4-2010

Disestablishing the Family

Alice Ristroph
Brooklyn Law School, alice.ristroph@brooklaw.edu

Recommended Citation
119 Yale L. J. 1236 (2009-2010)

THE YALE LAW JOURNAL

ALICE RISTROPH & MELISSA MURRAY

Disestablishing the Family

ABSTRACT. This Feature explores what it would mean to disestablish the family. It examines a particular theory of religious disestablishment, one that emphasizes institutional pluralism and the importance of competing sources of authority, and argues that this model of church-state relationships has much to teach us about family-state relationships. Though substantial rights to what might be called "free exercise of the family" have been recognized in American constitutional doctrine, at present there is no parallel principle of familial disestablishment. The state is free to regulate families *qua* families, and to encourage or discourage certain kinds of familial relationships. This Feature suggests reasons to rethink these existing familial establishments. Disestablishment is a risky and unpredictable enterprise, but its risks may be the risks inherent in liberty.

AUTHORS. Alice Ristroph is Associate Professor of Law, Seton Hall University School of Law; Visiting Professor, Georgetown University Law Center (Fall 2009). Melissa Murray is Assistant Professor of Law, University of California, Berkeley, School of Law. For helpful comments and suggestions, we thank Kathy Abrams, KT Albiston, Michelle Wilde Anderson, Bobby Bartlett, Bob Berring, Eric Biber, Angela Carmella, Jesse Choper, Jack Coons, David Cruz, David Gamage, Steven Goldberg, Joshua Hill, Jameel Jaffer, Gillian Lester, Goodwin Liu, Marc Poirier, Camille Gear Rich, Russell Robinson, David Sklansky, Sarah Song, Talha Syed, Eric Talley, Nelson Tebbe, Molly Van Houweling, Leti Volpp, and Jennifer Urban, as well as workshop participants at Berkeley Law, Georgetown University Law Center, Lewis and Clark Law School, Southwestern Law School, University of Southern California Gould School of Law, and Vanderbilt University Law School. Yan Fang, Erica Franklin, James Goodloe, Cynthia Hsu, and Jacob Richards provided excellent research assistance. Finally, we thank Rebekah Perry and the staff of *The Yale Law Journal* for outstanding editorial assistance.

FEATURE CONTENTS

INTRODUCTION 1238

I. AN ANTITOTALITARIAN VIEW OF (RELIGIOUS) DISESTABLISHMENT 1241

II. FAMILIAL ESTABLISHMENT: ENCOUNTERS WITH THE CONSTITUTION 1251

A. The Marriage Model 1252

B. Thick Establishment 1259

C. Thin Establishment 1263

III. THE FAMILY-STATE RELATIONSHIP, REIMAGINED 1270

CONCLUSION 1278

INTRODUCTION

Congress shall make no law respecting an establishment of a family, or prohibiting the free exercise thereof. . . .

Nothing seems more churlish—or more likely to provoke reactionary critique—than an attack on the family. Plato's *Republic* famously proposed a system in which women and children would belong to all men in common,[1] and for that (and other reasons) the *Republic* is sometimes derided as an argument for a totalitarian regime.[2] Similarly, proposals to "abolish the family" in communist literature[3] have been the target of intense criticism by thinkers in the classical liberal tradition.[4] According to these critiques, totalitarian or communist regimes are bad because they dissolve families, which are self-evidently worthwhile. But one could also argue from the other direction: families are worthwhile in part because they make totalitarianism less likely. Families are institutions in which individuals find meaningful relationships, necessary nurturing and support, and a structure of authority independent of the state. Individuals with strong family ties are more likely to be capable of critical reflection about organized political institutions; individuals who are family members before they are citizens are less susceptible to organized public indoctrination.[5]

---

1. PLATO, THE REPUBLIC 457d (R.E. Allen trans., Yale Univ. Press 2006).

2. For a detailed critique of Plato's *Republic* as totalitarian, see KARL R. POPPER, 1 THE OPEN SOCIETY AND ITS ENEMIES: THE SPELL OF PLATO (5th ed. 1966). As Popper explains Plato's argument, "family loyalties might . . . become a possible source of disunion." *Id.* at 48. To ensure political stability and social harmony, "[n]o member of the ruling class must be able to identify his children, or his parents." *Id.*

3. KARL MARX & FREDERICK ENGELS, THE COMMUNIST MANIFESTO 21-22 (David McLellan ed., Oxford University Press 1992) (1848) (responding to arguments against the "infamous" communist proposal of abolishing the family).

4. *See, e.g.*, IRVING KRISTOL, NEOCONSERVATISM: THE AUTOBIOGRAPHY OF AN IDEA 143-44 (1995) (describing and critiquing "hostility" toward the family in communist and socialist thought).

5. The Greek drama *Antigone* is perhaps the most famous literary illustration of the competing claims of family and state. Antigone's brother Polyneices has been killed in the course of a revolt against Creon, King of Thebes, and Creon prohibits the burial of Polyneices as punishment for his disloyalty. Antigone buries Polyneices anyway: "Is he not my brother . . . ? *I* shall never desert him, never . . . . [Creon] has no right to keep me from my own." SOPHOCLES, THE THEBAN PLAYS 128 (E.F. Watling trans., Penguin Books 1974). Of course, Antigone believes her brother's burial is both a familial obligation and a religious one; for this reason, her story illustrates that religion as well as family might generate duties or values that clash with political obligations. For further discussion, see *infra* text accompanying notes 28-29.

Similar antitotalitarian arguments have been advanced in defense of the religion clauses in the United States Constitution.[6] We should resist the establishment of a single official church and instead embrace religious pluralism, the argument goes, because a populace with a diverse array of religious beliefs is less likely to enable or accept excessive concentrations of government power. Notably, this line of thought does not condition the constitutional protection of religion on the degree to which religion serves "state interests," as that phrase is typically used.[7] To the contrary, religion is recognized as an important dimension of human life that may well conflict with political obligations or the claims of public institutions. Indeed, to foster some tension between institutions is precisely the point: we seek to preserve separate sources of authority so no single authority gains too much power. Toward that end, the Constitution validates individual liberty interests directly by protecting the free exercise of religion. At the same time, it provides indirect, structural protection for individual religious liberty by insisting on the institutional separation of church and state.[8] The Establishment Clause may sometimes be thought to protect the state from the influence of religion, but it is equally or more concerned with protecting religion from the influence of the state. Indeed, one of the goals of the Establishment Clause is to preserve distinctive spheres of meaning, value, and authority for these two institutions. By this account, to disestablish religion is hardly to abolish it: disestablishment seeks to preserve the possibility of religious freedom along with other liberties.[9]

---

6. *See, e.g.*, Michael W. McConnell, *Establishment and Toleration in Edmund Burke's "Constitution of Freedom,"* 1995 SUP. CT. REV. 393, 425-26 [hereinafter McConnell, *Establishment and Toleration*]; Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1514-17 (1990) [hereinafter McConnell, *Origins and Historical Understanding*]; Ira C. Lupu & Robert W. Tuttle, *The Limits of Equal Liberty as a Theory of Religious Freedom*, 85 TEX. L. REV. 1247, 1271 (2007) (book review).

7. The antitotalitarian argument against an established church can be thought to serve state interests if we think a democratic government of limited powers has an interest in remaining a government of limited powers. But we do not usually associate the phrase "state interests" with an interest in limitations on state power.

8. *See, e.g.*, Steven H. Shiffrin, *The Pluralistic Foundations of the Religion Clauses*, 90 CORNELL L. REV. 9, 37 (2004) ("A longstanding claim about the relationship between the Free Exercise Clause and the Establishment Clause is that the Free Exercise Clause protects liberty directly and the Establishment Clause protects liberty indirectly.").

9. This last point is crucial. On the antitotalitarian argument, the Establishment Clause is not simply an enforcement mechanism for the Free Exercise Clause. Separate spheres of authority are important not only because separation protects religious liberty, but also

This antitotalitarian view of church-state relations has much to teach us about family-state relations. This Feature explores what it would mean to disestablish the family—how a principle of familial nonestablishment could ensure familial and individual freedom.[10] In many ways, the rationales for the Free Exercise and (non-) Establishment Clauses of the First Amendment support parallel principles of free exercise and nonestablishment for the family. Indeed, substantial rights to what we call "free exercise of the family"—rights to marry and to divorce,[11] to procreate or avoid procreation,[12] to direct the education of one's children,[13] and to cohabit with relatives[14]—have already been recognized in American constitutional doctrine.[15] But there is not, at present, any parallel principle of nonestablishment. Legislators and other policymakers are free to regulate families *qua* families, and to encourage or discourage certain kinds of familial relationships. Legal privileges or burdens are often contingent on an individual's family status. One of the most obvious ways in which states—and the federal government—have established a particular vision of the family is by limiting civil marriage to heterosexual couples.[16] But there are other forms of familial establishment. Just as religious establishment often assumed the form of criminal prosecutions for nonconformance, familial

---

because competition among authoritative institutions helps maintain limitations on government power in areas other than religion.

10. The terms "nonestablishment" and "disestablishment" are used interchangeably in discussions of the Establishment Clause. We use the verb "disestablish" to refer to efforts to untangle existing establishments, and either "disestablishment" or "nonestablishment" to refer to an ongoing norm against establishment. On what constitutes an "establishment," of religion or of a family, see *infra* text accompanying notes 26-27.

11. *See* Zablocki v. Redhail, 434 U.S. 374 (1978); Boddie v. Connecticut, 401 U.S. 371 (1971); Loving v. Virginia, 388 U.S. 1 (1967).

12. *See* Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965).

13. *See* Wisconsin v. Yoder, 406 U.S. 205 (1972); Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

14. *See* Moore v. City of East Cleveland, 431 U.S. 494 (1977).

15. We discuss the "free exercise of the family" in more detail in Part II.

16. To date, only a handful of U.S. jurisdictions permit same-sex marriage. *See* Melissa Murray, *Strange Bedfellows: Criminal Law, Family Law, and the Legal Construction of Intimate Life*, 94 IOWA L. REV. 1253, 1265 n.45 (2009) (discussing the emergence of same-sex marriage in a minority of states). Most states do not permit same-sex marriages. Indeed, many U.S. jurisdictions maintain mini-Defense of Marriage Acts that explicitly restrict civil marriage to opposite-sex couples. *See* Andrew Koppelman, *The Difference the Mini-DOMAs Make*, 38 LOY. U. CHI. L.J. 265, 265-66 (2007) (describing the enactment of mini-DOMAs in a number of U.S. jurisdictions). Similarly, the federal Defense of Marriage Act defines marriage as a heterosexual union for purposes of federal law. *See* 1 U.S.C. § 7 (2006); 28 U.S.C. § 1738(c).

establishment sometimes has occurred through the force of the criminal law.[17] In this Feature, we give particular attention to instances in which criminal laws are used to enforce a particular model of the family. Ultimately, our focus is the use of state power to encourage or discourage particular visions of the family, and criminal sanctions are often, but not always, the most intrusive form of such power.

We begin in Part I by elaborating the antitotalitarian argument for a principle of disestablishment of religion. In Part II, we consider the extent to which a particular model of the family has been established in American law. We examine a number of constitutional challenges to state regulations of families to ascertain the outer limits of the power of the state over the family. As an established church seeks to ensure political stability and production of the right kind of citizen through a coincidence of civic and ecclesiastical authority, so American law has sought to guarantee political stability and a model citizenry through regulation of the family. We emphasize, however, that establishment is not an all-or-nothing matter. In several ways, the recognition of rights of free exercise of the family has already led toward disestablishment. Other incidents of familial establishment remain in force, however, and in Part III, we offer some initial reflections on the possibilities, promises, and perils of further familial disestablishment. We do so by means of comparison: we contrast the antitotalitarianism of familial disestablishment with the strongly statist proposals of recent scholarship by Dan Markel, Jennifer Collins, and Ethan Leib.[18]

I. AN ANTITOTALITARIAN VIEW OF (RELIGIOUS) DISESTABLISHMENT

A constitutional provision with disputed interpretations and muddled doctrine is no rarity. But even as constitutional disputes go, those concerning the Establishment Clause of the First Amendment are especially pronounced, and doctrinal clarity is elusive. In this Feature, we will neither survey the disputes nor attempt to resolve them. Instead, we examine a particular understanding of the purpose of disestablishment of religion and consider its implications for family-state relationships. This theory of religious disestablishment has occasionally surfaced in judicial opinions and scholarly

17. Murray, *supra* note 16, at 1264-70 (discussing criminal law's role in articulating and enforcing the normative parameters of intimate life).

18. DAN MARKEL, JENNIFER M. COLLINS & ETHAN J. LEIB, PRIVILEGE OR PUNISH: CRIMINAL JUSTICE AND THE CHALLENGE OF FAMILY TIES (2009).

writing, and we will note some of those appearances below. But we do not seek to unify doctrine, to identify the one true meaning of constitutional text, or to show the historical pedigree of this view of disestablishment.[19] Ours is an argument of principle and political theory, and caveats duly issued, we proceed to it.

