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THE RIGHT FAMILY

NOA BEN-ASHER & MARGOT J. POLLANS*

Abstract

The family plays a starring role in American law. Families, the law tells us, are special. They merit many state and federal benefits, including tax deductions, testimonial privileges, untaxed inheritance, and parental presumptions. Over the course of the twentieth century, the Supreme Court expanded individual rights stemming from familial relationships. In this Article, we argue that the concept of family in American law matters just as much when it is ignored as when it is featured. We contrast policies in which the family is the key unit of analysis with others in which it is not. Looking at four seemingly disparate areas of recent policymaking—the travel ban, family separation at the southern border, agricultural subsidies, and the religious rights of closely held corporations—we explore the interplay between the family, the individual, and the corporation in modern law. We observe that both liberals and conservatives make use of the family to humanize or empower certain people, and both reject the family when seeking to dehumanize or disempower. Where liberals and conservatives differ is which families they choose to champion. Ultimately, we conclude that the use of family as a mechanism through which to confer rights and benefits is a cover to hide policies that entrench and exacerbate existing racial and religious hierarchies. Further, in the context of family businesses, it risks becoming a steppingstone for radical expansion of rights to businesses themselves. To tell this story, we analyze the use and rhetoric of family in politics, media, and recent Supreme Court decisions such as Trump v. Hawaii (2018), Burwell v. Hobby Lobby (2014), Kerry v. Din (2015), and Masterpiece Cakeshop v. Colorado Civil Rights Commission (2018).

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INTRODUCTION

Most of the time, when we talk about the “social contract,” we consider the individual.¹ The individual is the primary subject of constitutional rights and criminal prosecution. And yet, it is the family rather than the individual that the law so often champions.² Indeed, it is the family over which the law obsesses. Pundits blame periods of crime and poverty on the disintegration of the family unit.³ Lawmakers design monetary policy to foster growth of family wealth via intergenerational wealth transfer.⁴ The Supreme Court has situated the freedom to marry at the peak of its LGBT rights jurisprudence.⁵

In this Article, we consider how legal and policy analysis vacillates between focus on the *family* and focus on the *individual*. We observe, through analysis of governmental policies and several recent Supreme Court decisions such as *Trump v. Hawaii* (2018),⁶

¹ The gist of social contract theory is that individuals are bound by state law because they freely chose to enter a contract wherein each individual waived some rights. In that sense, individuals who entered, or would rationally enter, a social contract are bound by law based on a theory of autonomy. See JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* 23–25 (G.D.H. Cole trans., 2008); see also Robert M. Cover, *Obligation: A Jewish Jurisprudence of the Social Order*, 5 J.L. & RELIGION 65, 73–74 (1987) (contrasting the American rights-based legal system with the Jewish obligation-based legal system).

² See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965) (establishing the right to privacy in the context of the marital unit).

³ See, e.g., KHIARA M. BRIDGES, *THE POVERTY OF PRIVACY RIGHTS* 37 (2017) (“[R]egardless of the precise moment in history when poverty and immorality became linked discursively, our present society certainly is one in which the relationship between the two concepts is firmly established.”).

⁴ See MELINDA COOPER, *FAMILY VALUES: BETWEEN NEOLIBERALISM AND THE NEW SOCIAL CONSERVATISM* 23 (2017) (identifying inheritance as one of the modern mechanisms through which we situate the family as the situs for provision of social welfare).

⁵ See generally Noa Ben-Asher, *Conferring Dignity: The Metamorphosis of the Legal Homosexual*, 37 HARV. J.L. & GENDER 243 (2014); Michael Boucai, *Glorious Precedents: When Gay Marriage Was Radical*, 27 YALE J.L. & HUMAN. 1 (2015).

⁶ *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (upholding the administration’s travel ban against nationals from six Muslim-majority countries).

Burwell v. Hobby Lobby (2014),⁷ *Kerry v. Din* (2015),⁸ and *Masterpiece Cakeshop v. Colorado Civil Rights Commission* (2018),⁹ that both liberals and conservatives use the unit of the family when seeking to recognize and empower certain groups or actions, and they focus on the individual when seeking to disempower.¹⁰

We support the liberal positions on the four policies at stake in this Article. But more importantly, we offer a conceptual analysis that explains how conservatives and liberals operate *in relation to each other* when it comes to defending and empowering individuals and families. We observe that both liberals and conservatives rely on the sanctity and unity of family in crucial political struggles. Where they differ is over which families to celebrate and, consequently, when the family is the correct unit of legal analysis. Conservatives and liberals disagree on the political, racial, religious, and national identity of the “right” family.

Our side-by-side analysis of recent policy debates surrounding the Trump administration’s Travel Ban, family separations at the southern border, agricultural subsidies, and the religious rights of closely held corporations reveals a troubling pattern. For some individuals, mostly Muslim and immigrant, one’s status as a member of a family is, at best, ignored and, at worst, exploited to punish. For other individuals, mostly white, Christian, and corporate, status as member of a family is elevated to justify what might otherwise appear to be undesirable government giveaways. The following table illustrates these four policies and the opposing positions taken by liberals and conservatives.

⁷ *Burwell v. Hobby Lobby*, 134 S. Ct. 2751 (2014) (holding that a closely held corporation whose owners had “sincerely held” Christian beliefs could not be forced to provide a health insurance plan covering certain types of birth control).

⁸ *Kerry v. Din*, 135 S. Ct. 2128 (2015) (plurality opinion) (holding that the government did not violate the procedural due process rights of a naturalized U.S. citizen from Afghanistan whose visa petition for her husband was denied).

⁹ *Masterpiece Cakeshop v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719 (2018) (holding that the hostility to religion in the Commissioners’ comments to baker who refused to bake a wedding cake for same-sex couple violated the Free Exercise Clause).

