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THE DOMAIN OF CIVIC VIRTUE IN A GOOD SOCIETY: FAMILIES, SCHOOLS, AND SEX EQUALITY

*Linda C. McClain**

I. INTRODUCTION: THE DOMAIN OF CIVIC VIRTUE

The general topic for this panel's discussion, "The Constitution of Civic Virtue for a Good Society," brings to mind an impossibly large set of fundamental questions. For example, what role does civic virtue play in sustaining our constitutional order and what role, if any, should government play in inculcating civic virtue and, thus, fostering self-government? What role do the institutions of civil society—a realm between the individual and the state, including the family and religious, civic, and other voluntary associations—play? What, exactly, is the content of civic virtue and what textual sources and institutional actors determine it? If historical accounts of civic virtue coexisted with and even lent support to forms of systematic inequality and subordination such as those rooted in sex and race, then as constitutional norms of equality change, shouldn't this, in turn, reshape accounts of civic virtue? And do conceptions of civic virtue apply primarily to democratic self-government, or public life, or should they also shape personal self-government, or, to use a contentious term, private life?

In this article, I will approach this large set of questions by taking up a subset of related questions, or puzzles, having to do with the domain of civic virtue in a good society. First, to what does civic virtue pertain, i.e., to democratic self-government, or also to personal self-government, or governing the self? Second, in what institutional domains does a society generate civic virtue and under what

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conditions may such institutions serve such a role? If in our constitutional order, important institutions of civil society as well as governmental institutions serve—or should serve—as “seedbeds of civic virtue,” places or spheres in which the capacities for self-government are fostered, how does this system of dual, or even multiple, authority work? I explore this by taking up the respective roles of families and schools in fostering civic virtue in children. In the current political climate, there is pervasive rhetoric about the need to “strengthen families” as a key to national prosperity and well-being. There is also a sense of an urgent imperative in various social movements (such as calls to renew civil society) to enhance families’ capacities to serve as first and foremost among the “seedbeds of civic virtue.” Somehow, it is assumed, families matter. And the health of families is thought to bear a close relationship to the overall moral and civic health of our nation, just as a weakening of families is thought to reflect and lead to moral and civic decline and to impose significant negative externalities on society.¹ But why? Is it because of families’ contribution to democratic self-government, to personal self-government (or “governing the self”), or both?

Third, if, as I argue, sex equality is a core civic virtue and also an important public value that should inform, to some extent, personal self-government, then what role should families and schools—as primary among the “seedbeds of civic virtue”—have in fostering it? This is one particularly pressing form of the more general question of how forms of civil society contribute to fostering democratic and personal self-government and whether, to do so, they must be congruent with democratic values and forms of governance. Families are an especially important, though neglected, context in which to ask about the domain both of civic virtue and of sex equality. A relevant historical paradox about the idea of families as seedbeds of civic virtue is that it was possible, from the time of the founding, to assert that married women fulfilled their civic obligations—and fostered civic virtue—by serving their husbands and children, even as married women were denied personal self-government within marriage and all women were excluded from full participation in democratic self-government and from conceptions of the virtuous citizen.² As feminist scholars have documented, although that legal regime of family self-governance has been repudiated in many respects by a regime of formal equality between husbands and wives, its legacy has

1. On the close link between the health of families and national health, and the problem of negative externalities arising from failing families, I have in mind claims in some prominent literature calling for a renewal, or revival, of civil society. See *infra* Parts II.A and III.A.

2. See Linda K. Kerber, *No Constitutional Right to be Ladies* (1998) [hereinafter Kerber, *No Constitutional Right*]; Linda K. Kerber, *Women of the Republic* (1980).

had lingering effects on family structure and family policy.³ Over a decade ago, Susan Moller Okin pointed out the neglect of the family in political theories of justice, and asked how families could serve as schools of citizenship—or, to use more contemporary parlance, seedbeds of civic virtue—in view of forms of gender-based inequality and injustice within families.⁴ Yet the literature about civic virtue and, particularly, about families as seedbeds of virtue is insufficiently attentive to this puzzle and to the question of what forms of family governance contribute to democratic and personal self-governance.

Finally, do families and schools play complementary roles, in supporting the efforts of each other in fostering such virtues as sex equality, or ameliorating or compensatory roles, when one or the other fails to do so? For example, if certain forms of sex inequality within families exist, but if a commitment to constitutional principles and prudential considerations must stay government's hand from coercive regulation within the family, then might schools carry out a "gentler" form of a formative project of fostering sex equality?

In other articles, I have argued that government should pursue a formative project to foster the capacities for self-government, both in the sense of democratic self-government and personal self-government, and that the institutions of civil society also have a proper role to play in fostering such capacities.⁵ As a matter of constitutional interpretation, I believe that our constitutional order presupposes that citizens possess the capacities for democratic and personal self-government; its scheme of basic rights and liberties serves to foster and protect the exercise of such capacities. The Constitution permits and depends upon, if not authorizes or even requires, a formative project, even as it places certain limits upon its pursuit. Similarly, as a matter of political theory, I endorse the principle that government, in a good society, has an affirmative responsibility to foster persons' capacities for self-government and, again, that civil society has an appropriate role to play. Within that general framework, I take the task of constituting civic virtue to be fostering persons' capacities for democratic self-government, i.e., to

3. See *infra* Part II.B.

4. Susan Moller Okin, *Justice, Gender, and The Family* 170-71 (1989) [hereinafter Okin, *Justice*]; see *infra* Part III.B.

5. See Linda C. McClain, *Toward a Formative Project of Securing Freedom and Equality*, 85 Cornell L. Rev. 1221 (2000); Linda C. McClain & James E. Fleming, *Some Questions for Civil Society-Revivalists*, 75 Chi.-Kent L. Rev. 301 (2000); Linda C. McClain, *Toleration, Autonomy, and Governmental Promotion of Good Lives: Beyond "Empty" Toleration to Toleration as Respect*, 59 Ohio St. L.J. 19 (1998) [hereinafter *Toleration*]. Although Michael Sandel is not the only political theorist to employ the term "formative project," he helpfully refers to such a project or a "formative politics" as one that "cultivates in citizens the qualities of character self-government requires." Michael J. Sandel, *Democracy's Discontent* 6, 321-24 (1996).

be good citizens, and I regard that task as an important and proper component of a formative project.

The first puzzle that I will address in this article concerns the domain of civic virtue and the relationship between democratic and personal self-government. Is the task of fostering good citizens separable from the task of fostering good people,⁶ or is there an inevitable spillover from the domain of fostering democratic self-government to that of fostering personal self-government, or governing the self?⁷ I want to propose a seemingly paradoxical approach to civic virtue: it is important to hold on to the schematic of two forms of self-government, democratic and personal, even though it is an uneasy one. There will be unavoidable spillover from fostering virtues important to democratic life into personal self-government, and vice versa.⁸ It is, in fact, the problem of spillover and a lack of containment that animates some of the most difficult problems concerning the second puzzle noted above: the respective division of labor between institutions of government and of civil society in carrying out a formative project.

It is tempting to try to avoid such conflicts by positing a simple schematic whereby institutions of government foster *civic* virtue, and, more broadly, democratic self-government, and institutions of civil society foster *personal* virtues and, more broadly, personal self-government. But, as I illustrate with the example of the dual authority of families and public schools to foster the self-government of children, this simple division of labor cannot hold. This is so not only because of our constitutional order and actual social practice, but also as a matter of good institutional design. In this article, I argue

6. I am grateful to Steve Schiffrin for bringing up this point in a discussion about government's formative project.

7. When I use this two-fold distinction, I am drawing upon John Rawls' idea of persons having two moral powers, one pertaining to democratic self-government, or the capacity for a conception of justice and one to personal self-government, or the capacity for a conception of the good. John Rawls, *Political Liberalism* 19 (1993) [hereinafter Rawls, *Political Liberalism*]. I believe that this is a useful schematic, but that, in light of cogent feminist critique of political liberalism, a more adequate conception of moral powers would add to this schematic a moral power pertaining to the capacity to form and participate in human relationships, participate in civil society, and to give and receive care. See Eva Fedar Kittay, *Love's Labor* (1999); Okin, *Justice*, *supra* note 4, at 106-08.

8. In the text, I am most concerned that blurring any distinction would seem to require too much congruence between government and civil society. Another reason for holding onto this distinction, which I will not explore here, is that affording a place for personal self-government emphasizes the importance of personal autonomy and may ward off attempts to disavow it or subsume it under democratic self-government. Of course, autonomy is relevant to both forms of self-government, but some accounts of self-government (e.g., Michael Sandel's in Sandel, *supra* note 5) seem to devalue autonomy in the domain of personal self-government. For elaboration, see James E. Fleming and Linda C. McClain, *In Search of a Substantive Republic*, 76 *Texas L. Rev.* 509 (1997) (book review) (discussing Sandel's civic republicanism).

that, in a good society, families (ideally) will play a role in cultivating civic virtue (and democratic self-government), but they also will play an indispensable role in fostering other forms of virtue and contribute vitally to personal self-government. Families provide necessary caregiving that nurtures human development and fosters human capital. Whether or not there are children in a family, families allow persons to realize goods of intimate association. To be sure, some or even many of these contributions to personal self-government may have the spillover effect of fostering civic virtue as well. Similarly, in a good society, schools properly aim to foster children's capacities for democratic *and* personal self-government by preparing them for good citizenship and for good, successful lives.

Thus, the idea of families as "seedbeds of civic virtue"—as well as of virtues generally—helpfully connotes that families, in a good society, serve as places or sources of growth and development of capacities and virtues.⁹ But taking the rhetoric about families as seedbeds of civic virtue seriously invites careful attention to the questions noted above concerning how families foster capacities for self-government and under what circumstances families are able to do so. Too often, prescriptions for fortifying families as seedbeds of virtue focus primarily on shoring up one form of the family, the two-parent, marital (heterosexual) family,¹⁰ and fail to consider the possible relevance to the capacity of families to generate self-government of such matters as forms of family self-governance, what values parents teach their children, and how they socialize them. Should the norms of institutions of civil society, such as families, be "congruent" with public norms and institutions "all the way down," so that "the membership and internal organization of associations should be a matter of public policy, legally enforced"?¹¹ If families are not congruent in this way, and do not explicitly mirror or generate democratic values, could they be said to be "seedbeds of virtue" if

9. See Webster's Ninth New Collegiate Dictionary 1062 (1987) (defining seedbed as "(2) a place or source of growth or development").

10. See, e.g., Council on Civil Society, *A Call to Civil Society: Why Democracy Needs Moral Truths* 18 (1998) [hereinafter *A Call to Civil Society*]; Nat'l Comm'n on Civic Renewal, *A Nation of Spectators: How Civic Disengagement Weakens America and What We Can Do About It* 13 (1998) [hereinafter *A Nation of Spectators*]. As I have explained my approach elsewhere, I support a more pluralistic approach to family policy, which would focus less on form and more on family dynamics and how to help different kinds of families serve the important functions they have in our constitutional democracy. Also, feminist work on family form and on gender roles within families has offered good reasons to be skeptical about appeals to preserving traditional families. Finally, whether families have the resources to fulfill their responsibilities depends upon baseline questions of what level of governmental and societal support for families exists. See McClain & Fleming, *supra* note 5, at 335 n.166 and accompanying text.

11. Nancy L. Rosenblum, *Membership and Morals* 4 (1998) (defining "congruence"). Rosenblum's excellent book does not address congruence in the context of families.

they play a "mediating" role in indirectly supporting those values by fostering in persons a "whole range of moral dispositions, presumptively supportive of political order"?¹²

In this article, I urge greater attention to sex equality as a core element in a conception of civic virtue in a good society and to the implications of taking sex equality seriously for a formative project. To be sure, "equality" commonly appears as part of a core set of civic virtues and public values, yet *sex* equality receives insufficient attention.¹³ In the United States, the content of this virtue of sex equality may be gleaned from federal constitutional and statutory norms, state and local anti-discrimination law, transformations in the law of domestic relations (e.g., the gradual repudiation of the law of coverture), contemporary principles of political morality, and perhaps even from cultural consensus. Sex equality is not only a civic virtue—one that should guide how government treats female and male citizens and how citizens treat and regard each other—but also is (or should be) a virtue of everyday life, a principle of political morality that should inform and regulate forms of personal self-government.

The critical question, of course, is just how deeply that virtue should structure everyday life and how competing political principles, constitutional rights, and prudential concerns may temper that reach. I will offer a somewhat contradictory set of responses to this puzzle of congruence. First, although the mere discussion of congruence between family values and democratic values is likely to trigger an initial fear of a complete violation of any boundary between private and public life, this immediate reaction ignores that the norm of sex equality already shapes family life to a significant degree and rules out the legally-sanctioned, patriarchal family of an earlier era. Thus, a simple schematic that would relegate sex equality to public life and exempt private life does not hold.

Second, even though sex equality is a core constitutional and public value, this value and its proper application are controversial, even as it touches on more public aspects of daily life, for example, sexual harassment law. The controversy is even sharper, and the range of consensus narrower, when the issue is its proper application to family self-governance and family life (e.g., the division of authority and of market and caregiving labor within marriage) and to how to educate children about gender roles. Indeed, even though Okin forcefully presses the claim that families cannot serve as sites for nurturing civic virtue if they do not comport with principles of sex equality in their norms of family governance and in socialization of children, she also

12. *Id.* at 41. Rosenblum notes that this is a "more capacious approach to the moral uses of association than the logic of congruence," because "[t]he business of instilling habits of responsibility, reciprocity, cooperation, or trust is compatible with a variety of political orientations and substantive values." *Id.* at 42.

13. See *infra* Part II.B and IV.B.2.

has argued that, given the lack of cultural consensus about proper gender roles within families, liberal principles and prudential considerations preclude government from compelling families to become egalitarian.¹⁴ Here, one dimension of the problem is that constitutional norms of equal protection require that *government* honor sex equality as a "sovereign" virtue,¹⁵ in the sense that when government regulates, it may not use sex-based classifications without an "exceedingly persuasive justification."¹⁶ Especially relevant here, it may not merely replicate ancient stereotypes about gender-based roles for women and men in families, workplace, and elsewhere. This, in turn, shapes family roles and responsibilities: it precludes states from requiring or supporting a patriarchal form of family governance. But it does not rule out either families constituting themselves in ways that reinforce traditional gender roles or parents seeking to ingrain those roles in their children. The most acute form of such adherence to traditional roles may be religious fundamentalist households, which follow a form of family self-governance of male authority and female submission with supposed scriptural roots, but such role division also exists in the many households in which women continue to bear disproportionate responsibility for domestic and caretaking labor.

There are significant constitutional principles and prudential considerations that argue against an insistence that families organize themselves according to a robust vision of sex equality. But this does not rule out government carrying out a formative project to promote sex equality by a wide range of measures that fall short of coercion. Such forms of governmental action could encourage sex equality within families and also inculcate in children norms of sex equality in sites outside of the family. For example, I believe that schools have an appropriate role to play in inculcating sex equality, particularly if families fail to do so, even though some families perceive this as a threat to their ability to foster their own conceptions of virtue. I offer some preliminary thoughts about how fostering sex equality should be a proper component of already-existing curricular tasks such as civic education and character education and I advocate that schools should incorporate into their curriculum gender education (by which I mean education to counter sex role stereotyping and the harms it imposes on both girls and boys). The contemporary challenge is *both* to affirm and support the important role of families in fostering the capacities

14. See Okin, Justice, *supra* note 4, at 16-21, 74-85; *infra* Part III.B.2.

15. I am borrowing the idea of "sovereign virtue" from Ronald Dworkin's recent book, *Sovereign Virtue*, in which he argues that equality, in the form of "equal concern" on the part of government for all its citizens, is the "sovereign virtue" of political community, without which government is not legitimate. See Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* 1-2 (2000). Dworkin's subject is not sex equality, but material equality, or equality of resources.