The particular defense of disestablishment of interest here is deeply grounded in principles of limited government.[20] It stems from the idea that in a liberal democracy, not only power but also limitations on power require popular support. It seems obvious enough that a democratic government cannot survive unless it is accepted by a substantial portion of the populace. Too rarely noticed, however, is the fact that restrictions on government power also depend on public opinion. Without popular support for principles of limited government, the ruling majority may be tempted to override inconvenient limitations. Even the existence of a written constitution is not alone sufficient to forestall what Alexis de Tocqueville called "the tyranny of the majority."[21] Constitutions require interpretation and enforcement, and majority sentiment shapes both interpretation and enforcement to a considerable degree.[22]

In order to preserve the limits in a system of limited government, citizens must be able to view political authority with skepticism and to reflect critically on the ruling authorities. But as a matter of human psychology, skepticism and

---

19. Commentators disagree on whether a single principle can explain the Establishment Clause; most say no. *See, e.g.*, Bd. of Educ. v. Grumet, 512 U.S. 687, 718 (1994) (O'Connor, J., concurring in part and concurring in the judgment) (expressing doubt that there could be one "Grand Unified Theory" of the Establishment Clause). Noah Feldman argues that as a matter of intellectual history, a single theory—Lockean liberty of conscience—unified the various arguments made in favor of disestablishment in colonial and post-revolutionary America. *See* Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 372-98 (2002) (identifying, and arguing against, scholarship that identifies multiple theories of establishment).

20. Limited government is a fairly capacious concept, since there is a considerable distance between no state and a total state. *See* Alice Ristroph, *Proportionality as a Principle of Limited Government*, 55 DUKE L.J. 263, 285-86 (2005). For purposes of this Feature, we need not specify the precise structure or scope of government power; we imagine disestablishment as a principle for a world in which there is some ruling authority but not an absolute ruler.

21. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 250 (J.P. Mayer ed., George Lawrence trans., Harper Perennial 1988) (1835) (discussing the "tyranny of the majority").

22. *See* LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004); Larry Alexander & Frederick Schauer, *Rules of Recognition, Constitutional Controversies, and the Dizzying Dependence of Law on Acceptance*, *in* THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION 175 (Matthew D. Adler & Kenneth Einar Himma eds., 2009).

critical reflection are neither innate nor inevitable. Humans learn to think in the context of institutions, and a person exposed to only one institution will have a difficult time imagining any other.[23] So a democratic, limited government requires a plurality of authoritative institutions. According to Tocqueville, the success of American democracy was linked to the proliferation of subnational associations and institutions: churches, political parties, business organizations, and myriad civic associations.[24] Individuals with affiliations to multiple associations will be exposed to competing ideologies and competing accounts of justice and value.[25] Such persons will be more likely to reflect on the various institutional claims and to criticize or even reject certain claims of authority. To be sure, institutional pluralism provides no hard guarantee of such critical distance; the institutions that grow independently of the state may yet end up endorsing and reinforcing the state's own authority. (In practice, some religious traditions in the United States do just this.) So institutional pluralism provides no guarantees of skeptical, critical citizens, but it provides better odds than institutional consolidation. In short, persons for whom government is not the only imaginable source of authority are more likely to endorse the idea of limited government, and they are more likely to engage in the practices of critique that make limited government a reality.

Religious establishment, on this account, consists of a coincidence of political and ecclesiastical authority that crowds out or suppresses competing frameworks or ideologies. Disestablishment resists that coincidence of authority, recognizing religion as a potentially powerful source of extrapolitical

---

23. *Cf.* MARY DOUGLAS, HOW INSTITUTIONS THINK 92 (1986) (arguing that given the extent to which institutions shape individual thought, "the hope of intellectual independence is to resist, and the necessary first step in resistance is to discover how the institutional grip is laid upon our mind").

24. *See, e.g.*, TOCQUEVILLE, *supra* note 21, at 68-70 (discussing the independence of New England townships); *id.* at 174-79 (discussing political parties); *id.* at 189-95 (discussing political associations as guarantees against tyranny); *id.* at 513-17 (noting the democratic benefits of civil associations not formed for explicitly political purposes).

25. Such individuals will also be exposed to competing understandings of law. Robert Cover famously argued that individuals inhabit different "normative worlds," and those worlds produce different and often irreconcilable claims about the content and meaning of the law. Robert M. Cover, *The Supreme Court 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 11-19 (1983). Cover called the production of these competing claims *jurisgenesis*, and courts' decisions to recognize one claim at the expense of another *jurispathic*. The antitotalitarian argument could be understood as an attempt to embrace, rather than forestall, the "multiplicity of meaning" that jurisgeneration produces. *See id.* at 16. Stephen Carter develops a similar argument with specific reference to religious communities and their antitotalitarian potential. *See* STEPHEN L. CARTER, THE DISSENT OF THE GOVERNED: A MEDITATION ON LAW, RELIGION, AND LOYALTY 27-35, 47-48, 53-54 (1998).

authority. Once again, we emphasize that religious authority is not inevitably extrapolitical. In many states past and present, religious authority and political authority coincide. The difference between establishment and disestablishment turns on whether these sources of authority are intertwined or distinct—whether it is possible to disentangle what is God's and what is Caesar's.[26] If there are obligations, values, or principles that are God's and not Caesar's, then there are limits to Caesar's power.[27]

Or Creon's. Sophocles's *Antigone* illustrates the clash of political obligations with those that are both religious and familial. Importantly, the play illustrates that religious institutions are not necessarily more likely to cultivate dissent, or more respectful of individual autonomy, than the state; as we just noted, institutional pluralism provides no guarantees. But amid competing authoritative claims, the ability to conceptualize limited government, and perhaps the capacity for individual autonomy, has a better chance to develop. When Antigone learns of Creon's order that her brother Polyneices, traitor to the kingdom of Thebes, must not be buried, she first speaks in the language of duty. She insists she will bury Polyneices in spite of the order, because "the holiest laws of heaven" require it: "I know my duty, where true duty lies."[28] After the burial, however, when Antigone has been captured and is facing punishment, she speaks not of duty but of choice. She recognizes disagreement about whether Creon's law or the law of the heavens is supreme, and she takes pride in her disobedience as an act of agency.[29]

The principle of disestablishment under consideration here is not only a substantive limitation on government power—government may not establish a church—but also an attempt to ensure that this and other substantive limitations on state power will survive over the long term. In other words, the

---

26. *See Matthew* 22:21.

27. William Galston makes similar arguments, also with reference to God, Caesar, and Antigone. *See* WILLIAM A. GALSTON, LIBERAL PLURALISM 93-103 (2002); William A. Galston, *The Idea of Political Pluralism*, *in* NOMOS XLIX: MORAL UNIVERSALISM AND PLURALISM 95 (Henry S. Richardson & Melissa S. Williams eds., 2009) [hereinafter Galston, *The Idea of Political Pluralism*]. Galston decries "civic totalism," which seems to be the idea that "a demos that observes the norms of democratic decision-making may do what it wants," including regulating nonstate institutions to serve public ends. Galston, *The Idea of Political Pluralism*, *supra*, at 103-04. The worry about civic totalism is akin to a worry about totalitarianism.

28. SOPHOCLES, *supra* note 5, at 128-29.

29. Antigone's sister, Ismene, had declined to help Antigone with the burial ("I cannot act Against the State. I am not strong enough."). *Id.* at 128. After the crime, Ismene wishes to share Antigone's punishment, but Antigone coldly refuses: "You chose; life was your choice, when mine was death. . . . Your way seemed right to some, to others mine." *Id.* at 141.

antitotalitarian principle[30] is consistent with a robust right of free exercise, but it is not *only* an enforcement mechanism to protect free exercise. Its aims are broader: it seeks to encourage the capacity to question the scope of state power.

Contours of the argument, from a believer's perspective, can be found in James Madison's *Memorial and Remonstrance*. "It is the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him. This duty is precedent, both in order of time and in degree of obligation, to the claims of Civil Society."[31] In other words, religious duties—which each man must determine for himself—set necessary limits to the state's power. Madison went on to argue that in historical fact, ecclesiastical establishments led to consolidations of power that "in no instance have . . . been . . . the guardians of the liberties of the people."[32] Consequently, even for those who belong to the church that the state would establish, "it is proper to take alarm at the first experiment on our liberties."[33] As appropriate for his time, Madison spoke of "tyranny" rather than totalitarianism. But his concern was that the union of civil and ecclesiastical authority would eventually lead to a government of absolute power.

---

30. This terminology is somewhat anachronistic, because, as our discussion of Madison's 1785 text makes clear, this argument for institutional separation precedes the term "totalitarianism." Mussolini introduced the latter term in the 1920s, and the word quickly became associated with a form of government that seeks total control over its subjects, including control of speech, belief, and opinion. *See* BENITO MUSSOLINI, FASCISM: DOCTRINE AND INSTITUTIONS 11 (1935) ("The Fascist conception of the State is all-embracing; outside of it no human or spiritual values can exist, much less have value. Thus understood, Fascism is totalitarian, and the Fascist State—a synthesis and a unit inclusive of all values—interprets, develops, and potentiates the whole life of a people."). Carl Schmitt developed similar arguments in support of the Third Reich. *See* Carl Schmitt, *The Way to the Total State*, *in* FOUR ARTICLES 1931-1938 (Simona Draghici trans. & ed., 1999). The critical analysis that introduced the term more widely is HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM (1951). Today, the adjective "antitotalitarian" invokes efforts to forestall expansive government control of private conduct and even thought and belief. *See, e.g.*, Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 784-87 (1989) (describing privacy rights as antitotalitarian). Accordingly, we use the word to describe our account of nonestablishment, notwithstanding the fact that the adjective is of more recent vintage than the underlying argument.

31. JAMES MADISON, *Memorial and Remonstrance Against Religious Assessments*, *in* 8 THE PAPERS OF JAMES MADISON 295, 299 (Robert A. Rutland et al. eds., 1973) (1785).

32. *Id.* at 302.

33. *Id.* at 300. The strong antitotalitarian argument, which is not necessarily one spelled out by Madison in *Memorial and Remonstrance*, is that persons exposed to plural authoritative institutions are more likely to take alarm at the first experiment on their liberties.

But Madison is hardly the only inspiration for the antitotalitarian argument.[34] In fact, in modern constitutional scholarship, one may find antitotalitarian arguments for religious disestablishment in the work of Michael McConnell, who has suggested that Madison's *Memorial and Remonstrance* may have loomed too large in First Amendment jurisprudence.[35] In his extensive scholarship on religion and the Constitution, McConnell has sought to combine Madisonian insights with lessons from Edmund Burke, who saw religious toleration and an established church as compatible.[36] McConnell directs his criticism toward what he characterizes as "the true opposite" of both Madison and Burke: "the totalitarian system first introduced in France, where the state . . . is the highest authority and both established church and individual conscience are subjugated to it."[37] McConnell's reference to totalitarianism does not correspond exactly to the argument we have sketched above, for he argues that "the recognition of an authority higher than the state" is "central to the constraint of governmental power."[38] This formulation may imply that religious belief is itself a sine qua non of limited government, and we are not sure whether that is true as an empirical matter. But we are interested in the argument that alternative, extrapolitical sources of authority of some form are key to the survival of limited government, and it is certainly true that religion has often provided those external sources of authority.[39]

Glimmers of antitotalitarian principles have sometimes appeared in U.S. constitutional decisions, especially those that focus on the prospect of religious coercion in education.[40] If the totalitarian danger is a fear that the state will be able to manipulate and direct thought, then we should expect particular

---

34. Nor, as we discuss below, is the argument one that would persuade only the religious.

35. *See* Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2107 (2003) (arguing that the Court has focused too much on "one event in one State" to interpret the Establishment Clause, and referring to the dispute in Virginia that prompted Madison's *Memorial and Remonstrance*).

36. McConnell, *Establishment and Toleration*, *supra* note 6, at 393-96.

37. *Id.* at 426.

38. *Id.*; *see also* Michael W. McConnell, *Origins and Historical Understanding*, *supra* note 6, at 1516 (1990) ("If government admits that God (whomever that may be) is sovereign, then it also admits that its claims on the loyalty and obedience of the citizens is partial and instrumental. Even the mighty democratic will of the people is, in principle, subordinate to the commands of God, as heard and understood in the individual conscience. In such a nation, with such a commitment, totalitarian tyranny is a philosophical impossibility.").

39. *See also* Lupu & Tuttle, *supra* note 6, at 1271 (explaining that "religious freedom finds its basic justification in liberalism's opposition to totalitarian pretensions of civil government").

40. *See infra* Part III.

vigilance in venues where impressionable minds are instructed. And in fact, the Supreme Court has expressed concern for "laws that cast a pall of orthodoxy over the classroom."[41] Justice Jackson's opinion in *West Virginia State Board of Education v. Barnette* probably constitutes the Court's most explicit development of this principle.[42] Striking down a mandatory flag salute in public schools in the midst of World War II, Justice Jackson contrasted the First Amendment's promise of limited government and ideological diversity with "the fast failing efforts of our present totalitarian enemies."[43] To be sure, *Barnette* was based on broad First Amendment principles rather than the specific religion clauses.[44] But similar values could explain the Establishment Clause. Relying on that provision explicitly, the Court repeatedly has struck down laws providing for prayer in public school classrooms or at certain official school events.[45] In one such case, *Lee v. Weisman*, the Court directly acknowledged the political importance of extrapolitical values: "an ethic and a morality which transcend human invention" might advance "the sense of

---

41. Epperson v. Arkansas, 393 U.S. 97, 105 (1968) (quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)) (finding state prohibition of teaching evolution to be motivated by religious belief and to violate the First Amendment).

42. 319 U.S. 624 (1943); *cf.* Galston, *The Idea of Political Pluralism*, *supra* note 27, at 113-16 (discussing *Barnette* as alternative to civic totalism).