¹⁰ We use the terms “liberal” and “conservative” broadly to mark two opposing theoretical, political, and legal approaches that have dueled in the United States over a range of domestic and international policies since the latter half of the twentieth century. *See generally* COOPER, *supra* note 4; ANDREW HARTMAN, *A WAR OVER THE SOUL OF AMERICA: A HISTORY OF THE CULTURE WARS* (2016).

THE RIGHT FAMILY: SUMMARY CHART

<i>The Policy</i>	<i>Liberal Position</i>	<i>Conservative Position</i>
Travel Ban	Family unity should be preserved.	National security threats caused by <i>dangerous individuals</i> trump family unity.
Southern Border Separation Policies	Family unity should be preserved.	Criminality threats caused by <i>dangerous individuals</i> trump family unity.
Agricultural Subsidies	The “family farmer” is a nostalgic myth. Lawmakers should redirect subsidies to <i>real</i> families.	The key social role of the <i>family farmer</i> justifies expanded wealth transfers to the industrial agriculture sector.
Religious Exemptions for Businesses	The “family business” is a mask for corporations and CEOs.	<i>Family businesses</i> are entitled to legal protections of their religious values.

Legal instruments regularly contract and expand families. Legal definitions of family control, among other things, marriage,¹¹ taxes,¹² zoning and cohabitation,¹³ sex,¹⁴

¹¹ See, e.g., Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (legalizing same-sex marriage nationwide); Turner v. Safley, 482 U.S. 78 (1987) (establishing the right of prisoners to marry); Zablocki v. Redhail, 434 U.S. 374 (1978) (striking down a law requiring court permission for a person subject to a child support order to marry); Loving v. Virginia, 388 U.S. 1 (1967) (striking down an anti-miscegenation law).

¹² Tax law confers benefits to those with children and to some married couples. See, e.g., Lawrence Zelenak, *Children and the Income Tax*, 49 TAX L. REV. 349, 351 (1994) (observing that the tax code tends to focus more on “increasing tax benefits to families with children than on rationalizing the distribution of benefits among families”); see generally Lawrence Zelenak, *For Better and Worse: The Differing Income Tax Treatments of Marriage at Different Income Levels*, 93 N.C.L. REV. 783 (2015) (describing the tax penalties and bonuses relating to marriage) [hereinafter Zelenak, *For Better and Worse*].

¹³ See, e.g., Moore v. City of E. Cleveland, 431 U.S. 494, 508 (1977) (Brennan, J., concurring) (rejecting a zoning ordinance that defined “nuclear family” narrowly on the ground that “[t]he Constitution cannot be interpreted . . . to tolerate the imposition by government upon the rest of us of white suburbia’s preference in patterns of family living”); Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) (upholding a definition of family that excluded unrelated college students and allowing municipalities to limit cohabitation to family by blood, adoption, or marriage); see also Angela Onwuachi-Willig, *Extending the Normativity of the Extended Family: Reflections on Moore v. City of East Cleveland*, 85 FORDHAM L. REV. 2655 (2017); Pala Hersey, *Moore v. City of East Cleveland: The Supreme Court’s Fractured Paean to the Extended Family*, 14 J. CONTEMP. LEGAL ISSUES 57 (2004).

¹⁴ In some states, adultery and fornication remain facially illegal. See Deborah L. Rhode, *Adultery: An Agenda for Legal Reform*, 11 STAN. J.C.R. & C.L. 179, 179 (2015) (noting that as of 2015, twenty-two states retained some type of criminal prohibition on adultery but observing that these laws are rarely enforced). Since 2015, several states have repealed their adultery laws. See, e.g., H.B. 40, 63d Leg., 2019 Gen. Sess.

healthcare,¹⁵ estate planning,¹⁶ immigration,¹⁷ and social welfare benefits.¹⁸ While definitions of family are not uniform,¹⁹ the recognition of familial status is often associated with legal protections or benefits.²⁰ It allows individuals to live together, share in one another's eligibility for benefits, and inherit. Protecting the integrity and privacy of the family and encouraging creation of families are consistent policy goals across numerous areas of law.²¹ In some contexts, the law penalizes those who violate duties to

(Utah 2019) (repealing UTAH CODE ANN. §§ 76-7-103, 76-7-104 (2019); 2018 MASS. ACTS ch. 155, § 2 (repealing MASS. GEN. LAWS ch. 272, §§ 14, 18–21 (2018))).

¹⁵ Definitions of family can control entrance into hospital rooms and are used to establish default rules for selecting health care proxies. *See, e.g.*, MARK A. HALL ET AL., HEALTH CARE LAW AND ETHICS 545–46, 560–62 (9th ed. 2018).

¹⁶ *See, e.g.*, Bridget J. Crawford, *The Profits and Penalties of Kinship: Conflicting Meanings of Family in Estate Tax Law*, 3 PITT. TAX REV. 1 (2005).

¹⁷ *See, e.g.*, Kerry Abrams, *Family Reunification and the Security State*, 32 CONST. COMMENT. 247 (2017); Victoria Degtyareva, *Defining Family in Immigration Law: Accounting for Nontraditional Families in Citizenship by Descent*, 120 YALE L.J. 862 (2011) (evaluating definitions of family for the purposes of citizenship by descent); Shani M. King, *U.S. Immigration Law and the Traditional Nuclear Conception of Family: Toward a Functional Definition of Family that Protects Children's Fundamental Human Rights*, 41 COLUM. HUM. RTS. L. REV. 509 (2010).

¹⁸ *See, e.g.*, Hubert J. Barnhardt, III, *Let the Legislatures Define the Family: Why Default Statutes Should Be Used to Eliminate Potential Confusion*, 40 EMORY L.J. 571 (1991) (looking at the definition of family in the context of foster care and access to welfare benefits).

