspects of the physical, social, and moral environment of the community.<sup>38</sup> Control of issues important to community life by national legislative bodies can be detrimental to social capital both because members of the community feel powerless to shape laws crafted at the national level, and because nationally adopted rules may be inconsistent with the normative structure that forms the foundation for community life.

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35. See, e.g., Thaddeus Coreno, *Fundamentalism as a Class Culture*, 63 SOC. OF RELIGION 335, 342–45 (Fall 2002); Carl E. Schneider, *State-Interest Analysis in Fourteenth Amendment “Privacy” Law: An Essay on the Constitutionalization of Social Issues*, 51 LAW & CONTEMP. PROBS. 79, 107–08 (1988); David Brooks, *One Nation, Slightly Divisible*, THE ATLANTIC MONTHLY, Dec. 1, 2001, at 60–63.

36. See generally Robert D. Putnam, *Tuning In, Tuning Out: The Strange Disappearance of Social Capital in America*, 28 PS: POL. SCI. & POL. 664 (1995); see also Amitai Etzioni, *The Responsive Community: A Communitarian Perspective 1995 Presidential Address*, 61 AM. SOC. REV. 1, 4–5 (1996); Joshua Miller, *Family and Community Integrity*, 28 J. OF SOC. & SOC. WELFARE 23, 28, (Dec. 2001); David J. Wood, *Let’s Meet: Rebuilding Community*, CHRISTIAN CENTURY, Feb. 10, 2004, at 1.

37. Robert D. Putnam, *The prosperous community, social capital and public life*, THE AMERICAN PROSPECT 13 (1993), available at [http://www.prospect.org/cs/articles?article=the\\_prosperous\\_community](http://www.prospect.org/cs/articles?article=the_prosperous_community).

38. Miller, *supra* note 36, at 28.

#### 4. *The Importance of Legal Diversity Among Communities*

Local dominance in setting family policy protects individual choice in another way as well, by creating legal diversity within the federal system concerning family issues. When uniform national family laws are adopted, persons who find the laws inconsistent with their personal beliefs and aspirations have no choice but to comply. Leaving family law to the states, however, allows diversity to exist within the United States, and individuals whose values differ from those of the majority in one location have the alternative of emigrating to another, more compatible, community.<sup>39</sup> Thus, legal diversity among the states “increase[s] aggregate social welfare . . . [by] accommodat[ing] the [moral] preferences of a greater proportion of the [citizenry].”<sup>40</sup>

#### C. *Community Values in the Supreme Court*

The diversity of communities throughout the United States makes it inevitable that nationally adopted rules will fail to capture local norms and practices. A nationally adopted rule on a matter heavily affected by cultural variables has significant potential for a disruptive impact on the normative structures of at least some communities.<sup>41</sup>

The notion that issues strongly connected with upholding community value systems should be determined at the local level appears regularly in Supreme Court jurisprudence. The Court’s obscenity cases provide a prominent example. Stating that a primary

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39. Dailey, *supra* note 34, at 1871–72; see Seth F. Kreimer, *Federalism and Freedom*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 66, 72 (2001). See generally Richard A. Epstein, *Exit Rights Under Federalism*, 55 LAW & CONTEMP. PROBS. 147 (1992). This concept could have influenced recognition/creation of a constitutional right to interstate migration, though it is not explicitly discussed in the Court’s seminal opinions on the issue. See, e.g., *Mem’l Hosp. v. Maricopa County*, 415 U.S. 250 (1974); *Shapiro v. Thompson*, 394 U.S. 618 (1969). These cases struck down state laws aimed at discouraging persons from migrating to the state to take advantage of its laws.

40. Lynn A. Baker & Mitchell N. Berman, *Getting off the Dole: Why the Court Should Abandon Its Spending Doctrine, and How a Too-Clever Congress Could Provoke It to Do So*, 78 IND. L.J. 459, 471–72 (2003); see also Michael W. McConnell, *Federalism: Evaluating the Founders’ Design*, 54 U. CHI. L. REV. 1484, 1494 (1987).

41. See Schneider *supra* note 35, at 113; Mark Regnerus et al., *Voting with the Christian Right: Contextual and Individual Patterns of Electoral Influence*, 77 SOC. FORCES 1375, 1380, 1392 (June 1999).

purpose of obscenity regulation is protection of the environment and quality of life of the community,<sup>42</sup> the Court has grounded its definition of “obscenity” in the values of the local community.<sup>43</sup> The Court explicitly recognized the right of the people of Maine or Mississippi to conclude that the social fabric of their community was debased by public display of certain explicit conduct, even though the people of Las Vegas or New York City did not regard the same display as objectionable.<sup>44</sup> Supreme Court deference to community values on issues heavily laden with moral values is also visible in areas such as education law and criminal law and procedure. In reaffirming state and local primacy in matters relating to public education, the Court has emphasized the role of public schools in transmitting community values.<sup>45</sup> Similarly, in defining and protecting the role of the jury, the Court often speaks of the jury’s role in assuring that community values are reflected in making determinations regarding criminal guilt and sentencing.<sup>46</sup>

The public and judicial focus on individual liberties in the last part of the twentieth century led some to question whether the Court remained committed to protecting community values and recognizing the legitimacy of state laws based on community conceptions of morality.<sup>47</sup> This trend was most fully realized in the Supreme Court’s 2003 decision in *Lawrence v. Texas*, striking down state prohibitions of homosexual sodomy, where the Court made clear that majoritarian

42. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 57–61 (1973).

43. *Miller v. California*, 413 U.S. 15, 33–35 (1972) (citing *Jacobellis v. Ohio*, 378 U.S. 184, 200 (1964) (Warren, J., dissenting)).

44. See *Paris Adult Theatre I*, 413 U.S. at 57–63; *Miller*, 413 U.S. at 32–33.

45. See *Bd. of Educ. v. Pico*, 457 U.S. 853, 864 (1982) (noting a “substantial community interest in promoting respect for authority and traditional values be they social, moral or political”).

46. See, e.g., *Ring v. Arizona*, 536 U.S. 584, 615–16 (2002) (Breyer, J., concurring) (citing *Spaziano v. Florida*, 468 U.S. 447, 481, 486 (1984) (Stevens, J., concurring in part and dissenting in part)); *Gregg v. Georgia*, 428 U.S. 153, 184 (1976); *Witherspoon v. Illinois*, 391 U.S. 510, 519 & n.15 (1968); *Atkins v. Virginia*, 536 U.S. 304, 323 (2002) (Rehnquist, J., dissenting) (citing *Coker v. Georgia*, 433 U.S. 584, 596 (1997)); *Spaziano*, 468 U.S. at 474–76, 483–90.

47. See Suzanne B. Goldberg, *Morals-Based Justifications for Lawmaking: Before and After Lawrence v. Texas*, 88 MINN. L. REV. 1233, 1254–58 (2004); see also Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803 (1985) (documenting decreased discourse concerning morality in American judicial and statutory law concerning the family).

perceptions of moral behavior cannot justify legal incursions upon individual liberty.<sup>48</sup>

*Lawrence* was seen by many, including Justice Scalia, as delegitimizing all state laws based on moral choices.<sup>49</sup> However, *Lawrence* did not speak to state laws advancing public morality, as contrasted to state laws enforcing majoritarian conceptions of private morality.<sup>50</sup> Protection of the social fabric of communities, which implicates public rather than private morality, remains a vital governmental interest.

Furthermore, *Lawrence's* emphasis on individual rights is consistent with its parallel interest in community values. Individual community members' constitutionally protected choices concerning marriage and family life are themselves the source of and are supported by the social fabric of their communities. Nonconformists whose choices lie outside community norms are protected by the diversity of social norms and legal rules throughout the United States. Thus, the increased emphasis on individual rights does not negate the policies that support local control of family law. Rather, the traditional rationales continue to call for local control of the broad range of laws that structure family relationships and define the rights and duties of family members.

