

# NEOLIBERALISM IN U.S. FAMILY LAW: NEGATIVE LIBERTY AND LAISSEZ- FAIRE MARKETS IN THE MINIMAL STATE

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## I INTRODUCTION

Neoliberalism permeates U.S. family law. The law protects negative liberty in family life but denies positive rights to the resources that make family life possible. The law endorses laissez-faire market outcomes and portrays the state as overbearing and incompetent.

Even seemingly progressive landmarks in family law remain within the neoliberal frame. *Loving v. Virginia*, *Lawrence v. Texas*, and *United States v. Windsor*, for instance, mark true victories for social progressives, protecting important rights long denied to persecuted groups.<sup>1</sup> And yet, none of them challenges in any deep way the three core ideals of neoliberal family law: negative liberty, laissez-faire market distributions and the minimal state. To take another example, the earned income tax credit (EITC) passes in today's United States for a progressive welfare program, even though it alleviates only modestly the harshness of laissez-faire labor markets.<sup>2</sup>

In this article, I document how neoliberalism dominates U.S. family law in three legal arenas. The first is federal constitutional law, where the Supreme Court has adopted a thoroughly neoliberal vision of the family. According to the Court, the Federal Constitution grants individuals wide latitude to assert negative liberty—that is, freedom from state intervention—in family life. But individuals have no constitutional right to claim any distribution of resources other than that produced by the marketplace. So strong is the Court's ideal of negative liberty, and so extreme is its skepticism about state power, that it has insulated the state from any responsibility to protect children—even against vicious and foreseeable parental attacks.

The second legal arena is state family law, which pursues a limited mission

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1. See *United States v. Windsor*, 133 S.Ct. 2675 (2013); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Loving v. Virginia*, 388 U.S. 1 (1967).

2. See *infra* text at notes 83–91; Anne L. Alstott, *Why the EITC Doesn't Make Work Pay*, 73 *LAW & CONTEMP. PROBS.* 285 (Winter 2010) [hereinafter Alstott, *EITC*].

shaped by the contours of constitutional law. When individuals have sweeping rights to negative liberty but no rights at all to challenge market distributions, the primary task of subconstitutional law is simply to create legal space for individuals to exercise negative liberty. Accordingly, state family law pursues no broad mandate to foster family life. Rather, it seeks only to authorize private ordering and to adjudicate private disputes. Even in the parent-child relationship, neoliberalism dominates, as state law leaves children's fates to depend on their parents' market earnings. Rich children prosper and poor ones suffer, and neither children nor their parents can seek legal redress.

The third legal arena is federal and state welfare law. One might suppose that welfare would provide a legal vehicle for citizens to challenge market outcomes. However, in the United States today, welfare provision tends to ratify market distributions rather than upend them. Absent constitutional rights to aid, welfare programs exist at the sufferance of political actors, and the programs' terms reflect neoliberal commitments. So, for instance, the major U.S. social insurance programs privilege paid employment by granting benefits that reward high earnings and steady participation in the workforce. And welfare programs often feature time limits, work requirements, and other conditions that ensure that poor individuals and their families subsist primarily on their market earnings. The predictable consequence is that individuals and families can suffer dire poverty without any entitlement to state assistance.

The entrenched neoliberalism of family law is frustrating for many reasons, not least because it blocks sustained consideration of a more appealing liberalism. Negative liberty, as important as it is, is insufficient for justice. We can imagine—indeed, other countries have adopted—constitutional interpretations that convey positive rights. We can also imagine—and, again, other countries have enacted—law that looks beyond the minimalist task of settling private disputes and instead aims to correct market distributions and promote a family life open to all.

But so thorough is the neoliberal cast of U.S. family law at all levels that it is difficult to create legal space for consideration of such ideas. Today, constitutional law, family law, and social welfare represent separate legal specialties.<sup>3</sup> To engage the possibilities of liberalism, a necessary, though hardly sufficient, first step will be to draw connections across bodies of law that are, today, treated as separate fields.

## II

### NEGATIVE LIBERTY AND THE MINIMAL STATE IN FEDERAL CONSTITUTIONAL FAMILY LAW

Neoliberalism is a slippery term, and as David Grewal and Jed Purdy discuss, it takes plural forms in legal discourse.<sup>4</sup> In family law, three neoliberal

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3. See *infra* notes 96–98 and accompanying text.

4. See generally David Singh Grewal & Jedediah Purdy, *Introduction: Law and Neoliberalism*, 77

ideals dominate both constitutional and subconstitutional law: negative liberty, market distribution, and the minimal state.

According to the Supreme Court, individual liberty in family life begins and ends with negative liberty—the absence of state intervention in the family. Every major constitutional right in family law that has been recognized by the Supreme Court sounds in negative liberty. In *Loving*, the Court famously invalidated a state ban on interracial marriage, holding that the freedom to marry “resides with the individual and cannot be infringed by the State.”<sup>5</sup> More recently, in *Windsor*, the Court struck down the provisions of the Defense of Marriage Act (DOMA) that denied federal recognition to state marriages between individuals of the same sex, holding that DOMA amounted to an unconstitutional denial of liberty guaranteed by the Fifth Amendment.<sup>6</sup> To be sure, *Loving* and *Windsor* invoked other constitutional considerations, including the prohibition on racial classifications (in *Loving*) and the historic deference of the federal government to the states in matters of domestic relations (in *Windsor*). But both decisions invoked individuals’ claim to negative liberty in choosing marital partners.

Reproductive rights cases have also reflected the constitutional allegiance to negative liberty. In *Griswold v. Connecticut*, the Court struck down a state law imposing criminal penalties on the use of birth control,<sup>7</sup> while in *Roe v. Wade*, the Court invalidated some state restrictions on abortion.<sup>8</sup> In both cases, the Court protected negative liberty, framed as “zones of privacy” in *Griswold* and “rights of personal privacy” in *Roe*.<sup>9</sup> Today, reproductive rights remain contested, with social conservatives scoring some victories limiting access to abortion,<sup>10</sup> but the key rights protected by the Constitution are rights to act free of government interference.