¹⁹ *See, e.g.*, Crawford, *supra* note 16 (exploring variation within estate tax law); Frank S. Alexander, *The Housing of America's Families: Control, Exclusion, and Privilege*, 54 EMORY L.J. 1231 (2005); Barbara J. Cox, *Alternative Families: Obtaining Traditional Family Benefits Through Litigation, Legislation and Collective Bargaining*, 15 WIS. WOMEN'S L.J. 93 (2000); J. Gregory Richards, *Zoning for Direct Social Control*, 1982 DUKE L.J. 761, 766–68 (1982).

²⁰ *But see* Zelenak, *For Better and Worse*, *supra* note 12 (explaining the circumstances under which tax rules produce marriage penalties).

²¹ *See, e.g.*, *Moore*, 431 U.S. at 498–99 (citing cases acknowledging “a private realm of family life which the state cannot enter”) (internal quotation marks omitted).

their families.²² And, at an extreme, when individual actors are considered particularly bad, the law punishes an individual's family as well.²³

Over the course of the twentieth century, individual rights stemming from familial relationships have emerged in the Supreme Court's liberty and equality jurisprudence,²⁴ including the rights of parents,²⁵ unwed fathers,²⁶ and grandparents,²⁷ as well as privacy²⁸

²² For instance, laws targeting child abuse and failure to pay child support criminalize people considered to be bad family members. While claiming to ensure the well-being and safety of children, institutions like the child welfare system tend to systematically target families of people of color by scrutinizing and vilifying the parenting capacities of black and brown parents, allowing judges and officials to use the consequences of poverty (such as several siblings sharing a single room or lack of adequate heat) and personal parenting choices as evidence of child neglect. See Dorothy Roberts & Lisa Sangoi, *Black Families Matter: How the Child Welfare System Punishes Poor Families of Color*, THE APPEAL (Mar. 26, 2018), <https://theappeal.org/black-families-matter-how-the-child-welfare-system-punishes-poor-families-of-color-33ad20e2882e/> [<https://perma.cc/GTG3-72QT>]. Studies show that black families are more likely to be reported for child abuse, have cases against them substantiated, and have their children removed from their care. *Id.* Once placed in the foster system, black parents are significantly less likely to regain custody of their children than white parents. *Id.*

²³ At the extreme, family is an express weapon. One recent example of this was Donald Trump's assertion, during his 2016 presidential campaign, that "[w]hen you get these terrorists, you have to take out their families. Then, they care about their lives. Don't kid yourself. But they say they don't care about their lives. You have to take out their families." Billy Robson, *Donald Trump on ISIS: 'You Have to Take Out Their Families,'* YOUTUBE (Dec. 2, 2015), <https://www.youtube.com/watch?v=WWiaYQUV2oM> [<https://perma.cc/AJ4D-DJUU>].

²⁴ See David D. Meyer, *The Constitutionalization of Family Law*, 42 FAM. L.Q. 533, 571 (2008) (beginning in the 1960s, the Warren Court "ushered in a dramatically different understanding of the relationship between family law and the constitution").

²⁵ See *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

²⁶ See *Lehr v. Robertson*, 463 U.S. 248 (1983); *Stanley v. Illinois*, 405 U.S. 645 (1972).

²⁷ See *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977).

²⁸ See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); *Roe v. Wade*, 410 U.S. 113 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

and marriage rights.²⁹ Scholars have recently turned to this dialogue between family law and constitutional law as an avenue to protect vulnerable families.³⁰

This Article underscores the danger of limiting human rights to the context of the family. Political scientist Melinda Cooper recently observed that “[t]he history of family is one of perpetual crisis.”³¹ Perhaps, too, so long as family remains a fundamental unit of social organization, the myth of family and of individuals’ relationships to the family serve as fodder for achieving other goals of social ordering.³² Muslims and immigrants are currently subjected to family-separating policies that are justified by condemnation of individual bad actors.³³ Farmers and businessmen, by contrast, are rewarded by policies that expand the size and power of individual families.³⁴ The decision between centering a

²⁹ See *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *United States v. Windsor*, 133 S. Ct. 2675 (2013); *Turner v. Safley*, 482 U.S. 78 (1987); *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Loving v. Virginia*, 388 U.S. 1 (1967).

³⁰ See, e.g., Douglas NeJaime, *The Family’s Constitution*, 32 CONST. COMMENT. 413 (2017) (describing the dialogic relationship between family law and constitutional law); Abrams, *supra* note 17, at 265; Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825 (2004); see also JILL ELAINE HASDAY, *FAMILY LAW REIMAGINED* 40 (2014); Meyer, *supra* note 24, at 571; Abrams, *supra* note 17, at 280 (“The development of a modern family reunification right has occurred slowly but is now ripe enough to be poised for affirmative recognition by the courts.”); Kerry Abrams, *The Rights of Marriage: Obergefell, Din, and the Future of Constitutional Family Law*, 103 CORNELL L. REV. 501, 502–03 (2018) (“[S]ix of the Justices assumed for purposes of the case that a U.S. citizen does have a due process liberty interest in his or her marriage to a noncitizen. Put differently, the right to marry means little if individuals cannot enjoy the benefits of marriage.”).

³¹ COOPER, *supra* note 4, at 7.