16. *United States v. Virginia*, 518 U.S. 515, 524 (1996) (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)).

for self-government and in cultivating civic and personal virtues *and* to affirm and support principles of sex equality and liberty. This latter commitment requires the repudiation of a legally-supported model of family governance that denies or hinders women's responsible self-government and invites careful examination of how gender ideology prescribes family roles.

In Part II, I raise the issue of spillover between democratic and personal self-government, and the virtues of good citizens and good persons, by exploring three distinct approaches to the domain of civic virtue. I argue that sex equality is a core, though neglected, civic virtue and consider some of the problems of spillover raised by examining the domain of that virtue. I pose questions concerning the appropriate domain of sex equality within families. In Part III, I examine the role of families in contributing to self-government. I address the issue of spillover by looking at current political concern to strengthen families as "seedbeds of civic virtue." I discuss how to address two forms of sex inequality within families: the gendered division of authority and labor in many American households and the more acute form of this division in religious fundamentalist households. In Part IV, I discuss the dual authority, under our constitutional order, of families and schools to foster civic virtue, as well as other forms of virtue, in children, illustrating the impossibility of a simple schematic that would neatly divide the labor between government and civil society for carrying out a formative project. I then explore the role of public schools in promoting sex equality and ameliorating forms of sex inequality within families.

II. PLACING SEX EQUALITY IN THE DOMAIN OF CIVIC VIRTUE: THE PROBLEM OF SPILLOVER

A. *Defining Civic Virtue and its Role in Self-Government: Three Approaches*

What is civic virtue? What is its relationship to self-government? One useful definition of civic virtue is that it encompasses the set of qualities of character, skills, and dispositions that are necessary for democratic self-government.¹⁷ Put in a slightly different way, civic virtue is among the "preconditions of active citizenship," and "the capacities and dispositions conducive to thoughtful participation in the activities of modern politics and civil society."¹⁸ Contrasting the first definition, offered by civic republican theorist Michael Sandel, and the more expansive second definition, offered by civic liberal theorist Stephen Macedo, suggests the problem of spillover and

17. Sandel, *supra* note 5, at 25 (republican theory "seeks . . . to cultivate in citizens the qualities of character necessary to the common good of self-government.").

18. Stephen Macedo, *Diversity and Distrust* 10 (2000).

containment, since participation in civil society would seem to embrace important dimensions of personal, as well as democratic, self-government. In either case, if virtue (etymologically) connotes excellence, then *civic* virtue connotes excellence in carrying out a particular role: the role of citizen.¹⁹ Civic education, then, should focus upon "developing the knowledge, understandings, and intellectual and participatory skills necessary for competent and responsible citizenship in our constitutional democracy."²⁰

It may be helpful to think about the domain of civic virtue and the spillover between democratic and personal self-government by considering three contrasting positions: (1) civic virtues are distinct from personal virtues; (2) the virtues of the good person closely overlap with the virtues needed to be a good citizen, so that learning to govern the self is indispensable to democratic self-government; and (3) the virtues of a good citizen closely overlap with the virtues needed to be a good person, so that persons should evaluate their personal lives and commitments in light of key civic virtues. What role, on each of these approaches, does a formative project play in fostering democratic and personal self-government? After canvassing these approaches, I will then focus more explicitly upon sex equality as a core component of civic virtue.

The first position is one of discontinuity, or a lack of congruence: there is a distinct set of virtues identifiable as *civic* or *political virtues*, which characterize the ideal of a good citizen of a democratic state, and these must be distinguished from the virtues that characterize the ideal of the good person—virtues that characterize "ways of life" belonging to persons' comprehensive and philosophical doctrines, as well as the virtues related to forms of associational life, such as families and other forms of civil society. Political liberalism, as elaborated by John Rawls, takes this view. His conception of justice may affirm the superiority of "the virtues of fair social cooperation such as the virtues of civility and tolerance, of reasonableness and the sense of fairness," and government appropriately promotes and strengthens public virtues, such as toleration, anti-discrimination, and mutual trust.²¹ But it should not advance a comprehensive ideal of the virtues of a good person.²² Political liberalism's distinction between political and personal virtues seems to offer some barrier against spillover.²³ Political liberalism's conception of a set of civic virtues, or

19. Richard Dagger, *Civic Virtues* 13 (1997).

20. *The Role of Civic Education: A Report of the Task Force on Civic Education* (Center for Civic Education, prepared for Second Annual White House Conference on Character Building for a Democratic, Civil Society, May 19-20, 1995) [hereinafter *The Role of Civic Education*].

21. Rawls, *Political Liberalism*, *supra* note 7, at 194-95.

22. *Id.*

23. See *id.* at 194. Even though William Galston's account of liberal virtues articulates a closer relationship between the good citizen and the good person than

skills, distinct from virtues applicable to personal, or private life, finds echoes in prominent accounts of the proper aims of civic education.²⁴

But the discontinuity approach does not mean that there is no relationship between the good person and the good citizen, nor does it mean that government has no affirmative responsibility to foster *personal* self-government. Political liberalism recognizes a proper role for government in helping to develop *both* moral powers (the capacity for a sense of justice and the capacity for a conception of the good) and to provide the goods necessary for such development.²⁵ Further, it regards the institutions of civil society as a "fund of implicitly shared ideas and principles" that make a shared political conception possible.²⁶ Civil society also affords communities in which persons may develop and experience the vital good of self-respect, which is the good most important for human development.²⁷ Families, as part of the "basic structure" of society, have the important task of ensuring the "nurturing and development" of children, who, as citizens, must "have a sense of justice and the political virtues that support political and social institutions."²⁸ In this regard, political liberalism expects that families and other institutions of civil society are, in a significant sense, seedbeds of virtue and will generate support for political principles, public values, and such civic virtues as reciprocity.²⁹

The second position assumes that there is an important continuity, or congruence, between the virtues of the good person and the good citizen: virtues important for personal self-government, or *governing the self*, are also important for—and form the foundation for—democratic self-government. The most vivid contemporary example

does Rawls, Galston wishes to hold onto a distinction between a "limited conception of liberal public purposes"—i.e., of the appropriate domain of civic ends—and a more robust account of liberal virtues that would threaten world views or ways of life that reject key liberal ideals, such as critical reflection. William A. Galston, *Liberal Purposes* 153-54 (1991).

24. See Center for Civic Education, et al., *CIVITAS: A Framework for Civic Education* (1991) [hereinafter *CIVITAS*] (noting that "civic virtue is distinct from those virtues that are relevant to private or personal lives").

25. In *Political Liberalism*, Rawls uses a set of primary social goods, which includes rights and liberties, powers and opportunities, income and wealth, to express the things citizens need to be free and equal persons. This list then serves as a source of appropriate claims by citizens and allows citizens the means to advance their conceptions of the good. Rawls, *Political Liberalism*, *supra* note 7, at 187. Here, as with moral powers, I believe that Rawls' account of primary goods is a helpful way to begin thinking about government's formative project, but some additions to this list are needed: for example, the caretaking necessary to foster human capacity for responsible self-government, connection, and community, and the freedom from violence and exploitation. See Kittay, *supra* note 7; Okin, *Justice*, *supra* note 4.

26. Rawls, *Political Liberalism*, *supra* note 7, at 14.

27. John Rawls, *A Theory of Justice* 440-42 (1971).

28. John Rawls, *The Idea of Public Reason Revisited*, 64 U. Chi. L. Rev. 765, 788 (1997) [hereinafter Rawls, *Public Reason Revisited*].

29. Rosenblum refers to this assumption about the effects of associational life as Rawls' "liberal expectancy." Rosenblum, *supra* note 11, at 51-53.

of this position may be found in some of the contemporary calls to revive, or renew, civil society. There is a close relationship, in much of the civil society literature, between the good person and the good citizen. Proponents of renewing civil society take as their canonical text *Federalist* No. 55, in which James Madison first observes that "there is a degree of depravity in mankind which requires a certain degree of circumspection and distrust," but then acknowledges that there are "other qualities in human nature which justify a certain portion of esteem and confidence" and that "republican government presupposes the existence of those qualities in a higher degree than any other form."³⁰ The civil society thesis is that the Founders assumed that the institutions of civil society would be the primary "seedbeds of civic virtue," or "foundational sources of competence, character, and citizenship."³¹ The challenge today is to help civil society carry out its "essential social task": "to foster competence and character in individuals, build social trust, and help children become good people and good citizens."³² But both government and civil society play a role in this formative project: "the basic purpose of government—and all other institutions—is to help foster the conditions for human flourishing," and "democratic civil society, anchored in moral truth," provides these "essential conditions for human flourishing."³³

There is a close affinity between virtues important to democratic self-government and those important to personal self-government because self-government begins with "governing the self," a task taught especially well by families. For example, one report, *A Call to Civil Society*, characterizes the family as first among the seedbeds of virtue and the "cradle of citizenship," because there a child learns "the essential qualities necessary for governing the self: honesty, trust, loyalty, cooperation, self-restraint, civility, compassion, personal responsibility, and respect for others."³⁴ Families are at the heart of

30. The *Federalist* No. 55, at 346 (James Madison) (Clinton Rossiter ed., 1961); *A Call to Civil Society*, *supra* note 10, at 7 (quoting *Federalist* No. 55); see also Mary Ann Glendon, *Rights Talk* 116 (1991) (quoting and discussing *Federalist* No. 55).

31. *A Call to Civil Society*, *supra* note 10, at 7.

32. *Id.* at 6. However, even though they extol non-governmental institutions such as families and religious institutions as "seedbeds," revivalists generally advocate that such institutions as schools engage in civic education and recognize local government as an important potential seedbed.

33. *A Call to Civil Society*, *supra* note 10, at 16. This is, to be sure, a fairly thick account of civic virtue, one that insists upon a foundation for democracy in a "public moral philosophy" of "a larger set of shared ideas about human virtue and the common good," moral truths, that are "in large part biblical and religious" and that make self-governance possible. *Id.* at 12-14. Elsewhere, I critique this thick account and argue that an approach more akin to political liberalism is better suited to a constitutional democracy characterized by reasonable moral pluralism. McClain & Fleming, *supra* note 5, at 322-26.

34. *A Call to Civil Society*, *supra* note 10, at 7; see also *Seedbeds of Virtue: Sources of Competence, Character, and Citizenship in American Society* (Mary Ann

the agenda for renewal: a core goal for "moral renewal" of democracy is stemming the "steady break-up of the married couple child-raising unit," which is viewed as the "leading propeller of our overall social deterioration."³⁵

This mixing of the good person and good citizen continues in the account of the values that religious institutions³⁶ and schools³⁷ should teach. It is not until one gets to the virtues taught by participation in local government that one finds a set of civic virtues that are more obviously political, or, as *A Call to Civil Society* puts it, which teach "the particular skills of citizenship: deliberation, compromise, consensus building, and reason giving."³⁸

If one theme characterizes the account of civic virtue as it appears in this kind of civil society literature, it is that one cannot readily separate matters of personal morality from political morality, or civic renewal from moral renewal. Hence, the "rejection of legitimate authority" is primary evidence of "increasingly uncivil . . . behavior," as are "[c]hildren disrespecting adults" and "[n]eighbors not being neighborly."³⁹ But even the strand of the civil society literature that focuses more on *civic* renewal links civic life to "moral ecology" and "government of the self" to "self-government," contending that the defense of liberty requires "more than the pursuit of happiness; it requires the modest but vital virtues of loving parents, faithful spouses, good neighbors, law-abiding citizens, and sober patriots."⁴⁰

Glendon & David Blankenhorn eds., 1995) [hereinafter *Seedbeds of Virtue*] (linking fate of American democracy to health of families as "seedbeds of virtue").

35. *A Call To Civil Society*, *supra* note 10, at 18; *see also* *Seedbeds of Virtue*, *supra* note 34, at 3 ("[T]he simultaneous weakening of child-raising families and their surrounding and supporting institutions constitutes our culture's most serious long-term problem.").

36. Religious institutions "foster values that are essential to human flourishing and to democratic civil society: personal responsibility, respect for moral law, and neighbor-love, or concern for others." *A Call To Civil Society*, *supra* note 10, at 8.

37. In a "self-governing" society, schools are to teach "basic standards of good conduct: personal responsibility, respect for teachers' authority, and respect for other students." *Id.* at 10. There is, under the rubric of teaching "civic literacy," a component that seems less obviously tied to personal self-government: students are to be taught "knowledge of their country's constitutional heritage, respect for the lives of national heroes, including great dissidents, a comprehension of what good citizenship is, and an appreciation of their society's civic and moral ideals." *Id.*; *see also* *A Nation of Spectators*, *supra* note 10, at 14 (advocating that schools should reorganize their internal life to "reinforce basic civic virtues such as personal and social responsibility" and instruct in civic knowledge and skills and encourage community work).

38. *A Call To Civil Society*, *supra* note 10, at 10.

39. *Id.* at 5.

40. *A Nation of Spectators*, *supra* note 10, at 6-7, 12. The passage continues: "We need tolerance and commitment; and especially in moments of challenge, we need the capacity for sacrifice." *Id.* at 12. A variant on the civil society thesis is that political liberalism, if it is to honor its respect for reasonable moral pluralism, requires a modest governmental agenda, one that leaves the inculcation of civic virtue to the institutions of civil society because any governmental attempt directly to foster civic

Finally, a third position echoes the second (i.e., the civil society approach) in seeing continuity between the democratic and personal virtues, but here the direction of influence runs the other way: the virtues important for liberal democratic self-government are also those that make possible—and should inform—governing of the self, or personal self-government. Moreover, liberal principles should serve as a critical benchmark against which to evaluate all of our life projects and relationships. An excellent example of this position is Stephen Macedo's book, *Liberal Virtues*, which strongly argues that liberalism's public virtues inevitably will and appropriately should spill over into the realm of personal self-government, or private life.⁴¹ In his more recent book, *Diversity and Distrust*, Macedo advances an ambitious account of liberalism's legitimate civic ends and claims an expansive domain for liberal civic virtue, which he characterizes as "civic liberalism."⁴² The best and bluntest articulation of this strategy of continuity or "congruence" is his account of the demands of the core liberal virtue of critical self-reflection:

The fact is that a broad (not comprehensive) commitment to critical thinking is inseparable from the core civic capacities of good liberal citizens. Liberal citizens should be committed to honoring the public demands of liberal justice in all departments of their lives. They should be alert to the possibility that religious imperatives, or even inherited notions of what it means to be a good parent, spouse, or lover, might in fact run afoul of guarantees of equal freedom. A basic aim of civic education should be to impart to all children the ability to reflect critically on their personal and public commitments for the sake of honoring our shared principles of liberal justice and equal rights for all. Only in this way can citizens reassure themselves and their fellow citizens that they are alert to possible conflict among their nonpublic imperatives and commitments and the demands of liberal public reasonableness.⁴³

Beyond this demand made on liberal citizens, civic liberalism also advocates that our liberal constitutional order permits a statecraft that attempts to shape and educate citizens and the institutions of civil

virtue would be an inappropriate imposition of a public orthodoxy that would destroy genuine pluralism and diversity. Michael W. McConnell, *The New Establishmentarianism*, 75 Chi.-Kent L. Rev. 453, 455-56, 469 (2000).

