

Family, Religion and the Constitution: Penumbra of Sovereignty

by

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In the following essay, Professor Hunter uses the metaphor of family sovereignty to analyze three stages in the history of family law and the Constitution. Over time, the jurisprudential dynamic of family law has shifted from rejection of constitutional principles to incorporation of liberal equality norms to exporting the concept of private non-state sovereignty to the religious sector and free exercise law. In each stage, the hybrid public-private nature of how the legal system has constructed the family has been essential to the law's capacity to switch between shielding or disrupting internal hierarchies of power within the family without apparent inconsistency in legal doctrine. The liberalization of family law that characterized the second stage remains incomplete because gender and race continue to skew application of "constitutionalized" family law. But the policing function that emanated from traditional family law and was directed toward unconventional sexual and gender practices has substantially changed. It now is more likely to reside in the growing role of religious institutions as employers, health care providers, and managers of social welfare programs. Its regulatory power derives from judicial allowance of a "ministerial exception" to civil rights law rather than from deference to the metaphorical sovereignty of the traditional family.

Until legal liberalism took hold during the 1960s, most courts refused to acknowledge any overlap between family law and constitutional law, and the intersection of the two fields consisted of an almost null set. Despite active contestation by women's rights advocates, the legal system traditionally treated the white heteronormative family as a quasi-autonomous realm of interpersonal relationship issues.¹ Unless or until divorce

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¹ Hendrik A. Hartog, *Marital Exits and Marital Expectations in Nineteenth Century America*, 80 GEO. L.J. 95, 96-98, 129 (1991-1992); Sanford N. Katz, *Individual Rights and Family Relationships*, in SANFORD N. KATZ ET AL.,

threatened, marriage was regarded as best regulated by the (mostly) men in charge of their respective castles.

The legal premises of family structure and governance changed only modestly from the Civil War until after World War II. During this “long nineteenth century” of family law,² the most significant legal reforms occurred with the adoption of Married Women’s Property Acts, but these were often modest, unstable and applicable only to the minority of women who could assert independent claims to property.³ Occasional rulings from courts of equity, which could exercise greater discretion than law courts before the two systems were merged, also mitigated some of the harshest denials of women’s autonomy.⁴ The legal norm, however, consisted of variations on the rules of coverture.

Throughout this period, the concept of family sovereignty⁵ served as a narrative, trope, and metaphor that women’s rights groups doggedly, and for the most part futilely, sought to disrupt with themes of collective liberty, individual rights, and social welfare.⁶ The animating cultural theme of marriage and family was a discourse of domesticity in which the category “woman” was consigned to and celebrated for the role of homemaker. That understanding itself was stratified, with white women understood to represent the virtues associated with home and Black women forced into subordinate roles that made escape to equal citizenship virtually impossible, especially but not only in the South.⁷

CROSS CURRENTS: FAMILY LAW AND POLICY IN THE UNITED STATES AND ENGLAND 4 (2000) [hereinafter Katz, *Individual Rights*].

² Michael Grossberg, *How To Give the Present a Past?*, in KATZ ET AL., *supra* note 1, at 4 (quoting HENDRIK HARTOG, *MAN AND WIFE IN AMERICA: A HISTORY* (2000)).

³ NANCY F. COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* 53-54 (2000).

⁴ LEO KANOWITZ, *WOMEN AND THE LAW: THE UNFINISHED REVOLUTION* 38-40 (1969).

⁵ In this essay, I sometimes use the phrases “semi-sovereignty” or “family-style sovereignty” to indicate the same concept.

⁶ Nan D. Hunter, *In Search of Equality for Women: From Suffrage to Civil Rights*, 59 *DUQUESNE L. REV.* 125, 130-32 (2021); Nan D. Hunter, *Reconstructing Liberty, Equality, and Marriage: The Missing Nineteenth Amendment Argument*, 108 *GEO. L.J.* 73, 81-84, 86-88 (2020).

⁷ JACQUELINE JONES, *LABOR OF LOVE, LABOR OF SORROW: BLACK WOMEN, WORK AND THE FAMILY, FROM SLAVERY TO THE PRESENT* 135, 139, 142 (2d ed. 2010).

The social, political, and economic practices of male dominance merged into and fueled the practices associated with the primary institution of personal life.