³² See Robert M. Cover, *Nomos & Narrative*, 97 HARV. L. REV. 4, 7 (1983) (“The normative universe is held together by the force of interpretive commitments—some small and private, others immense and public. These commitments—of officials and of others—do determine what law means and what law shall be.”); see also Judith Olans Brown, Lucy A. Williams, & Phyllis Tropper Baumann, *The Mythogenesis of Gender: Judicial Images of Women in Paid and Unpaid Labor*, 6 UCLA WOMEN’S L.J. 457, 457–58 (1996). For examples of the role of myth shaping particular areas of law, see generally Noa Ben-Asher, *In the Shadow of a Myth: Bargaining for Same-Sex Divorce*, 78 OHIO ST. L.J. 1345 (2017) (exploring the myth of egalitarianism in same-sex divorce); Albert C. Lin, *Myths of Environmental Law*, 2015 UTAH L. REV. 1, 45 (2015) (exploring the myths that shape development and implementation of environmental law); Joan R. Tarpley, *Blackwomen, Sexual Myth, and Jurisprudence*, 69 TEMP. L. REV. 1343, 1344 (1996) (deconstructing the use of the “Jezebel” myth of black women’s sexuality by courts).

³³ See *infra* Parts I.A.2. & I.B.2.

³⁴ See *infra* Parts II.A.2. & II.B.2.

policy on the individual or the family determines which groups of people are empowered and which are not.

This Article proceeds in three parts: Part I examines contemporary immigration laws and policies that separate families and harm individuals. In Part I.A., we examine the context of the war-on-terror, in which Muslims are often perceived and regulated as actual or potential terrorists. We focus primarily on the Trump administration's orders banning immigration from six Muslim-majority countries (the "Travel Ban"),³⁵ which was upheld by the Supreme Court in *Trump v. Hawaii*.³⁶ Part I.B. considers the parallel treatment of Central American immigrant families. Lawmakers and policymakers often stereotype Central American immigrants as "rapists" and "murderers."³⁷ Under Trump administration policies, migrant families fleeing violence and crushing poverty have been separated at the border and sent to detention facilities across the country. The administration regularly justifies family separation as a deterrent to the alleged crime of illegal border crossing or even legal asylum seeking. In this context, the threat posed by individuals is deemed so great that it justifies intentional collateral punishment of families.

In Part II, we examine farm- and business-owning families. These families enjoy a variety of state benefits. In Part II.A., we examine federal and state policies that protect family farms. These policies channel state subsidies to predominantly white farm owners. We show that when lawmakers emphasize "the family," it often serves to obscure how policies ultimately channel taxpayer dollars to the largest and most profitable farms. Liberal critiques of these policies underscore the misleading nature of "family farm" rhetoric and the ways in which these policies serve corporate interests. In Part II.B., we consider laws and policies that empower Christian family business owners. We focus on *Burwell v. Hobby Lobby*, in which the Supreme Court decided that a closely held corporation whose owners had "sincerely held" Christian beliefs could not be forced to

³⁵ There is a long history of the goal of family reunification in immigration law. *See, e.g.*, Abrams, *supra* note 17 (tracing the history of this goal vis-à-vis national security).

³⁶ *Trump v. Hawaii*, 138 S. Ct. 2392, 2408 (2018); *see also* Jessica A. Clarke, *Explicit Bias*, 113 NW. U.L. REV. 505 (2018) (arguing that many discrimination cases ignore explicit bias and that courts refuse to consider evidence of biased statements of government officials in cases such as *Trump v. Hawaii*); Katherine Shaw, *Speech, Intent, and the President*, 104 CORNELL L. REV. (forthcoming 2019) (highlighting the absence of a coherent framework for assessing presidential speech and intent).

³⁷ *Trump Hosts Victims of Undocumented Migrants Amid Family Separation Row*, BBC NEWS (June 23, 2018), <https://www.bbc.com/news/world-us-canada-44580964> [<https://perma.cc/UHX7-C2CX>].

provide a health insurance plan covering certain contraceptives.³⁸ *Hobby Lobby* and its progeny empower Christian families not only by giving them access to the corporate form, but also by granting them religious sovereignty over their employees (and, in some cases, customers).³⁹

In Part III, we observe that both liberals and conservatives use the choice between the family and the individual as the primary unit of analysis to humanize or dehumanize legal subjects. We situate the special treatment for farm- and business-owning families in the context of corporate and religious sovereignty. We argue that in some instances, such as *Hobby Lobby*, empowering the business-owning family becomes a mechanism to disempower employees (as isolated individuals) vis-à-vis their employers (as family businesses).

Our story is one of race, religion, and capitalism in America. Recent treatment of Muslim and Central American immigrants, viewed on its own, raises questions about why these families are not valued. But when viewed together with treatment of other types of American families—farmers and family businesses—it becomes clear that the treatment of Muslim and immigrant families is part of the systemic entrenchment of a political system that favors racial, religious, and economic elites by, among other things, recognizing their privileged family status.

³⁸ *Burwell v. Hobby Lobby*, 134 S. Ct. 2751 (2014).

³⁹ See generally Noa Ben-Asher, *Faith-Based Emergency Powers*, 41 HARV. J.L. & GENDER 269 (2018) (arguing that religious exemption-seeking should be viewed as claiming religious sovereignty); Nancy J. Knauer, *Religious Exemptions, Marriage Equality, and the Establishment of Religion*, 84 U.M.K.C.L. REV. 749 (2016) (arguing that religious exemptions “are not consistent with our tradition of religious liberty or civil rights protections”); Louise Melling, *Religious Refusals to Public Accommodations Laws: Four Reasons to Say No*, 38 HARV. J.L. & GENDER 177 (2015) (arguing against allowing religious exemptions in anti-discrimination measures); Douglas NeJaime & Reva Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516 (2015) (arguing that religious exemptions prolong conflict instead of providing a solution); Amy Sepinwall, *Conscience And Complicity: Assessing Pleas For Religious Exemptions After Hobby Lobby*, 82 U. CHI. L. REV. 1897 (2015) (arguing that religious exemptions impose a substantial burden on third parties); Mary Anne Case, *Why “Live-And-Let-Live” Is Not a Viable Solution to the Difficult Problems of Religious Accommodation in the Age of Sexual Civil Rights*, 88 S. CAL. L. REV. 463 (2015) (arguing that religious exemptions are unconstitutional); Samuel R. Bagenstos, *The Unrelenting Libertarian Challenge to Public Accommodations Law*, 66 STAN. L. REV. 1205, 1237–40 (2014) (arguing that libertarian opponents will utilize First Amendment arguments against public accommodation laws, spurring the same concerns raised during the Reconstruction and Civil Rights eras); Martha Minow, *Should Religious Groups Be Exempt from Civil Rights Laws?*, 48 B.C.L. REV. 781 (2007).