The Supreme Court has extended negative liberty to sexual activity as well. In *Lawrence*, the Court struck down a Texas statute criminalizing sexual acts between persons of the same sex.<sup>11</sup> The Court admonished that “[t]he petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime.”<sup>12</sup>

Despite these negative rights against the state, individuals have no positive

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LAW & CONTEMP. PROBS., no. 4, 2014 at 1.

5. *Loving v. Virginia*, 388 U.S. 1, 4 (1967). *See also Zablocki v. Redhail*, 434 U.S. 374 (1978) (invalidating a Wisconsin statute prohibiting marriage by individuals owing child support).

6. *United States v. Windsor*, 133 S.Ct. 2675, 2695–96 (2013).

7. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

8. *Roe v. Wade*, 410 U.S. 113 (1973).

9. *Id.* at 152; *Griswold*, 381 U.S. at 484.

10. *See, e.g., Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (imposing an “undue burden” test for abortion restrictions and upholding some Pennsylvania regulations while striking down others).

11. *Lawrence v. Texas*, 539 U.S. 558 (2003).

12. *Id.* at 578.

rights at all to the resources they need to conduct family life. Families have no constitutional right to cash welfare, to housing, or to education, for instance.<sup>13</sup> In federal constitutional parlance, welfare, taxation, and other distributive policies face only “rational basis” review, meaning that they are essentially beyond constitutional challenge.<sup>14</sup> Poverty is not a suspect classification triggering constitutional scrutiny.<sup>15</sup> Thus, for instance, states can cap welfare benefits regardless of family size,<sup>16</sup> can refuse to build public housing projects,<sup>17</sup> and can fund public schools inadequately (or, apparently, not at all).<sup>18</sup> The United States can constitutionally limit welfare benefits to five years,<sup>19</sup> deny Supplemental Nutrition Assistance Program (SNAP, formerly Food Stamps) benefits to a household if a parent fails to pursue employment,<sup>20</sup> and deny welfare benefits to children based on parental behavior.<sup>21</sup>

The Supreme Court’s rejection of a positive right to state support reflects the second neoliberal ideal that dominates U.S. family law: the primacy of resource allocations produced by laissez-faire markets. When the Court denies welfare rights, it endorses market outcomes and rejects the notion that individuals are entitled to basic resources (or any resources at all) other than those earned in the marketplace.

In *Dandridge v. Williams*, for instance, the Court permitted Maryland to cap welfare benefits to larger families, based on the state’s interest in encouraging employment in the marketplace at prevailing wages:

By [limiting the welfare grant and permitting the recipient to retain her market earnings] . . . Maryland provides an incentive to seek gainful employment. And by keying [welfare grants] to the minimum wage. . . the State maintains some semblance of an equitable balance between families on welfare and those supported by an

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13. For recent scholarship noting the absence of welfare rights in the U.S. Constitution, see Mario L. Barnes & Erwin Chemerinsky, *The Disparate Treatment of Race and Class in Constitutional Jurisprudence*, 72 LAW & CONTEMP. PROBS. 109 (Fall 2009); William E. Forbath, *Social Rights, Courts, and Constitutional Democracy: Poverty and Welfare Rights in the United States*, 12 DEMOCRATIZATION 725 (2005).

14. See, e.g., *Dandridge v. Williams*, 397 U.S. 471 (1970) (upholding a state welfare law denying extra benefits to larger families); *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937) (upholding a state minimum-wage law for women). For rare federal constitutional victories in rational-basis cases, see *Plyler v. Doe*, 457 U.S. 202 (1982) (striking down a Texas statute denying public-education funds for undocumented immigrants); *U.S. Dept. of Agric. v. Moreno*, 413 U.S. 528 (1973) (invalidating Food Stamp Act provision denying benefits to households with unrelated persons).

15. *Harris v. McRae*, 448 U.S. 297, 323 (1980).

16. *Dandridge*, 379 U.S. 471.

17. See *James v. Valtierra*, 402 U.S. 137 (1971) (upholding the constitutionality of a California law requiring that public housing projects be approved by referendum).

18. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973) (“Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected.”). If a state chooses to provide public education, however, it may face constitutional mandates to provide it equitably. See *Plyler*, 457 U.S. 202 (striking down a Texas statute denying public-education funding for undocumented immigrants).

19. 42 U.S.C. § 608(a)(7) (2006) (five-year time limit).

20. 7 U.S.C. § 2015(d)(1) (2006 & Supp. 2008) (work requirements for SNAP).

21. 42 U.S.C. § 607(e) (2006) (states may terminate benefits for parental refusal to work, with limited exceptions).

employed breadwinner.<sup>22</sup>

A legal reader might recall that the 1960s and 1970s fostered a vigorous welfare-rights movement that won landmark cases in the Supreme Court. Cases including *King v. Smith*<sup>23</sup> and *Rosado v. Wyman*<sup>24</sup> did mark victories for welfare recipients over state authorities seeking to enforce moral restrictions and cut benefits. But these were statutory victories, not constitutional ones. The repeal of Aid to Families with Dependent Children (AFDC) in 1986 and its replacement with Temporary Assistance for Needy Families (TANF) marked the death of these statutory victories: by design, TANF is not an individual entitlement but a block grant to the states that requires time limits and work restrictions. TANF contains no open-ended mandate (as AFDC arguably did) for the state to support impoverished children and families.<sup>25</sup>

Even the widely celebrated 1970 constitutional case *Goldberg v. Kelly*<sup>26</sup> did not establish a constitutional right to welfare. The Supreme Court deployed sweeping language in its opinion: “From its founding the Nation’s basic commitment has been to foster the dignity and well-being of all persons within its borders. We have come to recognize that forces not within the control of the poor contribute to their poverty.”<sup>27</sup> But the Court guaranteed only the limited procedural right to a fair hearing before the termination of welfare benefits.<sup>28</sup> Similarly, the Supreme Court later held that states cannot deny access to the courts to indigent parties seeking a divorce solely because of an inability to pay court costs.<sup>29</sup> However, despite possessing this “right to be heard,”<sup>30</sup> nothing in the Constitution guarantees state support to indigent divorced individuals or their children.