Beneath the ideological coherence of traditional family law, however, lay a foundational paradox. The state creates the institution of marriage, but the law treated it not only as a derivative of the state but also as the paradigm of private sphere self-governance. Frames such as “the Constitution of the family”⁸ and doctrines such as family privacy⁹ spanned the history of U.S. family law and fed the presumption that at least some families functioned as a private non-state unit of governance. The judiciary, especially, intentionally and intensively constructed a legal fiction to which it attributed characteristics of autonomy and toward which it could and sometimes did exercise its option to defer.¹⁰

Sexuality and gender issues provided two triggers for when courts have activated their residual power to regulate family as a creature of public law. Usually, state institutions and family practices have operated in tandem as technologies of policing, but if private family life conduct crossed a line into sexual transgression, such as polygamy,¹¹ or gender equality, such as marital contracts that rearranged the internal balance of power,¹² courts intervened. Racialization of sexuality and gender discourse with respect to family has reliably increased the likelihood of official action.¹³ In this way, the law kept a floating lid on the degree of acceptable deviance.

The modern era of family law unfolded when courts began to enforce different values, specifically those individual rights

⁸ *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J., concurring).

⁹ Grossberg, *supra* note 2, at 20 (describing family privacy as a “family law continuity”). See *Troxel v. Granville*, 530 U.S. 57, 87 (2000) (Stevens, J., dissenting); *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 845 (1977).

¹⁰ MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA* 290 (1988).

¹¹ *Reynolds v. United States*, 98 U.S. 145 (1878).

¹² Jill Elaine Hasday, *The Canon of Family Law*, 57 *STAN. L. REV.* 825, 840-41 (2004).

¹³ See, e.g., KHIARA M. BRIDGES, *THE POVERTY OF PRIVACY RIGHTS* (2017) (analyzing race-biased application of family privacy principles).

that formed the core of Supreme Court jurisprudence on race and gender issues in roughly the period 1965 to 1990.¹⁴ Second wave feminists who were committed to effectuating the vision of Pauli Murray that the equality promise of the Fourteenth Amendment applied to discrimination based on sex led the change.¹⁵ Breakthroughs in courts, legislatures, and public culture partially democratized the law of marriage and liberal governance norms crept into the social meanings of marriage and the family. The high point to date of constitutionalization came in *Obergefell v. Hodges* in which the Supreme Court mandated recognition of marriage between same-sex couples, thus degendering the definition of marriage.¹⁶

Rights challenges in the context of marriage and family proliferated along a number of axes, not only those growing out of antidiscrimination principles.¹⁷ At the core of each was a contest between the tradition of family semi-sovereignty and the insistence on individualized rights. Cases raising the sharpest conflicts between individual rights and family authority now occupy the previously empty intersection of family law and constitutional law.

At that same location but so far unnoticed, a new channel has emerged through which the semi-sovereignty once found in family law has migrated – pushed and pulled by political and cultural shifts – into a receptive pocket of constitutional law itself: the Free Exercise Clause. The new free exercise sovereignty, and its underlying reasoning, appears poised to dominate the contemporary law of religious liberty.

What bridges family-based and faith-linked forms of sovereignty is not doctrinal or even philosophical, but functional: the utility of sovereignty-style arguments for those seeking to preserve the traditional policing of practices related to sexuality and gender. A series of Supreme Court decisions barred the state from criminalizing sexual relations between adults regardless of marriage, either directly or by blockage of access to contracep-

¹⁴ David D. Meyer, *The Constitutionalization of Family Law*, 42 FAM. L.Q. 529 (2008).

¹⁵ Serena Mayeri, *Constitutional Choices: Legal Feminism and the Historical Dynamics of Change*, 92 CALIF. L. REV. 755, 763-66 (2004).

¹⁶ *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

¹⁷ Grossberg, *supra* note 2, at 7-12.

tives.¹⁸ In many instances, however, the policies of faith groups regulate the same practices that states sought to prohibit in those cases. The expansion of semi-sovereignty to institutional religion preserves the same policing function through a different non-state actor mediated through the operation and enforcement of laws that regulate employment, health care, and social benefits.

In this essay, I examine the ramifications of the diminishment of semi-sovereignty in one field occurring simultaneously with its increase in another. Part I draws out the metaphor of family law sovereignty and briefly traces its resonance across legal culture. Part II amplifies the conventional story of constitutionalization to incorporate the role of non-judicial actors and to acknowledge the ways in which inequality, as well as equality, increased during this period. In Part III, I analyze how the vocabulary and frame of sovereignty have largely migrated out of family law in the wake of the constitutionalization process. In its place and assuming part of the traditional role of policing sexuality and gender played by the family and the state, the Supreme Court has generated a metaphorical sovereignty for religious institutions. This marks a new era in both family law and First Amendment law.