I. The Bad Individual

Conservatives often frame oppressive laws and policies around individual “bad” actors rather than around families. The family unit in these situations is left unmentioned, or worse, used to deter or punish the allegedly bad individual. This Part demonstrates how, by characterizing the subjects of regulation as individuals rather than as families, conservative politicians and lawmakers have promoted policies of exclusion. The liberal response to this framing is to emphasize the family and its sacredness. We demonstrate this in two domains: (1) the ongoing “War on Terror” and (2) “protecting” the southern border. Part II (“The Right Family”), will demonstrate the flipside of this phenomenon: Conservative lawmakers promote a rhetoric of family in order to empower farms and businesses, and liberals object that the regulated subjects are individuals and corporations, *not* families.

A. The War on Terror

On September 11, 2001, President George W. Bush declared a war on terror.⁴⁰ “[O]ur way of life,” he said, “our very freedom came under attack . . . Lives were suddenly ended by evil, despicable acts of terror.”⁴¹ Therefore “the only way to defeat terrorism as a threat to our way of life is to stop it, eliminate it, and destroy it where it grows.”⁴² Since then, the executive branch, the courts, Congress, and the American public have engaged in an ongoing dialogue regarding the appropriate measures in this war.⁴³

⁴⁰ See Address to the Nation on the Terrorist Attacks, 2 PUB. PAPERS 1099, 1100 (Sept. 11, 2001); see also Address Before a Joint Session of Congress on the United States Response to the Terrorist Attacks of September 11, 2 PUB. PAPERS 1140, 1141 (Sept. 20, 2001).

⁴¹ Address to the Nation on the Terrorist Attacks, *supra* note 40, at 1099.

⁴² Address Before a Joint Session of Congress on the United States Response to the Terrorist Attacks of September 11, *supra* note 40, at 1142.

⁴³ See, e.g., Boumediene v. Bush, 553 U.S. 723 (2008); Hamdan v. Rumsfeld, 548 U.S. 557 (2006); Hamdi v. Rumsfeld, 542 U.S. 507 (2004); Rasul v. Bush, 542 U.S. 466 (2004).

1. The Individual Muslim Terrorist

The idea of “clash of civilizations” is frequently used to represent the conflict between the West and Islam.⁴⁴ Terrorism allegedly reflects a deep problem in contemporary Islam,⁴⁵ and terrorist attacks are perceived as different from state-waged violence.⁴⁶ Images of Osama Bin-Laden and Muhammad Atta and debates about the nature of terrorism have infiltrated American culture through news media,⁴⁷ film,⁴⁸ literature,⁴⁹ television,⁵⁰ law, and politics.⁵¹ Stories connecting terrorism and Islam have

⁴⁴ See, e.g., BERNARD LEWIS, *THE CRISIS OF ISLAM: HOLY WAR AND UNHOLY TERROR* (2004). *But see* TALAL ASAD, *ON SUICIDE BOMBING* 9 (2007) (arguing that “[y]et another—more complicated—story can be told, one that doesn’t lend itself so easily to the popular drama of a clash of civilizations.”).

⁴⁵ See, e.g., Alan Dershowitz, *In Love with Death*, *GUARDIAN* (June 3, 2004), <https://www.theguardian.com/world/2004/jun/04/saudi-arabia.comment> [<https://perma.cc/DZQ6-42PG>] (“[W]hy do these overprivileged young people support this culture of death, while impoverished and oppressed Tibetans continue to celebrate life despite their occupation by China? . . . The time has come to address the root cause of suicide bombing: incitement by certain religious and political leaders who are creating a culture of death and exploiting the ambiguous teachings of an important religion.”).

⁴⁶ See MICHAEL WALZER, *ARGUING ABOUT WAR* 51 (2004) (arguing that state violence is a legal activity when legitimated through international law, while terrorism is illegal and immoral).

⁴⁷ See *id.*

⁴⁸ See, e.g., *SEAL TEAM SIX: THE RAID ON OSAMA BIN LADEN* (Lantern Entertainment 2012); *ZERO DARK THIRTY* (Columbia Pictures 2012); *A MISSION TO DIE FOR* (Four Corners 2001).

⁴⁹ See, e.g., PETER L. BERGEN, *MANHUNT: THE TEN-YEAR SEARCH FOR BIN LADEN FROM 9/11 TO ABBOTTABAD* (2013); LAWRENCE WRIGHT, *THE LOOMING TOWER: AL-QAEDA AND THE ROAD TO 9/11* (2007).

⁵⁰ See, e.g., *Homeland* (Showtime 2011); *The Looming Tower* (Hulu 2018); *Fauda* (Yes Oh 2018).