Together, the neoliberal ideals of negative liberty and market distribution create an asymmetric pattern of federal constitutional protections for family life. Individuals have fundamental rights to marry, engage in sexual activity, and otherwise carry on family life, but their legal rights enable them only to fend off state regulation. Individuals have no right to the resources they need to marry, to divorce, or even to remain alive (a rather obvious prerequisite to family life).<sup>31</sup> Every individual is expected to support herself and her spouse on what she can earn in the labor market. And she has no recourse if the market prices

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22. *Dandridge v. Williams*, 397 U.S. 471, 486 (1970).

23. *King v. Smith*, 392 U.S. 309 (1968) (invalidating an Alabama rule denying welfare benefits to a family with a “substitute father”).

24. *Rosado v. Wyman*, 397 U.S. 397 (1970) (striking down a state rule that cut benefits to some families in New York State).

25. See 42 U.S.C. § 601 (providing that the purpose of TANF is to “increase the flexibility of the states” in offering welfare to families and providing that the statute must not be interpreted “to entitle any individual or family to assistance under any State program”).

26. *Goldberg v. Kelly*, 397 U.S. 254 (1970).

27. *Id.* at 264–65.

28. *Id.* at 270–71.

29. *Boddie v. Connecticut*, 401 U.S. 371 (1971).

30. *Id.* at 377.

31. See *Druker v. Commissioner*, 697 F.2d 46 (2d Cir. 1982).

of basic necessities are beyond her reach. The absence of positive rights to income or to sustenance impose de facto limits on citizens' access to marriage and family life, but these limitations are invisible in federal constitutional law.

Constitutional cases on parental rights dance the same neoliberal two-step. Parents have near-absolute rights to rear their children as they choose, but the law protects only negative liberties. The Supreme Court has invalidated a number of state regulations, including compulsory-education laws<sup>32</sup> and grandparent-visitation mandates,<sup>33</sup> on the ground that they infringe parental liberty. State "interference" with parents is tolerated only when parents put children in danger of physical harm.<sup>34</sup>

In *Pierce v. Society of Sisters*, for instance, the Supreme Court struck down a statute requiring children to attend public school as:

unreasonably interfer[ing] with the liberty of parents and guardians to direct the upbringing and education of children . . . . The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.<sup>35</sup>

Although some legal fashions of the 1920s went out of style rather quickly in the New Deal, negative liberty for parents withstood the test of time and has remained central to federal constitutional jurisprudence, as confirmed by the Court in 2000 in *Troxel v. Granville*. In *Troxel*, the Court invalidated a Washington state statute that mandated visitation rights for grandparents (among others) over parental objection: "The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court."<sup>36</sup>

At the same time, parenthood, like other family activities, confers no positive rights to the resources needed to rear children. Families have no right to welfare and no constitutional hook to challenge the adequacy of their wages or living standard. Even education is optional from a federal constitutional perspective, according to the Supreme Court: "Education, of course, is not among the rights afforded explicit protection under our Federal Constitution.

32. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (rejecting state mandate that children attend high school); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925) (sustaining parents' authority to enroll children in private schools, defying a state mandate for public education); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (sustaining parents' rights to educate their children in a language other than English).

33. *Troxel v. Granville*, 530 U.S. 57 (2000). Courts permit the states to limit parental authority only when serious physical harm to the child is highly likely. See generally WALTER WADLINGTON & RAYMOND C. O'BRIEN, *FAMILY LAW IN PERSPECTIVE* 121–24, (2d ed. 2007) (discussing the evolution of the law on parental authority to decline medical treatment).

34. See, e.g., *Prince v. Massachusetts*, 321 U.S. 158, 169–70 (1944) (upholding application of labor laws to child distributing religious materials on the street, because the situation "may and at times does create situations difficult enough for adults to cope with and wholly inappropriate for children, especially of tender years, to face," and "[o]ther harmful possibilities could be stated, of emotional excitement and psychological or physical injury").

35. *Pierce*, 268 U.S. at 534–35.

36. *Troxel*, 530 U.S. at 65.

Nor do we find any basis for saying it is implicitly so protected.”<sup>37</sup>

The Federal Constitution, then, paints parenthood in neoliberal colors: parents may rear their children (mostly) as they like but must support them out of their own earnings and have no claim to state support. Indeed, so strong is the Supreme Court’s endorsement of market outcomes that the Court has approved draconian measures, including jail time, for parents who fail to support their children out of their own earnings.<sup>38</sup> States routinely impose sanctions for child-support nonpayment, including wage withholding and the denial of state licenses, even when payors are indigent.<sup>39</sup>

To be sure, the Supreme Court in *Zablocki v. Redhail* famously invalidated one sanction on nonpayment of child support. In that 1978 case, the Court struck down a Wisconsin statute that denied the “fundamental” right to marry.<sup>40</sup> But *Zablocki* has come to seem outdated in light of recent, more aggressive sanctions upheld by the judiciary. For instance, a state court in 2001 upheld against a federal constitutional challenge a probation condition that prohibited a “deadbeat dad” from having more children.<sup>41</sup> The court in that case reasoned that the father in question could regain his constitutionally protected right to procreate simply by paying what he owed (a tall order, given the defendant’s nine existing children and years of arrears in child support).<sup>42</sup>

The third neoliberal ideal endorses a minimal state, an aspiration that permeates the constitutional canon in family law. Negative-liberty cases often highlight the dangers of the overreaching state. In *Lawrence v. Texas*, for instance, the Supreme Court framed the issue as whether the majority may use the power of the State to enforce [moral views opposing homosexuality] on the whole society through operation of the criminal law.”<sup>43</sup> The overreaching state also appears as the villain in parental-rights cases. In *Troxel*, for instance, the Supreme Court held that “the Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a ‘better’ decision could be made.”<sup>44</sup> And the Court worried that interactions with the state, even to enforce a well-intentioned rule, could be toxic to family life: “[T]he burden of litigating a domestic relations proceeding can itself be ‘so disruptive of the parent-child

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37. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973).

38. See WADLINGTON & O’BRIEN, *supra* note 33, at 144–45 (discussing federal legislation that imposes criminal penalties on parents who fail to pay child support). As the authors note, there is a Commerce Clause question about the federal government’s constitutional powers to act in this arena; there is not, however, any constitutional question that the states may do so.