## II. FEDERAL POLICY INITIATIVES AFFECTING FAMILY LAW

Congress has shown no interest in a broad takeover of family law and continues to express deference to the states in this area. However, the expansion of its power under the Spending Clause invites direct federal involvement in family law areas whenever fiscal, political, or other federal concerns lead in this direction.<sup>51</sup> Federal law on child

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48. *Lawrence v. Texas*, 539 U.S. 558 (2003). The Court held that the prohibition of homosexual sodomy "furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual." *Id.* at 578.

49. *Id.* at 586–606 (Scalia, J., Dissenting).

50. Devaluation of the states' interests in controlling private morality does limit the scope of state rulemaking regarding family matters. For instance, it may provide the basis for rejecting state authority to limit marriage to persons of different sexes. *Id.* at 577.

51. Congress generally avoids direct involvement in family law except where pursuit of a federal

support enforcement, for instance, is an outgrowth of congressional concern about spiraling costs of the federally funded welfare program.

When congressional legislation reaches into the realm of family and social issues, a too-narrow focus on federal policy objectives tends to prevent careful examination and understanding of the effect that federal proposals may have on the cohesive bodies of family law that have evolved in each of the states. The displacement of state authority in affected areas of family law is not mitigated by its being merely a side-effect of the pursuit of federal policy goals. Indeed, the very fact that Congress's objective is peripheral to the main body of family law and policy increases the potential that its mandates will disrupt the integrity of the body of state family law.

Some federal family law proposals, such as the constitutional amendment prohibiting same-sex marriage, are controversial even at the conceptual level. The objectives of other federal family law enactments such as child support enforcement and child abuse prevention are widely applauded and are generally shared by policy-makers at both state and federal levels.<sup>52</sup> However, even as to these, federal execution of the shared objectives, both in the legislative details and in the administrative oversight, has sometimes been artless, leading to significant costs in the quality of the resulting policy.<sup>53</sup> Unintended effects are prevalent, and corrective modifications are difficult at the federal level.

Problems of this sort are inevitable when federal legislation sets rules of family law and process and nationalizes specific family policy concepts. The problems that arise when Congress legislates in the family law arena arise precisely because family issues will always

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objective can be enhanced by a particular approach to a family law issue. A possible exception is the federal legislation concerning child abuse and neglect, which was addressed by Congress on its own merits without a federal policy "hook." See BARBARA J. NELSON, MAKING AN ISSUE OF CHILD ABUSE: POLITICAL AGENDA SETTING FOR SOCIAL PROBLEMS 76 (1984).

52. State legislation regarding both child support and child abuse was widespread prior to Congress's entry into the field.

53. See generally *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring) (potential for considerable disagreement as to how best to accomplish a goal despite general agreement about the goal itself).

remain inherently local in nature, and the expertise and institutions necessary for addressing them do not and cannot exist at the federal level.

### III. STRUCTURAL AND PROCEDURAL FACTORS THAT LIMIT THE QUALITY OF CONGRESSIONALLY CREATED FAMILY LAW

The framers of the Constitution drew a sharp distinction between local concerns, which would continue to be the province of the states, and national issues, which were delegated to the federal government. Issues affecting individual persons, such as crime, family law, and education, are prototypical examples of the local issues that were to remain the domain of the states.<sup>54</sup> The enumerated powers that were delegated to the federal government by the Constitution were related to collective national issues: those affecting the nation as a whole (such as foreign affairs), those involving relations among states (interstate commerce), and those which transcended state borders (such as promotion of scientific advancement).

With the recent judicial expansion of the realms of federal authority, it is now difficult to delineate any area in which the federal government is totally uninvolved. However, the interests and structures of each level of government, and hence their competencies, continue in significant ways to reflect the original understanding of the roles of federal and state governments. Consequently, members of Congress often are not familiar with or sensitive to local policy areas that may be affected by federal enactments. This is particularly true in an area such as family law which has so adamantly been regarded as an exclusive state province.

Thus, it is not only the inherent difficulty of developing national rules in areas overlain with diverse local cultures that militates against congressional adoption of family law rules. Congress and the state legislatures look at issues through different lenses. Although the legislative processes in Congress and the state legislatures are

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54. See, e.g., *United States v. Morrison*, 529 U.S. 598, 615–16 (2000); *Lopez*, 514 U.S. at 564–65 (1995); THE FEDERALIST NO. 17 (Alexander Hamilton).

structurally similar, statutes that emerge from the process in Washington tend to differ in important ways from statutes on the same subject that emerge from a state legislative process. The historical difference in the roles of state and federal governments in the American system of government is only one source of these different perspectives. A number of practical differences in the circumstances and context of each law-making process contribute to differences in the legislative product of each body.

### *A. Lack of Structure and Expertise in Congress Concerning Family Law*

A fundamental handicap to congressional competence in the family law arena is its own structure and its lack of internal expertise on issues of traditional state concern. Expertise in any legislative body is closely linked to committee structure, as committees and subcommittees form the infrastructure for most significant legislative activity. All legislative bodies are organized into committees with jurisdiction over specific subject areas, and most committees are divided into subcommittees which are even more specialized. Within their areas of jurisdiction, these committees and subcommittees hold hearings, develop proposed legislation, provide detailed scrutiny of each bill and determine whether the bill should be referred to the full House or Senate and in what form. It is the committee or subcommittee that has the greatest impact on the substance of any bill that becomes law, and, indeed, on the decision whether Congress should legislate at all on a particular subject.<sup>55</sup> In order to carry out these functions, and as a result of carrying them out, both members and staff of a particular committee or subcommittee develop considerable expertise in the areas of committee or subcommittee jurisdiction.<sup>56</sup>

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55. See Lawrence Mead, *The Politics of Conservative Welfare Reform*, in *THE NEW WORLD OF WELFARE* 201, 214 (Rebecca Blank & Ron Haskins eds. 2001).

56. See, e.g., EDWARD SCHNEIER & BERTRAM GROSS, *LEGISLATIVE STRATEGY* 79–83 (1993); Robert Zwiier, *The Search for Information: Specialists and Nonspecialists in the U.S. House of Representatives*, IV *LEGIS. STUD. Q.* 31 (1979).



All state legislatures designate a particular committee to manage the numerous bills relating to family law that are introduced in every state during each legislative session. Normally this is the Judiciary Committee, since family law constitutes a large portion of the business of state courts. The primary committee in turn often creates one or more subcommittees specializing in family law. This structure produces a cadre of legislators and staff with a broad awareness of the many interlinking family issues, including divorce, child custody, child support enforcement, paternity establishment, parental rights, adoption, and child abuse. These internal experts are relied on by other legislators to evaluate new initiatives and assure that any new policies are integrated into a coherent body of family law.

The committee structures of the United States House and Senate, on the other hand, are dominated by traditional federal concerns. Areas within the traditional jurisdiction of the states generally lack their own committees, and rarely have their own subcommittees, despite recent federal legislative action relating to those areas. No congressional committee has jurisdiction over family law as such. Since federal courts do not hear family law cases, jurisdiction of the Judiciary Committees in Congress does not encompass this area. Matters relating to family law and family policy are considered by several different committees, depending on how the issue is perceived and the context in which it arose. For instance, the welfare reform bill, which required many specific changes in state child support law, was handled by the House Ways & Means Committee and the Senate Finance Committee, both of which are primarily concerned with federal fiscal issues.<sup>57</sup> Neither of these Committees had any particular expertise in identification of parents, family economics, or the intersection of these matters with other aspects of family policy. Their jurisdiction of the bill arose from the primarily fiscal character of the traditional welfare program as viewed from the federal perspective.