⁵¹ For arguments in favor of executive unilateralism, see RICHARD A. POSNER, *NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY* 35 (Geoffrey R. Stone ed., 2006); Eric A. Posner & Adrian Vermeule, *The Credible Executive*, 74 *U. CHI. L. REV.* 865, 893 (2007). For arguments in favor of robust judicial review of executive power in emergencies, see DAVID DYZENHAUS, *THE CONSTITUTION OF LAW: LEGALITY IN A TIME OF EMERGENCY* 60–65 (2006); Bruce Ackerman, *The Emergency Constitution*, 113 *YALE L.J.* 1029, 1029–30 (2004) (“Even if the next half-century sees only four or five attacks on the scale of September 11, this destructive cycle will prove devastating to civil liberties by 2050.”).

proliferated.⁵² Muslim men are portrayed as dangerous, effeminate,⁵³ immature,⁵⁴ ruthless, and irrational.⁵⁵ Lawmakers have often relied on such ideas to fight real or perceived terrorist suspects.⁵⁶ The American public has mostly consented.⁵⁷

Post 9/11 war-on-terror policies have mostly focused on *individual bad actors* while ignoring the consequences for families. Guantanamo Bay detainees, for instance, have been detained without trial for almost two decades.⁵⁸ The Geneva Conventions require

⁵² For more critical approaches to the “war on terror,” see JUDITH BUTLER, *FRAMES OF WAR: WHEN IS LIFE GRIEVABLE?* (1st ed. 2009); ASAD, *supra* note 44; JASBIR K. PUAR, *TERRORIST ASSEMBLAGES: HOMONATIONALISM IN QUEER TIMES* (1st ed. 2007); Richard Rorty, *Post-Democracy*, 26 *LONDON REV. BOOKS* 7 (2004); NOAM CHOMSKY, 9-11: WAS THERE AN ALTERNATIVE? (1st ed. 2001).

⁵³ See, e.g., PUAR, *supra* note 52, at xxiii.

⁵⁴ See, e.g., Thomas Friedman, *Foreign Affairs: The Real War*, *N.Y. TIMES*, Nov. 27, 2001, at A19 (claiming that Islam had not yet achieved modernity).

⁵⁵ See, e.g., TAREK HEGGY, *THE ARAB MIND BOUND* (2011) (arguing that Arab societies are now trapped in a cycle of violence to which the only solutions are science and Western management).

⁵⁶ See, e.g., *Boumediene v. Bush*, 553 U.S. 723, 827 (2008) (Scalia, J., dissenting) (“America is at war with radical Islamists.”); *id.* at 816 (Roberts, C.J., dissenting) (“The dangerous mission assigned to our forces abroad is to fight terrorists, not serve subpoenas.”).

⁵⁷ See, e.g., Lydia Saad, *Anti-Muslim Sentiments Fairly Commonplace*, *GALLUP* (Aug. 10, 2006), <https://news.gallup.com/poll/24073/antimuslim-sentiments-fairly-commonplace.aspx> [<https://perma.cc/7E5M-WW9P>]. A Gallup poll posted on August 10, 2006, found that many Americans have hostile feelings towards Muslims. For instance, “[n]early one quarter of Americans, 22%, say they would not like to have a Muslim as a neighbor . . . fewer than half [49%] believe U.S. Muslims are loyal to the United States . . . [Almost four in ten, 39%, advocate that Muslims here should] carry a special I.D.” *Id.*

⁵⁸ The Bush administration originally asserted that detainees were not entitled to protections of the Geneva Conventions, but the Supreme Court disagreed. See, e.g., *Boumediene v. Bush*, 553 U.S. 723 (2008); *Hamdan v. Rumsfeld*, 548 U.S. 557, 635 (2006) (holding that detainees were entitled to the minimal protections listed under Common Article 3 of the Geneva Conventions); *Rasul v. Bush*, 542 U.S. 466 (2004). For criticism of Guantanamo Bay as a lawless zone, see Johan Steyn, *Guantanamo Bay: The Legal Black Hole*, 53 *INT’L & COMP. L.Q.* 1, 1 (2004). In 2009, President Obama signed an order declaring that he would close the facility within a year, but the effort was unsuccessful. *Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities*, Exec. Order No. 13,492, 74 *Fed. Reg.* 4,897 (Jan. 22, 2009) (ordering review of individuals detained and closure of the detention facility); Connie Bruck, *Why Obama Has Failed to Close Guantanamo*, *NEW YORKER* (July 25, 2016), <https://www.newyorker.com/magazine/2016/08/01/why-obama-has-failed-to-close-guantanamo> [<https://perma.cc/3DKD-GP2D>]. In January 2018, President Donald Trump signed an executive order to keep the prison camp open indefinitely. Phil Stewart, *U.S. Transfers Inmate from Guantanamo Even as Trump Hints at Refilling It*, *REUTERS* (May 2, 2018), <https://www.reuters.com/article/us-usa-trump-guantanamo/us->

providing detainees with access to their families, yet family visits at Guantanamo Bay are banned to this day.⁵⁹

2. The Travel Ban

Before and after he became president, Donald Trump spoke and tweeted of dangerous Muslim terrorists. He called for a registry of Muslims,⁶⁰ surveillance of mosques,⁶¹ and “a total and complete shutdown of Muslims entering the United States.”⁶² Regularly conflating *jihad* and Islam, Trump asserted that Muslims hate America,⁶³ “believe only in Jihad, and have no sense of reason or respect of [sic] human life.”⁶⁴ He

transfers-inmate-from-guantanamo-even-as-trump-hints-at-refilling-it-idUSKBN1I32WT
[<https://perma.cc/B2EA-Y8DV>].