The same underlying political and social forces are driving both the diminishment of family sovereignty and the strengthening of free exercise sovereignty. Each of the two branches of law has its own line of doctrinal precedents, but the extent to which the resulting changes to the institutions of family and religion overlap, reinforce, and compensate for each other indicate that the convergence is more than mere happenstance. Whatever other factors are at play, rising and falling forms of sovereignty-style arguments reflect modifications and evolution of the forms of social control.

I. Family and Sovereignty

“Sovereignty” – in its philosophy, principles, and functions – operates as a metaphor as well as a legal principle. We think of political and legal sovereignty as an essential of nationhood and part of the intrinsic structure of governance, a concept that is

¹⁸ *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Lawrence v. Texas*, 539 U.S. 558 (2003).

implicit in the American constitutional charter. Sovereignty denotes the residual of public power and authority, subject to enumerated exceptions and shaped by its triple existence at federal, state, and tribal levels.

Standard political science references describe sovereignty as an attribute of nation states with three defining characteristics.¹⁹ First, the term connotes the highest level of political authority in an autonomous governance unit. Second, a sovereign state comes into existence when other nations recognize it as such. Third, sovereign entities contain internal hierarchies of power represented in classes of citizens/members, acknowledged or not.

Consider how these characteristics of sovereignty would apply if our starting point was the family rather than the nation. Sovereignty as associated with family is metaphorical and partial: families never literally functioned entirely outside the scope of public authority, but the judicial use of that metaphor greatly enhanced the political power of family sovereignty as a cultural signifier, i.e., as an underlying concept viewed as a normal or natural part of the social environment. It found legal traction in the creation of a shield for the internal status-based hierarchies within families. Courts that shielded those hierarchies from challenge implicitly recognized and accorded comity to families that embodied the white self-sufficient ideal form. In effect, the legal system treated the family as one component in the operations of subsidiarity, arguably the highest authority outside government.²⁰

Using the family rather than the state as the index institution clarifies that sovereignty is a construct produced by various mechanisms of the legal system.²¹ For family sovereignty, the ju-

¹⁹ Jens Bartelson, *Sovereignty in* ENCYCLOPEDIA OF POLITICAL THEORY 1308-10 (Mark Bevir, ed., 2d ed. 2010).

²⁰ See Allison Anna Tait, *The Return of Coverture*, 114 MICH. L. REV. FIRST IMPRESSIONS 99, 103-04 (2016) (describing the historical sources for Justice Kennedy's invocation of the theme of "marriage as a building block of government" in *Obergefell v. Hodges*).

²¹ Contemporary political theory no longer treats state sovereignty as a unitary concept but as a fragmented set of governance and regulatory policies and practices. See Scott Burris, et al., *Changes in Governance: A Cross-Disciplinary Review of Current Scholarship*, 41 AKRON L. REV. 1, 12-17 (2008); Alexandria Jayne Innis & Brent J. Steele, *Governmentality in Global Governance*, in DAVID LEVI-FEUR, THE OXFORD HANDBOOK OF GOVERNANCE 716 (2012). In

diciary, rather than the domain of international relations, was its venue of origin.²² Its most important consequence was ideological: the reinforcement and insulation of power within the family that both reflected and modeled gendered and racialized power outside the family. In this way, law helped constitute the social meaning of family and marriage as well as the metaphor of family sovereignty.

In his classic 1927 essay, legal realist Morris Cohen teased readers with this beginning statement: “Property and sovereignty, as every student knows, belong to entirely different branches of law. Sovereignty is a concept of political or public law and property belongs to civil or private law.”²³ He traced the distinction to Roman concepts of “*dominium*, the rule over things by the individual, and *imperium*, the rule over all individuals by the prince.”²⁴ Cohen’s point, however, was that the distinction between property and sovereignty evaporates when one “consider[s] the nature of private power with reference to the sovereign power of the state.”²⁵ In fact, “property [functions] as sovereign power compelling service and obedience. . . . [D]ominion . . . is also *imperium* over our fellow human beings.”²⁶ Private property, in other words, is also a creature of public, political law; it has no meaningful existence without the state’s enforcement.

Legal realists believed that the public law/private law distinction was illusory, itself an ideological product, the function of which was to enhance private ownership rights – exemplified in contract principles – against intervention by public authority in the form of state regulation.²⁷ Had he extended this insight, Cohen’s point would have powerfully reframed family law. To para-

this understanding of state power, families function as nodes of governmentality in a network that includes other non-state actors as well as agencies of the state. Michel Foucault, *Governmentality*, in *THE FOUCAULT EFFECT: STUDIES IN GOVERNMENTALITY* (Graham Burchell et al., ed.) 92-94 (1991).