43. *Barnette*, 319 U.S. at 641. The antitotalitarian principle prohibits government from taking certain steps to shore up its own authority. Justice Jackson was optimistic that this prohibition bore little danger for the United States, but one can also understand the antitotalitarian argument as a claim that democracy entails certain risks.

> We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the State as those we deal with here, the price is not too great. But freedom to differ is not limited to things that do not matter much.

Id. at 641-42; *see also infra* text accompanying note 189 (discussing the implications of Justice Jackson's *Barnette* opinion). Robert Tsai has argued that "the anti-totalitarian enterprise . . . utterly dominated free speech mythos" after World War II, but he notes that this enterprise often led the Supreme Court to uphold restrictions on allegedly dangerous or inflammatory speech. Robert L. Tsai, *Fire, Metaphor, and Constitutional Myth-Making*, 93 GEO. L.J. 181, 205 (2004).

44. *Barnette*, 319 U.S. at 634-35 ("Nor does the issue as we see it turn on one's possession of particular religious views . . . . While religion supplies appellees' motive for . . . making the issue in this case, many citizens who do not share these religious views hold such a compulsory rite to infringe constitutional liberty of the individual.").

45. Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000); Lee v. Weisman, 505 U.S. 577 (1992); Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962).

community and purpose sought by all decent societies."[46] But, the Court said, "though the First Amendment does not allow the government to stifle prayers which aspire to these ends, neither does it permit the government to undertake that task for itself."[47]

This language is worth close consideration, for it may help distinguish the antitotalitarian argument from other claims of the political value of religion. Defenders of establishment and disestablishment alike have argued that religion (Christianity in particular) helps instill certain qualities needed for republican self-government, such as discipline, temperance, and respect for others.[48] In claiming that religion might foster a sense of community and purpose, the *Lee* Court seemed to make a similar suggestion. The antitotalitarian argument of interest here focuses on a somewhat different ability, no less critical to self-government. As discussed above, this is the ability to view one's own rulers skeptically and critically. It is the capacity to stand at a distance from the state, to judge it, and to demand limitations on its power. Obviously, this capacity may not foster political stability and indeed may endanger it. But as Justice Jackson suggested in *Barnette*, the risks posed by dissenters are probably quite low, and in any event, constitutional democracy involves some inherent risks.[49] To have a limited government means that the government will not be permitted to do anything and everything it can to forestall political unrest or instability. Unlike the broad claim that religious citizens will be virtuous and loyal (a claim that does not necessarily imply disestablishment), the antitotalitarian argument contemplates the possibility that a religious citizen will be contrarian—or even illiberal.

The preceding paragraphs consider a political and nonsectarian argument for religious disestablishment. In the many disputes over the meaning of the Establishment Clause, complaints are often raised that various interpretations of the clause are themselves predicated upon religious faith, or else hostile to such faith. It is worth noting, then, that the antitotalitarian argument sketched here presumes neither belief nor nonbelief. It emphasizes the value of religion as an extrapolitical source of authority. A person of faith might appreciate this argument for disestablishment, just as a nonbeliever might appreciate the value

46. *Lee*, 505 U.S. at 589.

47. *Id.*

48. McConnell, *supra* note 35, at 2193-96.

49. *Barnette*, 319 U.S. at 641-42.

of distinct authoritative institutions.[50] By many historical accounts, America came to disestablishment somewhat circuitously; church and state were separated less as a matter of principle and more as an insurance policy for risk-averse believers. Clashes between Christian sects, and especially between Protestants and a rapidly growing Catholic community, led many believers to prefer disestablishment over the risk that their religious adversaries would gain majority control and establish an unwelcome church.[51] This explanation of religious disestablishment in America only illustrates the antitotalitarian argument: individuals exposed to plural claims of authority and value are more likely to appreciate, and demand, limits on government power.[52]

The antitotalitarian principle under consideration here is not necessarily specific to religious institutions, and in the remainder of this Feature we will explore its application to the family. Before doing so, it is worth reiterating that we do not claim that antitotalitarianism is the only or even the predominant paradigm through which to understand religious disestablishment. Many scholars find a principle of equality, and a corresponding requirement of state neutrality toward religion, to be the central value of the religion clauses. Not surprisingly, then, other works that apply the language of disestablishment to nonreligious contexts are often calls for a principle of state neutrality.[53] While principles of equality and neutrality capture important dimensions of nonestablishment, they do not necessarily focus our attention on institutions,

---

50. *Cf.* McConnell, *supra* note 35, at 2205 (noting the "remarkable" fact that "the most prominent voices for disestablishment" in early American history often relied on explicitly religious arguments).

51. *See* Michael W. McConnell, *Education Disestablishment: Why Democratic Values Are Ill-Served by Democratic Control of Schooling*, *in* NOMOS XLIII: MORAL AND POLITICAL EDUCATION 87, 103-04 (Stephen Macedo & Yael Tamir eds., 2002).

52. In other words, it may be the case that the antitotalitarian rationale for disestablishment was one that early Americans performed unselfconsciously rather than theorized in extensive detail.

53. *See* David B. Cruz, *Disestablishing Sex and Gender*, 90 CAL. L. REV. 997 (2002); Andrew Koppelman, *Sexual and Religious Pluralism*, *in* SEXUAL ORIENTATION & HUMAN RIGHTS IN AMERICAN RELIGIOUS DISCOURSE 215 (Saul M. Olyan & Martha C. Nussbaum eds., 1998); Michael W. McConnell, *What Would It Mean to Have a "First Amendment" for Sexual Orientation?*, *in* SEXUAL ORIENTATION & HUMAN RIGHTS IN AMERICAN RELIGIOUS DISCOURSE 234 (Saul M. Olyan & Martha C. Nussbaum eds., 1998); Andrew P. Morriss & Benjamin D. Cramer, *Disestablishing Environmentalism*, 39 ENVTL. L. 309 (2009). Consistent with our reading of Michael McConnell as an advocate of a version of antitotalitarianism, his argument for "education disestablishment" is more concerned with protecting the possibility of separate, competing authoritative institutions. *See* McConnell, *supra* note 51.

or on the particular value of institutional pluralism.[54] Indeed, a norm of neutrality can be interpreted as indifference; some read the neutrality jurisprudence of the Establishment Clause as official indifference to whether churches thrive or falter. An understanding of nonestablishment that emphasizes institutional pluralism is hardly indifferent: this approach sees the existence of multiple, competing institutions as an affirmative good.

Of course, to borrow from the philosophy and jurisprudence of the First Amendment may reproduce some of the unresolved questions of that field. But that is part of the attraction: to a substantial degree, the perennial puzzles of church-state relationships have corollaries in family-state relationships. Just as scholars ask, for example, what constitutes religion and whether the Constitution can regulate religion without adopting an already normatively loaded conception of it, so too one might ask what constitutes a family and whether there is any nonideological way to define it.[55] Additionally, commentators ask why churches and religion should be afforded distinctive constitutional status, and the same question should be raised with respect to families.[56] Are churches, or families, different from other associations and relationships, and if so, how? For us, these difficult questions are part of the appeal of the disestablishment model.

---

54. A growing literature advocates increased attention to institutional context in First Amendment jurisprudence. *See, e.g.*, Frederick Schauer, *Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84 (1998); Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256 (2005). In the subset of this literature that directly addresses religious institutions, one finds frequent emphasis of the political value of plural, autonomous institutions. *See, e.g.*, Richard W. Garnett, *Do Churches Matter? Towards an Institutional Understanding of the Religion Clauses*, 53 VILL. L. REV. 273, 292-93 (2008); Paul Horwitz, *Churches as First Amendment Institutions: Of Sovereignty and Spheres*, 44 HARV. C.R.-C.L. L. REV. 79 (2009) (arguing that First Amendment doctrine should be based on an understanding of church and state as distinct institutions, each sovereign in its own sphere).

55. Kent Greenawalt has proposed that constitutional analysis should interpret the term "religion" by deploying Ludwig Wittgenstein's multifactor "family resemblances" approach. *See, e.g.*, 1 KENT GREENAWALT, RELIGION AND THE CONSTITUTION: FREE EXERCISE AND FAIRNESS 139 (2006). This approach creates an opportunity for normative bias. The definition of religion (or for our purposes, of the family) will depend on the "selection of the 'paradigm cases.'" Eduardo Peñalver, Note, *The Concept of Religion*, 107 YALE L.J. 791, 815 (1997). Like religion, which is not easily defined but is recognizable by "family resemblances," the family itself is identified in law by its resemblance to a certain model of kinship and domesticity, as we discuss below.

56. If we identify principled (rather than textual) reasons for religion to get special constitutional protection, those principles may well apply to families as well. Families play similarly important roles in individual development; they impose similarly not-quite-voluntarist obligations; and they have similar cultural and moral importance in the lives of citizens.

II. FAMILIAL ESTABLISHMENT: ENCOUNTERS WITH THE CONSTITUTION

Families are often sites of value creation and moral development, as philosophers and political leaders alike have long recognized.[57] It is often simply taken for granted that a state will encourage, or even require, the kind of familial institutions most likely to produce the right kind of citizens. The right kind of citizen, and thus the best form of family, may vary from one regime to another, but the power of the regime to regulate the family for these purposes is rarely questioned.

Of course, churches too are sites of value creation and moral development, and at one time it was taken for granted that a state would encourage or require the kind of *religious* institutions most likely to produce the right kind of citizens. The puzzle, then, is why the liberal commitment to religious disestablishment has never led to any similar call for familial disestablishment. One possible explanation is that the family is not seen as posing the same threats as an established religion. That is, the state's promotion of a particular form of family—the marital, nuclear family—does not entail the same thick ideological content as an ecclesiastical establishment because the values associated with the marital family are perceived as broad and inclusive values whose active promotion by the state poses no threat to ideological diversity or healthy political debate.[58]

But is this right? In this Part, we suggest that the particular normative framework promoted by the model legal family is more ideologically specific than a set of general principles easily acceptable to all members of a democratic society. We begin with the constitutional construction of the marital, nuclear family as an ideal family, and explore the underlying ideological implications of that model. We then examine constitutional challenges to criminal laws that

---

57. *See, e.g.*, SUSAN MOLLER OKIN, JUSTICE, GENDER, AND THE FAMILY 17-23 (1989) (discussing perceptions of "the family as a school of justice" in western political thought); JOHN RAWLS, A THEORY OF JUSTICE 462-71 (1972).

58. For example, Linda McClain argues that the state may promote (marital) families as "seedbeds of civic virtue," but argues for a broad, liberal list of virtues that includes toleration, gender equality, and the capacity for critical reflection. LINDA C. MCCLAIN, THE PLACE OF FAMILIES: FOSTERING CAPACITY, EQUALITY, AND RESPONSIBILITY 50-84 (2006). Similarly, Mary Anne Case has suggested that modern marriage law promotes at most a very general vision of the good—"the assumption that the social good is likely to be promoted when government facilitates people working together to achieve joint ends." Mary Anne Case, *Marriage Licenses*, 89 MINN. L. REV. 1758, 1782 (2005). According to Case, "it is hardly a thick and rich ethical vision that is presently being given state sponsorship." *Id.*

regulate the family. We identify a thick, aggressive version of familial establishment in a criminal ban on polygamy, and a somewhat thinner form of familial establishment in the Supreme Court's decisions concerning parental control over their children's education.

A. The Marriage Model

Notwithstanding the considerable extent to which familial relationships are regulated by state law, a national, federalized understanding of the family helps determine the parameters of government power over families.[59] Unsurprisingly, this understanding is closely intertwined with marriage. As a general matter, marriage historically has been a conduit to family formation, as law channeled individuals (and their sexual behavior) into marriage, and from marriage into coupled parenthood.[60]

Constitutional doctrine's clear preference for the marital nuclear family above other alternatives is evident in a number of contexts.[61] Take, for example, the Supreme Court's decisions concerning unmarried fathers. On its face, *Stanley v. Illinois* appeared to diminish the importance of the marital model.[62] There the Court struck down a state law requiring the children of unwed fathers to become wards of the state upon the death of the mother. Yet, even as the Court emphasized constitutional protections for biological fathers,

---

59. In the following discussion, we rely almost exclusively on decisions of the United States Supreme Court in order to consider the outer parameters of the state's power to define the family or to limit government intervention into families. Our reliance on Supreme Court cases resists the claim that family law is exclusively the creature of state law, and emphasizes the degree to which a normative model of the family has been adopted at the national level. For historical evidence that family law has long been a subject of federal *and* state concern, see Jill Elaine Hasday, *Federalism and the Family Reconstructed*, 45 UCLA L. REV. 1297 (1998).

60. *See* Carl E. Schneider, *The Channelling Function in Family Law*, 20 HOFSTRA L. REV. 495, 497-98 (1992). This channeling function occurred in a number of ways. Family law historically prescribed the parameters for executing a valid marriage, specifying relationships that were eligible for marriage and those that were not. *See* Murray, *supra* note 16, at 1266. However, family law relied on criminal law to bolster and police the normative parameters of marriage. *Id.* at 1266-67. Historically, family law's prescriptions for valid marriages have been echoed by criminal law's prohibitions on behavior deemed ineligible for, or inimical to, marriage. *Id.* at 1267. As a consequence, until quite recently, marriage was the legally approved site for sexual activity and, importantly, childbearing. *Id.* at 1268, 1270.

61. Perhaps the clearest example of this preference is the robust privacy protections afforded to members of the marital family. *See* Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (expressing alarm over the prospect of police entering "the sacred precincts of marital bedrooms").