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57. Mead, *supra* note 55, at 210–11. Mead notes that these committees' power and control of tax and budget issues has enabled them to make changes in the AFDC program with little detailed scrutiny by Congress as a whole. *Id.*

### *B. Limitations on External Sources of Expertise*

Congress's limited internal expertise on family law issues could be remedied to some extent if Congress had ready access to adequate information from external sources. Indeed, both elected representatives and congressional staff do have a variety of excellent sources of information. Reform efforts during the 1970s created several sources of expertise and information for Congress, including the Office of Technology Assessment, the Congressional Budget Office, and the Congressional Research Service.<sup>58</sup> These entities serve as sources of perspectives, ideas, and information on a variety of policy issues, including issues of family policy.<sup>59</sup> The problem with this information is not its quality, but rather its focus, as these entities were created to provide Congress with information deemed relevant at the national, rather than the local level.<sup>60</sup> Hence, these entities tend to focus on the discrete areas of family law that have drawn federal attention, but do not generally develop a nuanced understanding of family law and policy as a whole.

The concerns of national advocacy organizations and think tanks, another source of expert information for Congress, tend to be similar to those of congressional members and staff, and hence the subjects of their studies and reports are similarly focused. The same is true of federal agencies. This is not surprising, since both federal agencies and national advocacy organizations are part of the policy networks that regularly interact with congressional members and staff to frame issues for congressional action.<sup>61</sup> Consequently, they have similar

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58. Bruce Bimber, *Information as a Factor in Congressional Politics*, XVI LEGIS. STUD. Q. 585, 586 (1991).

59. But note that a 1979 survey of legislators found that few regarded the Congressional Research Service and General Accounting Office as important sources of information. Zwier, *supra* note 56, at 39–40.

60. See Norman Beckman, *Congressional Information Processes for National Policy*, ANNALS OF THE AM. ACAD. POL. & SOC. SCI., Mar. 1971, at 84, 93. A particular impetus for Congress's creation of these internal sources of expert information was to equalize the informational capacity and expertise of Congress with that of the executive branch. The 1970's were a time of sharp clashes between the Democratic Congress and the Nixon administration. Bimber, *supra* note 58, at 589.

61. See SCHNEIER & GROSS, *supra* note 56, at 80–83; Zwier, *supra* note 56, at 37–38 (legislators' reliance on program staff for technical information); Jeffrey M. Berry, *Citizen Groups and the Changing Nature of Interest Group Politics in America*, ANNALS OF THE AMER. ACAD. OF POL. & SOC. SCI., JULY 1993, at 30, 34–37. Issue networks are loose agglomerations of individuals who share an interest in a

views of what issues are proper subjects for study and reporting. All tend to focus on the national issues at which federal action is targeted rather than collateral issues of state and local concern, including the broad range of family laws and policies that may be implicated by the federal initiative. Information concerning diverse local conditions and norms falls outside the expertise, if not the interest, of the typical policy network.

### *C. Obstacles to Congressional Access to Local Information*

#### *1. The Significance of Local Information*

Limitations on the availability of local information to legislators and to the legislative process are tolerable in regard to inherently national issues. The facts and circumstances which underlie policy decisions on these issues are not subject to local variation. With regard to the war in Iraq, for instance, it is important for each representative to know his constituents' views, but the representative's understanding of the issue and how it affects his or her constituents is not dependent on communication from those constituents themselves.

The situation is very different when Congress legislates in regard to family issues. In 1996, for instance, Congress considered and enacted legislation that would require states to centralize child support disbursements.<sup>62</sup> One state-level entity would collect and disburse all child support monies, whether obtained directly from noncustodial parents or through wage withholding or other collection techniques.<sup>63</sup> The primary reason for this federal proposal was to provide employers with a single location in each state to which they could send income withholding payments. In addition, it was felt that

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particular issue and play a dominant role in developing and implementing federal policy affecting that issue. Entities within these networks conduct studies, analyze data, and engage experts in creative thought concerning their issue, resulting in an extensive array of information to contribute to the legislative process. *See* Bimber, *supra* note 58, at 601 (regarding legislators' reliance on lobbyists to help them connect desired outcomes with specific policies).

62. Pub. L. No. 104-193, Tit. III § 312(b), 116 Stat. 2207, codified as amended at 42 U.S.C. § 654(b) (2000).

63. *Id.*

centralization would make processing of payments more efficient and economical,<sup>64</sup> and reduce the time required to get child support checks into the hands of custodial parents.

The federally mandated system would displace varied state methods for administering the collection and disbursement of these funds—for instance, a number of states had at least some portion of this function performed by county clerks of court.<sup>65</sup> These states had established the clerk-administered system for reasons of administrative efficiency<sup>66</sup> having to do with the court's role in setting and modifying the amount of support and in certain enforcement actions such as civil contempt proceedings. Some of these states asserted that in their jurisdictions, the localized collection and disbursement systems resulted in quicker receipt of support by the custodial parent<sup>67</sup> and fewer occurrences of unallocated funds.<sup>68</sup>

The merits of the centralized disbursement proposal were not nationally uniform. The costs and benefits would vary depending upon factors such as the efficiency of alternative state systems, the value of the judicial tie-in, the administrative and other costs of changing from the current system to the new centralized system, and the capacity of the state to develop and operate a system of the

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64. JUNE GIBBS BROWN, U.S. DEPT. OF HEALTH & HUMAN SERVS., CHILD SUPPORT ENFORCEMENT STATE DISBURSEMENT UNITS: SHARING THE IMPLEMENTATION EXPERIENCES OF SIX STATES 1 (2000) [hereinafter OIG SDU RPT.].

65. See, e.g., FLA. OFFICE OF PROGRAM POLICY ANALYSIS & GOV'T ACCOUNTABILITY, RPT. NO. 00-11, ESTABLISHMENT OF THE STATE DISBURSEMENT UNIT RAISES COST TO PROCESS CHILD SUPPORT PAYMENTS 2 (2000) [hereinafter FLORIDA SDU RPT.].

66. See, e.g., *id.* at 4-6; *Delegation Wants State Welfare Waiver, Writes HHS*, WYOMING DELEGATION: NEWS FROM CONGRESS (Aug. 19, 1999), <http://thomas.senate.gov/html/pr219.html> [hereinafter *Delegation Wants State Waiver*].

67. See, e.g., Affidavit of Jean Hoefer Toal, Chief Justice of South Carolina, in Joint Appendix Vol. I at 333, *Hodges v. Shalala*, 311 F.3d 316 [hereinafter Toal aff.]; *Delegation Says Child Support Money Secured*, WYOMING DELEGATION: NEWS FROM CONGRESS (March 10, 2000), <http://enzi.senate.gov/prde13.htm>; OIG SDU RPT., *supra* note 64, at 3, 11.

68. Toal aff., *supra* note 67, at 333. Unallocated funds are child support monies that the child support agency is unable to distribute to the payee because the payee or his/her location cannot be identified, or for other reasons. As to problems in this area for states implementing the State Disbursement Unit, see, e.g., OIG SDU RPT., *supra* note 64, at 21-23; *Effects of the 1996 Welfare Reform Law, Hearing Series on Welfare Reform Before the Subcomm. on Human Resources of the House Ways & Means Comm.*, 107th Cong., 1st Sess. 84-87 (2001) (statement of Geraldine Jensen, President, Association for Children for Enforcement of Support, Inc.); and U.S. GENERAL ACCOUNTING OFFICE, CHILD SUPPORT ENFORCEMENT: BETTER DATA AND MORE INFORMATION ON UNDISTRIBUTED COLLECTIONS ARE NEEDED, Rpt. No. GAO-04-377 (2004).

federally desired type. These matters varied considerably from one state to another. In order to assess the viability and wisdom of the proposal for his constituency, each representative would need information from a variety of local sources such as the court system, payors and payees of support, and the child support agency. And in order to assess the viability and wisdom of the proposal for the nation, Congress as a body would need information about the differing costs and benefits of the program in the diverse legal, governmental, and social environments of the fifty states to which the requirement would apply. It is on an issue like this that the obstacles to access and participation by local publics and their representatives result in federal policies that may be seriously flawed when applied to some or all states.<sup>69</sup>

The need for local information is most apparent when the differences in local contexts, and hence local effects of a change in the law, are tangible, as in the prior example. However, the same issues arise when the local variations involve intangible issues of morality, family life, and the integrating principles of local communities. For instance, local norms concerning protection of the family unit and the significance of biological versus social relationships have resulted in differing state legal approaches to determining the paternity of a child born to a married woman.<sup>70</sup> Without information about these variations and the rationales for them, substantive rules concerning paternity determination adopted at the national level would run a substantial risk of unnecessarily disrupting important state family law policies.