39. See *id.* at 146. See also *Eunique v. Powell*, 302 F.3d 971, 974 (9th Cir. 2002) (upholding against constitutional challenge a rule denying a passport to a mother who had failed to pay child support on the grounds that “the failure of parents to support their children is recognized by our society as a serious offense against morals and welfare”).

40. *Zablocki v. Redhail*, 434 U.S. 374 (1978).

41. *State v. Oakley*, 629 N.W.2d 447 (Wis. 2001).

42. *Id.* at 473–75.

43. *Lawrence v. Texas*, 539 U.S. 558, 571 (2003).

44. *Troxel v. Granville*, 530 U.S. 57, 72–73 (2000).

relationship that the constitutional right of a custodial parent to make certain basic determinations for the child's welfare becomes implicated.<sup>45</sup>

The ideal of the minimal state played a heartbreaking role in the tragedy of Joshua Deshaney. Four-year-old Joshua was nearly beaten to death by his father, who had a history of abusing the child. But the Supreme Court held that the state had no constitutional obligation to protect the child:

The [Due Process] Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security; it forbids the State itself to deprive individuals of life, liberty, and property without "due process of law," but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means."<sup>46</sup>

The three neoliberal ideals are, of course, intertwined. The minimal state is deeply consistent with negative liberty and distribution via laissez-faire markets. The state's implicit role is to facilitate market transactions by protecting property rights. Beyond that, the state need not take any particular actions to promote family life, protect children, or mitigate the poverty, distress, and isolation produced by free markets.

These propositions are so thoroughly familiar in U.S. law that it may be difficult to imagine what else might be done. But, in fact, it would be entirely possible for the United States, like other constitutional democracies, to protect welfare rights and other positive liberties and harmonize them with U.S. institutions. Scholars including Frank Michelman,<sup>47</sup> Lawrence Sager,<sup>48</sup> and Goodwin Liu<sup>49</sup> have explored in detail a variety of avenues for incorporating positive rights into U.S. constitutional law.

### III

#### PRIVATE ORDER AND PRIVATE TRAGEDIES IN SUBCONSTITUTIONAL FAMILY LAW

The three neoliberal ideals—negative liberty, market distributions and the minimal state—also shape subconstitutional family law. State family law nominally prescribes the duties associated with marriage, divorce, and parenthood. But a closer look reveals that the law privileges private ordering

45. *Id.* at 75.

46. *DeShaney v. Winnebago Co. Dep't. of Soc. Servs.*, 489 U.S. 189, 195 (1989) (dismissing a Section 1983 claim against the Wisconsin social services agency that failed to intervene despite the known threat posed by the father to the son).

47. For work exploring constitutional grounds for welfare rights, see Frank I. Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U. L. Q. 659 (1979); Frank I. Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962 (1973); Frank I. Michelman, Foreword, *On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969).

48. LAWRENCE SAGER, *JUSTICE IN PLAINCLOTHES* 95–102 (2004) (arguing that the Constitution confers a right to minimum welfare, which should be respected by Congress and the President, even if underenforced by the judiciary).

49. Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330, 334 (2006) (arguing that the Fourteenth Amendment should be interpreted to confer a right to a "meaningful floor of educational opportunity").

and deploys state power only to resolve private disputes.

The result is that family law is one of the most depressing courses in law school. Failed marriages, dysfunctional parents, and neglected children sprawl across a thousand pages in a typical family-law casebook. Most of the stories sound a familiar theme: When individuals destroy their lives and their families, they must bear the consequences, and there is little or nothing the state can do to help. But these narratives rest on the neoliberal architecture of constitutional and subconstitutional family law. When the law privileges private ordering and provides individuals with no right to challenge market outcomes, individuals and their families bear the brunt of bad luck as well as bad choices.

The law of marriage nicely illustrates how state prescriptions lay only a thin veneer over the expectation that private ordering will govern. The states regulate entry into marriage, banning incest and polygamy.<sup>50</sup> But spouses in an ongoing marriage have very few cognizable legal claims against each other, and none against the state.<sup>51</sup> The canonical case is *McGuire v. McGuire*,<sup>52</sup> in which a Nebraska wife sued her husband, asking the court to require him to pay for a variety of ordinary expenses, including furniture, a car with a working heater, and travel expenses to visit her daughters. Mr. McGuire apparently had plenty of money but refused to pay for these items or to permit his wife to charge them to his account.

State law imposes a duty of support on parties to a marriage, and the legal duty was quite clear in *McGuire*.<sup>53</sup> But the court held that the law conclusively presumes the duty of support to be met unless the spouses are separated or filing for divorce:

The living standards of a family are a matter of concern to the household, and not for the courts to determine . . . . As long as the home is maintained and the parties are living as husband and wife it may be said that the husband is legally supporting his wife . . . .<sup>54</sup>

Thus, what appears to be a legal mandate (to support one's spouse) is nothing more than a delegation to engage in private ordering. Mrs. McGuire, it turns out, cannot invoke the law's authority to challenge her standard of living.<sup>55</sup> Consistent with the minimal state, the primary exception to the state's non-

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50. See WADLINGTON & O'BRIEN, *supra* note 33, at 21–29.

51. See generally Mary Anne Case, *Enforcing Bargains in an Ongoing Marriage*, 35 WASH. U. J.L. & POL'Y 225 (2011) (noting that the states typically do not enforce bargains between spouses prior to separation or divorce).

52. *McGuire v. McGuire*, 59 N.W.2d 336 (Neb. 1953).

53. See *id.* at 339–40 (reviewing past decisions supporting the proposition that spouses owe a duty of support to one another).

54. *Id.* at 342.