62. 405 U.S. 645 (1972).

whether married or not, it noted with favor the ways in which Peter Stanley had discharged his paternal role in the years preceding his partner's death. Stanley was not a fly-by-night father. He shared in the parenting of his children, living with the children and their mother for eighteen years and sharing responsibility for their upkeep.[63] Stanley acted like a father, but perhaps more importantly, he acted like a *husband*, performing his paternal role in a manner consistent with marital family norms.

The close association of legally cognizable fatherhood with the marital family is even clearer in two subsequent cases involving unmarried fathers. In *Quilloin v. Walcott*[64] and *Lehr v. Robertson*,[65] the Court rejected petitions for paternal rights by two unmarried biological fathers.[66] According to the Court, what distinguished *Quilloin* and *Lehr* from *Stanley* was the fact that neither father had been a consistent presence in his child's life.[67] Unlike Stanley, who had been a co-parent with his deceased partner, the two petitioning fathers had been only minimally involved in the rearing of their children. They had not cohabited with their children and had provided little in the way of financial or emotional support. In short, they had failed to act in the manner of married fathers, as Stanley had done.[68] In *Quilloin* and *Lehr*, as in *Stanley*, the Court's understanding of fatherhood is inextricably intertwined with its understanding of the husband's role in the marital family.

The force of the marital family in the disposition of *Quilloin* and *Lehr* also is visible from another perspective. In each case, the biological father raised his

---

63. The fact that the Court understood Peter Stanley to have functioned as a husband and father is evident in subsequent cases where the Court contrasted the behavior of other petitioning fathers with Peter Stanley's conduct. *See infra* text accompanying notes 67-68 (discussing the Court's disposition of *Quilloin* and *Lehr*).

64. 434 U.S. 246 (1978).

65. 463 U.S. 248 (1983).

66. *See Lehr*, 463 U.S. at 250; *Quilloin*, 434 U.S. at 255.

67. *See Lehr*, 463 U.S. at 267 (noting that "appellant . . . ha[d] never established a substantial relationship" with his daughter); *Quilloin*, 434 U.S. at 256 (noting that appellant "ha[d] never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child").

68. The *Lehr* Court underscored this critical distinction by comparing the circumstances in *Lehr* to those in an earlier case, *Caban v. Mohammed*, 441 U.S. 380 (1979). *See Lehr*, 463 U.S. at 267. Statutes like the ones challenged in *Lehr* and *Quilloin*, the Court concluded, could "not constitutionally be applied in that class of cases where the mother and father are in fact similarly situated with regard to their relationship with the child." *Id.* The father in *Caban* was deemed similarly situated to his children's mother because he, like Peter Stanley, "had admitted paternity and had participated in the rearing of the children." *Id.* (discussing *Caban*). As important, the father in *Caban* had also "contributed to the [financial] support of the family." *Caban*, 441 U.S. at 383.

claim for paternal rights to challenge an adoption petition filed by the child's stepfather (the mother's husband).[69] In each case, there was another father figure, one who functioned in the family in the manner of a father *and* a husband. Faced with the prospect of recognizing the rights of an itinerant unmarried father—that is, a father who failed to comport with the paternal norms developed in the context of the marital family—the Court chose to sever paternal rights, allowing the child to be adopted into a marital family.[70] In denying Quilloin's and Lehr's claims for paternal rights and allowing the children to be adopted by their stepfathers, the Court not only clarified the doctrine regarding the rights of unmarried fathers, but also deemphasized "the mere existence of a biological link" in favor of "[t]he importance of the *familial* relationship[] to the individuals involved and to the society."[71] These decisions prioritize a child's opportunities for "emotional attachments that derive from the intimacy of daily association" over the fact of biological paternity.[72] These decisions are about providing children with the experience of being raised in the marital family (or a family structure that closely approximated it).

The Court's preference for the marital family is still more explicit in *Michael H. v. Gerald D.*[73] Carole D. was married to Gerald D. when she became pregnant by Michael H. following an extramarital affair.[74] Their child, Victoria, grew up in what the plurality opinion dismissed as a "quasi-family."[75] Victoria regarded both Gerald and Michael as her fathers, and each man held himself out as Victoria's father.[76] In denying Michael's claim for recognition of his rights as Victoria's biological father, a plurality of the Court made clear its affinity for the marital family: "The family unit accorded traditional respect in our society" is the "'unitary family,'" a model "typified, of course, by the marital family."[77] Though the concept of the "unitary family" could extend beyond the marital family, it included only those family structures that most approximated the marital family, such as the "household of unmarried parents

69. *Lehr*, 463 U.S. at 250; *Quilloin*, 434 U.S. at 551.

70. *Lehr*, 463 U.S. at 268 (affirming the lower court's decision to sever parental rights and permit the stepparent adoption); *Quilloin*, 434 U.S. at 255 ("[T]he result of the adoption in this case is to give full recognition to a family unit already in existence . . . .").

71. *Lehr*, 463 U.S. at 261 (emphasis added) (internal quotation omitted).

72. *Id.* at 261.

73. 491 U.S. 110 (1989).

74. *Id.* at 113-14.

75. *Id.* at 114.

76. *Id.* at 116 (noting that Victoria also raised a due process challenge to the statute, seeking to preserve her relationships with both Michael and Gerald).

77. *Id.* at 123 n.3.

and their children" represented in *Stanley*.[78] It did not include relationships that "[bore] no resemblance to traditionally respected relationships," like "the relationship established between a married woman, her lover, and their child."[79] Here, as in earlier cases, the Court links paternal rights to the embrace of the marital family as the model legal family.

Importantly, constitutional protections for the marital family are not confined to those cases dealing with the rights of unmarried fathers. In *Troxel v. Granville*,[80] two grandparents sought, pursuant to a state statute, visitation privileges with their granddaughters, the children of their deceased son.[81] A state trial court complied, but on appeal, the Supreme Court struck down the "breathtakingly broad" statute as an impermissible intrusion on parental rights.[82] Though *Troxel* has been understood as pertaining solely to the question of parental rights, it might also be understood as endorsing the primacy of the nuclear family model over claims for alternative family structures in which extended family might play a larger role in children's lives.[83]

The claim that law favors the marital family as the normative ideal for family life may prompt resistance. In constitutional and state law alike, several efforts have been made to update the legal understanding of the family to reflect the increasing diversity of family life.[84] These efforts have been manifested in constitutional protections for nonmarital children,[85] rights of

---

78. *Id.* at 123.

79. *Id.*

80. 530 U.S. 57 (2000).

81. *Id.* at 61. The state court concluded that visitation with their paternal grandparents would be in the girls' best interests. The girls' mother, who had never married her daughters' father and was now married to another man with whom she had a child, vehemently objected. *Id.*

82. *Id.* at 67.

83. As in *Quilloin* and *Lehr*, the children's mother recently had married and was creating a marital family with her new husband, who had adopted the daughters. *Id.* at 61-62 (noting Granville's marriage to Kelly Wynn and Wynn's adoption of Granville's daughters). Extensive visitation with their grandparents likely would have precluded the girls' integration by requiring their absence from the marital family unit their mother and her husband were creating. Ariela R. Dubler, *Constructing the Modern American Family: The Stories of* Troxel v. Granville, *in* FAMILY LAW STORIES 95, 100 (Carol Sanger ed., 2008).

84. Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 VA. L. REV. 385, 439-41 (2008).

85. Levy v. Louisiana, 391 U.S. 68 (1968) (holding that laws that discriminate on the basis of legitimacy violate the Equal Protection Clause).

cohabitation,[86] and nonmarital and same-sex intimacy,[87] as well as sub-constitutional recognition of alternative legal statuses for same-sex couples[88]—legal developments that are credited with disrupting the primacy of the marital family model. However, these seeming departures from the marital family ideal may be less radical than they first appear. Just as unmarried fathers were recognized as fathers when they acted like husbands, unmarried couples have sometimes enjoyed legal protection because they acted as though they were married.[89]

The marital model that emerges in the case law reflects several specific—and contestable—normative preferences. Before we turn to a discussion of familial establishment, it is worth specifying the constellation of values that shape the legal understanding of what it is to act like a family. The marital, nuclear family is one that encourages monogamy, procreation, industriousness,

---

86. Moore v. City of E. Cleveland, 431 U.S. 494 (1977) (striking down a Cleveland housing ordinance limiting occupancy of a single-family dwelling unit to nuclear family members).

87. Lawrence v. Texas, 539 U.S. 558 (2003) (striking down a state law criminalizing same-sex sodomy); Eisenstadt v. Baird, 405 U.S. 438 (1972) (striking down a state law prohibiting the distribution of contraception to unmarried persons); McLaughlin v. Florida, 379 U.S. 184 (1964) (striking down a state law prohibiting interracial cohabitation).

88. Melissa Murray, *Equal Rites and Equal Rights*, 96 CAL. L. REV. 1395, 1396-97 (2008) (discussing the development of civil-union statutes); Murray, *supra* note 84, at 440-41, 449 (same).

89. For example, the New York Court of Appeals deemed two (unmarried) gay men "family members" for purposes of a New York City rent and eviction regulation, in large part because their relationship comported with traditional indicia of marital family life. Braschi v. Stahl Assocs. Co., 543 N.E.2d 49, 53-55 (N.Y. 1989). Interestingly, the court declined to find the couple to be "spouses," indicating that the terms spouse/marriage are less flexible than the term "family." And yet, even as the court declined to find them spouses, it used the normative concept of marriage to inform its understanding of family. *Id.* at 53-54 ("[A] more realistic, and certainly equally valid, view of a family includes two adult lifetime partners whose relationship is long term and characterized by an emotional and financial commitment and interdependence. This view comports both with our society's traditional concept of 'family' and with the expectations of individuals who live in such nuclear units.").

Likewise, in *Hann v. Housing Authority of Easton*, 709 F. Supp. 605 (E.D. Pa. 1989), an unmarried couple with children was determined to be a family for purposes of public housing assistance because they conducted their lives as though they were a marital family, cohabiting and raising children together. *Id.* at 610 (noting that "[t]he only thing missing [was] a marriage certificate"). Though not legitimated through marriage, both relationships approximated the marital family in substance and form. *See also* Ariela R. Dubler, *Wifely Behavior: A Legal History of Acting Married*, 100 COLUM. L. REV. 957, 1020 (2000) ("[C]ontemporary performance-based approaches to nonmarital cohabitation posit marriage as the as the reigning normative model against which nonsolemnized unions are compared and against which their legal merits are evaluated.").

insularity, and—seemingly paradoxically—a certain kind of visibility. These last two terms warrant some explanation.

By insularity, we mean that the established family is understood as a closed unit, a discrete group that may initially be created by the state (through a marriage) but then functions relatively autonomously of the state.[90] Importantly, the perceived autonomy of the marital family is not first and foremost a moral or normative autonomy, though some morally contentious decisions are protected from state interference.[91] Rather, the norm of familial autonomy is largely a norm of financial self-sufficiency, and the financial independence of the family unit goes hand in hand with an expectation of financial dependency within the family.[92]

By visibility, we mean that the state has encouraged the view that public recognition as a family is something to be prized. Given the association of the family with privacy, it may seem odd to associate it also with visibility. But familial privacy, insofar as it is protected, is a privacy of decisions and spaces. It is not a privacy of status.[93] Instead, familial status is observed, recorded, and

---

90. As Martha Fineman and others have noted, this autonomy is illusory. We are all dependent on others—and the state—at some point in our lives. MARTHA ALBERTSON FINEMAN, THE AUTONOMY MYTH: A THEORY OF DEPENDENCY 35-40 (2004).

91. Procreative decisions are the most obvious example, but note that they are protected only up to a point. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 876 (1992) ("The very notion that the State has a substantial interest in potential life leads to the conclusion that not all regulations [on abortion] must be deemed unwarranted."). States may restrict access to abortion in numerous ways, and may prohibit it outright in the third trimester subject to certain narrow exceptions. Roe v. Wade, 410 U.S. 113, 154 (1973) (concluding that "the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation"). In addition, the cultural and political battle over the meaning of marriage should make clear that the socially recognized "autonomy" of married couples is not a principle of moral laissez-faire.

92. *See* FINEMAN, *supra* note 90.

93. Historically, the prosecution of Mormon polygamy in the Utah Territory involved invasive investigative techniques like questioning minors about their parentage. RICHARD S. VAN WAGONER, MORMON POLYGAMY: A HISTORY 117-19 (2d ed. 1989). Some have argued that Utah's modern statute criminalizing bigamy sweeps more broadly than analogous laws in other states because of these efforts to detect and punish "unlawful cohabitation." *See* Brief of Appellants at 27-32, Bronson v. Swensen, 500 F.3d 1099 (10th Cir. 2007) (No. 05-4161). More recently, law enforcement efforts to prosecute underage marriages in a fundamentalist Mormon sect in Texas included DNA testing of sect members in an attempt to determine family relationships. James C. McKinley Jr., *Trial of Sect Leader Exposes Difficulties for Prosecutors*, N.Y. TIMES, Nov. 4, 2009, at A14.

regulated by the state.[94] Familial status is a question of legitimacy—of a relation brought within the aegis of law. Perhaps some degree of this type of surveillance is simply necessary as an administrative matter. What is not obvious, though, is that individuals should place tremendous value on their public recognition as husbands, wives, sons, and sisters. Many do, of course, as is evident in the quest for recognition of same-sex marriage. Some dissenters question the value of recognition, noting that recognition and regulation go hand in hand.[95] But we think it is fair to characterize the desire for one's own intimate relationships to be officially recognized as the predominant view among both those who support same-sex marriage and those who oppose it. This quest for recognition is part of the ideology of the established family.