## 2. *Access to Local Information Related to Family Policy.*

Congress rarely receives information from the family court judges, clerks of court, attorneys, and other affected individuals who are frequent communicants with their state legislatures on issues of

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69. The Wyoming Congressional delegation noted this problem in complaining that "the state disbursement unit adds up to a one-size-fits-all bureaucratic solution to a problem that doesn't exist in our state." *Delegation Wants State Waiver*, *supra* note 66.

70. *See infra* notes 109–119 and accompanying text.

family law. These are the persons who can predict the effect of a proposal on local institutions, law practice, community norms and individual behavior. These also are the persons who can point out pitfalls to effective implementation of a proposal at the local level and suggest more workable alternatives. Their failure to provide this information to Congress is primarily due to lack of awareness of the details of proposed federal legislation, lack of access to Congress, and the difficulty of having any effect on provisions of a pending bill.

### *3. Limitations on Constituent Access to Legislators and the Legislative Process*

Washington is less accessible than their state capitols for most persons and interest groups who might wish to influence a piece of legislation. The constituent lacks access to his or her representatives as well as access to the legislative process itself—that is, a realistic opportunity to present one’s views to legislative bodies, particularly committees and subcommittees, that are considering a bill. Public participation in the process requires notice, physical access, and openness of the proceedings to public comment. In all of these areas the federal process is more difficult than the state process for the average person to grasp and utilize.

Accessibility to one’s representatives in Congress is lessened by distance, by the greater competition for each representative’s time, and by the lack of informal contact opportunities with nonresident representatives. A state representative is accessible to constituents both in his official status and as a member of the represented community. State legislators generally live and work in their districts, even during the legislative session, making personal contact easy for anyone wishing to express an opinion. Furthermore, being themselves part of the community, these resident legislators are personally aware of community events, norms, and practices.

Being a federal representative is a full-time job<sup>71</sup> in a location distant from the constituencies of most representatives. Many

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71. In recent years, the time commitment demanded by this ostensibly “full-time” job has decreased dramatically. Whereas Congress was generally in session 323 days in the 1960s and 1970s, the average

representatives own or rent a home in the Washington area,<sup>72</sup> and return to their home districts on weekends and during Congressional recesses.<sup>73</sup> Although this may add up to a substantial amount of time in the district, it does not allow for the level of participation in community life or informal interaction with constituents that is available to state legislators in most states. Opportunities for formal meetings are also more limited.

The difference in constituent access to state and federal legislators is not simply a matter of physical proximity or availability. The competition for the legislator's time is far greater at the federal level than at the state level—from the larger number of constituents, as well as from sources of campaign funds<sup>74</sup> and national entities with federal legislative interests.<sup>75</sup> Schneier and Gross describe four levels of constituent influence with legislators. Most influential are a small core of 10–20 insiders. Next are persons and members of interest groups on which the member can count for campaign contributions and volunteer support. The third level is made up of persons within broad partisan, geographical, demographic or other categories that

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for 2000 through 2006 was estimated as less than 250. Norman Ornstein, *Part-Time Congress*, WASH. POST, Mar. 7, 2006, at A17, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/03/06/AR2006030601611.html>.

72. See RISMedia, *New Members of Congress Seek Home Deals*, Dec. 12, 2006, <http://rismedia.com/wp/2006-12-12/new-members-of-congress-seek-home-deals> (last visited Oct. 9, 2008).

73. Ornstein, *supra* note 71.

74. The larger the representative's electoral district and the more constituents he or she represents, the greater will be the role of money in conducting a re-election campaign. These representatives will allocate much of their available access to potential sources of campaign funds, which are generally entities with substantial interests in federally regulated matters. SCHNEIER & GROSS, *supra* note 56, at 42–45.

75. At the most basic level, each federal representative has a much larger number of constituents than his state counterparts. Each member of the U.S. House of Representatives represents approximately 647,000 voters. See U.S. CENSUS BUREAU, UNITED STATES CENSUS 2000: CONGRESSIONAL APPORTIONMENT, [www.census.gov/population/www/censusdata/apportionment.html](http://www.census.gov/population/www/censusdata/apportionment.html) (last visited July 18, 2008). By way of example, the constituencies of state representatives in New York are 127,000, and in Nevada, 48,000, while in these same states, senate constituencies are 306,000 and 95,000, respectively. New York State Task Force on Demographic Research & Reapportionment, Frequently Asked Questions, <http://latfor.state.ny.us/faqs/>; Nevada Legislature, Summary of 2001 Redistricting Legislation, <http://www.leg.state.nv.us/lcb/research/redistreapplIntro.cfm>. United States Senators represent an entire state, with voting age populations from 495,304 in Montana to 33,871,648 in California. The larger the number of constituents, the more competition for the representative's time and the less likelihood that the representative will be able to meet or talk personally with any given constituent.

generally vote in favor of the member. Finally, the fourth group includes the entire voting population of the member's district. The member's attention is generally distributed among constituents according to their rank in this hierarchy.<sup>76</sup> As noted by Schneier and Gross, members of Congress must give audience to a wide range of individuals whom they cannot afford to offend, even if those individuals can provide little in the way of useful information or perspective.<sup>77</sup>

#### 4. *Local Preferences vs. Local Information*

Of course, legislators themselves seek out and are responsive to public preferences on high-profile issues, and sometimes other issues as well.<sup>78</sup> However, public preferences, about which legislators are most aware, are distinguishable from publicly proffered information in two important ways. Public preferences relate to policy directions, and reflect individual opinions—whether informed or uninformed. Information, on the other hand, describes the factual context upon which proposed legislation would operate. Information, of course, often comes to the legislator accompanied by an opinion about how the factual context would be affected by the legislation and whether that would be a good or bad thing. However, the informational part of the communication enables the legislator to assess how the legislation will affect his constituents and their communities,<sup>79</sup> rather than what they think of the idea or philosophy reflected in the legislation.

Further, public preferences are most likely to be framed in relation to general issues—such as, “Should Congress pass legislation to assure that noncustodial parents (‘deadbeat dads’) support their

76. SCHNEIER & GROSS, *supra* note 56, at 40–42.

77. *Id.* at 74.

78. See, e.g., Benjamin I. Page et al., *Constituency, Party, and Representation in Congress*, 48 PUB. OPINION Q. 741, 753 (1984) (report of a study finding a strong correspondence between congressmen's roll call votes and the policy preferences of their constituents on social welfare issues, though less strong on other issues such as “law and order”).

79. Bimber, *supra* note 58, at 597. Bimber notes that members often know what outcomes their constituents desire, but are uncertain about what policies will produce the right outcome. *Id.* at 600. Indeed, “reducing [legislators'] uncertainty about the consequences of legislation can be a significant source of persuasion and influence for lobbyists and interest groups.” Richard A. Smith, *Interest Group Influence in the U.S. Congress*, XX LEGIS. STUDIES Q. 89, 99 (1995).



children?" The general public is less likely to be informed about, or have opinions concerning, the specific mechanisms by which proposed legislation would implement the new policy direction, much less the effect of specific legislative provisions on the principles and processes of family law in their locality.

It is not public opinion that is particularly lacking in federal legislative processes, but rather information related to the effects of specific legislative provisions on families and individuals, on court systems, on communities and community norms. Indeed, in one study legislators cited the difficulty in assessing the impact on their districts of proposed legislation as their most vexing informational problem.<sup>80</sup> Cooper and McKenzie distinguish among several categories of information used by legislators: factual information about circumstances and conditions, empirical information related to outcomes of policy choices, knowledge of analytical methods, and information about attitudes and preferences.<sup>81</sup> It is only the latter category that is commonly received from the legislator's constituency.