55. See Case, *supra* note 51, at 227 (noting that states adopting the Uniform Act “do not seem to enforce such contracts, and some have seemingly inconsistent statutory provisions”). Case considers whether, as a normative matter, the law ought to permit explicit bargains between spouses, and she notes that even the *McGuire* case (which did not involve an explicit contract) might be consistent with such an interpretation. She acknowledges, however, that the dominant interpretation of the positive law today is otherwise.

involvement in ongoing marriages involves violence and severe harm: the state may “intervene” in cases of spousal rape and other torts committed against a spouse.<sup>56</sup>

Divorce might seem to offer an entry point for legal intervention into a couple’s affairs.<sup>57</sup> But even when divorcing spouses insist on their day in court, the substantive law privileges negative liberty and market allocations. No-fault divorce, now available in every state, permits marriages to dissolve for any reason, including no reason at all (provided, typically, that the spouses live separately for some period). Thus, the state declines to “intervene” even in the divorce decision—no matter how vulnerable one of the parties may be or how disastrous divorce may prove.<sup>58</sup>

Along similar lines, statutory law provides rules for property division, spousal support, and child custody. But the rules rarely challenge private decisionmaking and market distributions. For instance, the formal law of property division in most states calls for the equitable division of marital (or community) property.<sup>59</sup> That rule might seem to authorize the courts to intervene heavily in the affairs of a divorcing couple, making fine judgments about merit and need. But *de jure*, the law excludes many classes of assets from property division, including future earnings from professional degrees.<sup>60</sup> And, *de facto*, the law can only divide what the parties own. With the exception of the very rich, there is often little to divide, and so there is little room to play even the zero-sum game the law contemplates. In 2010, the median family had net worth (assets less debt) of just \$77,300.<sup>61</sup> Even that figure overstates the financial position of many Americans. Among families headed by an individual under the age of thirty-five, for example, median net worth in 2010 was \$9,300.<sup>62</sup> Twenty-five percent of Americans in 2010 had negligible or negative net worth.<sup>63</sup> And most family assets are illiquid and not easily divisible: more than half of family wealth in 2010 was held in the form of equity in homes and cars.<sup>64</sup>

Although data on divorce settlements are scarce,<sup>65</sup> it appears that, in the vast

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56. See generally CLARE DALTON & ELIZABETH M. SCHNEIDER, *BATTERED WOMEN AND THE LAW* (2001); Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CAL. L. REV. 1375 (2000).

57. Indeed, the court in *McGuire* implies as much. See *McGuire*, 59 N.W.2d at 342 (“As long as the home is maintained and the parties are living as husband and wife . . .”).

58. See WADLINGTON & O’BRIEN, *supra* note 33, at 77–78.

59. See HARRY D. KRAUSE & DAVID D. MEYER, *FAMILY LAW IN A NUTSHELL* 280–85 (4th ed. 2003).

60. See *id.* at 295.

61. Jesse Bricker et al., *Changes in U.S. Family Finances from 2007 to 2010: Evidence from the Survey of Consumer Finances*, 98 FED. RES. BULL. 1, 17 tbl.4 (2012).

62. *Id.*

63. *Id.* at 18.

64. *Id.* at 42 tbl.8.

65. See Kiley Morgan, *How Ubiquitous are Alimony Awards? A Call for Current Data*, 20 J. CONTEMP. LEGAL ISSUES 95, 95 (2011) (“systemic study of the incidence of alimony awards . . . seems nonexistent for the last 20 years”); Amanda Ruiz, *Alimony Awards for Petitioners*, 20 J. CONTEMP. LEGAL ISSUES 103, 105 (2011) (referring to the “unavailability of divorce and alimony data . . .”).

majority of cases, divorced couples part ways with neither owing much, if any, spousal support (alimony) to the other.<sup>66</sup> Private ordering is common, as many couples seek only a judicial rubber-stamp of a private agreement, and large percentages of divorcing couples forgo lawyers entirely.<sup>67</sup> Mediation programs further privilege private ordering over judicial inquiry.

The law of divorce, then, has come to privilege private decisionmaking and a “clean break,” with each party returning to the marketplace to make his way. Today, the law increasingly expects spouses to hold jobs and to subsist after divorce on their own earnings.<sup>68</sup>

Child-custody doctrine also might seem to invite a role for the active state. The law, after all, typically requires the courts to consult the “best interests of the child.”<sup>69</sup> One might imagine vigorous court interviews of the parents and the extended family, perhaps supplemented by reports by social workers and psychologists, all trying to craft the best placement for the child. One might even imagine state supports for parents and children after divorce to ensure that neither financial nor personal stress causes undue harm. But, on the ground, neoliberal ideals govern instead. Divorce confers no right at all to state assistance or services, even for children.

In keeping with negative liberty, the law does grant parents strong rights to custody. A fit parent trumps any nonparent, even when the nonparent might be a far better caregiver. And, in keeping with the minimal state, the law sets a low bar for parental “fitness”: a fit parent is simply one who is not abusive or neglectful. Custody disputes between parents attract state scrutiny, but contested custody is fairly rare: typically, parents arrive at a negotiated custody arrangement without serious judicial oversight.<sup>70</sup>

Stepping back, the neoliberalism of state family law is striking. Negative liberty, market distribution, and the minimal state limit the scope of the law, ruling out of bounds many of the most important questions about families.

Even progressive scholarship in family law, seemingly unencumbered by neoliberal ideals, mostly occupies the legal space authorized by neoliberalism. For instance, a key legal issue at divorce is whether the market earnings and savings of one member of a couple should be redistributed, once or on an

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66. See Judith G. McMullen & Debra Oswald, *Why Do We Need a Lawyer?: An Empirical Study of Divorce Cases*, 12 J. LAW AND FAM. STUDIES 57 (2010) (finding that alimony was awarded in only 8.6% of cases in a county in Wisconsin 2005, and that most of these awards were temporary or would terminate upon specified events (e.g. the sale of a house or car). The U.S. Census Bureau reports alimony awards in 14.6% of divorces. See U.S. CENSUS BUREAU, CHILD SUPPORT AND ALIMONY: 1985, 14 (1987).

67. See McMullen & Oswald, *supra* note 66, at 71 (finding that approximately 44% of husbands and 38% of wives represented themselves in a sample of divorce cases).

68. See generally WADLINGTON & O'BRIEN, *supra* note 33, at 80–83 (discussing the evolution of the law on spousal support and concluding that “both spouses are expected to exercise employment opportunities, diminishing the need for ‘sustenance’ for either”).