The established family is a site of domestication, of discipline through interdependency and visibility. From the antitotalitarian perspective, this point bears special emphasis: the marital family is as important for what it discourages as for what it encourages. Specifically, it discourages nonconformity and rebelliousness by encouraging discipline through dependency among family members. In the traditional family recognized in early American law, men were disciplined by their obligations to support wives and children, women were disciplined by their caregiving obligations and their financial dependence on their husbands, and children were disciplined by their disciplined parents.[96] This structure would provide the capitalist state with

---

94. *Cf.* 1 MICHEL FOUCAULT, THE HISTORY OF SEXUALITY: AN INTRODUCTION (Robert Hurley trans., Vintage Books 1978) (1976) (discussing the state's use of the family as a site of intimate regulation).

95. *See, e.g.*, MICHAEL WARNER, THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE 82 (1999) (arguing that the drive toward same-sex marriage will further marginalize sexual expression and relationships that are not recognized and valued by the state); Judith Butler, *Is Kinship Always Already Heterosexual?*, 13 DIFFERENCES: J. FEMINIST CULTURAL STUD. 14, 17-18 (2002) (suggesting that discussions of same-sex marriage may insufficiently value intimate relations that are neither recognized nor prohibited by the state); Katherine M. Franke, *The Domesticated Liberty of* Lawrence v. Texas, 104 COLUM. L. REV. 1399, 1418 (2004) (identifying the complexity of the GLBT community's decision to exchange one form of legal regulation of homosexuality (criminal law) for another (marriage)); Katherine M. Franke, *Longing for* Loving, 76 FORDHAM L. REV. 2685, 2687-88 (2008) (explaining that because marriage is a potent regulatory tool, the GLBT community should be more skeptical of the drive toward same-sex marriage).

96. *See, e.g.*, Bradwell v. Illinois, 83 U.S. 130, 141 (1872) (Bradley, J., concurring) ("Man is, or should be, woman's protector and defender . . . . The harmony [of] the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband."); Mark E. Brandon, *Family at the Birth of American Constitutional Order*, 77 TEX. L. REV. 1195, 1204 (1999) (discussing the Lockean view that "the family's function was to bring the child into the exercise of reason—a kind of self-limitation—and therefore enable him to live under law"); John Gilbert McCurdy, *We the Bachelors*, N.Y. TIMES, July 4, 2009,

loyal and industrious citizens, at little or no cost to public coffers. Even as American law has changed to recognize a broader array of familial relationships, these norms of order, discipline, and intrafamilial dependence have persisted.

Against this model, families that resist, rebel, or simply fail to conform may be perceived as threats to the political order. Historically, the state has responded to such threats in many ways. Of particular interest here are responses that involve criminal sanctions. To be clear, the criminal law was a central tool of ecclesiastical establishment, but it was not the only way in which the state enforced religious conformity.[97] Nor are criminal sanctions the only way in which the state has established a particular model of the family.[98] But criminal punishment is among the most coercive forms of state action, and it is often an especially *moralized* state practice.[99] So if establishment entails the state's enforcement of a particular ideology in nonstate institutions, it makes sense to consider criminal laws that punish nonconforming ideologies—and families' efforts to resist such laws.

B. Thick Establishment

It is no coincidence (but too rarely noted) that many of the Supreme Court's encounters with the family involve efforts by states to use criminal sanctions against unruly families.[100] We discuss several of these encounters below, arguing that the criminal laws in question constitute efforts to establish an official family model. Sometimes the Court has permitted and even

---

at A21 (observing that when the founding fathers "created a new nation, they assailed sexual immorality, luxury and sloth—all of which they associated with the single life").

97. McConnell, *supra* note 35, at 2131.

98. Murray, *supra* note 16, at 1267 n.50.

99. Indeed, many scholars have identified moral condemnation as the distinctive feature of criminal (as opposed to civil) sanctions. *See, e.g.*, Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 402, 404 (1958) ("What distinguishes a criminal from a civil sanction . . . is the judgment of community condemnation which accompanies it and justifies its imposition.").

100. *But see* Martha Minow, *We, the Family: Constitutional Rights and American Families*, 74 J. AM. HIST. 959 (1987). Though Minow does not emphasize the role of *criminal* sanctions in early constitutional cases involving families, she does illuminate the extent to which these cases involved the enforcement of favored ideological positions. *Id.* Though *Griswold v. Connecticut* and other post-1960 opinions depict a lengthy tradition of respect for family privacy, Minow suggests that this image of family autonomy is an "invented tradition." *Id.* at 962. Opinions such as *Meyer v. Nebraska* and *Pierce v. Society of Sisters* are more accurately characterized as the scenes of ideological battles between religious or ethnic groups. *Id.* at 962-65.

enthusiastically endorsed familial establishment; on other occasions, it has limited states' power to promote ideologies within the family. As is true of religion, the difference between establishment and disestablishment is a continuum rather than a stark binary dichotomy. In this section, we examine the thick form of establishment evident in *Reynolds v. United States*, an 1878 case involving a criminal ban on bigamy.[101] Here, the link between political ideology and family structure is closely regulated. Later cases involving parental choices about education, discussed in the next section, depart from this thick form of establishment, permitting some degree of autonomy within families. Still, even in the education cases, a thin version of familial establishment remains: autonomy from the state is a privilege of those who adhere to the norms of the marital family, whether in form or function.

Convicted of bigamy under a federal statute in force in the Utah Territory, George Reynolds appealed his conviction on the ground that although he had taken a second wife in violation of the law, his religious beliefs shielded him from criminal liability.[102] Among the "accepted doctrine[s]" of the Mormon Church was the belief "that it was the duty of male members of [the] church . . . to practise polygamy."[103] The United States Supreme Court upheld the statute, finding it "impossible" to conclude that the Free Exercise Clause precluded the criminalization of plural marriage and other "actions . . . in violation of social duties or subversive of good order."[104]

The religious free exercise claim is only one dimension—and a rather cursorily dismissed one—of the Court's analysis in *Reynolds*. Much more attention is given to the ideological importance of monogamous marriage and the marital family in a democratic society: "[A]s monogamous or polygamous marriages are allowed, do we find the principles on which the government of the people, to a greater or lesser extent, rests."[105] Citing the German émigré Francis Lieber, the Court explained that "polygamy leads to the patriarchal

---

101. 98 U.S. 145 (1878).

102. *Id.* at 146, 161. For useful studies of *Reynolds* in historical context, see SARAH BARRINGER GORDON, THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH-CENTURY AMERICA (2002) [hereinafter GORDON, THE MORMON QUESTION]; Martha M. Ertman, *The Story of* Reynolds v. United States*: Federal "Hell Hounds" Punishing Mormon Treason*, *in* FAMILY LAW STORIES 51-75 (Carol Sanger ed., 2008); and Sarah Barringer Gordon, *"The Liberty of Self-Degradation": Polygamy, Woman Suffrage, and Consent in Nineteenth-Century America*, 83 J. AM. HIST. 815 (1996) [hereinafter Gordon, *The Liberty of Self-Degradation*].

103. *Reynolds*, 98 U.S. at 161 (internal quotations omitted).

104. *Id.* at 164-65.

105. *Id.* at 165-66.

principle," and "when applied to large communities, fetters the people in stationary despotism."[106] The *Reynolds* Court's apparent aversion to patriarchy may pass too easily unnoted by a contemporary audience. Just six years before *Reynolds*, the Supreme Court upheld a state court decision excluding women from the practice of law, and in so doing, apparently endorsed the subordination of women to their husbands.[107] What made polygamy's patriarchal principle so objectionable?

In the political discourse of late nineteenth-century America, monogamous marriage was distinguished from polygamy by the opposing concepts of consent and coercion.[108] Monogamous marriage was marked by the parties' consent to enter into the marital relationship. By contrast, antipolygamists declared forcefully that Mormon women were so fettered by their religion – so *unfree* – that they lacked the ability to give meaningful consent to plural marriage.[109] Their inability to provide meaningful consent to marriage, coupled with their subsequent subordination to their polygamous husbands, made polygamous wives no better than slaves. And like slaves in the antebellum period, they too were unfit for citizenship within a democracy.[110]

A distinctive view of the relation between marriage and citizenship lay beneath the broad disapprobation of polygamy. At the time the *Reynolds* decision was announced, the traditional model of monogamous marriage was one that consigned husbands and wives to specific roles within their "separate spheres."[111] A critical component of this separate spheres ideology was the

---

106. *Id.* at 166. Monogamy, Lieber insisted, "is one of the primordial elements out of which all law proceeds . . . [and] the foundation of all that is called polity." Carol Weisbrod & Pamela Sheingorn, Reynolds v. United States*: Nineteenth-Century Forms of Marriage and the Status of Women*, 10 CONN. L. REV. 828, 835 (1978) (quoting Francis Lieber, *The Mormons: Shall Utah Be Admitted into the Union?*, 5 PUTNAM'S MONTHLY 225, 234 (1855)).

107. Bradwell v. Illinois, 83 U.S. 130 (1872).

108. *See* GORDON, THE MORMON QUESTION, *supra* note 102, at 171-72 (noting that those opposed to polygamy emphasized the perceived absence of consent in polygamous unions).

109. After all, what right-thinking woman would voluntarily consent to live in a "system as fundamentally contrary to her interests as polygamy"? *Id.* at 173.

110. Interestingly, first wave feminists also analogized marriage to slavery. Gordon, *The Liberty of Self-Degradation*, *supra* note 102, at 824. However, their disapprobation was not directed at polygamous wives, but to women in monogamous marriages. *Id.* at 837 (observing that marriage, like slavery, stripped wives of legal capacity and demanded their submission to their husbands' will).

111. In his concurrence in *Bradwell v. Illinois*, Associate Justice Joseph Bradley famously expounded on "the constitution of the family," which specified separate spheres for husbands and wives. 83 U.S. 130, 141 (1872) (Bradley, J., concurring); *see also* TOCQUEVILLE, *supra* note 21, at 603 ("Americans do not think that man and woman have the duty or the

construction of the wife as the moral center of the household.[112] The wife was responsible for making the home a haven from the vulgarities and immoralities of the public sphere,[113] all while inculcating their children with the values and virtues necessary for citizenship.[114]

According to the antipolygamists, the role of women in polygamous households was wholly at odds with the notion of womanhood represented by the separate spheres and monogamous marriage. The notion of the woman as the moral center of the household presumed not only her moral superiority, but her possession of the virtues of good citizenship.[115] Tethered to tyrannical husbands in a "virtual harem," polygamous wives were hardly models of wifely morality.[116] Indeed, they appeared to be willing, or at least unobjecting, participants in the licentiousness and vice that characterized plural marriage for most of the country. Utterly immoral and unfit for citizenship themselves, polygamous wives, it was feared, would fail to inculcate their children with the moral virtue and freedom-loving values necessary to sustain a vital democracy.[117]

Moreover, if monogamous marriage was the foundation "[u]pon [which] society may be said to be built," children raised in polygamy would be dangerously ignorant of the "social relations and social obligations and duties" associated with monogamy.[118] Their understanding of the "family," that critical unit of society and democracy, would be shaped by the norms and values more

---

right to do the same things, but they show an equal regard for the part played by both and think of them as being of equal worth, though their fates are different.").

112. Mark E. Brandon, *Home on the Range: Family and Constitutionalism in American Continental Settlement*, 52 EMORY L.J. 645, 694 (2003) ("[T]he wife, as mistress of the home, was perceived by society and herself as the moral superior of the husband, though his legal and social inferior.") (internal quotations and citation omitted); Barbara Welter, *The Cult of True Womanhood: 1820-1860*, 18 AM. Q. 151, 151-52 (1966).

113. Welter, *supra* note 112, at 152.

114. Brandon, *supra* note 112, at 653 ("Combined with assumptions about women's innately superior capacity for moral judgment and behavior, the educative function pictured wives and mothers as guardians of civilization in society.").

115. For more detailed discussion of the view that mother's domestic behavior served a political function in the cultivation of good citizens, see Linda Kerber, *The Republican Mother: Women and the Enlightenment—An American Perspective*, 28 AM. Q. 187, 202 (1976).

116. Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 COLUM. L. REV. 641, 659 (2005) (quoting Akhil Reed Amar & Daniel Widawsky, *Child Abuse as Slavery: A Thirteenth Amendment Response to* De Shaney, 105 HARV. L. REV. 1359, 1366 & n.19 (1992)).

117. Abrams, *supra* note 116, at 661-62 (discussing the fears that polygamy and illiberal values would be reproduced in subsequent generations).

118. Reynolds v. United States, 98 U.S. 145, 165 (1878).

familiar to "Asiatic and . . . African people."[119] And perhaps most troubling of all, through the power of reproduction, polygamy would expand with each successive generation of Mormons to the point that polygamous families could eventually disrupt the predominance of the monogamous marital family.