²² GROSSBERG, *supra* note 10, at 294-96.

²³ Morris R. Cohen, *Property and Sovereignty*, 13 *CORNELL L.Q.* 8, 8 (1927).

²⁴ *Id.*

²⁵ *Id.* at 11.

²⁶ *Id.* at 12, 13.

²⁷ Joseph William Singer, *Legal Realism Now*, 76 *CALIF. L. REV.* 465, 483-85 (1988).

phrase, one might say that family and sovereignty belong to entirely different branches of law, but – as with property – family has also produced imperium over persons. Under coverture, the male head of household was treated as owner not only of material property but also of the services of other family members, both adults and children.

The oscillating and hybrid public-private nature of family law preserved roles derived from status categories rather than from the negotiated terms associated with private law.²⁸ As a semi-sovereign social institution, the family was baked in a deep if inconsistent discourse of privacy in one sense, but at the same time its members lacked the capacity to engage in independent contractual relations, the litmus test for private law. The result was a double bind – family law could be private to resist regulation that threatened traditional power relations but public to enable invalidation of actions by individuals who sought to change those traditional dynamics.

Legal realists believed that by enforcing the terms of private contracts, the legal system provided state power to facilitate private coercion,²⁹ but they failed to see how the state's unwillingness to intervene in marital relations produced coercion. What legal realists recognized as the coercive aspects of freedom to contract did not register for them in the context of family law.³⁰

²⁸ *Id.* at 480 (“Status became the sole subject of the law of persons, which ultimately became family law.”).

²⁹ *Id.* at 482.

³⁰ A massive study of family law by legal realists at Columbia Law School that was undertaken at approximately the same time as publication of Cohen's essay sought to integrate social science into legal practice but failed to analyze the public-private power dynamics underlying the field. The primary purpose of the study was to “uncover those hidden areas of the law which are affecting the family without our being aware of the fact; and to reclassify this material and the material now understood to be familial law in a way that will be more significant for the study of law as social forces actually shaping human relations and conduct.” *RESEARCH IN FAMILY LAW* 6-7 (Albert C. Jacobs & Robert C. Angell, eds. 1930). The *New York Times* described it as “an extensive study of the social and legal branches of family law.” *Columbia To Survey World Family Laws*, *N.Y. TIMES*, May 5, 1929. The final report amounted to a taxonomy of the intersecting fields.

It was not until several generations later that feminists called out the subordinating potential of family privacy arguments.³¹

As legal realists might have said, family sovereignty is what family sovereignty does.

II. Constitutionalization as Disestablishment

Constitutionalization eviscerated the power of sovereignty in family law.³² Driven by recognition of individual rights of liberty and equality, courts struck down multiple legal manifestations of imbalanced, gendered power relations inside as well as outside the family. When the center of gravity for autonomy shifted from the marital unit to individuals, one result was greater sexual freedom for women. The Supreme Court guaranteed women the legal capacity to independently *prevent* pregnancy when it struck down barriers on access to contraceptives for unmarried women,³³ while *Roe v. Wade*³⁴ and decisions that mitigated the impact of non-marriage on mothers and children³⁵ weakened the *consequences* of non-marital sex.³⁶

³¹ Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635, 657 (1983); Elizabeth M. Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973 (1991); Robin West, *Equality Theory, Marital Rape, and the Promise of the Fourteenth Amendment*, 42 FLA. L. REV. 45 (1990).

³² Aspects of family sovereignty continue to have a minor effect, but they cluster mostly in peripheral areas of the field, such as exceptions to general federal court jurisdiction or presumptions as to remedies. See *Ankebrandt v. Richards*, 504 U.S. 689 (1992); Zachary Potter, *Ridding the Family-Law Canon of the Relics of Coverture: The Due Process Right to Alternative Fee Arrangements in Divorce*, 131 YALE L.J. FORUM 295 (2021).

³³ *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

³⁴ 410 U.S. 113 (1973).

³⁵ See Susan Frelich Appleton, *Illegitimacy and Sex, Old and New*, 20 J. GENDER SOC. POL'Y. & L. 347 (2012) (analyzing illegitimacy laws in terms of the state's interest in regulating sex); Melissa Murray, *What's So New About the New Illegitimacy?*, 20 J. GENDER SOC. POL'Y. & L. 387, 391-99 (2012) (cautioning against reading invalidation of some penalties against children born outside of marriage as more freedom-enhancing than it was).