41. To highlight just a few of the numerous articulations of this idea in Macedo's book, see, e.g., Stephen Macedo, *Liberal Virtues* 265 (1990) ("[P]ublic values penetrate and partly constitute private relations Liberal political norms have a private life: they help shape and structure the private lives of liberal citizens. To a greater extent than liberals usually allow, freedom is a way of life."); *id.* at 272 ("The same virtues that contribute to individual flourishing in pluralistic liberal communities also contribute to the performance of liberal civic duties, the liberal virtues are both civic and personal virtues.").

42. Macedo, *supra* note 18, at 8-12.

43. *Id.* at 239.

society in ways that support free self-government and liberal citizenship.⁴⁴

Giving content to the demands of liberal public reasonableness and liberal justice, Macedo refers to a shared "public" or "political" morality that would include "national ideals of liberty and equality" as "supreme" civic ideals informing the Constitution.⁴⁵ (Although I assume that Macedo would readily include sex equality as a component of such virtues, it does not make an explicit appearance in his account.) Other virtues relate to the demands of public reasonableness, e.g., (1) reciprocity, or seeking to discern and abide by the fair terms of cooperation and (2) willingness to acknowledge the fact of reasonable pluralism, which requires such virtues as "toleration, openness, self-criticism, and mutual respect."⁴⁶ It is also clear from the passage quoted above that the capacity for critical reflection is a core virtue.

None of the three accounts considered above envisions a sharp line demarcating personal and democratic self-government, particularly as they consider the role of families. Even the discontinuity approach, as exemplified by political liberalism, assumes that important sites of personal self-government, such as families, will nurture and support civic virtue and democratic self-government. Indeed, Okin's well-known feminist criticism of Rawls' initial account of families for assuming—without taking steps to ensure—that families are just has required political liberalism to face the issue of how families can serve as seedbeds of virtue if they harbor injustice and inequality and what permissible measures government might use to foster sex equality within families.⁴⁷

While both the civil society thesis and the civic liberal approach posit a continuity between civic virtue and personal virtue, there is a possibly sharp point of tension with respect to the content of civic virtue. This tension point is one of considerable relevance to the role of families and to the domain of sex equality. The civil society thesis often notes women's historic role within families as transmitters of civic virtue; yet calls to strengthen families rarely examine the problem of inequality within families.⁴⁸ The civil society model of continuity stresses that learning respect for authority and cherishing tradition help to form good persons and good citizens. By contrast, for Macedo's civic liberalism, critical reflection upon tradition, inherited roles, and, indeed, all one's personal commitments—such as

44. *Id.* at 10-11.

45. *Id.* at 144, 168.

46. *Id.* at 233.

47. See Rawls, *Public Reason Revisited*, *supra* note 28, at 788-94; see also *infra* text accompanying notes 106-13, 119-32.

48. This is a point that I have discussed elsewhere. See McClain & Fleming, *supra* note 5, at 329-30.

that of spouse or parent—is a core civic capacity that bears on personal self-government. And while the civil society literature generally views schools as reinforcing the moral lessons taught at home, civic liberalism recognizes that there may be a sharp, unavoidable tension between parental authority to shape children and the authority of public schools to treat children as “independent persons-in-the-making with their own basic interests and their own lives to lead.”⁴⁹ The tension between the virtue of respecting authority and tradition and the virtue of critical reflection upon tradition is of key importance to a consideration of the civic virtue of sex equality and of the role of families and schools in promoting it.

B. Sex Equality as a Core Component of Civic Virtue

I have suggested that civic virtue is usefully understood as the set of skills, dispositions, and traits of character conducive to democratic self-government and that a proper component of a formative project is to foster democratic self-government. In seeking to articulate a “core” set of principles, virtues and values that exemplify and undergird our constitutional democracy, scholars and proponents of civic education look to fundamental texts such as the Declaration of Independence and the Constitution, and to historical understandings.⁵⁰ “Equality” is among that core set of virtues, but sex equality often receives insufficient attention.⁵¹ It may be subsumed under the virtue of “respect for the rights of others.”⁵² And it is implicitly at stake, for example, in the debate over whether the capacity for critical reflection is a core virtue that should be inculcated in children.

It would be better to state explicitly that a commitment to antisubordination and to women’s equal citizenship is a core public

49. Macedo, *supra* note 18, at 233.

50. See, e.g., The Role of Civic Education, *supra* note 20, at 4, 8; CIVITAS, *supra* note 24, at 3-8; Rosemary C. Salomone, Visions of Schooling 228-34 (2000); Symposium: Civics Education and America’s Founding Documents, 175 J. Educ. 5-129 (1993) (addressing themes pertaining to the work and mission of The National Center for America’s Founding Documents, whose primary aim is to promote education in the schools by encouraging “civic literacy”).

51. One illustrative example, discussed in text *infra*, is CIVITAS, *supra* note 24. See also *Fostering Civic Virtue: Character Education in the Social Studies*, Soc. Stud. Rev., Fall/Winter 1997, at 23 (position statement of the National Council for the Social Studies). This position statement by NCSS mentions “equality” (once) as a fundamental value, notes that teachers’ position should be that “while there have been failures in our nation’s attempt to live according to democratic ideals, there is a common tradition worth transmitting to the next generation,” but makes no explicit reference to the idea of dissident citizenship or how that struggle might be part of civic virtue. *Id.* at 25. Stephen Macedo’s otherwise excellent book, *Liberal Virtues*, *supra* note 41, has little explicit discussion of sex equality. One notable counterexample is Toni Marie Massaro, Constitutional Literacy: A Core Curriculum for a Multicultural Nation 116-21, 128-53 (1993).

52. See, e.g., Macedo, *supra* note 41, at 259; Dagger, *supra* note 19, at 196.

value and civic virtue. Moreover, the story of the emergence of sex equality as a constitutional and political norm is a complex one of subordination and emancipation.⁵³ It includes the initial exclusion of all women (free or enslaved) from equal citizenship and the relegation of women within marriage to coverture, a system of family governance under which women were under various legal disabilities excluding them from participation in the economic, civic, and political spheres and in which men had authority over women's bodies, property, and freedom of movement. Alongside the legal regime of coverture were ideologies about gender roles that legitimized women's exclusion from equal citizenship. As Linda Kerber's work on the ideology of republican motherhood reveals, women fulfilled their obligations to the state—and thus contributed to civic virtue—through service to their husbands and children.⁵⁴ The story of "We the People" is both one of exclusion and one of the gradual inclusion of the excluded, along with the gradual extension of (most of) the obligations of citizenship to women.⁵⁵ This story is one of "dissident" citizenship⁵⁶ and of women claiming rights and equal status based on a core set of national commitments, as was done, for example at the Seneca Falls Convention. Thus, a full account of the emergence of sex equality as a civic virtue would include this history of dissident citizenship, as in the abolitionist and suffrage movements, and of the critical transformation of women's legal and social status in light of reflection upon the demands of those national commitments, as well as reconstruction of those national commitments, as illustrated by the passage of the Nineteenth Amendment. Moreover, feminists identified and contested women's unequal status and men's unjust power within the family as a principal site of women's legally-sanctioned subordination.⁵⁷

53. See Reva B. Siegel, *Collective Memory and the Nineteenth Amendment: Reasoning about "the Woman Question" in the Discourse of Sex Discrimination*, in History, Memory, and the Law 131 (Austin Sarat & Thomas R. Kearns eds., 1999).

54. Kerber, No Constitutional Right, *supra* note 2, at 8-11.

55. *Id.* at 161-85 (discussing *Hoyt v. Florida*, 368 U.S. 57 (1961), where the Supreme Court upheld women's exclusion from jury service because of their "special responsibilities" for home life). The use of the modified "most" in the text refers to women's exclusion from registration for the military draft (*Rostker v. Goldberg*, 453 U.S. 57 (1981)), although women are actively enrolled in all branches of military service.

56. See Holloway Sparks, *Dissident Citizenship: Democratic Theory, Political Courage, and Activist Women*, 12 *Hypatia*, Fall 1997, at 74, 75 ("Dissident citizenship . . . encompasses the often creative oppositional practices of citizens who, either by choice or (much more commonly) by forced exclusion from the institutionalized means of opposition, contest current arrangements of power from the margins of the polity.").

57. See David A.J. Richards, Women, Gays, and the Constitution 224-33 (1998); Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 Cal. L. Rev. 1373 (2000); Siegel, *supra* note 53.

Why, then, isn't sex equality more readily recognized as part of the core of civic virtue? And why do some of those accounts that do mention sex equality express such ambivalence about it? One leading text, *CIVITAS: A Framework for Civic Education*, illustrates this ambivalence. On the one hand, its "Civic Knowledge and Skills" section (intended to offer to educators "summaries, by specialists in their respective fields, of what the specialists believe people should ideally know in order to be effective as citizens"⁵⁸) includes a section on "Gender Issues."⁵⁹ It does note women's exclusion from formal political life, offers a historical account of first and second wave feminism, of how beliefs about different male and female natures were thought to justify different roles, and mentions a number of contemporary problems women face, such as work/family conflict, wage inequality, and job segregation.⁶⁰ On the other hand, this account gives scant attention to coverture and women's lack of autonomy and bodily integrity within marriage, and how those conditions motivated feminist efforts.⁶¹ Moreover, it erases the important role of feminist struggle against second class citizenship with such questionable assertions as: "most changes in the status of women can be traced to social and economic changes not directly attributable to political action specifically aimed at the betterment of women's conditions" (such as the influx of women into the workforce).⁶² And although this is to be a guide for what sorts of knowledge citizens ought to have, its approach is not to affirm a commitment to sex equality, after this history of subordination, is a core part of contemporary civic understandings, but instead to offer a quite equivocal stance toward sex equality. It notes many unresolved "gender issues" as "open political questions," due to "underlying disagreements about deeply held values, especially views about the proper roles for women and men in society."⁶³ Thus, on the one hand, "most Americans recognize questions of fairness in the treatment of both women and men as an important part of their values," but, on the other, "[m]any Americans are wary of the fundamental changes in institutions that are demanded by advocates who wish to provide men and women with complete equality in every sphere of life."⁶⁴

Why don't discussions of the aims of civic education more frequently refer to this history of women's exclusion and gradual emancipation? Is such an equivocal or ambivalent stance toward sex

58. *CIVITAS*, *supra* note 24, at 93. Christina Hoff Sommers, author of the controversial book *Who Stole Feminism? How Women Have Betrayed Women* (1994), is identified as an author of this section of *CIVITAS*. *Id.* at x.

59. *Id.* at 258-77.

60. *Id.*

61. *Id.* at 262 (discussing briefly coverture and domestic violence).

62. *Id.* at 258.

63. *Id.* at 273.

64. *Id.* at 276.

equality, as a core component of civic virtue, warranted? If not, and I believe it is not, what accounts for such ambivalence? Reva Siegel has recently argued that while the story of race discrimination recognizes a history of racial wrongdoing and a constitutional commitment to transcend it, discourse about sex equality generally lacks a story that is "structurally homologous" to the race discrimination narrative, one that recognizes the role of coercive state power in maintaining women's second-class citizenship.⁶⁵ She attributes this to a forgetting of what was at stake in the "protracted struggle over 'the woman question'" (culminating in the Nineteenth Amendment, removing constitutional impediments to women's right to vote): in significant part, it was conflicts over women's status within the family. Instead, she argues, the discourse about women's equality more readily attributes the change in women's legal rights and responsibilities to discarding archaic attitudes about the sexes.⁶⁶

Nonetheless, Siegel interprets the recent Supreme Court decision concerning the Virginia Military Institute as invoking "a history of constitutional wrongs to demonstrate why the nation has a deep moral obligation to protect women's constitutional rights."⁶⁷ I would also argue that, in *Planned Parenthood v. Casey*, in striking down the husband notification provision of an abortion statute, the Court made clear that our constitutional order cannot permit states to allow households to reinstate coverture; for principles of individual liberty and equality directly conflict with patriarchy as a mode of family and societal governance.⁶⁸ Similarly, one could view the Violence Against Women Act ("VAWA") as a national legislative repudiation of coverture, and its vestigial remains in state law, and an attempt to affirm that protecting women from forms of family governance that include violence against them is a matter of appropriate national political concern (warranting a combined federal-state effort).⁶⁹ Unfortunately, the Supreme Court's closely divided opinion striking down the Civil Rights Remedy of VAWA failed to accept the link between violence against women and their status as equal citizens under the federal Constitution, under the guise of distinguishing what

65. Siegel, *supra* note 53, at 131-32.

66. *Id.* at 181-82; 173-74.

67. *Id.* at 178 (discussing *United States v. Virginia*, 518 U.S. 515 (1996)).

68. *Planned Parenthood v. Casey*, 505 U.S. 833-98 (1992) (stating that contemporary constitutional norms of individual liberty and privacy preclude husbands from exercising the kind of control over wives that characterized earlier understandings of marriage). Thus, Linda Kerber invokes the Court's repudiation of the patriarchal marriage relation in *Casey* as "the moment when coverture, as a living legal principle, died." Kerber, *No Constitutional Right*, *supra* note 2, at 307; *see also* *Kirchberg v. Feenstra*, 450 U.S. 455 (1981) (striking down Louisiana community property law treating husband as "head and master" of property jointly owned with wife).

69. Violence Against Women Act of 1994, 42 U.S.C. §§ 13931-14040 (1994).

is "truly national" (hence, constitutional) and "truly local" (preventing and remedying crime).⁷⁰

In sum, sex equality should be within the core of principles, virtues, and values that may be said to reflect a national consensus. This is not to deny that there are contemporary conflicts over the meaning of the constitutional and societal commitment to equality, as well as over the scope of sex equality as a civic virtue. Indeed, as Toni Massaro usefully argues, an important component of "constitutional literacy" should include not only teaching about the history of "excluding people on the basis of race, religion, ethnicity, and gender," but also should include teaching about contemporary conflicts over what "abstract constitutional principles" such as equality mean in practice.⁷¹

The content of that civic virtue is gleaned from federal constitutional and statutory norms, transformations in the law of domestic relations (e.g., the gradual repudiation of the law of coverture), contemporary principles of public morality, and, to some extent, cultural consensus.⁷² (Admittedly, civil rights laws forbidding sex discrimination may not have been motivated by a desire to inculcate civic virtue, but rather by a desire to prevent the harm of discrimination and to further the principle of equal opportunity. Yet it seems reasonable to say that such laws promote a disposition not to discriminate and teach that good citizens do not discriminate in a specified range of dealings with others.)

If sex equality is a civic virtue, then it is appropriate for government to promote it. Promoting that virtue should include cultivating certain skills, dispositions, and attitudes, such as the idea that one's sex is irrelevant to one's ability to contribute to society, as well as promoting certain substantive norms or ends, such as equal opportunity, anti-subordination, and the repudiation of coverture and a caste system based on sex. Given the central role of education through common schools in forming citizens, it follows that educational institutions should be major actors in fostering civic virtue.