69. WADLINGTON & O'BRIEN, *supra* note 33, at 150.

70. See KRAUSE & MEYER, *supra* note 59, at 184 (citing a study finding that only 1.5 percent of divorces involved judicial determination of child custody).

ongoing basis, to the other. Accepting this frame, the most progressive possible position is that alimony should be generous in order to implement something like equal sharing of economic fortune. One might also, on the progressive side, advocate expanded alimony to take into account women's traditionally greater share of child care and the career sacrifices that women make in raising children. But proposals to increase alimony can only divide the market earnings and assets of the couple. The hard truth is that alimony makes little practical difference to many people in the middle class and all of those below it—that is, those with modest market earnings and very little savings.

So strong are the principles of negative liberty, market distribution, and the minimal state that there simply is no room in family law, as presently constituted, to ask important questions about family life, such as:

1. How should society respond if marriage is beyond reach for individuals with low earnings or with disabilities?
2. How should society act if a couple, married or unmarried, earns so little that their children lead impoverished lives?
3. How should society respond when a divorce would leave one or both spouses destitute?
4. How should society respond if divorce would leave children with insufficient resources to permit them to flourish?

Sadly, these questions are irrelevant to family law in the United States. Constitutional law forecloses any legal claim to positive rights—to the resources needed to marry, to procreate, and to grow and develop. And the mission of subconstitutional law is confined to ensuring that couples and their children subsist on the resources they earn in the marketplace.

We can now see why family law is a singularly painful subject for study. Consider two examples of the private tragedies that populate the casebooks and demonstrate how the neoliberal conventions of family law prevent legal actors from identifying and addressing the real issues at stake.

*In re Marriage of Wilson* is the case of the brain-damaged wife.<sup>71</sup> Elma and Tom Wilson married in midlife and divorced after Elma suffered brain damage that left her unable to work. Tom paid Elma alimony for nearly five years but then petitioned the court to cease alimony payments. The trial judge, whose ruling was affirmed on appeal, posed the question as, “at what point in time does the obligation to assist Mrs. Wilson become one of society's as distinguished from an obligation that is Mr. Wilson's,” and concluded, “I find that it is society's at this point in time.”<sup>72</sup>

*Wilson* presents a classic private tragedy. Without alimony from Tom, Elma was left to subsist on government disability benefits that did not even raise her income to the poverty line.<sup>73</sup> The court noted Elma's “tragic disability” but

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71. *In re Marriage of Wilson*, 247 Cal. Rptr. 522 (1988) (Cal. Ct. App.).

72. *Id.* at 524.

73. See also Anne L. Alstott, *Private Tragedies? Family Law as Social Insurance*, 4 HARV. L. &

placed it squarely beyond the state's responsibility: "The [trial] court recognized both the grievous and permanent nature of Elma's disability. It was beyond the court's power to render her self-supporting."<sup>74</sup>

The neoliberal cast of family law shines the spotlight on Elma's actions. Perhaps she should have thought ahead, saving more money for a rainy day. Perhaps she should have chosen a more loyal husband. Compounding her bad luck, her adult daughter and her daughter's husband moved back home with her, unable to work due to a car accident and unemployment.<sup>75</sup> But perhaps they, too, should have been more prudent.

The larger point is that a neoliberal court cannot interrogate the state (because the law does not permit it) about why Elma's bartending wages were so low and why her disability insurance entitlements were so meager. Brain damage is something that might happen to anyone at any time. Legal scholars might at least debate (just as political theorists do<sup>76</sup>) whether the responsibility to insure against such calamities should belong to the individual or the state. But, given the absence of constitutional entitlements and the limited mission of state family law, such questions are excluded from legal discourse. Elma's limited remedy lies against Tom, and she cannot claim any particular assistance from the state.

Another example of the private tragedies of family law is *In Re Eden F.*, which tells the story of a mother with mental illness and her daughter with disabilities.<sup>77</sup> Ann, the mother, had a mental illness that made it difficult to care for her children. The state offered spotty support, and Ann's condition waxed and waned in severity, with the result that Eden and her younger sister were frequently removed from and then returned to Ann's care after periods in foster homes. In a telling detail, the court relates how the state social-services agency gave Ann a hotline number to call when she felt overwhelmed—a hotline that apparently was unstaffed for days at a time.<sup>78</sup> Partly as a result of the disrupted living arrangements, Eden developed an attachment disorder and behavioral and learning disabilities, making her especially difficult to care for. The court terminated Ann's parental rights, despite noting that Ann had "achieved a level of stability within her limitations" and had "sincere love for her daughters."<sup>79</sup>

The story of Ann and Eden reads like a tragic novel. Poor Ann, doing the best she can, and poor Eden, who deserved better! But this is law, not Dostoevsky. Law can—and should—aim to do more than portray the private

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POL'Y REV. 3, 8 (2010) [hereinafter Alstott, *Private Tragedies*] (noting that Elma's yearly benefits of \$5,232 per year would fall below the then federal poverty threshold of \$5,360).

74. *Wilson*, 247 Cal. Rptr. at 526.

75. *Id.* at 524.

76. RONALD DWORKIN, SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY 312–40 (2002).

77. 741 A.2d 873 (Conn. 1999).

78. *Id.* at 897.

79. *Id.* at 893.

tragedies of the modern age. Once again, however, the neoliberalism of the law rules the important issues out of bounds. The holding of the case is that Connecticut law at that time did not require the state to prove that it had made reasonable efforts to reunify Ann and Eden. The echoes of *DeShaney* are clear: Here, statutory law, like the constitutional law at issue in *DeShaney*, creates no affirmative duty for the state to take measures to promote family life or protect children.

It is impossible to know whether Ann would have been capable of caring for Eden with greater state support. But the absence of any affirmative state duty to families and to children silences the critical questions about justice. How should society anticipate and address the challenges of parenthood for people with mental illness? What legal remedies should be open to parents and children when mental illness and developmental disabilities arise?