⁵⁹ Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 116, Aug. 12, 1949, 75 U.N.T.S 287 (requiring that “[e]very internee shall be allowed to receive visitors, especially near relatives, at regular intervals and as frequently as possible”); see also David Smith, *A Tour of Guantánamo Bay: Ghostlike Figures Wait as a Promise Goes Unfulfilled*, GUARDIAN (Feb. 15, 2016), <https://www.theguardian.com/us-news/2016/feb/15/guantanamo-bay-tour-detainees-obama-administration> [<https://perma.cc/5DHB-M7F3>]; Q&A: *Guantanamo Bay, U.S. Detentions, and the Trump Administration*, HUMAN RIGHTS WATCH (June 27, 2018), <https://www.hrw.org/news/2018/06/27/qa-guantanamo-bay-us-detentions-and-trump-administration> [<https://perma.cc/7EWW-U4WH>]. Detainees are allowed to write letters and, starting in 2008, detainees who met certain conditions were allowed one call home each year. See Peter Finn & Julie Tate, *Guantanamo Bay Detainees’ Family Members May Be Allowed to Visit*, WASH. POST (May 11, 2011), https://www.washingtonpost.com/national/guantanamo-bay-detainees-family-members-may-be-allowed-to-visit/2011/05/11/AFGAMtsG_story.html?utm_term=.f121a7088a3b [<https://perma.cc/9GRG-PS47>]. In 2009, the military began facilitating one-hour video conferences (monitored by the military) between detainees and their families. *Id.*

⁶⁰ See Alana Abramson, *What Trump Has Said About a Muslim Registry*, ABC NEWS (Nov. 18, 2016), <https://abcnews.go.com/Politics/trump-muslim-registry/story?id=43639946> [<https://perma.cc/PHR9-4YK3>].

⁶¹ See *id.*

⁶² This statement remained on his campaign website until May 2017. See Christine Wang, *Trump Website Takes Down Muslim Ban Statement After Reporter Grills Spicer in Briefing*, CNBC (May 8, 2017) (reproducing original statement), <https://www.cnbc.com/2017/05/08/trump-website-takes-down-muslim-ban-statement-after-reporter-grills-spicer-in-briefing.html> [<https://perma.cc/47UM-EBSJ>].

⁶³ See *id.* (“[T]here is great hatred towards Americans by large segments of the Muslim population. Shariah authorizes such atrocities as murder against nonbelievers who won’t convert.”).

⁶⁴ *Id.* Trump later confirmed his position on “banning Muslims from entering this country” when asked about it in a Presidential debate in January 2016, and continued asserting that “Islam hates us” and “[w]e’re having problems with the Muslims, and we’re having problems with Muslims coming into the country.” James R. Clapper, Jr., Joshua A. Geltzer, & Matthew G. Olsen, *We’ve Worked on Stopping Terrorism. Trump’s Travel*

later, after much criticism, shifted from direct attacks on Muslims to enhanced national security measures.⁶⁵

On January 27, 2017, President Trump signed an Executive Order that banned entry of individuals from seven Muslim-majority countries (“Muslim Ban 1”).⁶⁶ Christians would receive priority for refugee status, he assured.⁶⁷ After a federal court enjoined enforcement of Muslim Ban 1,⁶⁸ on March 6, 2017, Trump issued a new Executive Order (“Muslim Ban 2”),⁶⁹ referring to it as a “watered down, politically correct version” of the

Ban Fuels It, CNN: OPINION (Apr. 23, 2018), <https://www.cnn.com/2018/04/23/opinions/trump-travel-ban-fuels-terrorism-clapper-geltzer-olsen/index.html> [<https://perma.cc/6VPL-4GCE>].

⁶⁵ In June 2016, for instance, he characterized the policy proposal as a suspension of immigration from countries “where there’s a proven history of terrorism.” *Trump v. Hawaii*, 138 S. Ct. 2392, 2436 (2018) (Sotomayor, J., dissenting) (internal citations omitted). He also described the proposal as rooted in the need to stop “importing radical Islamic terrorism to the West through a failed immigration system.” *Id.* (internal citations omitted). Asked in July 2016 whether he was “pull[ing] back from” his pledged Muslim ban, Trump responded, “I actually don’t think it’s a rollback. In fact, you could say it’s an expansion.” *Id.* (internal citations omitted). He then explained that he used different terminology because “[p]eople were so upset when [he] used the word Muslim.” *Id.* (internal citations omitted).

⁶⁶ *Protecting the Nation from Foreign Terrorist Entry Into the United States*, Exec. Order No. 13,769, 82 Fed. Reg. 8,977, 8,977 (Feb. 1, 2017) (identifying the purpose of the order as “detecting individuals with terrorist ties and stopping them from entering the United States”) [hereinafter *Muslim Ban 1*].

⁶⁷ *See Trump v. Hawaii*, 138 S. Ct. 2392, 2436 (Sotomayor, J., dissenting) (“That same day, President Trump explained to the media that, under Muslim Ban 1, Christians would be given priority for entry as refugees into the United States. In particular, he bemoaned the fact that in the past, ‘[i]f you were a Muslim [refugee from Syria] you could come in, but if you were a Christian, it was almost impossible.’ Considering that past policy ‘very unfair,’ President Trump explained that Muslim Ban 1 was designed ‘to help’ the Christians in Syria.”) (internal citations omitted).

⁶⁸ *Washington v. Trump*, No. C17-0141JLR, 2017 WL 462040, at *3 (W.D. Wash. Feb. 3, 2017). The Ninth Circuit denied the Government’s request to stay the injunction. *Washington v. Trump*, 847 F.3d 1151, 1169 (9th Cir. 2017) (per curiam).