70. *United States v. Morrison*, 120 S. Ct. 1740, 1754 (2000).

71. Massaro, *supra* note 51, at 140-41. I view Massaro's approach as different from that of CIVITAS, discussed in text accompanying notes 63-64, which expresses ambivalence about the idea of equality itself.

72. Although I differ with some of her conclusions about the scope of the value of sex equality, I have found helpful Rosemary Salomone's argument that schools should teach "common values" or "core values" and her appeal to such sources as constitutional and statutory law to discern those values. Salomone, *supra* note 50, at 231-40. She defines "core values" as "so central to the preservation of democratic government and so basic to the constitutional enterprise that they do not lend themselves to governmental exemption." *Id.* at 239. She derives this "core" from "common history and folklore," from "legal norms established in the federal Constitution as interpreted by the Supreme Court, from federal statutes with supporting administrative regulations, and from executive orders. Taken together, these legal pronouncements represent a statement of national consensus." *Id.* at 233.

Naming sex equality as a core component of civic virtue leads to a number of interpretive quandaries and points of tension. What is the domain of this civic virtue? If it is part of a national core, then what role do local communities play in defining it? Who should foster it? Does it relate principally to "public" life (e.g., the right to vote or to be free from discrimination from governmental actors) or to "private" life as well (e.g., the workplace, the institutions of civil society, and most importantly, families)? What is the scope of government's formative project with respect to sex equality?

Sex equality is relevant both to democratic and personal self-government, and so it would seem to be more than just a *civic* virtue. As noted in Part I, it is a "sovereign" virtue, which should guide how government treats its citizens, but it is also a principle of political morality with appropriate spillover. Tough questions involve the scope of that spillover. That is, does a commitment to this civic virtue require that all institutions in society cultivate and reflect that virtue, i.e., should there be congruence?

The issues of domain and congruence are particularly acute with respect to the idea that our constitutional order depends upon families to be prominent seedbeds of civic virtue and to foster the capacities for self-government. There is no easy or persuasive recourse to a public/private schematic to delineate the domain of sex equality. For if, as I think is demonstrable, public norms and the legal regime largely repudiate the law of coverture and accept principles of equality and anti-subordination between men and women within marriages, then sex equality already does reach into family, or "private" life, through laws against domestic violence, marital rape, and laws abandoning the husband's authority over the wife and conferring on husbands and wives equal rights and responsibilities within marriage. (That is not to say that the residue of coverture does not remain and exert some continuing influence.)

But what about norms of family governance that relate to responsibility for market and domestic labor? And what of socializing children concerning appropriate gender roles that may reinforce stereotypes of masculinity and femininity and sexism in a way that shapes children's development of their capacities?⁷³ Do these family norms and socialization processes bear upon personal self-government and, ultimately, democratic self-government, in a way that would warrant governmental attention?

73. I am, for example, thinking of the claims about the harmful effects of prevailing socialization about gender—which perpetuates certain forms of sex inequality—for both female and male children made in such best-selling books as *Reviving Ophelia* and *Raising Cain*. See Dan Kindlon & Michael Thompson, *Raising Cain: Protecting the Emotional Life of Boys* (1999); Mary Pipher, *Reviving Ophelia: Saving the Selves of Adolescent Girls* (1994).

In her recent book, *Visions of Schooling*, Rosemary Salomone draws a line between aspects of sex equality as to which there is national consensus (e.g., a principle of anti-discrimination as to "public" life, such as the workplace) and matters as to which there is more cultural ambivalence. In the latter, she includes replacing traditional gender-specific roles for men and women, in the family and market, with gender-neutral roles. Because gender equality in this area is still highly contested, she contends, it is not a part of an appropriate national consensus, one that schools should teach; rather "this aspect of the gender equality principle may work more effectively as a value determined by local consensus rather than as a national commitment."⁷⁴ And *CIVITAS*, discussed above, notes a lack of consensus on the application of sex equality to family life, due to deep disagreements over "proper roles for women and men in society."⁷⁵

However, I think this solution misses the extent to which federal constitutional norms *have* put limits upon government's ability to perpetuate traditional gender roles. As argued above, contemporary family law and constitutional law have repudiated to a significant degree the patriarchal model of family governance.⁷⁶ And with respect to the question of the division between market and family labor, the Court's Equal Protection jurisprudence has struck down sex-based classifications in family law, concerning such things as employee benefits, alimony, and child support, that would perpetuate the gendered dyad of male breadwinner/female caregiver. In *Orr v. Orr*, in which the Court struck a statutory requirement requiring only men to pay alimony, the Court observed that such a requirement was part of a larger statutory scheme (reflecting wives' common law disabilities), "which invidiously discriminated against women, removing them from the world of work and property and 'compensating' them by making their designated place 'secure.'"⁷⁷ As the Court stated in *Stanton v. Stanton*, "[n]o longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas."⁷⁸ As Laurence

74. Salomone, *supra* note 50, at 236-37.

75. *CIVITAS*, *supra* note 24, at 273.

76. See, e.g., *Kirchberg v. Feenstra*, 450 U.S. 455 (1981) (striking down Louisiana community property law treating husband as "head and master" of property jointly owned with wife).

77. *Orr v. Orr*, 440 U.S. 268, 279 n.9 (1979). The Court also noted the risk that legislative classifications distributing benefits and burdens on the basis of gender will reinforce "stereotypes about the 'proper place' of women and their need for special protection." *Id.* at 283.

78. *Stanton v. Stanton*, 421 U.S. 7, 14-15 (1975) (striking down sex-based classification requiring child support for longer period for male children than for female children); see also *Orr*, 440 U.S. at 280 (quoting same language; striking down sex-based classification requiring husbands, but not wives, to pay alimony). For a discussion of the import of these precedents, see Mary Ann Case, *Response to*

Tribe has observed of the laws invalidated in such cases:

All either prevented, or economically discouraged, departures from "traditional" sex roles, freezing biology into social destiny. And government's almost uniform argument in justification of these laws emphasized the economy achieved by the accurate and therefore "rational" assumption of traditional male and female inclinations and capacities. The Supreme Court's thoughtful response to this argument has recognized the argument's essence as self-fulfilling prophecy: The "accuracy" of government's assumption is derived in some significant degree from the chill on sex-role experimentation and change generated by the classifications themselves. While that may have been thought permissible as late as 1948, when the Court declared that "the Constitution does not require legislatures to reflect . . . shifting social standards," thirty years later the Court decidedly came to view "shifting social standards" as controlling.⁷⁹

In light of this constitutional jurisprudence, it is not so simple to relegate the question of family roles and the gendered division of household labor to local, rather than national, concern.

As discussed above, sex equality is a sovereign virtue, applicable to how government should treat citizens and constitute family rights and responsibilities. Yet that constitutional norm concerning governmental structuring of family roles and governance does not preclude individual family members from choosing certain gendered roles or from engaging in forms of socialization that reproduce such gendered roles. What interests does government have in this gendered division of labor?

Should a formative project seek to bring about closer congruence between family governance and sex equality? Does government's interest in fostering the capacities not only of adults but also of children warrant such congruence? If one accepts an idea of pluralism that values institutions of civil society as "multiple sites of sovereignty,"⁸⁰ or if one believes that such principles as toleration and respect for diversity require that government should not impose an orthodoxy, what implications follow for sex equality within families? What are the competing values to assess in sorting out just how much diversity is appropriate or properly protected? To answer those questions, I will first examine the idea that families are seedbeds of civic virtue. I will then return to the question of the domain of sex equality and the role of families and schools in fostering it.

Kathleen Sullivan's Constitutionalizing Women's Equality, Cal. L. Rev. (forthcoming 2001).

79. Laurence H. Tribe, *American Constitutional Law* 1565 (2d ed. 1988) (footnotes omitted).

80. See Abner S. Greene, *Civil Society and Multiple Repositories of Power*, 75 Chi.-Kent L. Rev. 477 (2000).

III. THE DOMAIN OF FAMILIES AS "SEEDBEDS OF CIVIC VIRTUE"

A. *Why Families Matter: The Example of the Family Meal*

Recently, then-President Clinton convened the "first-ever White House Conference on Teenagers," which brought together parents, teens, policy makers, and other experts to discuss "the importance of the teenage years in the social and intellectual development of children," and to offer "strategies for raising responsible and resourceful youth."⁸¹ The President released a report by his Council of Economic Advisers that found that two factors, a teenager's sense that she has a close relationship with her parents and the practice of eating dinner together, as a family, significantly reduced the likelihood of a teenager's engagement in risky, harmful behavior—such as alcohol and drug use, thoughts of suicide or suicide attempts, early sexual involvement—and significantly increased such behaviors as achieving success in high school and attending college.⁸² Both of these factors, which suggest forms of connection between parents and teens, seem to affirm the vital importance of parental involvement in helping teens. If this is so, then it may be of concern that, recently, Robert Putnam reported that the evening meal, a "traditionally important form of family connectedness," is in dramatic decline among married Americans.⁸³

It is useful to consider whether and how this parental involvement is, in effect, fostering *civic* virtue. Why do families matter and what warrants the focus of the White House on the family meal? Is it the contribution to democratic self-government, personal self-government, or to both? The governmental report gives no data on what actually transpires during the family meal, and how this helps teenagers—especially if the family routinely keeps the television on (if not watches it) during the meal.⁸⁴ But the importance attached to the family meal brings to mind civic republican/communitarian appeals to "table talk" as an important site for "dialogues about freedom and responsibility, individual and community, present and future," as well

81. Press Release, The White House at Work, The Clinton-Gore Administration: Working to Help Families Raise Responsible Teenagers (May 2, 2000) (on file with author).

82. Council of Economic Advisers, *Teens and Their Parents in the 21st Century: An Examination of Trends in Teen Behavior and the Role of Parental Involvement* 18-23 (2000).

83. Robert D. Putnam, *Bowling Alone* 100 (2000) (reporting that "[t]he fraction of married Americans who say 'definitely' that 'our whole family usually eats dinner together' has declined by a third over the last twenty years, from about 50 percent to 34 percent").

84. *Id.* at 227 (reporting that "[r]oughly half of all Americans—married and single, parents and childless—report watching television while eating dinner, and nearly one-third do so during breakfast and lunch").

as for "stories about relationships, obligations, and the long-term consequences of present acts and decisions."⁸⁵

If parents are able to arrange their lives (e.g., their employment schedule) to allow the cultivation of this close relationship and to honor the ritual of the family meal, then this may well contribute valuably to fostering a teenager's capacities for self-government and success in life. But this contribution is not simply to the teenager's development of civic virtue, a vital component of democratic self-government. The very benefits mentioned in the Report that stem from close parental attachment suggest that the contribution is also to the teen's capacities for personal self-government, or governing the self, in areas including negotiating friendships and sexual relationships, in the sense of not harming one's body or mental development, developing one's intellectual capacities, and finding one's own path in life.⁸⁶ Social science research about parental contributions to children's success in life bears out the importance of close attachment.⁸⁷ For example, the literature on how adolescents develop their own sense of identity points to a "secure sense of attachment to parents" as affording an adolescent "a safe foundation from which to explore and sample life alternatives and make self-chosen commitments to life directions."⁸⁸

Whatever the benefits of a close parent-child relationship to personal self-government, it may or may not guarantee the cultivation of *civic* virtue. For example, a benign type of spillover from personal to democratic self-government would be if close families cultivated dispositions of cooperation and reciprocity among members—a sense of engagement in a common enterprise and a willingness to share burdens and help each other—that they, in turn, demonstrated outside the family, in dealings with the broader polity. For "generalized reciprocity," according to Robert Putnam's recent book, *Bowling Alone*, is the "touchstone of social capital,"⁸⁹ and it also is, on many accounts, an important *civic* virtue.⁹⁰ Yet, in close families, parents

85. Glendon, *supra* note 30, at 174. I have to confess that in earlier work I have been skeptical about the potential of table talk to foster democratic self-government. McClain & Fleming, *supra* note 5, at 311.

86. See Counsel of Economic Advisers, *supra* note 82, at 18-23. In the same way, I would argue that community-based programs that help to empower disadvantaged adolescent females to invest in their education and to defer pregnancy and motherhood cultivate those young women's general capacities for democratic and personal self-government.

87. David Popenoe, *The Roots of Declining Social Virtue: Family, Community, and the Need for a "Natural Communities Policy,"* in *Seedbeds of Virtue*, *supra* note 34, at 71, 74-79 (summarizing social science research about the importance of emotional attachment to successful child development).

88. Dennis R. Papini, *Family Interventions*, in *Interventions for Adolescent Identity Development* 47, 52 (Sally L. Archer ed., 1994).

89. Putnam, *supra* note 83, at 134.

90. See, e.g., Dagger, *supra* note 19, at 197 ("The virtuous citizen has a strong

may teach children prejudicial and intolerant attitudes toward those who differ. Thus, the literature on identity formation suggests that in families in which children had a strong sense of closeness and security, parents often were "mistrustful" of the outside world, and inculcated attitudes in children that left them, as adults, unable to "establish enough trust outside the family" to form friendships.⁹¹ It would seem, to use the terminology that Putnam employs, that such families may foster "bonding" (or exclusive) social capital, but not the sort of "bridging" (inclusive) social capital that can generate broader identities and reciprocity.⁹²

To take a slightly different example, imagine, despite peer pressure and possible negative employment sanctions, that an employed father takes parental leave, or adopts a more flexible work schedule to care for and nurture his child. This care giving may not, at this stage, directly foster the child's development of civic virtue, but it contributes to the child's human development and helps lay the foundations for the child's eventual development of the capacities for both democratic and personal self-government. That is, providing children the care, nurturing, and moral education necessary to become good people ultimately helps them to become good citizens. But rather than viewing the father's nurturing behavior as a direct and immediate contribution to the child's *civic* virtue, it seems more apt to think of it as an act that may indirectly, or eventually, foster civic virtue. By contrast, if the same father, some years hence, adopts a flexible work schedule to allow him to spend more time with his teenager, and part of this time is devoted to moral and civic education, especially during the evening meal, it is easier to make the case that the father's approach to the work/family conflict directly fosters civic virtue.

A final example suggesting that current concern about strengthening families relates at least as much to families' role in fostering personal self-government, or governing the self, as to democratic self-government is current political efforts to encourage "responsible fatherhood," that is, to promote the positive, active engagement of fathers in the rearing of their children. The primary appeal is not to foster children's *civic* virtue and improve their future *civic* participation, as measured in, for example, voting rates or attendance of public meetings. Rather, the claim is that children with involved fathers have better life prospects because they are more likely to stay in school, achieve success in school, avoid (in the case of male children) committing crime, and are less likely to engage in a

sense of reciprocity—of the need to bear a fair share of the burdens of a cooperative enterprise *and* to insist that others bear their share as well.”).

91. Ruthellen Josselson, *Finding Herself* 65 (1987) (describing the family characteristics of women in the "Identity Foreclosure" category).