Just as in *Wilson*, the structure of state entitlements in *Eden F.* stands like Mount Everest, part of the landscape and just as immovable. Ann received the services the state chose to provide, as did Eden. Strikingly, the incompetence of the state is both evident and unquestioned: if the hotline went unanswered, well, what more could have been expected of the bumbling bureaucracy? Neither Ann nor Eden had any legal claim to more.

In subconstitutional family law, then, negative liberty, market distributions and the minimal state form an unvarying backdrop. The result is that the cases repeat the same story line: individuals suffer bad luck or make bad choices, and they—and their children—must bear the consequences. The law has no duty to foster family life, to protect children's development, or to mitigate market outcomes.

#### IV

##### THE MINIMAL WELFARE STATE

It might seem that welfare law is the place to turn to detect the state's role in mitigating family tragedy. Perhaps the constrained mission of family law can be explained by positing a legal division of labor: perhaps the law relegates to the welfare state the tasks of fostering family life, protecting children's development, and mitigating market outcomes.

But, in fact, welfare programs in the United States provide only minimal and grudging resources for family life. Indeed, the "welfare state" is nearly a misnomer here: although the term provides a convenient shorthand for a gaggle of federal and state programs, it is too grandiose to describe the minimal and patchwork protections enacted by the United States. As we have seen,<sup>80</sup> the United States guarantees aid neither to adults nor to children as a constitutional matter. Congress and state legislatures have adopted welfare programs, but these assist only some families in some circumstances. Not everyone in distress

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80. See *supra* part II.

receives adequate (or, indeed, any) public aid.<sup>81</sup>

The United States provides two kinds of assistance: poverty relief and social insurance. Both are deeply neoliberal in their commitments to market distribution and to the minimal state. This basic point is well known. For instance, Gosta Esping-Andersen documents with accuracy the contours of what he terms the “liberal” welfare states, including the United States. In these welfare regimes, the laissez-faire market is idealized and poverty is attributed to individual failings:

The general assumption in liberalism is that the market is emancipatory, the best possible shell for self-reliance and industriousness. Private life may be wrought with insecurity, danger, and pitfalls; and poverty or helplessness is in principle not unlikely to occur. Yet this is not the fault of the system but solely a consequence of an individual’s lack of foresight and thrift.<sup>82</sup>

A brief summary suffices to show how the U.S. welfare state tracks neoliberal principles. Social insurance, payable only to claimants with a substantial on-the-books work record, accounts for the bulk of federal dollars spent on the welfare state. In 2012, for instance, Social Security cash benefits cost the federal government \$773 billion, or about five times the \$155 billion spent on cash and cash-like benefits in the major means-tested programs—SNAP, TANF, and the EITC.<sup>83</sup>

Social Security illustrates the dual nature of social-welfare initiatives in the (neo)liberal state: the program mitigates market allocations but also reinforces them. On the one hand, Social Security provides cash benefits when old age, disability, or the death of a family member disrupts family economic arrangements. Moreover, benefits are calculated so that low (lifetime) earners receive a disproportionately high “return” on their payroll taxes.

On the other hand, Social Security ratifies and valorizes market distributions. Benefits are payable only to workers with a substantial history of market employment in on-the-books jobs. The program thus excludes many marginal workers, gray-market workers, and individuals engaged in care work. Further, the program pays higher (absolute) benefits to individuals with higher wages and longer work histories, enhancing their already-greater market security.<sup>84</sup> And the program assesses its taxes in a regressive pattern, taxing the first dollars of wages of low earners while exempting high wages entirely.<sup>85</sup>

A separate program of unemployment insurance follows the same pattern. Unemployment Insurance (UI) pays benefits to the unemployed, but only to

81. This theme is explored in detail in JOEL F. HANDLER & YEHESEKEL HASENFELD, *BLAME WELFARE; IGNORE POVERTY AND INEQUALITY* (2007).

82. GOSTA ESPING-ANDERSEN, *THE THREE WORLDS OF WELFARE CAPITALISM* 42 (1990).

83. *Historical Tables*, Office of Mgmt. & Budget, <http://www.whitehouse.gov/omb/budget/Historicals> (Table 11.3) (last visited Feb. 27, 2014).

84. For a summary of benefits calculation, see *Social Security Benefit Amounts*, SOC. SEC. ADMIN., <http://www.ssa.gov/oact/cola/Benefits.html> (last visited Feb. 27, 2014).

85. 26 U.S.C. § 3101.

workers with a demonstrated history of on-the-books employment.<sup>86</sup> And benefits track market wages, with the lowest payouts to the lowest earners. A time limit on benefits (variable by state and by the state of the economy) limits the program's impact on market outcomes.

Means-tested programs in the United States display the same two tendencies, but with a sharper edge: they temporarily mitigate market outcomes but push recipients as quickly as possible back into the marketplace. The major means-tested programs—TANF, the EITC, and SNAP—are intended to alleviate dire distress for limited periods and not to drive a permanent wedge between parents' earnings and children's living standards.

Thus, TANF pays sub-poverty level benefits and imposes work requirements and a time limit.<sup>87</sup> SNAP includes work requirements.<sup>88</sup> The EITC, although permanent, provides only a modest wage supplement to workers with a significant market presence. Indeed, EITC benefits rise proportionally with market earnings up to (roughly) the poverty level and decline thereafter.<sup>89</sup> Commentators sometimes praise the EITC for its antipoverty effect,<sup>90</sup> but that effect depends critically on the fact that the U.S. poverty thresholds are set well below the cost of decent food, housing, and other necessities. In fact, the EITC lifts families out of (officially-measured) poverty, but it does not lift them to a decent living standard. Instead, the program aids committed market workers by mildly mitigating the distress of living on very low wages.<sup>91</sup>

Notably, the United States has no catchall or residual program for families or even children who fall through the gaping holes in the safety net. With no federal constitutional mandate for welfare, the fifty states determine their own welfare commitments, and many states either have no general assistance program, or provide small benefits, often only to those deemed unable to work.<sup>92</sup> In recent years, general assistance has “weakened considerably . . . despite the large increase in need resulting from the recession.”<sup>93</sup>

Medical care represents an evolving and contested exception to the neoliberalism of the U.S. welfare state. The Affordable Care Act (ACA)

86. For an overview of the UI program, see THEODORE R. MARMOR, JERRY L. MASHAW, AND JOHN PAKUTKA, *SOCIAL INSURANCE: AMERICA'S NEGLECTED HERITAGE AND CONTESTED FUTURE* 139–43 (2013).