Viewed through this lens, the *Reynolds* decision is as much (or more) a pronouncement on family-state relationships as it is a judgment of the proper church-state relationship. The federal ban on bigamy, like the opinion upholding it, vindicates a particular model of the family (and its role in the polity) over a competing—and potentially destructive—alternative.[120] At odds with the Anglo-American legal tradition, American society, and American norms and values,[121] polygamy challenged democratic governance, which was undergirded by monogamous marriage and the marital family.[122]

As such, *Reynolds* is a case about deploying the criminal law to denounce the polygamous family as immoral and antidemocratic while vindicating—indeed, *establishing*—the marital family and its mission to cultivate future citizens for the state. And importantly, the thick version of establishment seen in *Reynolds* is uncompromising in its stance. There is conformity with law, and there is nonconformity, which must be reordered by the force of the criminal law. There is no middle ground where families might resist conformity, but nevertheless be understood as serving the state.

C. *Thin Establishment*

Although the *Reynolds* Court made clear that the marital family was an important site for the cultivation of civic virtue and "American values," the family is certainly not the only locus for such activities. In particular, public education has emerged as an important conduit for imparting democratic

---

119. *Id.* at 164.

120. The perception that polygamy—and Mormonism more generally—posed a threat to democracy persisted, even after *Reynolds*. *See* Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 49 (1890) (referring to the Mormons' "persistent defiance of law under the government of the United States"); *see also* SARAH SONG, JUSTICE, GENDER, AND THE POLITICS OF MULTICULTURALISM 155-56 (2007) (discussing the perception of the Mormons as an antiauthoritarian threat to the government of the United States).

121. *Reynolds*, 98 U.S. at 165 (discussing the criminalization of polygamy in England and Wales, and later in the United States).

122. *Id.* at 165-66 ("[A]ccording as monogamous or polygamous marriages are allowed, do we find the principles on which the government of the people to a greater or less extent, rests.").

values and respect for national civic traditions.[123] This means that family and school sometimes stand in an uneasy relationship: the ideological claims of one institution may conflict with those of the other. In adjudicating these conflicts, the Court has continued to underscore the importance of the family in inculcating civic values. But it has also explicitly endorsed the family as a source of ideological diversity. Accordingly, in the education cases, the state tolerates nonconforming families—up to a point. Familial establishment is thinner in this context, but it is not abandoned altogether.

In *Meyer v. Nebraska*, the Court struck down a statute criminalizing the teaching of any subject in any language other than English in any school, or the teaching of languages other than English below the eighth grade.[124] The citizenship dimensions of the case are clear: the adoption of the statute was animated by fears that children raised in foreign households speaking another language as their mother tongue would develop into unreliable citizens.[125] The familial dimensions are less immediately obvious, because the law was challenged not by a parent, but by a schoolteacher convicted for teaching German to his students.[126] But in reversing the teacher's conviction, the Court endorsed "the power of parents to control the education of their own"[127] as one of many liberties protected by the Constitution.[128]

---

123. *See* Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) ("The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, (rather) than through any kind of authoritative selection.") (internal citations and quotations omitted); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943) (noting that public schools are "educating the young for citizenship").

124. 262 U.S. 390, 397, 400 (1923).

125. The statute, popularly known as the "Foreign Language Statute," was enacted after World War I amid a wave of anti-German hysteria. *See* Sylvia R. Lazos Vargas, *Judicial Review of Initiatives and Referendums in Which Majorities Vote on Minorities' Democratic Citizenship*, 60 OHIO ST. L.J. 399, 450 n.239 (1999). The statute was part of the "100 percent Americanism" campaign, a nationwide pro-American movement that identified and celebrated the "beliefs and actions of patriotic Americans." Mark Kessler, *Legal Discourse and Political Intolerance: The Ideology of Clear and Present Danger*, 27 LAW & SOC'Y REV. 559, 574 (1993).

126. Robert Meyer, a teacher at the Lutheran Zion Parochial School in Hamilton County, Nebraska was charged with violating the Foreign Language Statute. *Meyer*, 262 U.S. at 396-97.

127. *Id.* at 401. The Court also referred to Meyer's own rights under the Fourteenth Amendment ("the calling of modern language teachers"), *id.*, but most of its discussion focuses on parental autonomy and the limits of state power to direct children's education. *Id.* at 400-03.

128. The Court read the Fourteenth Amendment to protect "the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge,

Those who supported the ban on foreign language teaching saw immigrant families as a political threat, much as antipolygamists saw Mormon families as a political threat. But the Supreme Court's evaluations of the perceived danger to the state differ sharply. Meaningfully, the German-American families discussed in *Meyer* were not raising their children in the polygamous arrangements seen in *Reynolds*. True, these families imparted to their children the customs and traditions of their native land, much to the consternation of those Nebraskans who preferred a greater degree of assimilation. But, as the Court noted, the immigrant families were not sufficiently threatening to democracy to require the state to usurp the parents' role in raising their children.[129] Indeed, the Court suggested that the linguistic and cultural diversity of immigrant families could actually be "helpful and desirable" in a democratic society.[130]

Meyer may be read to adopt the kind of antitotalitarian argument for institutional and ideological diversity explored in Part I. Recalling Plato's suggestion to raise children in common and the Spartans' history of communal education designed to "submerge the individual and develop ideal citizens," the Court maintained that laws intended to "foster a homogenous people," though well-intended, may go too far in their desire to cultivate good citizens.[131] Homogeneity of the sort advocated by Plato and sought by the Nebraska legislature was "coerc[ive]" and yielded citizens who could neither discern nor challenge tyranny in their midst.[132] Such homogeneity was more in keeping with totalitarianism than with democracy.[133]

The Court later elaborated this point in *Pierce v. Society of Sisters*.[134] Under Oregon's Compulsory Education Act, parents who failed to enroll their children in public schools were subject to criminal sanctions.[135] Here, the

---

to marry, establish a home and bring up children . . . ." *Id.* at 399. Some of these liberties have since been denied full constitutional protection. W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (overruling *Lochner v. New York* and the concept of an unfettered freedom of contract). But the principle of familial autonomy, for the most part, survives.

129. *Meyer*, 262 U.S. at 403 ("No emergency has arisen which renders knowledge by a child of some language other than English so clearly harmful as to justify its inhibition with the consequent infringement of rights long freely enjoyed.").

130. *Id.* at 400.

131. *Id.* at 401-02.

132. *See id.*

133. *See id.* at 402 (noting that the state's insistence on homogeneity "exceed[ed] the limitations" of the state's power and "conflict[ed] with rights assured to [citizens]").

134. 268 U.S. 510 (1925).

135. *Id.* at 530-31, at *.

perceived threat was Catholicism (and again, immigration).[136] Citing *Meyer* approvingly, the *Pierce* Court struck down the statute, deeming fundamental "the liberty of parents and guardians to direct the upbringing and education of children under their control."[137] As in *Meyer*, the Court referenced the coercion inherent in crafting a homogenous citizenry and the democratic potential of the family as a check on such governmental excesses. "The child," the Court declared, "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."[138]

Interestingly, these protections for parental rights operate in terms similar to the First Amendment's protections for religion. The fundamental right of parents to raise their children in the manner of their choosing enunciated in *Pierce* and *Meyer* is akin to a right to familial free exercise; it provides families with space to be nonconforming. But what of the complementary protection—a principle of familial nonestablishment? If *Pierce* and *Meyer* offer families a space where they need not conform, do they also abandon the idea of familial establishment seen in *Reynolds*?

Though *Pierce* and *Meyer* recognize some parental prerogatives, the Court does not necessarily abdicate the state's interest in establishing a particular form of family. Certainly, the Court's pronouncements in *Meyer* and *Pierce* make clear that the family, as a font of pluralistic traditions and customs that foster a heterogeneous polity, is essential to democratic government—a bulwark against the state's own totalitarian impulses. But it does not necessarily follow that *all* nonconforming families will be welcomed and accepted as democracy enhancing.

The specter of nonconforming polygamous family denounced in *Reynolds* is present but unmentioned in *Pierce* and *Meyer*. Some degree of linguistic, cultural, or educational pluralism can enhance democracy by challenging state impulses toward homogeneity. But *familial* pluralism—deviations from the form and substantive values of the marital family—is less amenable to

---

136. *See* Josh Chafetz, *Social Reproduction and Religious Reproduction: A Democratic-Communitarian Analysis of the* Yoder *Problem*, 15 WM. & MARY BILL RTS. J. 263, 276 (2006). As in *Meyer*, the actual plaintiffs in *Pierce* were not convicted parents, but a Catholic organization that maintained several parochial schools, and a private all-male military training school. *Pierce*, 268 U.S. at 531-33. But the challenged statute was directed at parents: it required parents, guardians, and other persons having custody of children to enroll them in the local public school. *Id.* at 530-31.

137. *Pierce*, 268 U.S. at 534-35.

138. *Id.* at 535.

democratic life.[139] As the *Reynolds* Court suggests, such departures breed chaos, tyranny, and despotism—everything that is inimical to (and threatening to) democracy.[140]

In this way, *Pierce* and *Meyer* offer a more nuanced conception of familial establishment than that seen in *Reynolds*. *Reynolds*'s thick notion of establishment draws a line in the sand. There is an acceptable family and a clearly unacceptable family, and nothing in between.[141] By contrast, the Court's decisions in *Pierce* and *Meyer* admit the possibility of acceptance for nonconforming families—up to a point. As *Pierce* and *Meyer* make clear, parents have broad authority to raise their children,[142] particularly when they do so within the structure and normative parameters of the marital family.[143]

To see that rights of familial free exercise are conditioned on conformity with the established family norm, consider a case that explicitly combines the free exercise issues of *Reynolds* with the education concerns of *Pierce* and *Meyer*:

---

139. It is also worth considering the social contexts that distinguish *Pierce* and *Meyer* from *Reynolds*. Even those schools that provided foreign language instruction or religious instruction also provided instruction in elements specifically designed to foster patriotism. A child raised in a polygamous family in the Utah Territory had few options for acquiring the American values perceived as inherent in the monogamous family. Moreover, the particular political circumstances in Utah guaranteed that almost all available institutions would accept—if not promote—polygamy as the accepted model for family life. To that point, adherence to polygamy would clearly convey one's allegiances to the Mormon Church and its institutions, rather than the nation itself. *See* Ertman, *supra* note 102, at 163-70 (arguing that the nineteenth century anxiety over Mormon polygamy was rooted in fears that Mormons were political traitors faithful to their church and territorial government, rather than to the United States).

140. Reynolds v. United States, 98 U.S. 145, 166 (1878).

141. To be clear, neither *Pierce* nor *Meyer* discusses family form explicitly—both cases are focused on the exercise of parental autonomy in the context of educational choices. Nevertheless, the facts of both cases make clear that the families at issue were organized along the traditional lines of the nuclear family. While they departed from preferred norms regarding education, they did not deviate from the form of the established family, and thus were less threatening to the state's authority.

142. Of course, parental authority is not unfettered. "The state may intervene into the family to usurp parental decisionmaking authority only in limited circumstances, such as abuse, neglect, and abandonment." Murray, *supra* note 84, at 395-96.

143. Scholars such as Dorothy Roberts and Linda Gordon have discussed at length the degree to which nonconformity with the marital family norm invites state scrutiny and interference. *See* Dorothy E. Roberts, *Welfare and the Problem of Black Citizenship*, 105 YALE L.J. 1563, 1577 (1996) (book review) (criticizing government interference with the morality of single mothers who are welfare recipients). *See generally* LINDA GORDON, PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE 1890-1935 (1994) (discussing the history of state regulation of single mothers).

Wisconsin v. Yoder.[144] In *Yoder*, three Amish fathers challenged a law mandating high school attendance on the ground that it impermissibly conflicted with the sect's religious values and practices.[145]

Given the parents' explicit free exercise claim, *Yoder* looks a lot like *Reynolds*. In both cases, religious minorities were convicted under criminal laws requiring them to forego essential tenets of their faiths in order to conform to the state's particular ideological commitments. But importantly, the facts of *Yoder* and *Reynolds* are not solely about limitations on religious exercise; they also are about state-imposed limitations on the exercise of particular *family* commitments. At bottom, both cases involved laws that challenged the rights of families to live their family lives in the manner of their choosing.

Despite these similarities, the *Yoder* Court barely mentions *Reynolds*,[146] and importantly, its disposition of the case departs significantly from the logic of *Reynolds* and its thick account of familial establishment. The *Reynolds* Court upheld the territorial law criminalizing bigamy on the ground that the First Amendment protects religious beliefs but not necessarily religious *practices*.[147] In contrast, in *Yoder*, the Court protects some kinds of religious practices – like foregoing high school – as essential expressions of religious beliefs.[148] In so doing, the Court explicitly embraced the reasoning of *Pierce* and *Meyer* and their "thinner" accounts of familial establishment. What explains the difference?

Although their religious traditions marked them as distinctive in modern America, the form and substance of Amish family life was nonetheless consistent with the essential attributes of the marital family and the project of

144. 406 U.S. 205 (1972).

145. *Id.* at 210-11.

146. *Reynolds* is cited twice by the majority for the proposition that "activities of individuals, even when religiously based, are often subject to regulation by the States," particularly where "[t]he conduct or actions so regulated have invariably posed some substantial threat to public safety, peace or order." *Id.* at 220, 230 (internal citations omitted). In a vigorous dissent, however, Justice Douglas argues that the majority's opinion allows "organized religion a broader base than it has ever enjoyed," perhaps portending that "in time *Reynolds* will be overruled." *Id.* at 247 (Douglas, J., dissenting).

147. *Reynolds*, 98 U.S. 145, 166 (1878) ("Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.").