³⁶ Whatever the consequences of the reversal of *Roe* in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), it appears unlikely that the effects will include a reinvigoration of traditional marriage, given how the demographics of marriage have shifted in the last fifty years. See *infra* discussion in text at notes 55-56.

The greater weight given to individual rights contributed to the fragmentation of the previously hegemonic traditional family form, both in practice and as an ideal type presumed to serve as the model and basis for regulation.³⁷ Sociologist Andrew Cherlin described this process as the deinstitutionalization of marriage, meaning that a single form was giving way to a variety of family relationships and household formations.³⁸ Deinstitutionalization drove and was driven by broader changes in gender relations, women's employment and later childbearing, and has dominated the trends in family-related demographics ever since.³⁹ Alice Ristroph and Melissa Murray described the correlative legal phenomenon as the disestablishment of family, describing the resulting increases in institutional pluralism and competing sources of authority as comparable to the effects of the First Amendment's guarantee of a shield for multiple religious beliefs.⁴⁰

The story of how family law was reconceptualized often begins and ends with this run of famous individual rights cases, most involving liberty and equality protections under the Fourteenth Amendment. The focus on Supreme Court cases, however, creates a false impression that the judiciary was the sole agent of change. It ignores major interventions by legislatures, especially the rapid adoption of no-fault divorce beginning in the 1970s, the same period when the Supreme Court was most actively engaged.⁴¹ Using the concept of disestablishment rather than constitutionalization better captures the extent of the change, although neither "constitutionalization" or "disestablishment" should be treated as indicating that transformation has been complete; echoes of coverture remain.⁴² The term "dis-

³⁷ Writing for the Court twenty years ago in *Troxel v. Granville*, Justice O'Connor noted that the "demographic changes of the last century make it difficult to speak of an average American family." 530 U.S. at 63.

³⁸ Andrew J. Cherlin, *The Deinstitutionalization of Marriage*, 66 J. MARRIAGE & FAM. 848 (2004).

³⁹ ANDREW J. CHERLIN, *THE MARRIAGE-GO-ROUND: THE STATE OF MARRIAGE AND THE FAMILY IN AMERICA TODAY* (2010).

⁴⁰ Alice Ristroph & Melissa Murray, *Disestablishing the Family*, 119 YALE L.J. 1236, 1242-43 (2009-2010).

⁴¹ Denese Ashbaugh Vlosky & Pamela A. Monroe, *The Effective Dates of No-Fault Divorce Laws in the 50 States*, 51 FAM. RELATIONS 317 (2002).

⁴² JILL ELAINE HASDAY, *FAMILY LAW REIMAGINED* 99-132 (2014).

tablishment” also better illuminates at least three dimensions of the process that tend to be obscured by a narrative of progress focused on particular Supreme Court decisions.

First, the disestablishment of family law was an iterative process rather than a linear or narrow path through federal courts. Radiating effects beyond family law produced changes that have reconfigured the fields that are related to family law. In terms of women’s and men’s lived experience, if not doctrine, it is difficult to disaggregate the changes that occurred in family law from those in social welfare law and employment law. New eligibility rules for programs like Social Security family benefits⁴³ aligned with new criteria for child support⁴⁴ and alimony.⁴⁵ Congress took the lead in providing workplace rights that meshed with the greater level of control that women had achieved with respect to reproductive choice.⁴⁶ Cascading effects such as these increased the cumulative legal and social impact of forcing family law to incorporate constitutional norms.

Second, the disestablishment process produced greater inequality as well as greater equality. It reinforced selectivity and bias in systems for family governance. Rather than a single institution becoming more egalitarian, differentiations in marriage and family patterns hardened and were treated differently by the state. The skewing of state intervention efforts by the race or economic status of the family not only did not abate,⁴⁷ contrary to what a greater focus on liberty and equality might suggest, but ramped up as the administrative apparatus of the state grew in its power to regulate.⁴⁸ Public agencies and private service provid-

⁴³ *Weinberger v. Weisenfeld*, 420 U.S. 636 (1975).

⁴⁴ *Stanton v. Stanton*, 421 U.S. 7 (1975).

⁴⁵ *Orr v. Orr*, 440 U.S. 268 (1979).

⁴⁶ Congress enacted the Pregnancy Discrimination Act in 1978. 42 U.S.C.A. § 2000e(k). In 1993, the Family Medical Leave Act became law. 29 U.S.C. §§ 2601-2654.