92. See Putnam, *supra* note 83, at 22-23.

range of harmful behaviors such as drug and alcohol abuse, and early parenthood.⁹³ And it should not be missed that a core element of the movement is increasing fathers' financial support of their children, as the tenor of the rhetoric of "deadbeat" dads has shifted to "deadbroke" dads and empowering low-income men to be better providers and marriage partners. Of course, in this respect it is possible to argue that this movement fosters at least two virtues that could be thought of as civic virtues: the virtue of self-sufficiency, which includes not being "needlessly" dependent upon governmental financial support, and the virtue of being law-abiding.⁹⁴ Nonetheless, it seems that much of the keen political interest in fathers' involvement in families relates more to securing better outcomes for children's personal self-government, or success in life, and to reducing the number of negative externalities suffered by society when children's lives do not go well.

In sum, the idea of families as "seedbeds" valuably recognizes that families are important places of growth and development of a wide range of human capacities and virtues, including civic virtue. Even the discontinuity approach that I identified with political liberalism holds that families have the important task of ensuring the "nurturing and

93. President Bush's proposed budget includes \$64 million to promote "responsible fatherhood" through providing competitive grants to faith-based and community based organizations. Tommy G. Thompson, Testimony, Health and Human Service's Fiscal 2002 Budget (Federal Document Clearing House), Mar. 6 2001. Such funds "will be used to support programs that help low-income and unemployment fathers and their families to avoid dependence on welfare, and to fund programs that promote successful parenting and marriage." *Id.* (testimony of Thompson). Members of Congress plan to reintroduce the Responsible Fatherhood Act, which was passed by the House of Representatives during the last Congress but not enacted. See Fatherhood Efforts Get Historic Boost from Congress (Evan Bayh News Release) at <http://www.senate.gov/~bayh/Press2000/19DEC00pr.htm>. Former Vice President Gore has been a champion of "responsible fatherhood" as the next phase of welfare reform. See *Al Gore Proposes Next Step in Welfare Reform: Help for Responsible Parents, Crackdown on Deadbeat Dads*, available at http://www.algore2000.com/briefingroom/releases/pr_102099_welfare_reform.html. Nearly every state has a task force on responsible fatherhood. See *National Center for Children in Poverty, Map and Track: State Initiatives to Encourage Responsible Fatherhood*, 1999 Edition, available at <http://cpmcnet.columbia.edu/dept/nccp/MT99text.html>.

94. See Galston, *supra* note 23, at 221-22 (including independence, which means avoiding "becoming needlessly dependent on others," and law-abidingness among "liberal virtues"); The Role of Civic Education, *supra* note 20, at 6-7 (advocating that civic education develop dispositions such as self-discipline, so that citizens adhere voluntarily to self-imposed standards of behavior rather than requiring the imposition of external controls). Recent political rhetoric of supporting "working families" suggests that some degree of governmental support is appropriate, so long as families "play by the rules" and make an effort to support themselves. Elsewhere I suggest that this rhetoric has the potential to open the door to a more robust and sustained focus upon the role of care in fostering human and social capital. See Linda C. McClain, *Citizenship Begins at Home: Building Support for Working Families into the New Social Contract of Supporting 'Working Families,'* in *Progressive Politics in the Global Age* (Henry Tam ed., forthcoming 2001) [hereinafter McClain, *Citizenship*].

development" of citizens, who must "have a sense of justice and the political virtues that support political and social institutions."⁹⁵ It would be a useful corrective to regard such caregiving as an act with important civic dimensions and to recognize care as a precondition for both democratic and personal self-government.⁹⁶ Indeed, it seems all the more important, given the vital role of families in fostering capacities for self-government, to address the lingering problems of sex inequality within families.

B. *Why Families Matter, Part II: Or, Does Government Have an Interest in Who Does the Dishes?*

1. The Case of Fundamentalist Families

I offered the case of the family meal and of the involved father as benign examples of how fostering the capacities for self-government may pertain both to democratic and personal self-government. But the case of fundamentalist families appears to be one of a less benign effect of family involvement on civic virtue and even a clash between family self-governance and the fostering of civic virtue, especially the virtue of sex equality. What, exactly, is the conflict here? I am assuming that, as commonly defined, a religious fundamentalist is one whose religion requires literal interpretation of scripture (such as the Bible). There is assumed to be a literal scriptural foundation for a patriarchal family governance structure of husband as "head" of the household, both as breadwinner and as authority, and wife as caregiver/homemaker and submissive or deferential to the husband's authority.⁹⁷ Religious fundamentalism appears to have a significant effect on the preference for this kind of patriarchal family,⁹⁸ and conservative Christian views about women's proper domestic roles as wife and mother appear to exert a significant effect on women's labor force participation, such that "fundamentalist women are significantly

95. Rawls, *Public Reason Revisited*, *supra* note 28, at 788.

96. This is an argument that I advance elsewhere, drawing on a range of feminist, liberal and progressive work. See Linda C. McClain, *Care as a Public Value: Linking Responsibility, Resources, and Republicanism*, 77 Chi.-Kent. L. Rev. (forthcoming 2001); McClain, *Citizenship*, *supra* note 94. For important arguments to recognize care as a public value, on which I draw, see Mona Harrington, *Care and Equality: Inventing a New Family Politics* (1999); Kittay, *supra* note 7, at 115-81; Martha Albertson Fineman, *Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency*, 8 Am. U. J. Gender, Soc. Pol'y & L. 13 (2000); Deborah Stone, *Why We Need A Care Movement*, *The Nation*, Mar. 13, 2000, at 13; see also in the present symposium Mary Becker, *Towards a Progressive Politics and a Progressive Constitution*, 69 Fordham L. Rev. 2007 (2001).

97. See Harold G. Grasmick et al., *The Effects of Religious Fundamentalism and Religiosity on Preference for Traditional Family Norms*, 60 Soc. Inquiry 352, 353 (1990). Recall the recent Southern Baptist declaration that wives should graciously submit to their husband's authority.

98. *Id.*

more likely to choose the home as their career in their early life course."⁹⁹ Fundamentalist families may well socialize their children into this religious tradition and into gender roles that would replicate this division of labor and authority/submission model. There is also some evidence that while fundamentalist parents are supportive of their fundamentalist sons' educational pursuits, they are less supportive if their children are nonfundamentalist, and especially so for female nonfundamentalist children.¹⁰⁰ Such families increasingly choose home schooling in an effort to insulate their children from the secular world and to prevent their children's exposure to conflicting values.¹⁰¹ Religious fundamentalists regard secular education, such as civic education aimed at teaching tolerance and respect for difference that would expose their children to different ways of life (without clearly affirming the superiority of their own way), as deeply threatening.¹⁰²

To this basic account, one can add many variations, each of which may alter one's perceptions of the potential magnitude of the problem or the argument for governmental attention. For example, as Susan Moller Okin poses the problem, assume that the children are "educated entirely at religious schools and within the church, temple, or mosque" and "that all of these 'nonpolitical' settings inculcate and reinforce in them the belief that there is a natural, god-given hierarchy of the sexes, each with its own proper sphere—the female's being narrow, circumscribed, and without authority, and the male's the opposite."¹⁰³ The literature on international economic development

99. Darren E. Sherkat, *"That They Be Keepers of the Home": The Effect of Conservative Religion on Early and Late Transitions Into Housewifery*, 41 *Rev. of Religious Res.* 344, 354 (2000). But Sherkat also found that "fundamentalist women are likely to reenter the workforce when their children are older." *Id.*

100. Darren E. Sherkat & Alfred Darnell, *The Effect of Parents' Fundamentalism on Children's Educational Attainment: Examining Differences by Gender and Children's Fundamentalism*, 38 *J. Sci. Study of Religion* 23 (1999).

101. Margaret Talbot, *A Mighty Fortress*, *N.Y. Times*, Feb. 27, 2000, (Magazine), at 34.

102. See *infra* Part IV.B.1.

103. Susan Moller Okin, *Political Liberalism, Justice, and Gender*, 105 *Ethics* 23, 29 (1994) [hereinafter Okin, *Political Liberalism, Justice, and Gender*]. At least as Okin poses the hypothetical, it is confined to religious fundamentalist families, and does not apply to "most" families in the U.S. and other liberal democracies. Thus, in *Is Multiculturalism Bad for Women?*, Okin extends her focus on families to the problem of whether Western democracies should recognize group rights for minority cultures present within those democracies. Okin contrasts families in liberal cultures such as the United States (with the exception of religious fundamentalists):

women in more liberal cultures are . . . legally guaranteed many of the same freedoms and opportunities as men. In addition, most families in such cultures, with the exception of some religious fundamentalists, do not communicate to their daughters that they are of less value than boys, that their lives are to be confined to domesticity and service to men and children, and that their sexuality is of value only in marriage, in the service of men, and for reproductive ends. This situation, as we have seen, is quite different

documents that in some instances, a mixture of religious and cultural influences leads families to favor their sons over their daughters in such concrete resources as education, food, health care, and leisure time.¹⁰⁴ Or suppose that the parents, pursuant to their religious convictions, teach their children a sexual code which condemns all premarital sexual activity, as well as any dating, any use of contraception or abortion, and gay and lesbian sexuality.

The case of the fundamentalist family is usefully understood as posing an especially sharp version of the general question about the domain of sex equality. For public repudiation of coverture and the erosion of separate-spheres ideology seems to stand in tension with private orderings and world views that reinforce traditional gender roles of male authority and female deference and that see the "traditional dichotomy between male and female spheres as critical to the preservation of family life."¹⁰⁵ What makes the fundamentalist family hypothetical so troubling is the role of literalism and of a scriptural foundation for sex inequality, because this seems to entail a rejection of critical reflection or of any right to independent judgment or interpretation.

2. Gender Roles in Families and Government's Interest in Sex Equality

Fundamentalist families are by no means the only families in which a gendered division of labor exists, or persists. If government's commitment to sex equality includes an interest in how adult family members divide the responsibility for market work and for caretaking and housework, as well as about how parents socialize and form their children, that interest will apply to many households. When Okin highlighted male political theorists' inattention to justice within the family, she targeted widespread practices in contemporary families of the disproportionate allocation to women of responsibility for housework and caregiving.¹⁰⁶ She also pointed to the problem of male domination and violence within families, arguing that if families are "not environments in which justice is normally practiced, work equally shared, and people treated with equal dignity and respect—if they are often instead places where injustice ranges from moderate unfairness to outright abuse, then how are children to develop the sense of

from that of women in many of the world's other cultures, including many of those from which immigrants to Europe and North America come.

Susan Moller Okin, *Is Multiculturalism Bad For Women?* 16-17 (1999) [hereinafter Okin, *Multiculturalism*]. For critical responses to Okin, which I do not address here, see *id.* at 27-113.

104. See Amartya Sen, *Inequality Reexamined* 122-25 (1992); Amartya Sen, *More Than 100 Million Women Are Missing*, N.Y. Rev. of Books (Dec. 20, 1990).

105. Salomone, *supra* note 50, at 236.

106. Okin, *Justice*, *supra* note 4, at 138-41.

justice that they need if the well-ordered society is to be stable?"¹⁰⁷ Here, the concern with injustice within the family goes both to the adult members of the family and to the children within it. Okin contended that a "genderless" family, in which roles and responsibilities were divided in an egalitarian manner, would be "more just to women" and "more conducive to [their] equal opportunity," as well as to the equal opportunity for the children of both sexes.¹⁰⁸ Most relevant to the discussion of families as seedbeds of virtue is her claim that an egalitarian or genderless family "creates a more favorable environment for the rearing of citizens of a just society."¹⁰⁹ In a recent article, Okin fortifies her argument by appealing to the literature on children's moral development, suggesting that "[t]he development of children's innate potential for empathy therefore seems crucial to a major segment of their moral thinking and moral action [and] their sense of justice."¹¹⁰ In other words, families may serve as seedbeds in playing a crucial role in developing "moral citizens" by nurturing "the qualities that are at the root of the more complex virtues."¹¹¹ However, Okin argues, unless two-parent, heterosexual households change their gender structure and become more equal, they will not be well suited to foster such empathy. Her claim is that a two-parent, heterosexual household is "the first model of how [children see] two adults who are different from each other in a socially salient way interact with each other;" if that household presents a model of a male sense of entitlement and a female sense of subservience, this will hinder the development of empathy.¹¹² By contrast, "with sex equality as a fundamental norm, children are surely less likely to grow into the habit of understanding differences such as those of race or ethnicity as reasons for unequal or disrespectful treatment."¹¹³

In other words, if families, in a good society, are to play a role in fostering virtues necessary for personal and democratic self-government, society's concern to foster sex equality and justice extends to the garden-variety household with the "second shift" familiar from feminist analysis, in which women bear disproportionate responsibility for the caregiving and household work, no matter whether they participate in the paid labor force or not. Government *does* have an interest in who does the dishes, as well as myriad other household tasks. This interest derives from fostering the capacities of

107. Okin, *Political Liberalism, Justice, and Gender*, *supra* note 103, at 38.

108. Okin, *Justice*, *supra* note 4, at 183.

109. *Id.*

110. Susan Moller Okin & Rob Reich, *Families and Schools as Compensating Agents in Moral Development for a Multicultural Society*, 28 J. Moral Educ. 283, 286 (1999).

111. *Id.* at 288.

112. *Id.* at 290.

113. *Id.*

children and adults for self-government. It also derives from its interest in promoting the principle of sex equality.

Gendered divisions of labor in the home and continuing adherence to a male breadwinner/female caregiver model—despite women's increased movement into the paid labor force—are hardly unique to fundamentalist or even to religiously observant families. Admittedly, the empirical picture is complicated. On the one hand, recent studies report the problematic “persistence of traditional marital roles,” at least in terms of women specializing in domestic labor and men in market labor.¹¹⁴ Feminist scholar Joan Williams contends that this model of “[d]omesticity remains the entrenched, almost unquestioned, American norm and practice.”¹¹⁵ In *Bowling Alone*, Putnam claims that “*virtually all the increase in full-time employment of American women over the last twenty years is attributable to financial pressures, not personal fulfillment.*”¹¹⁶ Moreover, the phenomenon of women choosing to leave the full-time labor force for either part-time work or full-time caregiving and homemaking is common.¹¹⁷ On the other hand, recent data suggests that families in which both parents are engaged in paid labor have become the majority (albeit, barely so), even among married couples with children.¹¹⁸ However, women continue to perform a disproportionate share of household labor, although data also suggests there has been some increase both in fathers' assumption of domestic labor and in fathers serving as “primary” caregivers within families.¹¹⁹

Whatever the precise empirical picture, the question remains: if mothers still assume disproportionate responsibility for caregiving and domestic labor within families, and if families tend to reproduce this gendered division of responsibility in children, then what appropriate

114. Ira Mark Ellman, *Divorce Rates, Marriage Rates, and the Problematic Persistence of Traditional Marital Roles*, 34 Fam. L.Q. 1, 2 (2000).

115. Joan Williams, *Unbending Gender: Why Family and Work Conflict and What To Do About It* 1 (2000). Williams reports a survey finding that two-thirds of Americans believed it would be best if women stayed home to care for their families and children. *Id.* at 2.

116. Putnam, *supra* note 83, at 197.

117. See generally Williams, *supra* note 115, at 2-6 (discussing the conflict women face between work and domesticity).

118. Amara Bachu & Martin O'Connell, *Fertility of American Women: Population Characteristics* (U.S. Census Bureau, June 1998); Tamar Lewin, *Now a Majority: Families With 2 Parents Who Work*, N.Y. Times, Oct. 24, 2000, at A20 (reporting data from Census Bureau Report).