148. *Yoder*, 406 U.S. at 220 ("But to agree that religiously grounded conduct must often be subject to the broad police power of the State is not to deny that there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability.").

cultivating good citizens for the state.[149] As individual families, and as a community, they were "productive and very law-abiding" and, importantly, self-sustaining and financially independent.[150] Tellingly, the Court explicitly noted that none of members of the Amish community "had . . . been known to commit crimes, that none had been known to receive public assistance, and that none were unemployed."[151] Unlike the polygamous families denounced in *Reynolds* as despotic and un-American, Amish families reflected the essential attributes of the marital family established in the American legal tradition, while also offering the safe, tolerable pluralism recognized in *Meyer* and *Pierce*. Without attention to familial form, it is not easy to reconcile *Reynolds* and *Yoder*. Indeed, the polygamous families in *Reynolds* satisfied the standards of industriousness and financial independence praised in *Yoder*. But the Court viewed the isolation of the Amish as an "idiosyncratic separateness" exemplary of "the diversity we profess to admire and encourage."[152] The Mormon polygamists, in contrast, were threatening in their isolationism and self-declared "sovereignty."[153]

Of course, the cases arose in distinct historical and jurisprudential contexts and were separated by almost a century.[154] But there is also something more basic at work—at least in part. The pluralism embodied in Mormon family life was not the sort of democracy-enhancing diversity celebrated in *Meyer*, *Prince*, and later, *Yoder*. Accordingly, Mormon family life would not serve as a bulwark against the homogeneity of a tyrannical state; instead, it was interpreted as an attempt to establish a tyrannical theocracy existing within the country's

---

149. Generally, Amish families are composed of a husband and wife living with their children (and perhaps an elderly family member). *See* JOHN A. HOSTETLER, AMISH SOCIETY 145-67 (4th ed. 1993) (discussing Amish family life); Franklin G. Snyder, *Nomos, Narrative, and Adjudication: Toward a Jurisgenetic Theory of Law*, 40 WM. & MARY L. REV. 1623, 1689 (1999) (noting that, in terms of "[t]heir nuclear family life, their houses and food, their general cosmology, and their theology," the Amish "share many more narratives of the rest of America than one might suspect").

150. *Yoder*, 406 U.S. at 222.

151. *Id.* at 223 n.11.

152. *Id.* at 226.

153. *See generally* GORDON, THE MORMON QUESTION, *supra* note 102 (noting that the Mormon conflict was essentially a battle in which the supremacy of the federal government over a rogue territory was at stake).

154. The political dynamics of the postbellum United States, coupled with its particular understanding of polygamy, all shaped the conditions in which the Court decided *Reynolds* in 1878. When the Court decided *Yoder* nearly a century later, there had developed a substantial body of jurisprudence concerning First Amendment rights and the fundamental rights of parents that had not informed *Reynolds*'s disposition.

borders.[155] The Mormons' deviation from the marital family betrayed their deviation from the substance of democratic principles.

The Amish families in *Yoder*, by contrast, presented a vision of family life rooted in democratic principles even as they lived apart from modern society. As the Court observed, the Amish lived "a life in harmony with nature and the soil."[156] Theirs was a family life consistent with "the simple life of the early Christian era" and the families that shaped and cultivated American democracy "during much of our early national life."[157] Accordingly, their deviations from the norms and standards of modern America—their dress, their insularity, and their antipathy toward high school—could be accepted as pluralistic traditions that fostered and nurtured democracy.[158]

III. THE FAMILY-STATE RELATIONSHIP, REIMAGINED

Disestablishing the family: our use of the present participle is deliberate. Many forms of familial establishment have already been dismantled: legitimacy classifications, adultery prohibitions, and sodomy bans are just a few examples.[159] The law of marriage is in flux, but there is little doubt that the trend in recent years is toward a thinner form of establishment, if not disestablishment.[160] Whether legal developments continue on this path

---

155. *See* Gordon, *The Liberty of Self-Degradation*, *supra* note 102.

156. *Yoder*, 406 U.S. at 210.

157. *Id.*

158. Austin Sarat & Roger Berkowitz, *Disorderly Differences: Recognition, Accommodation, and American Law*, 6 YALE J.L. & HUMAN. 285, 298 (1994) (discussing the *Yoder* Court's sentimental depiction of the Amish "as exemplars of fundamental American values"). It is perhaps not coincidental that *Yoder* was decided only four years before the American Bicentennial celebrations.

159. *See* Lawrence v. Texas, 539 U.S. 558 (2003) (holding unconstitutional a criminal ban on same-sex sodomy); Levy v. Louisiana, 391 U.S. 68 (1968) (holding unconstitutional discrimination on the basis of illegitimacy). Although laws criminalizing adultery continue on the books in a number of states, actual prosecutions are quite rare. *See* Elizabeth F. Emens, *Monogamy's Law: Compulsory Monogamy and Polyamorous Existence*, 29 N.Y.U. REV. L. & SOC. CHANGE 277, 290 n.50 (2004) (collecting adultery statutes). The impact of the Supreme Court's decision in *Lawrence* renders the likelihood of adultery prosecutions even more remote. *See* 539 U.S. at 590 (Scalia, J., dissenting) (observing that *Lawrence* "called into question" the continued vitality of adultery prohibitions and other morals legislation); Hobbs v. Smith, No. 05CVS267, 2006 WL 3103008 (N.C. Super. Ct. Aug. 25, 2006) (striking down a law criminalizing fornication and adultery on the ground that it violated substantive due process rights).

160. *See, e.g.*, NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 212 (2000) (characterizing the changed "relation between marriage and the state" as

remains to be seen. Also uncertain are the political benefits of disestablishment.[161] As we have emphasized, disestablishment offers no guarantees. Indeed, it poses risks—it may shield illiberal families and produce illiberal citizens. The antitotalitarian approach thus raises an enduring question about the extent to which a liberal government should tolerate illiberal practices and institutions. We have not sought to resolve that debate here, but we have suggested reasons to think that a liberal government might need to endure certain risks in order to survive as liberal.

Indeed, we think disestablishment, with all its perils, holds more promise than the statist alternative. That alternative is endorsed (though not by that name) in an important recent book on family-state relationships in the criminal law. *Privilege or Punish: Criminal Justice and the Challenge of Family Ties* lists and critiques many instances in which criminal sanctions (or indirect burdens of the criminal justice system) are distributed with reference to familial relationships.[162] Dan Markel, Jennifer Collins, and Ethan Leib identify an array of family-based benefits (including testimonial privileges, sentence reductions, exemptions from liability for harboring fugitives) and an array of family-based burdens (including some discussed here, such as bigamy and nonpayment of child support) as violations of liberal and egalitarian norms. *Privilege or Punish* sometimes seems to endorse principles of familial autonomy, and its authors profess a commitment to a "liberal minimalist paradigm."[163] But the book's argument is, in fact, deeply statist, and it offers proponents of limited government little but alarm.

"disestablishment"); Tamara Metz, *The Liberal Case for Disestablishing Marriage*, 6 CONTEMP. POL. THEORY 196, 199 (2007) ("[B]y some accounts the establishment of marriage is weakening."). We would balk at calling these changes "disestablishment." Although the marital nuclear family is no longer the only acceptable model for family life, nonconforming families and family practices are often judged against the model of the marital nuclear family, further entrenching its primacy as the normative ideal for intimate life. As such, we would not characterize this trend as complete disestablishment.

161. We do not here propose a particular model of familial disestablishment or identify the types of families that might be recognized under such an approach. Suffice to say that the boundaries that define the legal family are fraught with dignitary and economic interests. Instead, the Feature intends only to identify the degree to which the existing model of the established family is inadequate and to gesture toward an approach that might yield more satisfying models.

162. MARKEL, COLLINS & LEIB, *supra* note 18.

163. *Id.* at 95-96. Markel, Collins, and Leib imply a strong commitment to family autonomy in several instances. *See, e.g.*, *id.* at xiii ("It is one thing for the law to recognize how citizens organize themselves into close circles of affection; but it is another for the criminal law to take a stance on how citizens ought to organize themselves—and to discredit and disadvantage those who choose to draw their circles of intimacy differently.").

The authors note that the modern liberal state has an "ambivalent" relationship to the family; this ambivalence stems from the fact that families do not always serve state interests.[164] Of course, families routinely serve the state's interests by providing "care services" that the state cannot afford to provide on its own.[165] But in the criminal justice system, *Privilege or Punish* argues, most legal protections for families impede the state's efforts to deter and prosecute crime.[166] For purposes of this Feature, we leave aside the merits of that claim. We emphasize instead the vantage point from which the authors make it: the question, as far as they are concerned, is whether or not families serve the interests of the state. The relevant perspective is that of the state itself.[167] But as individuals, why should we assume the state and ask how best to serve its interests? To the authors of *Privilege or Punish*, to prioritize family before state is, at best, a sign of human frailty.[168]

For those who reject the statist perspective, however, it is not clear why this prioritization, or other demands for limited government, should be understood

---

164. *Id.* at 23-25.

165. "By giving families special support . . . the state may be able to economize on expenditures that it would otherwise be forced to bear in educating its citizenry and preparing its members to contribute to the stability and flourishing of the regime." *Id.* at 24.

166. *See id.* at 25.

167. So, for example, Markel, Collins, and Leib would permit classifications based on family status when they serve as "proxies for promoting some of the distinctive purposes of the criminal justice system." *Id.* at xix. The "normative framework" the authors adopt is one that simply asserts the priority of the state. *See, e.g.*, *id.* at 29 ("[W]e do not think the interest . . . in . . . encouraging close familial relationships . . . constitutes sufficient reason for the state to deny our commitment to the truth-seeking function of the criminal justice system."); *id.* at 58 ("[T]he state's and the public's interests should generally prevail over the need to promote the comparatively private interest of family preservation and 'harmony.'"); *see also infra* note 187 (discussing the statist perspective evinced by Markel, Collins, and Leib).

168. MARKEL, COLLINS & LEIB, *supra* note 18, at 29 ("Although it cannot be denied that humans are frail and fallible—particularly when it comes to family loyalty—the state simply cannot legitimize its acceptance of perjury and obstruction by refusing to prosecute individuals who engage in these practices."); *id.* at 43 (characterizing laws that exempt family members from prosecution for harboring a fugitive as "an acknowledgment of human frailty," and arguing that the exemptions are misguided) (quoting State v. Mobbley, 650 P.2d 841, 843 (N.M. Ct. App. 1982) (Lopez, J., dissenting)). It is worth noting that in other cultures, the presumption of institutional superiority is quite different. Prior to the Cultural Revolution, Chinese culture placed allegiance to the family ahead of allegiance to the state. DERK BODDE & CLARENCE MORRIS, LAW IN IMPERIAL CHINA: EXEMPLIFIED BY 190 CH'ING DYNASTY CASES 39 (1967) (noting that although Confucianism placed "heavy emphasis" on both loyalty to family and the state, if the two conflicted, loyalty to family was prioritized).

as weakness.[169] As we have argued here, an antitotalitarian argument for religious liberty recognizes that religious belief may lead to demands for limited government and may even undermine political power—and the antitotalitarian finds religion to be valuable for just that reason. Similarly, the fact that familial obligations may compete with political ones is a reason to value families, not a reason to bemoan them. Of course, families and churches, like states, may exercise coercion. We do not suggest that familial obligations should always and inevitably trump political authority. Instead, those truly committed to liberal minimalism might attempt to stand at a critical distance from both family and state and ask what institutional relationships would best preserve individual freedom.

The principle of institutional pluralism explored in Part I might be contrasted with two other visions, each of which appears at times in *Privilege or Punish*. First, one might maintain the state's institutional primacy, but be more permissive with respect to the structure of the subsidiary institutions that the state recognizes and regulates. Call this the contract model: individuals have greater ability to structure their family lives, but the state enforces the chosen structures (and, of course, choose which ones to enforce). Or one might, again, maintain the state's institutional primacy, and ask it to be indifferent to the subsidiary institution of the family. Call this the family-blindness model.

The contract model would encourage individuals to formalize intimate relationships of various forms in private contracts.[170] The state would enforce

---

169. Recall, again, Antigone and her sister Ismene:

> ISMENE: O think, Antigone; we are women; it is not for us
> To fight against men; our rulers are stronger than we,
> And we must obey in this, or in worse than this.
> May the dead forgive me, I can do no other
> But às I am commanded . . . .
> ANTIGONE: Go your own way; I will bury my brother;
> And if I die for it, what happiness!

SOPHOCLES, *supra* note 5, at 128. Which of these sisters is best described as frail?

Privilege or Punish refers to Antigone briefly, but the authors find the analogy between her story and their own concerns about conflicting obligations "imperfect." *See* MARKEL, COLLINS & LEIB, *supra* note 18, at xii, 156 nn.16-17. "[W]e are more sympathetic to Antigone's plight because the edict she was flouting was unreasonable and oppressive . . . . Antigone's defiance of Creon may be viewed as a rebellion against an unjust law . . . ." *Id.* at 156-57 n.17. But to excuse Antigone because she was bound by an unjust law is to miss the point. How does an individual gain the capacity to decide whether a law is just or unjust? Or the willpower to defy an unjust law? These faculties, we argue, are unlikely to arise in persons for whom the state is the only authoritative institution.