⁴⁷ Selectivity long preceded constitutionalization. Jacobus tenBroek described the starkly different rules for middle-class and poor families as a system of bifurcated law. Jacobus tenBroek, *California’s Dual System of Family Law: Its Origin, Development, and Present Status Part I*, 16 STAN. L. REV. 257, 270-91 (1964), and *Part II*, 16 STAN. L. REV. 900 (1964). See also HASDAY, *supra* note 42, at 195-220.

⁴⁸ See, e.g., DOROTHY E. ROBERTS, *TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES—AND HOW ABOLITION CAN BUILD*

ers offered assistance that increased state power in the name of equalizing life conditions.⁴⁹

Third and paradoxically, the process of disestablishment through the expansion of constitutional law occurred at the same time as the opposite process - the shrinkage of the overall scope of public regulatory authority - became more common throughout law. The nature of marriage and family as fundamentally hybrid institutions, rather than primarily public or primarily private, confused understandings of whether constitutionalization led to family members becoming more regulated through the application of constitutional principles to family law or more autonomous from government enforcement of laws that imposed traditional morality rules. Although the political valence of most family law reforms was liberal feminism, conservative advocates of limited government dominated the broader political landscape and their arguments also shaped aspects of family policy.⁵⁰ Scholars plausibly described these changes either as constitutionalization or privatization, and both analyses were correct.⁵¹ Two broader, contradictory changes in American law were at play.

As marriage and family became less coherent as institutions and as multiple versions of those formations became increasingly

A SAFER WORLD (2022) (analysis of the child welfare system as operating to separate members of racial minority and low-income families); DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* (2009) (foster care). Despite greater legal and social attention to LGBTQ equality issues overall, agencies appear to be more likely to remove children from low-income, often Black birth mothers who are lesbian. Nancy D. Polikoff, *Neglected Lesbian Mothers*, 52 *FAM. L.Q.* 87 (2018).

⁴⁹ Countless numbers of divorced mothers have had difficulties collecting child support. Katharine T. Bartlett, *Feminism and Family Law*, 33 *FAM. L.Q.* 475, 480-81 (1999). In 2000, Congress criminalized the non-payment of child support when parent and child live in different states or one lives outside the United States. Child Support Recovery Act, 18 U.S.C. § 228. For analyses that question the value of prioritizing securing financial support from low-income fathers, see Leslie Joan Harris, *Questioning Child Support Enforcement Policy for Low-Income Families*, 45 *FAM. L.Q.* 157 (2011); Solangel Maldonado, *Deadbeat or Dead Broke: Redefining Child Support for Poor Fathers*, 39 *U.C. DAVIS L. REV.* 991 (2006).

⁵⁰ Anne L. Alstott, *Neoliberalism in U.S. Family Law: Negative Liberty and Laissez-Faire Markets in the Minimal State*, 77 *LAW & CONTEMP. PROBS.* 25 (2014).

⁵¹ Compare Meyer, *supra* note 14, with Jana B. Singer, *The Privatization of Family Law*, 1992 *WIS. L. REV.* 1443.

salient, the semi-sovereignty associated with family law weakened until what remains is family law exceptionalism. Exceptionalism consists of an assemblage of mostly common law principles providing that contract, property, and tort law should differ in the context of intra-family relations from their application in the market or other non-family zones.⁵² These remnants manifest less in an abstract, overarching principle than in a series of specific limitations, paradigmatically the different rules that govern the allocation of property at the time of divorce compared to the consequences for a standard breach of contract.

What constitutionalization dislodged was an ideology of marriage and family grounded in male dominance that once commanded the enforcement powers of the state. It was replaced by a discourse of individual rights in family law. As market ideology has grown in political and cultural power, the new family law liberalism incorporated a transactional as well as a normative rationale for preferring marriage to non-marital households.⁵³

III. Relocation and Resurrection

The shrinkage of family sovereignty from a metaphor for semi-autonomy to a series of limited exceptions from general blackletter rules is not the end of the story. Family-style sovereignty has shifted not only size and shape but also location. Its function of policing sexuality and gender through nurturing the strength of non-state actors has relocated to free exercise law.⁵⁴

Many overlaps connect the worlds of family and religious faith group. In the popular imagination, both function apart from the market and the state. Both signify group formations based on interpersonal bonding, cultural and philosophical affiliation, and a sense of shared commitments. Both families and congregations can provide comfort, meaning, and social support to their members. Culturally, both family and religion create zones for the

⁵² HASDAY, *supra* note 42, at 15-94; Janet Halley & Kerry Rittich, *Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism*, 58 AM. J. COMP. L. 753 (2010).