119. Scott Coltrane, *Research on Household Labor: Modeling and Measuring the Social Embeddedness of Routine Family Work*, 62 J. Marriage & the Fam. 1208, 1208 (2000) (“Although the vast majority of both men and women now agree that family labor should be shared, few men assume equal responsibility for household tasks,” and “[o]n average, women perform two or three times as much house work as men”); Lynne M. Casper, *My Daddy Takes Care of Me! Fathers as Care Providers*, Current Population Reports (Census Bureau, Sept. 1997) (reporting increase in number of fathers taking care of preschoolers during time mothers are working).

role should government play in addressing family self-governance? Should a polity committed to sex equality as a public value and constitutional norm attempt to ensure that families constitute themselves and that parents constitute children in ways that are consistent with and foster sex equality? If families are to serve as seedbeds of civic virtue, or schools for citizenship, does this require a particular form of family or of family governance, or that families inculcate a particular set of civic virtues and values? Or should respect for rights of intimate association, freedom of religion, and parental autonomy prevent government from reaching these aspects of family life? Could government adopt "gentler" or "milder" forms of action short of outright prohibition or direct regulation? Are there ameliorative efforts that government—and institutions of civil society—might undertake to counter the effects of practices that are not congruent with sex equality?

These are hard questions, for they involve not only difficult empirical questions about the actual effects of associational life, within families, on democratic self-government, but also how to reconcile competing constitutional principles, not to mention significant prudential concerns. My proposed framework for thinking about these questions begins with the idea that government's legitimate interest in the family relates to how families function in the constitutional order. Government has two interests here. One is in how adult men and women structure their family lives and what impact that has on their development of civic virtue and capacity for self-government. The second interest concerns children and their interests and development within families. Government has a strong interest in children developing the capacities for responsible self-government and in families fostering in children respect for civic virtues and public values. As discussed above, families may contribute to cultivating civic virtue, but they also allow persons to realize goods of intimate association, nurture human development, and thus foster human and social capital.

I believe that government should not attempt to enforce complete congruence between democratic values and family structure and values. However, violence and domination are legitimate objects of governmental regulation. In light of the repudiation of coverture, and of the jurisprudence of constitutional sex equality, systems of private family governance that attempt to replicate coverture and women's political subordination deviate too sharply from the requirements of civic virtue. Households that seek to force children into such arrangements do not serve as seedbeds of civic virtue and do not seem to fit within the boundaries of "reasonable" moral pluralism. Okin persuasively argues that a liberal anti-caste principle that would condemn and render unreasonable world views that "assert the right to a mode of life involving serfdom or slavery" or that require "the

repression or degradation of certain persons on, say, racial, or ethnic, or perfectionistic grounds” similarly would apply to world views rejecting sex equality and “advocat[ing] and practic[ing] the dependency and submissiveness of women.”¹²⁰ In fact, some features of such family governance, such as Okin’s reference to domination and “outright abuse” may conflict with legal norms as well as moral norms. For example, government properly prohibits family violence and, in public awareness campaigns about domestic violence, sends a message that contradicts any assumption that such violence is a “private” matter or that family life affords a space immune from protection against violence.¹²¹ Moreover, I would support mandatory premarital counseling that educates persons seeking to marry about the history and repudiation of coverture and current laws condemning intimate violence.

When practices of sex inequality within families affect children in ways that pose harm to them by significantly impairing the development of their capacities for personal and democratic self-government, government would have a strong interest in preventing or ameliorating those practices. Indeed, as a constitutional matter, this flows readily from—and could build upon—government’s well-established *parens patriae* interest in children’s well being and healthy development.¹²² For example, if parents forbid female children from attending school it may well violate state laws imposing parental duties of support and trigger laws aimed at protecting children against abuse and neglect.¹²³

120. Okin, *Political Liberalism, Justice, and Gender*, *supra* note 103, at 30-31; see Rawls, *Political Liberalism*, *supra* note 7, at xxix (“The same equality of the Declaration of Independence which Lincoln invoked to condemn slavery can be invoked to condemn the inequality and oppression of women.”). In critiquing Rawls’ political liberalism for its principle of toleration of reasonable comprehensive moral views, Susan Moller Okin fears that Rawls’ “emphasis on toleration of a wide range of comprehensive philosophical, religious, and moral doctrines comes into conflict with some important means by which greater equality between the sexes might be promoted.” Okin, *Political Liberalism, Justice, and Gender*, *supra* note 103, at 28.

121. For example, New York City has carried out prominent public awareness campaigns along these lines (e.g., with dramatic subway advertisements) and recently enacted the first municipal civil rights law in the nation protecting against gender-motivated violence. See Nina Bernstein, *Council Readies Unique Sex Bias Measure*, N.Y. Times, Dec. 1, 2000, at B3.

122. See *Prince v. Massachusetts*, 321 U.S. 158 (1944) (upholding against constitutional challenge application of state law prohibiting child labor to child distributing religious pamphlets). Although I do not necessarily endorse the result in *Prince*, I cite it for the general principle that government may promote children’s well-being even in certain instances of conflicts with parental autonomy and religious convictions.

123. But, under existing understandings of abuse and neglect laws, the rationale for invoking such laws would focus on the issue of harm and would not likely focus on government’s interest in sex equality. Robert H. Mnookin & D. Kelly Weisberg, *Child, Family, and State: Problems and Materials on Children and the Law* 310-29 (4th ed. 2000) (discussing provision of education as part of parental support

I also believe that it is appropriate for government to promote the virtue of sex equality—and to repudiate the idea that women's and men's place in society is due to the innate capacities thought to follow from their sex—and to promote sex equality as an ideal important to family self-governance. However, a commitment to pluralism, to respect for diversity, to experiments in living, and to the idea that our understandings of such values as sex equality evolve over time cautions against a hard governmental line that there is only one way to embody sex equality in families. This seems especially appropriate in light of ongoing cultural exploration of appropriate family roles, and the persistence of some form of traditional roles. I think it is also appropriate in light of difficult empirical questions about the effects of the dynamics of family life and family values on capacities for democratic self-government.¹²⁴

Finally, this pluralistic model is also appropriate in light of the idea of the institutions of civil society serving as buffers against government. Whatever zeal one might have in enlisting government to bring about egalitarian families, it is wise to be wary of governmental power to enforce orthodoxies about family life. This has served to exclude many families from equal respect and to subject many families to intrusive governmental control.¹²⁵ As I have argued elsewhere, one important role played by the institutions of civil society, in a democracy in which perfect justice is never achieved, is to serve as what Jane Mansbridge has called "enclaves of protected discourse and action," where "counterpublics" can work out and nurture alternative conceptions of self, community, and justice.¹²⁶ I

obligation). I leave for exploration elsewhere what impact the idea of government's affirmative responsibility to carry out a formative project to foster capacity would have on abuse and neglect laws. I assume that if a family practice seriously impaired a child's development of her or his capacities, this would trigger a strong governmental interest in some form of prevention, intervention, or amelioration. *Cf.* Martha C. Nussbaum, *Women and Human Development: The Capabilities Approach* 275 (2000) (arguing that the state should not intervene in the conduct of family members without a compelling interest, but that "such a compelling interest is always supplied by the protection of the central capabilities.").

124. In her extensive study of the psychology of associational life, Nancy Rosenblum did not study families. Her study of a number of other forms of association concluded that the effects of participation in such associations were "inteterminate," although they did seem to lead to a certain "democracy of everyday life," which included the virtue of reciprocity. *See* Rosenblum, *supra* note 11, at 8-10, 15-17, 349-63. Although Okin makes various hypotheses about the impact of gendered family life on democratic self-government, testing these would call for some sort of empirical evaluation that I do not attempt here.

125. *See, e.g.,* Martha Albertson Fineman, *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies* 177-93 (1995) (discussing regulation of and lack of privacy accorded families headed by single mothers, in contrast to rhetoric of family privacy).

126. McClain & Fleming, *supra* note 5, at 318 (citing Jane Mansbridge, *Using Power/Fighting Power: The Polity, in Democracy and Difference: Contesting the Boundaries of the Political* 46, 55 (Seyla Benhabib ed., 1996)).

think this idea is also useful as applied to one function families may serve. For example, scholars have written of the way in which African-American families feel the need to socialize their children both to fit into the surrounding majority culture and to cultivate an oppositional consciousness that will protect them against the types of discrimination and prejudice they face.¹²⁷ Also, in the face of hostile and negative images, as well as a lack of social and (in most states) legal validation of their intimate lives, gay men and lesbians must actively construct their own models of family and of family values.¹²⁸

In addition, this pluralistic model attempts to give a proper place to constitutional principles of toleration and decisional liberty. Indeed, it is striking that even the most ardent proponent of the genderless family, Okin herself, invokes such liberal principles as toleration to hold back from government compelling families to adopt an egalitarian division of labor. Invoking such principles, in light of a pluralism of beliefs about, and lack of cultural consensus concerning, gender within families, Okin urges a two-fold approach: government should encourage genderless families, and tolerates (but seek to limit the harmful effects of) traditional gendered division of labor: "public policy . . . must *allow* families to divide roles along the line of gender, . . . it should [not] either encourage only women to assume care-taking roles . . . or allow the division of labour to be practised in such a way that women in traditionally female roles are economically dependent upon men or rendered servile in relation to them."¹²⁹ Specifically, she has advocated mandatory wage-splitting in "two-parent families who do not believe in or wish to practise shared parental roles."¹³⁰ Rawls' own response to Okin makes clear that, although government should tolerate "voluntary" divisions of labor within families, it must seek to reduce the involuntary division of labor. "If a basic . . . cause of women's inequality is their greater share in the bearing, nurturing, and caring for children in the traditional division of labor within the family," political liberalism would support taking steps "to equalize their share, or to compensate them for it."¹³¹ As I have discussed elsewhere, I believe that Rawls' response to Okin's criticism of political liberalism makes clear that a more

127. See Patricia Hill Collins, *Shifting the Center: Race, Class, and Feminist Theorizing about Motherhood*, in *Motherhood: Ideology, Experience, and Agency* (Evelyn Nakano Glenn et al. eds., 1994); see also Fredrick C. Harris, *Will the Circle be Unbroken?: The Erosion and Transformation of African-American Civic Life*, in *Civil Society, Democracy, and Civic Renewal* 317, 323-24 (Robert K. Fullinwider ed., 1999) (describing "oppositional civic culture" characteristic of African-Americans' civic life).

128. See Kath Weston, *Families We Choose: Lesbians, Gays, Kinship* (1991); Suzanne Slater, *The Lesbian Family Life Cycle* (1995).

129. Okin & Reich, *supra* note 110, at 285.

130. *Id.* at 290; Okin, *Justice*, *supra* note 4, at 181-82.

131. Rawls, *Public Reason Revisited*, *supra* note 28, at 792-93.

robustly feminist political liberalism could support governmental measures both to increase women's equality within families and to address injustices within families that "undermine children's capacity to acquire the political virtues required of future citizens in a viable democratic society."¹³²

Feminist work has usefully illuminated the significant ways in which existing public policy fails to promote sex equality within families, encouraging, through the structure of social security and tax laws, women to invest in uncompensated homemaking rather than wage earning, while also devaluing such labor.¹³³ I concur with Okin that it is a legitimate governmental concern to foster sex equality within families, both because of government's interest in the capacities of adults as well as of children. But with respect to some forms of sex inequality, respect for pluralism should stay government's hand from coercion, even though other measures may be appropriate. In recent work, Martha Nussbaum seems to draw a similar distinction between coercion and other measures: she finds that it would seem "an intolerable infringement of liberty for the state to get involved in *dictating* how people do their dishes," yet she supports governmental measures to change traditional decision-making and division of domestic labor within families, because "rethinking the division of labor in the family is a crucial aspect of guaranteeing women's full equality as citizens."¹³⁴

I take the view that sex equality is a relevant principle whose domain includes family self-governance, yet there are other principles that suggest limits to how far government should seek to promote sex equality within families. One reason that I resist a complete model of congruence is that I find persuasive the idea that government can use other means to promote important public values. This is one component of government's formative project. I also believe that governmental institutions may play an ameliorative, or compensatory,

132. McClain, *Toleration*, *supra* note 5, at 111 (quoting Rawls, *Public Reason Revisited*, *supra* note 28, at 790-91). Whether or not Okin's specific proposals of wage-splitting or other remedies to equalize income upon divorce are optimal solutions for protecting vulnerabilities arising from traditional gender roles, or whether other economic measures would be preferable, is not the issue that I wish to take up here. See Ian Shapiro, *Democratic Justice* 117-22 (1999) (contending that Okin's proposal is too intrusive upon adult men and women's ordering of their intimate and economic lives and would not, in any case, achieve its objectives).

133. See Edward J. McCaffery, *Taxing Women* (1997) (discussing federal income tax policy); Mary E. Becker, *Obscuring the Struggle: Sex Discrimination, Social Security, and Stone, Seidman, Sunstein & Tushnet's Constitutional Law*, 89 Colum. L. Rev. 264 (1989) (discussing how Social Security disadvantages women); Katherine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 Nw. U. L. Rev. 1 (1996) (discussing the legal treatment of housework throughout the law); Nancy C. Staudt, *Taxing Housework*, 84 Geo. L.J. 1571 (1996) (advocating the treatment of household work as taxable labor).

134. Nussbaum, *supra* note 123, at 280-83 (emphasis added).

role in fostering civic virtues. In the final part of this article, I turn to one important example: the role of public schools as domains in which civic virtue is cultivated, as one component of schools' broader formative project of fostering the capacities for self-government.

IV. WHY SCHOOLS MATTER: PREPARING CHILDREN FOR CITIZENSHIP AND FOR SUCCESS IN LIFE

How might we envision the dual authority of families and schools for fostering the capacities for self-government, in the sense of preparing children both to be good citizens and to live good, successful lives? I will focus in particular upon schools as domains in which the virtue of sex equality should be fostered. Schools are prominent among the "seedbeds of civic virtue" championed by civil society proponents. To return to the same question I asked of families, do schools matter primarily because of their contribution to children's capacities for democratic self-government, for personal self-government, or for both?

A. *The Dual Authority of Families and Schools for Fostering Children's Capacities*

As a matter of constitutional law, the familiar course of discussions of family governance, as it relates to children, is to note the dual authority of families and government with respect to fostering children's capacities. It is tempting to try to posit some simple division of labor between families and schools that would avoid the difficult problems posed by conflicts between parental and school authority, or objectives, concerning fostering children's capacities. One such division would be that it is the responsibility of parents to teach children to be good people and to nurture, care for, and provide for them. Public schools, as an instrument of the state, teach children how to be good citizens and equip them to participate in our constitutional democracy.

This is a neat schematic, with important elements of truth in it. Thus, as the Supreme Court recently affirmed, our constitutional order recognizes "the fundamental right of parents to make decisions concerning the care, custody, and control of their children."¹³⁵ The Court quoted favorably from such earlier precedents as *Pierce v. Society of Sisters* and *Prince v. Massachusetts* affirming a primary allocation of authority to parents: "[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."¹³⁶ Moreover, literature about such

135. *Troxel v. Granville*, 120 S.Ct. 2054, 2060 (2000) (citation omitted).