170. Mary Lyndon Shanley, *Just Marriage: On the Public Importance of Private Unions*, *in* JUST MARRIAGE 3 (Mary Lyndon Shanley ed., 2004).

the contracts, but it would not limit the capacity to contract to heterosexual couples, and the individual parties would have broad discretion to determine the content of the contract.[171] Obviously, contracts are already frequently used to structure familial relationships and obligations, often in the context of civil matters.[172] In *Privilege or Punish*, however, Markel, Collins, and Leib argue that contracts should sometimes serve as the basis for *criminal* regulation of families.[173] In addition to punishing failures to rescue (or protect) on the basis of traditionally recognized familial relationships, the state should invite individuals to make and record "covenants of care."[174] Once persons have voluntarily assumed responsibility to care for designated dependents, any failure to provide appropriate care should subject the registrant to criminal liability.

It is difficult to imagine why anyone would invite the criminal regulation of his or her intimate associations in this way. Given our antitotalitarian concerns, we note only that whatever one makes of this proposal, it cannot be fairly characterized as liberal minimalism.[175] Instead, it is authoritarianism with a voluntarist face. It justifies state regulation of intimate relationships on the ground that the state has been invited in. Here again, it is helpful to think of the Establishment Clause. On the antitotalitarian view, we do not satisfy the

---

171. *See, e.g.*, Edward A. Zelinsky, *Deregulating Marriage: The Pro-Marriage Case for Abolishing Civil Marriage*, 27 CARDOZO L. REV. 1161, 1165 (2006). Of course, as Zelinsky and other contract proponents note, many individuals may enter intimate associations but fail to formalize the relationship in a contract. Zelinsky argues that states should adopt default rules to apply to such persons. *Id.* at 1183.

172. *See* Edwardson v. Edwardson, 798 S.W.2d 941 (Ky. 1990) (enforcing a prenuptial contract negotiating around default rules for post-dissolution property distribution). *But see* Borelli v. Brusseau, 16 Cal. Rptr. 2d 16 (Cal. Ct. App. 1993) (refusing to enforce a postnuptial agreement requiring the husband to compensate the wife for providing care to him).

173. MARKEL, COLLINS & LEIB, *supra* note 18, at 90-93.

174. *Id.* at 91. Markel, Collins, and Leib argue that "one's familial status qua spouse or parent may be presumptively used to establish that the relationship involves voluntarism," and so the criminal law could continue to punish those who neglect their spouses or children whether or not they register for covenants of care. *Id.*

175. Oddly, after arguing for covenants of care, the authors consider and reject similar covenants of loyalty.

> [W]e toyed with an idea . . . that parties should be able to opt into a regime of voluntary criminal law regulation, such that breach of a contract for monogamy could lead to criminal prosecutions for bigamy or adultery. But upon further consideration, we recognized the unfairness of using public resources to investigate, prosecute, and punish conduct that amounted to a breach of private promises between individuals.

Id. at 139.

Establishment Clause by securing the consent of a church to be regulated, funded, or otherwise supervised by the state. The rationale for separate institutions is nonwaivable. Of course, we do not suggest that the state is never permitted to punish violence or abuse within families (or within churches). But the rationale for such punishment is based on the individual victim's interest in avoiding abuse. The state's intervention is not dependent on whether the abuser has invited the state in.[176]

There are two additional reasons to be wary of contract models for intimate relations. First, the contract paradigm may invite the rhetoric or norms of economic privatization. This is not an inevitable consequence; as we have discussed, economic self-sufficiency is a central component of the ideal marital, nuclear family, and in theory any move away from that model could diminish expectations of economic insularity. But given the association of private contract with private *economic* relationships, to view families as contracts may further entrench norms of financial insularity. Though we cannot develop the argument at length here, we believe a disestablishment perspective is consistent with substantial public financial support for caregiving within families.[177]

Second, the contract paradigm is conceptually inaccurate in many respects. Familial associations (like religious ones) are not always strictly voluntary, and the law should not pretend otherwise. Adult intimate relationships most approach the voluntarist model, though even here voluntariness is often overstated. The parent-child relationship often (but not always) begins with the parent's choice, but it never begins with the child's. In almost all cases, relationships with siblings or extended relatives are not entered voluntarily.[178]

---

176. The registry proposal seems to perpetuate the view that the wrongdoers' consent is the source of the right to punish. For a critique of that understanding of punishment, see Alice Ristroph, *Respect and Resistance in Punishment Theory*, 97 CAL. L. REV. 601 (2009).

177. Education disestablishment, according to Michael McConnell, entails "the idea . . . that families would be permitted to choose among a range of educational options, including but not limited to government schools, using their fair share of educational funding to pay for the schooling they choose." McConnell, *supra* note 51, at 87. On this view, access to diverse educational experiences should not be the privilege of wealthy families who can independently pay for private schools. So long as public funding is not used to promote a particular religion or to facilitate state control of religious institutions, publicly funded voucher programs do not violate the Establishment Clause. In short, antitotalitarian principles of disestablishment do not prohibit, and may even require, public funding for families who wish to educate their children at religious schools. It is possible to extend these arguments to defend other kinds of public funding to families. In particular, voucher programs might be developed that would enable families to pursue a greater range of childcare options – beyond the traditional marital family with one stay-at-home parent.

178. Theoretically individuals, once grown, can exit family relationships that they did not choose, but this does not make the voluntary label accurate. Notably, Antigone's particular loyalty to

To treat familial obligations as voluntarist is to misrepresent the character of those obligations in important ways. Michael Sandel has made a similar argument with respect to religious obligations. To speak of the right of free exercise as "freedom of choice" is misleading; "freedom of conscience" is a better term.[179] Religious beliefs often are not a matter of choice—and according to Sandel, following Madison and Jefferson, that is why they should be protected: "It is precisely because belief is not governed by the will that freedom of conscience is inalienable."[180] Similarly, as discussed below, the not-fully-voluntary nature of familial relationships may provide an argument for legal exemptions based on family status in certain circumstances.

Another model for the family-state relationship is a principle of family blindness. As some have argued that laws should be color blind or gender blind, so one could argue that they should be family blind. A rule of absolute family blindness would be difficult to implement, but it is possible to imagine official indifference to family status as a normative goal. At times, Markel, Collins, and Leib seem to advocate this approach.[181] We do not advocate a family-blind law. First, family blindness, like color blindness, may simply entrench existing discriminatory practices and impede efforts to eliminate those practices.[182] Second, to the extent that individuals actively seek public recognition of their familial associations, we would not ask the state to deny that recognition, so long as it is not granted selectively to promote a particular model of the family. Third, an antitotalitarian approach may sometimes need to recognize families in order to accommodate them, as is true of religious institutions and religious duties.

Disestablishment may help inspire models of family-state relationships preferable to those motivated by principles of contract or family blindness. Of course, disestablishment itself may be susceptible to multiple interpretations,

---

Polyneices is based on the fact that her relationship with him was not chosen and, in fact, was beyond her control. She would not have made the same choice to bury a husband or child, given that marriage and motherhood involve somewhat more individual agency: "O but I would not have done the forbidden thing / For any husband or for any son . . . . I could have had another husband / And by him other sons, if one were lost . . . ." SOPHOCLES, *supra* note 5, at 150.

179. MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY 65-71 (1996).

180. *Id.* at 66.

181. They distinguish their argument from an equal protection claim that familial classifications should get strict scrutiny, but urge that "as a policy matter, the government should view the use of family status skeptically." MARKEL, COLLINS & LEIB, *supra* note 18, at xvii.

182. Ian F. Haney López, *"A Nation of Minorities": Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985 (2007) (critiquing color blindness).

as it has been in the context of religion.[183] But if we focus on the antitotalitarian argument for religious disestablishment, we find two church-state issues of particular interest to a disestablished family-state relationship. From the antitotalitarian perspective, there are often good reasons to recognize religious accommodations from generally applicable laws, and there may be good reasons to make public funding available to religious institutions that fulfill important secular functions.[184] Similarly, a principle of familial disestablishment provides a rationale for family status accommodations from the burdens of criminal law. And it offers an argument for increased public funding for important caregiving services that take place within families.

Exemptions and accommodations address the question that arose in *Reynolds* and *Yoder*: when an ostensibly neutral and generally applicable law interferes with religious practice, should the believer be excused from compliance? In the religion context, most commentators seem to agree that such exemptions are often desirable, though there are continuing disputes about whether exemptions should be determined solely by legislatures (in which case they are more frequently called *accommodations*) or, in some cases, mandated by the judiciary.[185] Without entering that debate, we note that antitotalitarian principles support a parallel practice of familial accommodation. If we recognize families as independent sources of value and meaning, then we may want to protect them from certain laws that burden their normative independence.

In particular, the "family ties benefits" in the criminal justice system of which Markel, Collins, and Leib complain—such as spousal testimonial privileges, sentencing discounts, and exemptions from fugitive harboring

183. When it comes to religion, there is as much—or more—disagreement about how to implement the Establishment Clause as there is about the rationale for disestablishment. Even those who agree on the purpose of disestablishment often disagree about how best to resolve particular church-state controversies.

184. These two issues—exemptions from generally applicable laws and funding to religious institutions—are two of the most controversial and widely discussed questions arising under the religion clauses today. *See, e.g.*, Andrew Koppelman, *Corruption of Religion and the Establishment Clause*, 50 WM. & MARY L. REV. 1831, 1927-28 (2009) (identifying these two issues and a third: whether democratically enacted laws may permissibly be based on religious beliefs).

185. *See id.* at 1929; *cf.* Abner S. Greene, *The Irreducible Constitution*, 7 J. CONTEMP. LEGAL ISSUES 293, 307 (1996) (distinguishing judicially mandated exemptions from legislatively crafted accommodations). Since we do not take a position on whether familial accommodations should be decided by the legislature or judiciary, we use the terms *accommodation* and *exemption* interchangeably below.

laws[186]—could be understood and defended as accommodations of familial obligations.[187] Laws mandating testimony do not themselves address or defend any particular model of the family, but when applied to require one spouse to testify against another, such laws threaten the institutional independence of the family. A society that prized such independence might well choose to grant exemptions in these circumstances, although it might have to grant testimonial privileges more broadly than does present law, in order to avoid preferential treatment for certain family forms. A similar analysis applies to exemptions from fugitive harboring laws and to sentencing discounts. From an antitotalitarian perspective, it is no answer to assert, as Markel, Collins, and Leib do, that exemptions will impede the state's exercise of its criminal enforcement authority. Part of the value of families is that they ensure that the state is not the only authority in the game.

CONCLUSION

In offering these preliminary reflections on the consequences of familial disestablishment, we do not pretend that total disestablishment is possible, nor do we pretend to resolve all the many practical issues that disestablishment entails.[188] There is much more thinking to be done. But we hope to have illustrated the normative appeal of an antitotalitarian approach.

---

186. MARKEL, COLLINS & LEIB, *supra* note 18, at 36-43 (describing and critiquing evidentiary privileges); *id.* at 43-45 (describing and critiquing exemptions for family members from laws that punish harboring a fugitive); *id.* at 46-53 (describing and critiquing pretrial release and sentencing decisions that take into account a defendant's familial relationships and obligations).

187. It is worth noting that the labeling of these exemptions as "benefits" evinces the statist perspective of *Privilege or Punish*. If the only visible obligations are those to the state, then a release from those obligations is easily characterized as a benefit. But if we do not take the state as the most important human institution, then it is easier to recognize other sources of obligation. A defendant released early from prison to care for a family member has not simply received a free pass; he has been released from one obligation to assume another.

Markel, Collins, and Leib would sometimes take family relationships into account in sentencing or prison furlough or visitation policies, but in this context, their statist presumption is again evident: "[O]ne of the strong arguments for having the state benefit the family arises when the family is doing work the state very much wants done." *Id.* at 53. *See also* Murray, *supra* note 84, at 427-32 (discussing the state's considerations vis-à-vis the family in sentencing departures).

188. In some instances, the state cannot avoid making crucial decisions about the composition of families. For example, as James Dwyer has recently explained, the state must set default rules for the custody of newborn infants. James G. Dwyer, *A Constitutional Birthright: The State, Parentage, and the Rights of Newborn Persons*, 56 UCLA L. REV. 755 (2009).

And, once more, we want to acknowledge the risks inherent in embracing institutions that compete with the state or enjoy protection from its reach. Although the antitotalitarian principle clearly recognizes families as valuable institutions, no one should get too misty-eyed. Families—like churches, and like states themselves—are potential sources of numerous tangible and intangible goods, including care, support, emotional and intellectual engagement, education, moral guidance, and a sense of belonging. But families—again like churches, and again like states—are also potential sources of violence, abuse, brainwashing, discrimination, or neglect. If free from state regulation, families may inflict harm on the individuals within them, and they may inculcate illiberal values or produce illiberal citizens.

Some of these risks are easier to address than others. We do not think familial disestablishment disallows state intervention in response to familial violence, anymore than religious disestablishment disallows efforts to combat abuse within religious institutions. But the danger that disestablishment may permit or even encourage the development of illiberal values is a real one. We are not sure, however, that it is a danger that a liberal state can forestall if it is to remain liberal. Justice Jackson, who famously warned against "doctrinaire logic" that would render the Constitution a suicide pact, elsewhere acknowledged the other side of the coin: "[F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order."[189]

The antitotalitarian perspective explored here implies that a liberal order must sometimes leave its heart exposed. Liberal democracy is risky. So is freedom. We are concerned with possibilities for individual freedom, recognizing that individuals live and grow in the context of various social and political institutions. The question to ask of families, and of other institutions, is whether and how they serve the persons who live in and among them.

---

189. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943); *see also* Terminiello v. City of Chicago, 337 U.S. 1, 37 (1947) (Jackson, J., dissenting) ("There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.").