### 5. *Shortcomings of National Spokesmen for Local Interests*

The relative scarcity of opportunities for direct participation of local publics in setting federal legislative agendas and shaping the content of federal legislation magnifies the role of interest groups that purport to represent public perspectives on various issues. Although some of the advocacy groups that are most influential on social policy lack a direct grass roots connection,<sup>82</sup> others have close links to local publics because they are either national membership organizations or associations of state or local organizations. In theory, at least, these latter groups should be able to assimilate and bring before Congress the perspectives of their local members. There

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80. Arthur G. Stevens, Jr., et al., *U.S. Congressional Structure and Representation: The Role of Informal Groups*, VI LEGIS. STUD. Q. 415, 420 (1981).

81. Bimber, *supra* note 58, at 592 (citing *THE HOUSE AT WORK* (Joseph Cooper & G. Calvin Mackenzie, eds., 1981)).

82. See Hugh Heclo, *The Politics of Welfare Reform*, in *THE NEW WORLD OF WELFARE* 169, 189 (Rebecca Blank & Ron Haskins, eds., 2001).

are two problems with this theory. First, national organizations develop perspectives and interests of their own, distinct from those of their members. They tend to have a preference for congressional rather than state action because of the comparative ease of lobbying one legislature rather than fifty. Their staffs are based in Washington and often have previous experience as congressional members or staff, and they look at problems and their solutions through the same eyes as other Washington insiders.<sup>83</sup>

Further, assimilation of the perspectives of their membership—which may be quite diverse—necessarily results in setting aside or minimizing the interests of some members in order to develop a single “consensus” position for the organization as a whole. It is common, for instance, for policy positions to more closely reflect the preferences of larger, wealthier, and hence more influential states than those of smaller and poorer states.

#### *D. Local Representatives’ Limited Ability to Affect Legislative Provisions*

The primary voices in Congress for local interests are the elected representatives from each area. Madison envisioned Congress as a body capable of fashioning uniform laws for the nation as a whole despite the diversity of interests and circumstances among the states, because representatives knowledgeable about the interests and circumstances in each state would be participating in each decision.<sup>84</sup> As previously noted, the presumption that local representatives bring local knowledge to the table has not been fully borne out in practice. More importantly, only a small fraction of the local representatives are even present at the table when the most important decisions about national policy initiatives are being made. Thus, the ability of any legislator to serve as a voice for local needs and concerns within the federal legislative process is limited by the constraints on the legislator’s own access to the process.

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83. SCHNEIER & GROSS, *supra* note 56, at 81–82.

84. THE FEDERALIST NO. 56 (James Madison).

Because of the number and complexity of the issues that come before Congress, it is able to function only by dividing its workload into manageable segments over which subgroups of the membership are given primary authority. This is the concept underlying the committee system in every American legislature. Each member is expected to specialize in the policy areas of the committees to which he or she is assigned, and the other members rely heavily on these specialists for information, advice, and representation on issues and legislation considered by the committee.<sup>85</sup>

Because most of the substantive evolution of a piece of legislation takes place within committees and subcommittees,<sup>86</sup> a member's ability to influence the content of a bill is heavily dependent on his or her membership on the committee responsible for the bill.<sup>87</sup> Within the committee, he or she has voting power, negotiating clout, and credibility. Hall notes that "[s]ignificant influence over the substance of a bill seldom comes without involvement in such activities as writing, negotiating, and building support for its major provisions,"<sup>88</sup> and these are functions of committee and subcommittee membership.<sup>89</sup>

The ability to influence the shape of a bill from outside the committee is dependent upon such factors as relationships, common interests, or bargaining chips that can be used to obtain the support of a committee member. Moreover, the considerable demands on a legislator's time, energy, and legislative resources limit the legislator's ability and desire to become involved in legislation outside his or her own areas of responsibility.<sup>90</sup> "We may come here with deep interests in subjects unrelated to our committee," said one legislator, "but we are so busy there that we never get around to

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85. Herbert B. Asher, *Committees and the Norm of Specialization*, ANNALS OF THE AM. ACAD. POL. & SOC. SCI., Jan. 1974, at 63, 64–66; see also Zwier, *supra* note 56, at 35–37.

86. See, e.g., SCHNEIER & GROSS, *supra* note 56, at 175–76.

87. See generally Richard L. Hall, *Participation and Purpose in Committee Decision Making*, 81 AM. POL. SCI. REV. 105, 106–07 (1987).

88. *Id.* at 116–17.

89. See *id.* at 112; SCHNEIER & GROSS, *supra* note 56, at 81–82 (committee members as part of policy subsystems that dominate drafting and negotiation on bills).

90. Cf. Hall, *supra* note 87, at 108–09 (effect of multiple demands on legislator's activity within his or her own committee).

thinking through or drafting legislation covering other matters. . . . So we begin to concentrate on the committee on which we serve even though our interest may not lie there.”<sup>91</sup>

There is at least a theoretical possibility that any member can precipitate amendment of a bill on the House or Senate floor after it leaves committee. However, there are substantial practical and procedural obstacles to passage of a floor amendment. Not least of these is the frequency with which both House and Senate adopt rules that limit or prohibit floor amendments to a particular bill.<sup>92</sup> When floor amendments are allowed, the committee chair exerts considerable control over which amendments are taken up and what type of reception they receive.<sup>93</sup> Rarely is a floor amendment adopted that substantially alters the main provisions of the committee bill.

### *E. Congressional Inability to Accommodate Local Difference*

Even if Congress possessed perfect information about local differences, congressional mandates are ill-suited to accommodating those differences, whether they are tangible—as in the centralized disbursement example—or the intangible differences so often involved in family policy. Congressional enactments tend to be uniform for all affected individuals, states, or other entities. Indeed, constitutional parameters and practical difficulties limit Congress’ ability to act otherwise. Thus, it is inevitable that federal legislation affecting issues subject to local diversity will be incompatible with conditions in at least some localities.

Issues raised by local diversity can be avoided by allowing the states flexibility to tailor their approaches to achieving a federal goal, as was largely the approach taken to welfare reform with the Temporary Assistance to Needy Families (TANF) block grant. However, if Congress mandates a rule or approach for all states, or

91. CHARLES L. CLAPP, *THE CONGRESSMAN* 124 (1964).

92. One study in the late 1980’s found that fewer than one in seven House bills was subject to amendment. STEVEN S. SMITH, *CALL TO ORDER: FLOOR POLITICS IN THE HOUSE AND SENATE* 18 (1989). Floor amendments are viewed by many as a vehicle for the poorly informed to vitiate well-researched legislation. Bimber, *supra* note 58, at 598–99.

93. SCHNEIER & GROSS, *supra* note 56, at 184–85.

significantly limits the parameters for state flexibility, then choices must be made. These choices may reflect a congressional preference distinct from the preference of any state, or they may involve compromising or prioritizing the interests of states with different preferences. Unless the preferences of Congress and all the states are the same, the preferences of at least some states will not be reflected in the Congressional enactment. Similarly, if local contexts affected by the legislation differ, the approach adopted is likely to be inappropriate to at least some of these local contexts. In either case, this means that in at least some states the legislation will have disruptive effects not necessary to accomplishing the federal goal, and which may even impede accomplishment of the congressional objectives.

The institutional factors outlined above highlight three problems that arise when Congress legislates on traditionally local issues. Congress lacks its own institutional expertise in these areas, and hence is likely to overlook important consequences and disruptions that may result from provisions of the legislation. This information is unlikely to enter the federal legislative process through the participation of individuals or groups knowledgeable about local perspectives. It is not at all certain to come to the attention even of the local representatives in Congress; and if it does, they may have little ability to affect the legislative product. Finally, the uniformity of federal legislation makes it impossible for a specific federal mandate to accommodate local differences, even if known.