⁵³ *Obergefell*, 135 S. Ct. at 2601 (noting that the state privileges marital families in exchange for economic and other forms of support for the state).

⁵⁴ On the general concept of sovereignty in free exercise law, see B. Jessie Hill, *Kingdom Without End? The Inevitable Expansion of Religious Sovereignty Claims*, 20 LEWIS & CLARK L. REV. 1177 (2017).

greater valuation of statuses defined more by interpersonal relations than by organizational or merit-determined achievement. In many instances, both are linked to ethnicity, which reinforces both the affective strength of interpersonal ties and the capillaries of soft power. These similarities can facilitate their function of policing sexuality and gender-related behaviors considered to be transgressive or illicit.

Today, two major demographic changes are weakening the cultural authority of both the marital family⁵⁵ and institutional religion.⁵⁶ At the same time, however, the Supreme Court has undertaken a protectionist stance toward the interests of religious organizations.⁵⁷ The familism⁵⁸ of constitutional law has emerged in judicial interpretation of the Free Exercise Clause.

The Supreme Court has familized free exercise law most significantly by broadening the ministerial exception, a judge-made doctrine that insulates the authority of congregations and faiths to select which individuals shall serve as leaders or teachers of the faith.⁵⁹ The ministerial exception is grounded in the related

⁵⁵ Traditional family composition now characterizes a minority of households. Zachary Mettler, *Just 18% of American Households Are Families with Married Parents*, DAILY CITIZEN (Dec. 10, 2021), <https://daily-citizen.focusonthefamily.com/just-18-of-american-households-are-families-with-married-parents/>, citing *Census Bureau Releases New Estimates on America's Families and Living Arrangements*, CENSUS.GOV (Nov. 29, 2021), <https://www.census.gov/newsroom/press-releases/2021/families-and-living-arrangements.html> (reporting that only 18% of American families are traditional nuclear, opposite-sex married parents with children).

⁵⁶ Religiosity is a predictor of resistance to civil rights claims by LGBTQ individuals. Andrew L. Whitehead, *Sacred Rites and Civil Rights: Religion's Effects on Attitudes Toward Same-Sex Unions and the Perceived Causes of Homosexuality*, 91 SOC. SCI. Q. 63 (2010). However, the percentage of Americans who affiliate with any organized religion is declining. See Jeffrey M. Jones, *U.S. Church Membership Falls Below Majority for First Time*, GALLUP (Mar. 29, 2021), <https://news.gallup.com/poll/341963/church-membership-falls-below-majority-first-time.aspx>.

⁵⁷ Richard Schragger & Micah Schwartzman, *Against Religious Institutionalism*, 99 VA. L. REV. 917 (2013).

⁵⁸ Familism is a sociological term that denotes prioritizing the interests of the family or family-like structure over those of the individual. Archibaldo Silva & Belinda Campos, *Familism*, in THE BLACKWELL ENCYCLOPEDIA OF SOCIOLOGY (2019) (online).

⁵⁹ *Hosanna-Tabor Evangelical Lutheran Church v. EEOC*, 565 U.S. 171, 188-89 (2012).

doctrine of church autonomy that shields congregations from judicial intervention in disputes involving questions of faith, theological doctrine, and internal governance.⁶⁰ The exception often attaches to decisions arising from highly personalized relationships, not unlike the internal dynamics of traditional households. Family law sovereignty may be diminishing, but free exercise sovereignty is rapidly expanding.

In a series of cases beginning with *Hosanna-Tabor Evangelical Lutheran Church v. E.E.O.C.*,⁶¹ the Supreme Court has extended the scope of the ministerial exception far beyond clergy. The Court appears not to have settled yet on what will be the precise boundaries of this exception. In *Hosanna-Tabor*, the Court ruled that a teacher's claims under the Americans with Disabilities Act were barred because, although a lay person, she had been given the title of "minister" as a "called teacher," had received training in connection with that title, held herself out as a minister, and taught religion four days a week.⁶² In the more recent case of *Our Lady of Guadalupe School v. Morrissey-Berru*,⁶³ the Court ruled that the ministerial exception covered teachers whom the school classified as "lay teachers," who had received no training in teaching religion, and who had primarily secular duties.⁶⁴

For most workers, Title VII prohibits workplace discrimination based on pregnancy, sexual orientation, or gender identity.⁶⁵ Expanding the space in which employers can, because of the religious nature of the entity or the religious beliefs of business owners,⁶⁶ prefer or penalize workers based on LGBTQ status,

⁶⁰ *Id.* at 188-89. See *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952).