136. *Id.* (quoting *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925) (brackets in original)) ("It is cardinal with us that the custody, care and nurture of the child reside

matters as character education repeatedly states that families and other institutions of civil society bear primary responsibility for developing ethical behavior and character in children.¹³⁷

Similarly, with respect to schools, it is often argued that "schools . . . bear a special and historic responsibility for the development of competent and responsible citizens."¹³⁸ One key purpose behind the movement to establish common public schools was to use education in common schools to shape children from a diverse array of ethnic backgrounds and national origins into citizens unified behind a shared political morality and set of ideals.¹³⁹ The landmark case of *Brown v. Board of Education* referred to education as "the very foundation of good citizenship,"¹⁴⁰ and, in subsequent opinions, the Court has characterized the objectives of public education as the "'inculcat[ion] of] fundamental values necessary to the maintenance of a democratic political system."¹⁴¹

However, this simple division of labor between molding the good person and the good citizen cannot hold. First, as I have discussed above, a central claim in the calls to revive civil society is that families are—or should be strengthened so they can be—first and foremost among the "seedbeds of civic virtue." The idea that families play an important, even indispensable role in forming persons so they can be good citizens has a long history. Second, a closer look at the aims of public schools today—both what such schools aspire to do and what they actually do—reveals that much more than civic education, or preparation for citizenship, is at stake. Perhaps a better way to put the point is that preparation for citizenship is defined very broadly, so that it includes preparation to succeed in life. Undeniably, a core aim of public education pertains to preparation for citizenship. Thus, in *Brown*, in which the Supreme Court held that segregated public schools were inherently unequal and overruled prior precedent affirming the doctrine of separate but equal, the Court suggested that compulsory school attendance laws and the great expenditures for education "demonstrate our recognition of the importance of

first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Id.* (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)).

137. Role of Civic Education, *supra* note 20, at 1; Thomas Lickona, *Educating for Character: A Comprehensive Approach*, in *The Construction of Children's Character* 59 (Alex Molnar ed., 1997) (including among key ideas that "parents are a child's first and most important moral teachers, and the school must do everything it can to support parents in this role" and that "the impact of the school-parent partnership is enhanced when the wider community . . . promotes the virtues that make up good character").

138. Role of Civic Education, *supra* note 20, at 1.

139. Macedo, *supra* note 18, at 45-87.

140. 347 U.S. 483, 493 (1954).

141. *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 681 (1986) (alteration in original) (quoting *Ambach v. Norwick*, 441 U.S. 68, 76-77 (1979)).

education to our democratic society."¹⁴² But the *Brown* Court also stated:

Today [education] is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to *succeed in life* if he is denied the opportunity of an education.¹⁴³

In subsequent cases, the Court has also spoken of the role of schools in teaching "the shared values of a civilized social order,"¹⁴⁴ identifying such values both as "in themselves conducive to happiness" (or personal self-government) and "indispensable to the practice of self-government in the community and the nation."¹⁴⁵ Current political rhetoric, which puts education at the top of the list of national priorities, similarly regards education as vital not only to democracy but also to success in life, so as to equip children with the skills to be capable employees in the new economy, to be self-sufficient, or to pursue professional education.

On one view, it may seem that schools, in trying to prepare children for successful lives, are usurping the work of families and intruding upon dimensions of personal development that should be left to parents. The idea that schools, as a general matter, improperly usurp parental authority if they try to prepare children not only for citizenship but to live successful lives should be rejected. States have broad authority, under the police power, to promote public health, welfare, morals, and safety. As *Brown* observed, "[t]oday, education is perhaps the most important function of state and local governments."¹⁴⁶ An examination of state laws that set out the aims of public education confirms that it is assumed that public education plays an important role both in preparing children for citizenship and for success in life, in such realms as employment and higher education.

Recognizing the "constitutional dimension to the right of parents to direct the upbringing of their children"¹⁴⁷ does not require interpreting "primary" responsibility to mean "exclusive" responsibility. Families are not the only sites for generating the capacities for self-government, and government, through publicly-funded schools, has the authority and responsibility to foster children's capacities for self-government and create responsible, virtuous citizens. Thus, inverting the Supreme Court rhetoric noted above, Macedo contends: "[t]he

142. *Brown*, 347 U.S. at 493.

143. *Id.* (emphasis added).

144. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 272 (1988) (quoting *Bethel Sch. Dist.*, 478 U.S. at 683).

145. *Bethel Sch. Dist.*, 478 U.S. at 681 (quoting C. Beard & M. Beard, *New Basic History of the United States* 228 (1968)).

146. *Brown*, 347 U.S. at 493.

147. *Troxel v. Granville*, 120 S. Ct. 2054, 2069 (2000).

justification for some measure of public authority lies in the fact that children are not simply creatures of their parents, but are independent persons with their own lives to lead."¹⁴⁸ He assumes a dual sovereignty of parents and public schools, so that, "the child can rightfully be subjected to parental or public efforts to inculcate their visions of good character so long as these efforts are not repressive, and so long as the child is also presented with information about alternative ways of life."¹⁴⁹ The goal is that neither parents nor the democratic community should "be allowed to confine children's options within narrow limits, or deny any child the right to pursue his or her own path in life."¹⁵⁰

The current interest in character education offers a good illustration of how the mission of public schools pertains to preparing children both for citizenship and for living good, successful lives *and* of the dual authority of schools and families for fostering children's capacities. Local, state, and national government, as well as various non-governmental coalitions, all support character education as a way in which schools can support and reinforce the efforts of parents, who have the first and foremost obligation (along with other institutions of civil society) to provide moral education for their children.¹⁵¹ To be sure, some proponents argue that *because* families are failing in their duty to provide moral education to their children, schools must step into the breach and do so. An examination of the traits that such education seeks to develop shows that many of those traits would be relevant both to democratic life and to personal self-government. Indeed, the motivation behind the movement for character education suggests serious concern with helping children learn about and adopt moral values that would guide them in their lives and thus countering

148. Macedo, *supra* note 18, at 243.

149. *Id.* at 237.

150. *Id.* Abner Greene has also expressed this idea of dual sources of authority as consistent with his own view of our constitutional order as authorizing multiple repositories of power. *See* Greene, *supra* note 80, at 490-91. In contrast, *Wisconsin v. Yoder*, 406 U.S. 205 (1972), allowed Amish parents to remove their children, once they reached age 14, from compulsory public education and from any other formal education. But it should be noted that the Court assumed that the Amish community could successfully cultivate in its adolescents the virtues necessary to be both good citizens and successful (i.e., self-sufficient) in life. *See id.* at 224-25.

151. *See, e.g.*, William Jefferson Clinton, Remarks by the President at Character Education Conference (May 23, 1995) (transcript available on M2 Presswire on lexis.com) (describing character education as "a supplement . . . , not a replacement," for what parents do); William Jefferson Clinton, 1996 State of the Union Address at U.S. Capitol, 2/15/96 Vital Speeches 258 (challenging "all . . . schools to teach character education, to teach good values and good citizenship"); Character Counts! Coalition, <http://www.charactercounts.org> [hereinafter "Character Counts"] ("Character education is, first and foremost, an obligation of families and faith communities, but schools and use-service organizations also have a responsibility to help develop the character of young people."); Lickona, *supra* note 137, at 45, 59 ("[P]arents are a child's first and most important moral teachers, and the school must do everything it can to support parents in this role . . .").

the absence of strong moral values perceived in mass entertainment. Another powerful motivation for character education was the shocking series of episodes of violence committed by students against other students and teachers, and the prevalence of a sense of hopelessness among children.¹⁵² These character education efforts assume that there is a set of qualities that will serve students well both in their lives and in their role as citizens: "[T]he well-being of our society requires an involved, caring citizenry with good moral character."¹⁵³

Thus, in light of the current constitutional landscape and actual practices, a more plausible division of labor is that families and schools should play complementary roles in fostering both democratic and personal self-government. Some scholars have suggested that parents appropriately teach children what it means to follow a particular way of life, while schools, a setting in which children of diverse religious, ethnic, and racial origins learn together, teach children about how to tolerate and respect different ways of life.¹⁵⁴ This model of complementarity can become more tense and vexed when parental and school values conflict, such that it may seem, in some instances, more appropriate to regard schools as serving a compensatory or ameliorative role when instruction at home may conflict with democratic values. Other scholars contend that because "[p]arents may educate their children at home with a single moral voice," and seek to ensure that their children adhere to the values, beliefs, and way of life taught at home, they may be unsuited to expose their children to diversity and to inculcate respect for difference, and schools should play a compensatory role and "have a plurality of moral voices."¹⁵⁵ I will explore this dilemma more by focusing on sex equality.

152. See Character Counts, *supra* note 151; Character Education in America (The Commonwealth Foundation for Public Policy Alternatives, Mar. 1996).

153. *Aspen Declaration on Character Education*, in Character Counts, *supra* note 151. An Iowa statute, aimed at making schools safe, fostering academic excellence, and at equipping students to be model citizens, lists the desirable character qualities as:

honesty; responsibility; respect and care for the person and property of others; self-discipline; understanding of, respect for, and obedience to law and citizenship; courage, initiative, commitment, and perseverance; kindness, compassion, service, and loyalty; fairness, moderation, and patience; and the dignity and necessity of hard work.

Iowa Code Ann. § 256.18 (West 1996).

154. See Amy Gutmann, *Democratic Education* (1987).

155. Okin and Reich, *supra* note 110, at 295.

B. *Conflicts Between Parents and Schools Over the Domain
of Civic Virtue*

1. The Capacity for Critical Reflection

If governmental institutions, such as schools, seek to inculcate forms of civic virtue that families do not foster, what if such measures seem to threaten families' ability to foster their own conceptions of virtue? As has been well covered in the literature, the civic project of teaching tolerance and awareness of and respect for different ways of life threatens families that adhere to religious fundamentalism.¹⁵⁶ An underlying issue in this controversy to which scholars have devoted considerable attention is whether the capacity for critical reflection is a core civic virtue necessary for democratic self-government, one that common public schools should cultivate in children, and, if so, how deeply it should reach into children's personal self-government. While some scholars contend that cultivating that capacity would have a salutary effect on children's capacities to be good citizens and to live good (self-governing) lives,¹⁵⁷ others fear the "corrosive" effect of such spillover.¹⁵⁸ My purpose here in revisiting that controversy is not to offer a fresh resolution, but to make two points. First, the controversy itself illuminates the problem of identifying the domain of civic virtue and the problem of spillover from democratic to personal self-government. That is, the curriculum to which fundamentalist families object clearly has a civic purpose, but it also aims at fostering children's personal self-government, to prepare them for success in life. Two, although the scholarly literature has extensively covered the case of fundamentalist families from the perspective of the competing demands of respect for parental autonomy and religious freedom, on the one hand, and the imperatives of democratic education, on the other, it tends to neglect a vital dimension: the extent to which the civic education, character education, and other

156. For a helpful discussion of the literature and of the famous case, *Mozert v. Hawkins*, see Macedo, *supra* note 18, at 157-68.

157. See, e.g., Gutmann, *supra* note 154, at 50-52 ("Children will eventually need the capacity for rational deliberation to make hard choices in situations where . . . authorities do not supply clear or consistent guidance."); Macedo, *supra* note 18, at 233-40 ("The current system of public schooling aims to promote directly certain core liberal civic values."); Suzanne Sherry, *Responsible Republicanism: Educating for Citizenship*, 62 Chi. L. Rev. 131, 157, 172 (including "critical thinking" as a core element of republican education for citizenship).

158. See, e.g., Galston, *supra* note 23, at 254 (arguing that "sociopolitical institutions" should not encourage values that are "at odds with the deep beliefs of many of its loyal citizens"); Nomi Maya Stolzenberg, *"He Drew a Circle That Shut Me Out": Assimilation, Indoctrination, and the Paradox of a Liberal Education*, 106 Harv. L. Rev. 581, 609-11 (1993) (discussing the *Mozert* case and remarking that "the specific interest [the plaintiffs] asserted most strongly was the parents' exclusive right to control their children's upbringing").

forms of education to which fundamentalist families object seek to foster sex equality, an important civic virtue. Similarly, the literature seldom discusses the problem of the clash between systems of family governance and family values and the value of sex equality and what compensatory or ameliorative role government may play in promoting sex equality in the face of inequality at home.

For adherents to religious fundamentalism, the core liberal civic virtue of critical reflection upon one's roles and commitments in light of the demands of liberal principles would clash deeply with their world view. If the aim of government's formative project is to foster the capacities for democratic as well as personal self-government, then at issue in the fundamentalist hypothetical is how to prepare the children for free and equal citizenship and to help them live self-governing lives.

This dilemma cannot be resolved solely by falling back on the simple division of labor between parents and schools considered and rejected above. For if a public school's proper mission is to foster children's capacities to be good citizens and successful adults, then there is no simple way to confine the school's appropriate mission to "civic" virtue or even to democratic self-government. The most famous case involving the clash between the values of fundamentalist families and the imperatives of public education is *Mozert v. Hawkins County Board of Education*.¹⁵⁹ The "character education" statute adopted by the Tennessee legislature at issue in the case identified the aim of such education as "to help each student develop positive values and improve student conduct as students learn to act in harmony with their positive values . . . and learn to become good citizens in their school, community and society."¹⁶⁰ Religious fundamentalist parents objected to a reading curriculum that conflicted at many points with their Biblical literalism. Invoking the Supreme Court's affirmation that public schools teach "fundamental values 'essential to a democratic society,'" the circuit court concluded that the reading material at issue promoted the important virtue of "civil tolerance," or the idea that "in a pluralistic society we must 'live and let live.'"¹⁶¹

It should not be denied that recognizing that civic component of the character education effort at issue in *Mozert v. Hawkins* offers a strong justification for the curriculum at issue. Some of the most thoughtful literature about civic education and civic virtue clearly suggests the importance of the capacity for critical reflection for democratic self government: "[d]emocratic self-government means citizen participation based on informed, *critical* reflection."¹⁶² Thus,

159. 827 F.2d 1058 (6th Cir. 1987).

160. Tenn. Code Ann. § 49-6-1007 (1996).

161. *Mozert*, 827 F.2d at 1068-69.

162. The Role of Civic Education, *supra* note 20, at 5 (quoting Benjamin Barber, *An Aristocracy of Everyone* (1992) (emphasis added)); see also Macedo, *supra* note

one prerequisite intellectual skill is critical thinking.¹⁶³ Therefore, it seems that a strong case can be made that critical thinking is a basic intellectual skill important to democratic self-government and that fostering such thinking is a proper part of government's formative project.

Yet more was at stake in the conflict over Tennessee's character education program than civic virtues. As the concurring opinion pointed out, the curriculum aimed to "prepare students for life in a complex, pluralistic society."¹⁶⁴ The spillover question seems unavoidable. The fear many liberals express is that of children instructed in their parents' way of life and not exposed, through public education, to any idea of alternative possibilities or of any role for independent judgment about how to live their own lives, as they mature.¹⁶⁵ As Macedo puts it: "Insulating children from diversity is less serious than keeping them from needed medicine, but awareness of alternative ways of life is a prerequisite not only of citizenship . . . but also of being able to make the most basic life choices."¹⁶⁶ Here, the appeal is clearly made that such education is needed for good citizenship, to foster virtues such as respect for the rights of others, toleration of reasonable pluralism, and mutual respect, *and* for a good life, to help children make "informed and independent decisions" about how they want to live their lives.¹⁶⁷ Other liberals (famously Galston) defend a right to live an unexamined life and reject the idea that liberalism's legitimate civic purposes extend to developing in children critical ("corrosive") reflection on ways of life to facilitate (what Amy Gutmann calls) "conscious social reproduction."¹⁶⁸ And other theorists argue that it is not without justification that fundamentalist parents perceive that teaching fundamentalist children the liberal ideal of respect for diversity directly threatens the survival of their culture.¹⁶⁹ In a fresh approach to this familiar dilemma, Emily Buss turns to the literature on identity development to argue that, if parents are denied a right to opt out of curriculum, they will remove

18, at 231-40 ("Children must at the very least be provided with the intellectual tools necessary to understand the world around them, formulate their own convictions and make their own way in life."); Gutmann, *supra* note 154, at 39-47 ("[E]ducation [should not be used] to restrict rational deliberation of competing conceptions of the good life and the good society.").