#### IV. EXAMPLES FROM FEDERAL CHILD SUPPORT LAW

Federal child support enforcement statutes provide numerous examples of how these limitations lead to unintended and undesired effects on local family laws and policies. The federal focus in enacting child support enforcement legislation was on creating a relentlessly effective system for collecting as much child support as possible from absent parents. The system adopted is, in general, well designed for achieving this purpose; however, it does so at the expense of a number of long-standing state policies on issues ranging

from families to court procedure to privacy. The collateral effects of two specific provisions of this expansive federal mandate are examined below.

### *A. Retroactive Modification of Support*

In 1986 Congress enacted a provision known as the Bradley Amendment,<sup>94</sup> which prohibited retroactive modification of child support awards.<sup>95</sup> According to its sponsor, Senator Bill Bradley, the prohibition on retroactive modification was aimed at preventing “the practice of a noncustodial parent moving to another State, allowing a substantial debt to his or her child to pile up, and assuming that there will be a retroactive modification of the original order that substantially reduces or totally dismisses the debt.”<sup>96</sup> The provision thus was aimed at parents who might employ a friendly out-of-state court as a mechanism for willfully avoiding their child support obligation. However, the provision has had the unintended effect of perpetuating a huge backlog of unwarranted, uncollectible, and unchangeable child support arrearages resulting from missteps in applying the child support guidelines and other aspects of the system to low-income parents.

The federal child support legislation, of which the Bradley Amendment was a part, targeted the fathers of children receiving welfare benefits. As such, the resulting system reached a vast population of low-income fathers with substantially different social and economic characteristics from the largely middle-class divorced

94. Pub L. No. 99-509, § 9103, 100 Stat. 1873 (codified as 24 U.S.C. § 666(a)(9) (2000)).

95. *Id.* (“[E]ach State must have in effect laws requiring . . . [p]rocedures which require that any payment or installment of support under any child support order, whether ordered through the State judicial system or through the expedited processes required by [this section], is (on and after the date it is due) . . . (C) not subject to retroactive modification by such State or by any other State; except that such procedures may permit modification with respect to any period during which there is pending a petition for modification . . .”). The Bradley Amendment also required state laws making unpaid child support a judgment by operation of law, entitled to full faith and credit in every state. *Id.* This provision addressed a significant obstacle to interstate enforcement of child support arrearages: the necessity in many states of a proceeding to reduce the arrearage to a money judgment in the state of origin before it could be enforced in the second state. The Bradley Amendment obviated the need for this costly and time-consuming step. MARILYN RAY SMITH ET AL., MASSACHUSETTS DIVORCE LAW PRACTICE MANUAL § 10.18 (2003).

96. 132 CONG. REC., S5303-04 (daily ed. May 5, 1986) (statement of Sen. Bradley).

fathers who had previously dominated the population of child support obligors.<sup>97</sup> It was predictable that the influx of low-income obligors would raise new issues due to variations in their employment patterns and the difficulty of supporting two households with one poverty or near poverty-level income. Indeed, overzealousness in setting the amount of child support awards against indigent parents has resulted in the accrual of large arrearages by persons who have no means of ever being able to pay them.<sup>98</sup>

At the same time that this new population of indigent parents was being added to the program, the states were being mandated to implement “revolutionary”<sup>99</sup> changes in the program itself. Federal law required numerous changes in state law and significant reallocations of state governmental authority from the judicial to the executive branch. With changes of this magnitude, it was to be expected that post-implementation adjustments would be needed to correct inefficiencies and eliminate unintended adverse effects of the new system. Where those inefficiencies and unintended adverse effects have resulted in excessive child support awards against individual obligors—as in the case of many indigent parents—courts asked to enforce the awards need flexibility to avoid inequities, due process violations, and counterproductive outcomes. The Bradley Amendment not only ignored the likely potential for unintended

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97. See David L. Chambers, *Fathers, the Welfare System, and the Virtues and Perils of Child-Support Enforcement*, 81 VA. L. REV. 2575, 2596 (1995).

98. E.g., JUNE GIBBS BROWN, U.S. DEPT. OF HEALTH & HUMAN SERVS., STATE POLICIES USED TO ESTABLISH CHILD SUPPORT ORDERS FOR LOW INCOME NON-CUSTODIAL PARENTS (2000). In fact, it is common for child support obligors to accrue large arrearages that do not reflect either the obligor's economic circumstances or his unwillingness to pay. Total arrearages owed by child support obligors in 2003 approached \$100 billion, in 10,775,030 child support cases. OFFICE OF CHILD SUPPORT ENFORCEMENT, CHILD SUPPORT ENFORCEMENT FY 2003 PRELIMINARY DATA REPORT 3 & TABLE 13 (2004), available at [http://www.acf.hhs.gov/progrms/cse/pubs/2004/reprts/preliminary\\_data/](http://www.acf.hhs.gov/progrms/cse/pubs/2004/reprts/preliminary_data/). By way of comparison, \$21.2 billion in child support was collected during that year. *Id.* at 2. Collections in arrearage cases averaged \$600, compared with an average \$9,000 arrearage per case. *Id.* “The percentage of non-payers was greatest in the low-income tier.” JANET REHNQUIST, U.S. DEPT. OF HEALTH & HUMAN SERVS., CHILD SUPPORT FOR CHILDREN ON TANF 2 (2002). In 1998 about fifty percent of non-custodial parents in the child support enforcement system had earnings below the poverty line. *Id.* at i, 6. In a 2002 report, HHS's Office of the Inspector General concluded that the delinquency of sixty percent of low-income nonpayers is attributable to “income levels, employment history, education levels and rates of institutionalization” rather than unwillingness to pay. *Id.* at 2.

99. Paul K. Legler, *The Coming Revolution in Child Support Policy: Implications of the 1996 Welfare Act*, 30 FAM. L.Q. 519, 561 (1996).

consequences of the changes occurring in the system; it magnified those consequences by foreclosing the possibility of post hoc amelioration.

The problem of unintended consequences is a familiar one for all legislative bodies. It is difficult even in the best of circumstances for legislators to foresee and accommodate all the situations to which a particular legislative rule might be applied. Congress was unlikely to perceive the potential harms of a broad provision such as the Bradley Amendment not only because of its lack of family law expertise and information, but also because it has tended to view child support enforcement legislation through the lens of debt collection. From that perspective, the prohibition on retroactive modification appeared to be a simple and unremarkable statement that an accrued debt cannot be judicially extinguished. From the perspective of family law, however, retroactive modification of support would be viewed as a tool for assuring economic justice for members of divided families. Prior to being foreclosed by the Bradley Amendment, a number of states believed there were circumstances in which equity demanded that some or all of an obligor's accrued child support be forgiven.<sup>100</sup>

The effects on individuals, both obligors and their children, and on family policy of closing off state options in this area have been pronounced. Attempts to collect arrearages drive obligors underground,<sup>101</sup> separate children from their fathers,<sup>102</sup> and impede

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100. Eighteen states either explicitly or implicitly permitted retroactive modification of support in 1986. 54 Fed. Reg. 15,758 (Apr. 19, 1989); Comment, *An Unfortunate Change of Circumstances: Wisconsin Prohibits Retroactive Revision of Child Support Orders*, 1988 WIS. L. REV. 1123, 1127 & n.26 (1988) (listing states) [hereinafter *An Unfortunate Change*]. It is quite likely that additional states would have expressly adopted this position as the problem of indigents with excessive arrearages became widespread in the 1990s. States allowing retroactive modification typically coupled this relief with prospective modification, e.g., *Kelzenberg v. Kelzenberg*, 352 N.W.2d 845, 847 (Minn. Ct. App. 1984) (quoting then current Minnesota statute), on grounds such as the obligor's disability, e.g., *Carlson v. Carlson*, 303 N.W.2d 854 (Wis. Ct. App. 1981), incarceration, e.g., *Dickenson v. Dickenson*, No. C2-95-585, 1995 WL 507596, at \*2 (Minn. Ct. App. Aug. 29, 1995); cf. *Santa Clara County v. Wilson*, 4 Cal. Rptr. 3d 653 (Cal. Ct. App. 2003) (reversing trial court's forgiveness of arrears), or reduced income. E.g., *Kelzenberg*, 352 N.W.2d at 847; *Looyen v. Martinson*, 390 N.W.2d 465, 468 (Minn. Ct. App. 1986); see *An Unfortunate Change*, *supra*, at 1124 n.6. A number of states, many of which had not previously permitted retroactive modification, currently allow forgiveness of arrearages owed to the state in certain circumstances. See Esther Ann Griswold & Jessica Pearson, *New Approaches to Child Support Arrears*, POL'Y & PRAC. OF PUB. HUMAN SERVS., Sept. 1, 2001, at 18.