87. 42 U.S.C. § 608(a)(7) (2006) (five-year time limit); 42 U.S.C. § 607 (work requirements).

88. 7 U.S.C. § 2015(d), 2015(o) (work requirements).

89. 26 U.S.C. § 32.

90. See, e.g., Chuck Marr, *Commentary: One Anti-Poverty Initiative Both Sides Can Agree On*, CENTER ON BUDGET AND POLICY PRIORITIES (Jan. 24, 2014), <http://www.cbpp.org/cms/index.cfm?fa=view&id=4079>.

91. Alstott, *EITC*, *supra* note 2.

92. LIZ SCHOTT & CLAIRE CHO, *CTR. ON BUDGET & POL'Y PRIORITIES, GENERAL ASSISTANCE PROGRAMS: SAFETY NET WEAKENING DESPITE INCREASED NEED 1* (2011), *available at* <http://www.cbpp.org/files/10-26-11pov.pdf>.

93. *Id.* In 2011, thirty states had general assistance programs, while twenty had none. Of those states with GA programs, only twelve provided benefits to “employable” adults (i.e., those with no disability). *Id.*

incorporates neoliberal elements by continuing the tax exemption and other privileges of market workers with middle-class jobs.<sup>94</sup> The ACA also ratifies market distribution by relying on private-market provision of insurance and partial private financing. Still, the ACA awards public subsidies intended to expand health insurance for poor people and low-wage workers previously unable to afford or obtain insurance. As of this writing, the political battle over the ACA continues, and it remains to be seen whether the ACA will mark a new era of universal provision or, instead, a partial (and possibly failed) attempt to insulate health insurance from market distributions.

Public education might also seem to mark an exception to the neoliberal commitments of the U.S. welfare state: despite the apparent absence of a federal constitutional entitlement, states do guarantee children a free, public education. But the appearance of equality masks the well-known and long-tolerated inequalities in public education.<sup>95</sup> Racial inequalities remain, despite decades of remediation, and class inequalities are severe. The system de facto links the quality of education to market distribution: the children of the well-off and the middle-class receive better educations, whether they be public or private, than do the children of the poor.<sup>96</sup>

## V

### CONCLUSION

Taken together, constitutional law, subconstitutional family law, and the U.S. welfare state enact a distinctly neoliberal legal regime for the governance of family life. What is striking is that these three bodies of law are so seldom analyzed together. Constitutional law, family law, and social welfare represent distinct legal specialties. U.S. constitutionalists work within a regime in which negative liberty is powerful and positive liberty seldom mentioned. Family-law scholars work within a system of rules that permits only zero-sum allocations of market earnings within private families. And social-welfare specialists take as given the absence of constitutional rights and the political contingency of social programs.

I am certainly as guilty as anyone of this separate-spheres thinking. I have written often about families, equality, and social welfare and have never written a word about constitutional law (except to contemplate whether the Constitution prohibits wealth taxation).<sup>97</sup> I have written about family law and

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94. See 26 U.S.C. § 106 (excluding from federal taxable income employer contributions for health insurance).

95. For a recent discussion of national educational inequality, see Liu, *supra* note 49.

96. For evidence of disparate funding, see *More Than 40% of Low-Income Schools Don't Get a Fair Share of State and Local Funds*, Department of Education Research Finds, U.S. DEP'T OF EDUC. (Nov. 30, 2011), <http://www.ed.gov/news/press-releases/more-40-low-income-schools-dont-get-fair-share-state-and-local-funds-department->.

97. See, e.g., ANNE L. ALSTOTT, NO EXIT: WHAT PARENTS OWE CHILDREN AND WHAT SOCIETY OWES PARENTS (2004); BRUCE ACKERMAN & ANNE ALSTOTT, THE STAKEHOLDER SOCIETY (1999).

equal opportunity—surely a constitutional subject if not one recognized in U.S. constitutional law—and, once again, in those contexts, I have not explicitly addressed constitutional law because it has seemed so irrelevant.<sup>98</sup> I have even written about the disconnect between social welfare and the “private tragedies” of ordinary family law, again without attempting to invoke in any affirmative way the U.S. Constitution.<sup>99</sup>

Compounding the strangeness of these legal separations, I have often proposed large-scale, egalitarian reforms (\$80,000 for every young person; annual grants to parents; intensive education, health care, and talent development for children).<sup>100</sup> And yet (wait for it), it did not occur to me to constitutionalize any of these proposals. I simply ruled the constitutional possibilities out of bounds without much thought.

But when positive constitutional rights become impractical and unmentionable, the damage filters all the way down. States and individuals lack any legal means to assert positive rights or to challenge market outcomes. The absence of these rights impoverishes family law, which is reduced to adjudicating individuals’ claims against each other—and limited to redistributing the parties’ market earnings between them. Lacking a constitutional entitlement, social welfare degenerates into a purely political game, with entitlements rooted in inertia and in interest-group configurations rather than in any commitment to equality. These patterns become entrenched in professional and academic life: they become foundational rather than contingent.

I am not making the simple—and probably false—claim that constitutional litigation can lead the project of challenging the neoliberalism built into American family law. The same politics that lead Congress to hew to neoliberal norms in social welfare policy are at work in Supreme Court appointments and decisions and in the states as they enact and interpret subconstitutional family law. So I do not suppose that the project of challenging neoliberalism can or does begin in the Supreme Court or via litigation.

I do think, however, that those who worry that neoliberalism is foreclosing a more egalitarian and attractive liberalism should insist on making connections across bodies of law, and that has been my aim here.

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98. See Anne L. Alstott, *Is the Family At Odds With Equality? The Legal Implications of Equality for Children*, 82 S. CAL. L. REV. 1 (2008).

99. Alstott, *Private Tragedies*, *supra* note 73.

100. ACKERMAN & ALSTOTT, *supra* note 97 (grants to parents); Alstott, *supra* note 98 (extensive investments in children’s development).