⁶¹ 565 U.S. 171 (2012).

⁶² *Id.* at 191-92.

⁶³ 140 S. Ct. 2049 (2020).

⁶⁴ *Id.* at 2066-69.

⁶⁵ *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020) (holding that discrimination based on sexual orientation or gender identity violates Title VII); *Newport News Shipbuilding and Dry Dock Co. v. E.E.O.C.*, 462 U.S. 669 (1983) (discrimination based on pregnancy prohibited by amendments to Title VII).

⁶⁶ Employees of entities, including commercial businesses, that are not affiliated with a religious organization may suffer third party damage based on the beliefs of the owners. In *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014), the Court found that a federal health insurance mandate requiring cov-

unmarried pregnancy and other practices believed to be contrary to Biblical prescriptions create a new pocket of legal space in which employers may fire, refuse to hire, or deny workplace health insurance benefits to the same individuals who are otherwise protected from differential treatment.

Judicial allowances for entities with a connection to religion to reward or penalize individuals based on factors related to sexuality and gender have arisen in the health and social services sector as well. Religious networks own and/or manage an increasing segment of hospital care facilities.⁶⁷ “Government-owned, -operated, and -administered institutions combine economic power with religious domination and then add the authority of the state.”⁶⁸ Similarly, religiously-affiliated adoption agencies have denied services to prospective LGBTQ adoptive parents.⁶⁹

The cumulative result is that individual workers, health care patients, and program beneficiaries can be made legally subject to sectarian rather than secular rules for access to essential mate-

erage of contraceptives may impose a substantial Free Exercise burden on the broad class of private business owners and thereby violate the Religious Freedom Restoration Act. The decision in *Hobby Lobby* forced the government to extend exemptions that the statute had provided for non-profit organizations to for-profit businesses depending on circumstances such as the sincere religious beliefs of the owners and the availability of an alternative mechanism under which the purpose of the law could be achieved without substantial burden on the free exercise rights of the business owners.

⁶⁷ Elizabeth B. Deutsch, *Expanding Conscience, Shrinking Care: The Crisis in Access to Reproductive Care and the Affordable Care Act’s Nondiscrimination Mandate*, 124 *YALE L.J.* 2470, 2484-88 (2015); Lois Uttley & Christine Khaikin, *Growth of Catholic Hospitals and Health Care Systems: 2016 Update of the Miscarriage of Medicine Report* (2016), <http://static1.1.sqspcdn.com/static/f/816571/27061007/1465224862580/M>.

⁶⁸ Elizabeth Sepper & James D. Nelson, *Government’s Religious Hospitals*, 109 *V.A. L. REV.* 61, 84 (2023).

⁶⁹ The Supreme Court has not definitively ruled on this issue as to all such agencies. In *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021), the Court ruled that the City was not justified in refusing to refer children in need of adoption to Catholic Social Services, which had a policy of not certifying same-sex couples as adoptive parents. The Court found that the fatal flaw in the City’s policy to be its willingness to grant exemptions from its requirements for “good cause” in other situations. The effect was to authorize the disqualification of marriage between same-sex couples as eligibility for a publicly-funded service that was open to married different-sex couples.

rial resources. Like the family sovereignty that existed prior to constitutionalization, religion-based exceptions to neutral principles of law eliminate the capacity of citizens to challenge control over important segments of daily life by religious precepts rather than by public values.

III. Conclusion

Whether by suspension or application, the doctrinal and social meaning of the Constitution has shaped the doctrine and social meaning of the family and of family law. Before the disestablishment of family law, rulings that upheld the authority of male household heads were cloaked in the metaphor of sovereignty. One effect of family-style sovereignty was to enhance the enforcement of traditional sexuality and gender norms. During this period, there was little interaction between constitutional law and family law.

Starting in roughly the last third of the twentieth century, courts and legislatures transformed the old model of family law by extending constitutional norms of equality and individual autonomy into family governance. This process reached its apogee when the Supreme Court mandated the degendering of the formal definition of marriage.

Today, the familism of free exercise law has superseded the constitutionalization of family law. Primarily through expansion of the ministerial exception, courts are inoculating the authority of religious institutions against challenges by women and sexual minorities seeking equal treatment in the labor force and the arena of health and social services. The result poses dangerous challenges to principles of equality and liberty.