101. See MAUREEN WALLER & ROBERT PLOTNICK, CHILD SUPPORT AND LOW-INCOME FAMILIES:



efforts to improve the earning power of low-income parents.<sup>103</sup> Despite the problems, which are widely recognized at the state level and by the federal agency that oversees state child support programs, the Bradley Amendment remains on the books more than 20 years after its enactment.<sup>104</sup>

### *B. Defining Paternity*

The issue of paternity establishment provides another cogent example of the problems that can arise when federal legislation enters the realm of family law. Congress' interest in paternity establishment arose from the need to identify fathers of the 36.9% of children born out of wedlock<sup>105</sup> in order that child support could be ordered and collected. This interest coincided with advances in genetic technology that made it possible to establish with 98% probability that a particular man had fathered a certain child. Congress saw this technology as obviating the need for the complex judicial proceedings used by the states to establish paternity, perceiving that

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PERCEPTIONS, PRACTICES, AND POLICY 42, 44 (1999), available at <http://www.ppic.org/content/pubs/report/R-1199MWR.pdf>.

102. See Griswold & Pearson, *supra* note 100, at 34–35; Chambers, *supra* note 97, at 2597.

103. In addition, states are expending vast amounts of resources in futile efforts to collect arrearages from obligors who will never be able to pay.

104. 42 U.S.C. § 666(a)(9) (2000). The federal agency that administers the child support enforcement program is itself encouraging states not only to modify systemic mechanisms that lead to non-willful accrual of arrearages, but also to forgive the state share of accrued arrearages in certain circumstances. See, e.g., OFFICE OF CHILD SUPPORT ENFORCEMENT, MANAGING CHILD SUPPORT ARREARS, A DISCUSSION FRAMEWORK: SUMMARY OF THE ADMINISTRATION FOR CHILDREN AND FAMILIES RO I, II & III THIRD MEETING ON MANAGING ARREARS 10–13 (2003), available at <http://www.acf.dhhs.gov/programs/cse/pubs/2003/reports/arrears/>; OFFICE OF CHILD SUPPORT ENFORCEMENT, POLICY INTERPRETATION QUESTION 99-03 (1999), <http://www.acf.hhs.gov/programs/cse/pol/PIQ/1999/piq-9903.htm> (last visited July 21, 2008); OFFICE OF CHILD SUPPORT ENFORCEMENT, POLICY INTERPRETATION QUESTION 00-03 (2000), <http://www.acf.hhs.gov/programs/cse/pol/PIQ/2000/piq-00-03.htm> (last visited July 21, 2008). An original purpose of the federal child support enforcement program was to repay the state and federal governments for welfare benefits received by the payor's family. Collections received on behalf of children for whom TANF benefits are being or (in the case of arrearages) were paid are divided between the state and federal governments. See 42 U.S.C. § 657 (2000). The Department of Health and Human Services has interpreted the law to allow states to accept less than the full payment of child support arrearages under certain circumstances. OFFICE OF CHILD SUPPORT ENFORCEMENT, POLICY INTERPRETATION QUESTION 99-03 (1999), <http://www.acf.hhs.gov/programs/cse/pol/PIQ/1999/piq-9903.htm> (last visited July 21, 2008).

105. CDC National Center for Health Statistics, FASTATS: Unmarried Childbearing (2005), <http://www.cdc.gov/nchs/fastats/unmarry.htm> (last visited July 18, 2008).

paternity establishment could now be simply a matter of science rather than law. Consequently, in the Family Support Act of 1988 (FSA-88),<sup>106</sup> Congress mandated that states accepting federal welfare funds expedite proceedings for paternity establishment by enacting procedures that would require genetic tests in contested paternity actions if requested by any party.<sup>107</sup> Implicit in this provision was the intent that paternity be based on genetics, and it was generally so interpreted.<sup>108</sup>

No particular attention was given to the genetic testing provision during congressional consideration of FSA-88. From the perspective of the federal interest in child support collections, this provision was merely a logical and scientifically valid step in the important process of establishing a legal father for every child. There is no indication that Congress desired to override a longstanding family law rule presuming that a child born to a married woman is the legal offspring of her husband (the presumption of marital paternity). Rather, it appears that Congress was simply unaware of this rule, which was not a part of the child support enforcement dialogue at that time and hence not a part of the information brought to Congress's attention through its normal information networks.

In 1988 most, if not all, states recognized the presumption of marital paternity, said to be "one of the strongest known to law."<sup>109</sup> This presumption was not simply a product of the difficulty of proving paternity in the pre-genetic testing age. It also reflected important social policies. The presumption, together with collateral rules that limited the filing of paternity actions and the evidence that could be offered,<sup>110</sup> protected the integrity and privacy of the family

106. Pub. L. No. 100-485, § 111(b)(2)(B), 102 Stat. 2343 (1988).

107. FSA-88 added to the state plan requirements codified in 42 U.S.C. § 666 that states must have in effect "procedures under which the State is required . . . to require the child and all other parties, in a contested paternity case, to submit to genetic tests upon the request of any such party." *Id.*

108. See Mary R. Anderlik & Mark A. Rothstein, *DNA-Based Identity Testing and the Future of the Family: A Research Agenda*, 28 AM. J.L. & MED. 215, 217-18 (2002).

109. John M. v. Paula T., 571 A.2d 1380, 1383 (Pa. 1990) (citing *Cairgle v. Am. Radiator Standard Corp.*, 7 A.2d 439 (Pa. 1951)); *In re Marriage of Ross*, 783 P.2d 331, 335 (Kan. 1989); *Chandler v. Merrell*, 353 S.E.2d 133, 134 (S.C. 1987).

110. These rules strictly limited the persons who had standing to raise the issue of the paternity of a marital child, see generally Donald M. Zupanec, Annotation, *Who May Dispute Presumption of*

unit.<sup>111</sup> Of particular importance from the perspective of current family policy, the presumption also protected the child's interest in his relationship with the man he believed to be his father.<sup>112</sup> The presumption thus gave social paternity and family integrity priority over biological paternity.<sup>113</sup> This choice was reversed without deliberation or debate by the federal statute.

The impact on family policy of rejecting the presumption of marital paternity was summarized by one commentator as follows:

Quite suddenly, based on the results of genetic testing, men who are outside the legal family structure will gain rights and responsibilities toward one or more of the children in that family, men who unknowingly established loving relationships with their wives children will become legal strangers to those children, and children will lose the only father they have ever known, often

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*Legitimacy of Child Conceived or Born During Wedlock*, 90 A.L.R.3d 1032 (1979), and prohibited the mother and father from providing testimony that would bastardize the child. "Lord Mansfield's Rule," originally enunciated as dictum in *Goodright v. Moss*, 98 Eng. Rep. 1257, 1258 (1777) (K.B. stated that "decency, morality, and policy [required] that [a couple] shall not be permitted to say, that they have no connection, and therefore that their offspring is spurious." *Id.* This rule was generally adopted in the American colonies, though in recent times restrictions on testimony by the married couple have been significantly relaxed. *E.g.*, *Michael H. v. Gerald D.*, 491 U.S. 110, 124–25 (1989).

111. See *id.* The presumption and rules were based on a recognition that judicial inquiries into the child's paternity would themselves be destructive of family integrity and privacy, regardless of the outcome. See *id.*; Carl E. Schneider, *The Channeling Function in Family Law*, 20 HOFSTRA L. REV. 495, 526–28 (1992).