163. Macedo, *supra* note 18, at 239-40; The Role of Civic Education, *supra* note 20, at 5.

164. *Mozert*, 827 F.2d at 1071 (Kennedy, J., concurring).

165. See, e.g., Macedo, *supra* note 18, at 240 (learning about "the ethnic, racial, and religious diversity that constitutes our society" is to help children think as citizens and "not live in a mental straitjacket at odds with freedom").

166. *Id.* at 202.

167. *Id.* at 207, 232 (emphasis omitted).

168. Galston, *supra* note 23, at 254. On the ideal of "conscious social reproduction" as an aim of democratic education, see Gutmann, *supra* note 154, at 39. For a recent, critical evaluation of this ideal, see Salomone, *supra* note 50, at 197-215.

169. See Stolzenberg, *supra* note 158, at 611-33.

their children from common public schools, denying children valuable exposure to ideologically diverse peers that facilitates reflective identity formation rather than unquestioning adherence to parental and religious norms about identity.¹⁷⁰ But this interesting appeal to the literature on identity formation makes it quite clear that the concern over the reach of education applies to personal self-government, in the broadest sense, and not solely to democratic self-government.¹⁷¹

2. The Missing Dimension of Sex Equality

The extensive literature about conflicts between school curriculum and family imperatives tends to neglect the important issue of how schools may promote the virtue of sex equality.¹⁷² To be sure, the civic virtues of the capacity for critical reflection and of tolerance for diverse ways of life are very important for elaborating the content and domain of sex equality and to inculcating sex equality. Those capacities, if developed in children, might help to allow them to question the constraining effects of gender role expectations and of world view. The capacity for critical reflection is part of the familiar liberal idea of revisability, that persons can assess their commitments and connections and revise them. This liberal principle holds promise for fostering women's capacity for self-government. Cultivating the capacity for critical self-reflection might counter socialization into narrowly prescribed gender roles.

Moreover, the capacity for critical reflection, at least on some accounts, also enables persons to reflect on current institutional

170. Emily Buss, *The Adolescent's Stake in the Allocation of Educational Control Between Parent and State*, 67 U. Chi. L. Rev. 1233 (2000).

171. Indeed, my own look at the literature of identity formation suggests that Macedo's civic liberalism would be quite concerned that children not follow the path of *identity foreclosures*, or those who made identity commitments without a period of exploring, foreclosing possibility by bringing along unquestioned childhood ascriptions. For such adolescents, little or no value attaches to cultivating the capacity for critical reflection; the goal is to preserve tradition, not to question family attachments and religious beliefs. By contrast, those theorists who believe that critical self-reflection should be a core civic virtue that will spill over into all of life would likely wish adolescents to follow the path of *identity achievement*, that is, those who made identity commitments after a period of exploration, perhaps following a period of *moratorium*, in which they were in a period of crisis or exploration in an effort to discover the values or goals that fit them. For these categories, see Ruthellen Josselson, *The Theory of Identity Development and the Question of Intervention*, in *Interventions for Adolescent Identity Development* 12, 17-18 (Sally L. Archer ed., 1994) (using categories defined by James Marcia, based on Eric Erickson's work).

172. Some accounts that do discuss the issue include Gutmann, *supra* note 154, at 12-13, 113-15; Salomone, *supra* note 50, at 234-36. In this article, I am confining my discussion to the role of common public schools. I leave for elaboration elsewhere both a consideration of the question of vouchers for private schools and a consideration of how and to what extent private schools (including religious schools) should carry out the type of civic education I recommend here.

arrangements and to perceive gaps between ideals and practices. And here, for example, accounts of civic virtue that stress deference to authority or a general obedience and acceptance of legitimacy blunt the force of this dissident citizenship. Indeed, the story of the emergence of sex equality, as I argued in Part II, includes this history of dissident citizenship and reconstruction of national commitments to liberty and equality. But this capacity for reflection is not helpful without something to reflect upon—principles of anti-subordination and of free and equal citizenship. It is here that many accounts of civic virtue tend to fall short. It would be better to talk more forthrightly about sex equality and anti-subordination based on sex as a core component of civic virtue and political morality with relevance to democratic and personal self-government.

Part of what fundamentalist parents objected to in *Mozert v. Hawkins* was a curriculum that seemed to promote feminism and that challenged traditional gender roles by supposedly teaching “role reversal or role elimination, particularly biographical material about women who have been recognized for achievements outside their homes.”¹⁷³ And yet government’s interest in promoting sex equality played no role in the court’s analysis of the justifications for the curriculum. It is especially important, given that principles of toleration and associational liberty should preclude government from compelling families to eschew certain traditional gender roles, that schools be able to use curriculum to model sex equality to boys and girls in ways that might “eliminate differences in their basic liberties and opportunities.”¹⁷⁴

My approach to how government’s formative project should foster sex equality would be to examine places in the existing mission of schools in which that virtue should be featured. To offer a preliminary account, which I leave for elaboration elsewhere, this could include civic education, character education, family life and health education, and sex education.¹⁷⁵

173. *Mozert v. Hawkins*, 827 F.2d 1058, 1062 (6th Cir. 1987).

174. Amy Gutmann & Dennis Thompson, *Democracy and Disagreement* 63-67 (1996) (defending reading exercise at issue in *Mozert* picturing a boy cooking while a girl reads to him).

175. If schools properly seek to foster children’s capacities for personal self-government, as part of their mission of fostering success in life, then this raises difficult empirical and normative questions about when “interventions for identity,” i.e., ways in which governmental actors may seek to encourage optimal paths of development, may be appropriate. See generally Archer, *An Overview, in Interventions for Adolescent Identity Development* 3, 10 (Sally L. Archer ed., 1994) (calling for “continued development of interventions that could enrich” adolescent identity development). Some scholars on identity development, for example, argue that if certain paths of identity development allow an individual to make his or her way in the world more effectively, then such interventions are justified. Schools might, for example, consider how to help children negotiate difficult tasks of identity development when their home environments are not optimally suited to support such

Civic education should properly include fostering literacy about sex equality. As discussed in Part II, such education would include relevant federal constitutional law and civil rights statutes, as well as the history of dissident citizenship that took the form of abolitionism, early and second wave feminism, and the civil rights movement.¹⁷⁶ Given that equality is considered among the core national commitments and among the "values and principles basic to American constitutional democracy" in prominent accounts of the aims of civic education,¹⁷⁷ incorporating a more robust focus on sex equality would entail building on an existing framework. The lesson of women's exclusion from full citizenship and their gradual inclusion should be part of education about those "fundamental values necessary to the maintenance of a democratic political system."¹⁷⁸ The federal government would have an appropriate role in encouraging states to develop curriculum. States and localities also would be important sources of "core" values and norms about equality.¹⁷⁹ Undeniably, there are conflicts over the appropriate meaning and scope of such

tasks. Here, schools are engaging in a sort of intervention on behalf of fostering children's well-being, but one that doesn't directly regulate or intrude upon the family, and yet seeks to influence or, in some sense, have an effect on family dynamics. There are also many ways in which schools, through curriculum, can reinforce or even enhance families' roles in fostering children's capacities. Such curriculum could also seek to ameliorate the effects when families fail to offer an optimal environment for fostering children's capacities. This type of curriculum, generally, seems to be a promising and salutary way to carry out government's formative project. It also would find justification under the states' police power. If, as I argue, we should take seriously the idea that families properly serve an important institutional role of fostering children's capacities, then we should also think about the optimal circumstances within which families can do so. Of course, there are many prudential reasons for concern over state interventions, as well as constitutional restraints.

176. By contrast, even though women's reproductive rights are part of our constitutional norms of liberty and equality, Salomone would not include them in the common national core; because abortion is controversial and contested, education about it is a matter on which parents should exercise choice concerning curriculum and school. Salomone, *supra* note 50, at 228-66.

177. The Role of Civic Education, *supra* note 20.

178. *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 681 (1986) (quoting *Ambach v. Norwick*, 441 U.S. 68, 76-77 (1979)).

179. A more explicit focus upon sex equality might help to strengthen the type of "civic education" about basic rights and liberties that political liberalism seeks to give even to children whose parents wish to withdraw them from the world. Rawls, *Political Liberalism*, *supra* note 7, at 199-200. For example, Okin grants that such "civic education" "could be helpful in partially resolving the conflict between religious toleration and gender equality" because it "could to some extent counteract the isolation some religious groups now succeed in maintaining for their children." Okin, *Political Liberalism, Justice, and Gender*, *supra* note 103, at 32. But she is dubious whether this would suffice "to enable children whose primary environment taught them basic inequalities to question these inequalities deeply and successfully." *Id.* If the children live in a culture that reinforces these unequal social roles, then how will children develop the capacity to question those social roles? Okin, *Multiculturalism*, *supra* note 103, at 22.

norms as equality, and thus "teach[ing] the conflicts" is an important component of such education.¹⁸⁰

There would also be components of a formative project that are more properly of local concern and responsibility. For example, I believe that gender education, aimed at helping students recognize how sex role stereotypes shape ideas of womanhood and manhood and thus avoid the harms to self-government that such stereotyping causes (such as notions of male entitlement and female subservience), should be incorporated throughout the school curriculum.¹⁸¹ Schools should consider how to promote sex equality and foster gender education within such existing curricular offerings as courses as family life, health, and sex education.

Character education programs could be a promising framework within which to promote sex equality and to foster gender education, since they aim at teaching core values. At present, the literature on character education seems insufficiently attentive to sex equality and problems of constraining gender roles. Nonetheless, the values embraced in such programs, such as respect for others, justice, fairness, responsibility, caring, and civic virtue and citizenship, have obvious potential for incorporating a more explicit concern for sex equality.¹⁸² However, there is a tension in the literature on character education over whether its real aim is adherence to traditional values and uncritical deference to authority or encouragement of the sorts of moral capacities that allow for independent thought and critical reflection on traditional order.¹⁸³ If the former, it could leave problems of sex inequality and traditional gender roles unchallenged.

CONCLUSION

In this article, I have explored several puzzles about the domain of civic virtue. On the one hand, it seems that the proper domain of civic virtue pertains to democratic self-government, but, on the other, leading accounts of civic virtue suggest an unavoidable spillover from fostering virtues important to democratic life to fostering virtues

180. Massaro, *supra* note 51, at 140-52.

181. For an interesting example of such gender education, see Karen Greenlaw Bieri & Mindy Bingham, *A Working Curriculum for Gender Roles*, in *Interventions for Adolescent Identity Development* 141 (Sally L. Archer ed., 1994).

182. See *Aspen Declaration on Character Education*, in *Character Counts*, *supra* note 151 (listing core ethical values as: "respect, responsibility, trustworthiness, justice and fairness, caring, and civic virtue and citizenship").

183. For an introduction to this debate, see Alfie Kohn, *The Trouble With Character Education*, in *The Construction of Children's Character* 154 (Alex Molnar ed., 1997) (contending that character education aims at uncritical deference to authority rather than the better goal of fostering children's autonomy and ethical development); Charles S. White, *The Moral Dimension of Civic Education in the Elementary School: Habit or Reason?*, 179 J. Educ. 35 (1997) (summarizing the debate and urging a middle way, attentive to both approaches).

important to personal self-government, and vice versa. This problem of spillover, I have suggested, animates some of the most difficult problems concerning a second puzzle: the respective division of labor between institutions of government and of civil society in carrying out a formative project to foster democratic and personal self-government. A simple division of labor is elusive, as I have illustrated by examining constitutional jurisprudence—and contemporary social understandings—concerning the roles of families and schools in cultivating civic virtue. It is commonly claimed that families are, or should be, “seedbeds” of civic virtue. I have argued that, in a good society, families will play a role not only in cultivating civic virtue, but also in fostering other forms of virtue and contributing vitally to personal self-government. But they also are “seedbeds” in a much more foundational way: they provide necessary caregiving that nurtures human development and fosters human capital. Similarly, in a good society, schools properly aim to foster children’s capacities for democratic *and* personal self-government by preparing them for good citizenship and for good, successful lives.

In this article, I have also explored the domain of sex equality. I have argued that sex equality should be a core element in a conception of civic virtue in a good society, yet it receives insufficient attention in accounts of civic virtue. The content of this virtue of sex equality may be gleaned from federal constitutional and statutory norms, state and local anti-discrimination law, transformations in the law of domestic relations, contemporary principles of political morality, and (to some extent) shared cultural consensus. Sex equality, I contend, is not only a civic virtue—one that should guide how government treats female and male citizens and how citizens treat and regard each other—but also is (or should be) a virtue of every day life, a principle of political morality that should inform and regulate forms of personal self-government. Taking up the familiar feminist criticism of sex inequality within families, I have examined the puzzle of how families may serve as seedbeds of civic virtue if sex inequality exists within them. I have highlighted this problem by looking both at the fundamentalist family, and at the garden variety gendered division of household labor in many families. The difficult problem of “congruence” raises the issue of just how deeply that virtue should reach to structure everyday life and how competing political principles, constitutional rights, and prudential concerns may temper that reach.

I have offered a somewhat contradictory set of responses to this puzzle of congruence. First, I have taken issue with certain accounts of civic virtue that would imply that the matter of sex inequality within families is off limits because it is simply too contested by countering that, to a significant degree, norms of sex equality already shape family life and rule out the legally sanctioned, patriarchal family

of an earlier era. Thus, a simple schematic that would relegate sex equality to public life and exempt private life does not hold. Second, I have acknowledged that, even though sex equality is a core constitutional and public value, this value and its proper application are controversial, especially as it pertains to family self-governance and the socialization of children. I have suggested that there are significant constitutional principles and prudential considerations, such as a respect for pluralism and the value of civil society serving as a buffer against the state, that argue against government compelling families to organize themselves according to one uniform vision of what sex equality requires. At the same time, this does not rule out government carrying out a formative project to promote sex equality by a range of measures that fall short of coercion. Such forms of governmental action could encourage sex equality within families and also inculcate in children norms of sex equality in sites outside of the family. Schools, for example, may do this through civic education, character education, gender education, and through other curricula. Fostering sex equality is one important component of schools' proper formative project of fostering children's capacities for democratic and personal self-government.

Just as educating children for diversity by teaching them about different ways of life may help to foster civic virtue as well as personal self-government, so teaching about sex equality may help to counter messages learned in families and in other institutions of civil society. Inculcating sexism in children may not be as harmful as refusing them needed medication, but government has an appropriate interest in helping children develop their capacities free from the constraining force of sex-role stereotypes and of the legacy of male domination and female submission.