112. See *Michael H.*, 491 U.S. at 125; *Ross*, 783 P.2d at 338; *M.F. v. N.H.*, 599 A.2d 1297, 1300–02 (N.J. Super. A.D. 1991); Schneider, *supra* note 111, at 526–28 (describing practical and symbolic objectives underlying the presumption of marital paternity).

113. State courts and legislatures and family law scholars were in the process of re-evaluating use of the presumption in light of the availability of highly accurate genetic tests. Rather than giving absolute priority to either biological or social paternity, most sought to balance the two. Many developed nuanced approaches that took into consideration circumstances such as the child's age, seeing this as an indicator of the importance of the paternal relationship to the child. See Ira Mark Ellman, *Thinking About Custody and Support in Ambiguous-Father Families*, 36 FAM. L.Q. 49, 56–65 (2002). See also *Smith v. Cole*, 553 So.2d 847 (La. 1989) (in state with very rigid marital presumption, recognizing "dual paternity" in order to impose support and other obligations on biological father with strong relationship with child). Others left it to judicial discretion to determine whether genetic testing was appropriate and when the presumption should be overridden. *E.g.*, *Ross*, 783 P.2d at 338–39 (as modified 1990) (applying KAN. STAT. ANN. § 38-1118); *John M.*, 571 A.2d at 1384–86, 1388 (1989) (applying 42 PA. CONS. STAT. ANN. § 6133); *Michael K.T. v. Tina L.T.*, 387 S.E.2d 866, 870–71 (1989) (applying W. VA. CODE § 48A-6-3); *C.C. v. A.C.*, 406 Mass. 679, 550 N.E.2d 365 (1990) (abolishing presumption of legitimacy, but requiring preliminary hearing to determine extent of relationship between putative father and child before allowing action to go forward).

with little hope of establishing a father-child relationship with another man.<sup>114</sup>

Any notion that such situations would be infrequent is precluded by the disturbing commonality of “paternity disestablishment” suits in which a divorcing father seeks to prove that he is not the genetic father of a marital child in order to avoid paying child support.<sup>115</sup> In addition to the psycho-social effects on the child and family, these claims undermine achievement of the goals of the child support enforcement program itself. It was not until the federal Department of Health and Human Services (HHS) solicited comments on its proposed regulations to implement FSA-88 that the conflict with the presumption of marital paternity came to federal attention.<sup>116</sup> HHS amended the final rule to eliminate the conflict.<sup>117</sup> However, this regulatory interpretation was not issued until May 15, 1991, three years after enactment of the statute and one and one-half years after the deadline for states to bring their laws into compliance with the genetic testing requirement.<sup>118</sup> As a result of inertia, inattention and confusion at the state level, the law of some states continues to reflect the mandate of the proposed regulation despite apparently contrary state policy preferences.<sup>119</sup>

These two examples illustrate the unintended social consequences that can arise when Congress undertakes to establish national rules in areas that are inherently local in nature and with which Congress is

114. Theresa Glennon, *Somebody's Child: Evaluating the Erosion of the Marital Presumption of Paternity*, 102 W. VA. L. REV. 547, 551–52 (2000); see also Anderlik & Rothstein, *supra* note 108, at 218 (discussing effects on societal conceptions of fatherhood).

115. See, e.g., Paula Roberts, *Truth and Consequences: Part II Questioning the Paternity of Marital Children*, <http://www.clasp.org/publications>. These suits may also be filed by a putative biological father who wishes to establish a relationship with the child, see *Michael H.*, 491 U.S. at 110 (1989), or by a divorced mother contesting custody, see *Sleeper v. Sleeper*, 929 P.2d 1028, 1029–30 (Oregon Ct. App. 1997), or desiring to establish her second husband as the child's biological father, see *Stitham v. Henderson*, 768 A.2d 598, 600 (Me. 2001).

116. See 56 Fed. Reg. 22,350 (May 15, 1991) (codified at 45 C.F.R. pt. 303.5(d)(2) (2007)).

117. *Id.* at 22,335, 22,350, 22,354. HHS adopted a regulation limiting the genetic testing requirement to actions “in which the issue of paternity may be raised under State law.” *Id.*

118. *Id.* at 22,335. This interpretation was later codified by the Personal Responsibility & Work Opportunity Reconciliation Act, Pub. L. No. 104-193, § 331, 110 Stat. 210 (codified at 42 U.S.C. § 666(a)(5)(B)(i)).

119. See, e.g., S.C. CODE ANN. § 20-7-954 (Cum. Supp. 2007).

unfamiliar. Both the Bradley Amendment and the genetic testing mandate started with a legitimate federal concern: the interstate enforcement of child support orders in one case, and increasing child support collections from unwed fathers in the other. In each case, however, the congressional remedy was both too broad and too prescriptive, given the enhanced potential for unanticipated consequences.

### CONCLUSION

The above discussion of Congress' shortcomings as a source of family law rules and the type of problems that can result from federal legislation affecting family law is not an indictment of congressional policy-setting on social issues. Congress possesses the capacity to identify pressing social problems of national import and to move them to the forefront of the policy agenda throughout the nation. The interest groups, think tanks, and governmental entities that form the national policy networks on which Congress relies possess research and analytical capacities that enable them to conduct studies, marshal information, analyze trends, and make research-based recommendations. In some instances, significant policy tools are within the exclusive control of Congress.<sup>120</sup>

Federal administrators can point to data demonstrating the accomplishments of federally legislated programs such as child support enforcement and child protection, and many persons might see these benefits as clearly sufficient to outweigh some disruption of state family policy. I believe they are wrong for two reasons. First, disruption of state family law is rarely necessary in order to achieve federal objectives. Conditions on federal grants can generally be structured to leave the state sufficient flexibility to achieve congressional objectives in nondisruptive ways. Indeed, many federal grant conditions are structured in this fashion. If Congress is

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120. In regard to child support enforcement, for instance, effective tools for locating absent parents, transcending jurisdictional barriers in interstate cases, and locating and seizing assets could only have been created at the federal level.

scrupulous in structuring conditions affecting family law and policy to assure that adequate flexibility remains to accommodate local laws, practices, and social norms, it should be possible to achieve both state and federal objectives while retaining the coherent body of family law in each state.

The second reason is that the effects of disrupting state family policy are broad and subtle and may emerge as serious social problems as the impact of the legal change echoes through society. Family roles and values are affected by a complex amalgamation of cultural, economic, and legal forces. A change in family policy can affect these interacting forces in unanticipated ways even when carefully crafted within the context and with a full understanding of state laws relating to the family. The state of our knowledge about the long-term effects of changes in family policy, as Mary Ann Glendon has pointed out, is primitive.<sup>121</sup> At a time when the family is subject to many destabilizing pressures, we should be very cautious about legal changes at the national level that override or ignore local differences and squelch experimentation.

Although the Supreme Court has rejected moral bases for limiting private conduct and choice, it continues to affirm the importance of the state's interest in the moral environment of the community as a whole,<sup>122</sup> acknowledging the states' right "to maintain a decent society."<sup>123</sup> This distinction drawn by the Supreme Court indicates that community morality, order, and cohesion continue to be valued by the Supreme Court and the legal system generally, as they are by social scientists. These values that traditionally have been the rationale for local control of family policy are not obsolete despite the expansion of federal power and inclination to venture into this area, and disruption of community norms and practices relating to

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121. MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 1, 134 (1991).

122. *E.g.*, *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991); *Posadas de P.R. Assoc. v. Tourism Co. of P.R.*, 478 U.S. 328 (1986); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973); *see City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000) (both bringing community decency factors in through a "secondary effects" analysis); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986).

123. *Jacobellis v. Ohio*, 378 U.S. 184, 199 (1964) (Warren, C.J., dissenting) (*quoted in Paris*, 413 U.S. at 59, 69 (1973)).

families is a serious byproduct of overly prescriptive federal family law initiatives.