⁶⁹ *Protecting the Nation from Terrorist Entry into the United States*, Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017) [hereinafter *Muslim Ban 2*]. Section 2(c) of the Executive Order suspends for ninety days the entry of nationals of Iran, Libya, Somalia, Sudan, Syria, and Yemen into the United States. *Id.* at 13,213. Section 6(a) suspends for 120 days the entry of refugees into the United States and decisions on applications for refugee status, and Section 6(b) cuts by more than half the number of refugees that may be admitted to the United States in fiscal year 2017, from 110,000 persons to 50,000 persons. *Id.* at 13,215–16.

original.⁷⁰ Two federal courts enjoined this Ban⁷¹ and the Supreme Court granted certiorari to review its legality.⁷²

The challengers of the Muslim Ban in all its reincarnations have emphasized its devastating effects on *families*. When the Supreme Court stayed the injunctions of Muslim Ban 2, it did so only “with respect to foreign nationals *who lack any bona fide relationship with a person or entity in the United States.*”⁷³ The Court explained that “a close familial relationship is required . . . like Doe’s wife or Dr. Elshikh’s mother-in-law.”⁷⁴ The government, in response, guided agencies by defining “close familial relationship” to include a parent, parent-in-law, spouse, fiancé, child, adult son or daughter, son-in-law, daughter-in-law, sibling (whether whole or half), and step relationships, and to exclude grandparents, grandchildren, aunts, uncles, nieces, nephews, cousins, brothers-in-law, and sisters-in-law.⁷⁵

A legal battle over the definition of family ensued. The administration promoted a narrow definition and the liberal challengers of the ban, a broad one. A federal district

⁷⁰ *Trump*, *Trump v. Hawaii*, 138 S. Ct. 2392, 2437 (Sotomayor, J., dissenting); *see also id.* at 2436 (adding that in September 2017 the president tweeted that “[t]he travel ban into the United States should be far larger, tougher and more specific—but stupidly, that would not be politically correct!”) (internal citations omitted).

⁷¹ *See Hawaii’i v. Trump*, 245 F. Supp. 3d 1227, 1239 (D. Haw. 2017), *aff’d in part & vacated in part*, 859 F.3d 741 (9th Cir. 2017), *and vacated*, 138 S. Ct. 377 (2017); Int’l Refugee Assistance Project (IRAP) v. Trump, 241 F. Supp. 3d 539, 566 (D. Md. 2017), *aff’d in part & vacated in part*, 857 F.3d 554 (4th Cir. 2017), *and vacated*, 138 S. Ct. 353 (2017). The Fourth and Ninth Circuits upheld those injunctions. *IRAP v. Trump*, 857 F.3d 554, 606 (4th Cir. 2017) (en banc), *vacated*, 138 S. Ct. 353 (2017); *Hawaii v. Trump*, 859 F.3d 741, 789 (9th Cir. 2017) (per curiam), *vacated*, 138 S. Ct. 377 (2017).

⁷² *Trump v. IRAP*, 137 S. Ct. 2080, 2086 (2017). Two preliminary injunctions were granted by federal courts and appealed by the government. *IRAP v. Trump*, 241 F. Supp. 3d 539 (D. Md. 2017) (issuing preliminary injunction), *aff’d in part & vacated in part*, 857 F.3d 554 (4th Cir. 2017); *Hawaii v. Trump*, 245 F. Supp. 3d 1227 (D. Haw. 2017), *aff’d in part & vacated in part*, 859 F.3d 741, 789 (9th Cir. 2017) (per curiam). The Ninth Circuit then vacated the portions of the injunction preventing the Government from conducting internal reviews. *Hawaii v. Trump*, 859 F.3d 741, 789 (9th Cir. 2017) (per curiam); *see also Hawaii’i v. Trump*, No. 1:17-cv-00050-DKW-KSC (D. Haw. 2017) (denying plaintiffs’ emergency motion to clarify scope of preliminary injunction).

⁷³ *Trump v. IRAP*, 137 S. Ct. 2080, 2087 (2017) (emphasis added).

⁷⁴ *Id.* at 2088.

⁷⁵ *Hawaii’i v. Trump*, 263 F. Supp. 3d 1049, 1054 (D. Haw. 2017).

court sided with the challengers⁷⁶ and the Ninth Circuit affirmed,⁷⁷ emphasizing the “concrete hardships on such individuals’ family members in the United States.”⁷⁸ This broader judicial definition of kinship determined the fate of those who sought to reunite with family members. But the win for Muslim families was short lived. On September 24, 2017, President Trump issued a third version of the travel ban (“Muslim Ban 3”),⁷⁹ and although two federal courts again stayed the Ban, this time the Supreme Court allowed it to go into effect.⁸⁰

3. Trump v. Hawaii⁸¹

On June 26, 2018, the Supreme Court upheld Muslim Ban 3 in a decision that reflects robust deference to the President’s focus on individual bad actors.⁸² The Court held that the President fulfilled his statutory requirement under the Immigration and Nationality Act (INA) to find that entry of aliens from covered countries would be detrimental to the interests of the United States,⁸³ that the INA prohibition on national origin discrimination

⁷⁶ *Id.* at 1063 (holding that grandparents, grandchildren, brothers-in-law, sisters-in-law, aunts, uncles, nieces, nephews, and cousins of persons in the United States should all be included in the injunction).

⁷⁷ *State v. Trump*, 871 F.3d 646, 655 (9th Cir. 2017) (“[T]he Court wanted to exclude individuals who have no connection with the United States or have remote familial relationships that would not qualify as ‘bona fide.’”). The Supreme Court affirmed the order with respect to the definition of families. *Hawaii v. Trump*, 138 S. Ct. 34 (2017).

⁷⁸ *Hawaii v. Trump*, 871 F.3d 646, 655 (9th Cir. 2017). The court interpreted the Supreme Court’s position as broadly addressing “the harms faced by persons in the United States based on the denial of entry of foreign nationals with whom they have bona fide relationships . . . the Supreme Court deployed fundamental equitable considerations that have guided American law for centuries.” *Id.* at 656.

⁷⁹ Enhancing Vetting Capabilities and Process for Detecting Attempted Entry into the United States by Terrorists or Other Public-Safety Threats, Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 27, 2017) [hereinafter Muslim Ban 3].

⁸⁰ *Trump v. Hawaii*, 138 S. Ct. 542 (2017).

⁸¹ *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (validating the travel ban as consistent with statutory authority and the Establishment Clause); see also Nancy Gertner, *The “Lower” Federal Courts: Judging in a Time of Trump*, N.Y.U.L. REV. 7 (2018).

⁸² *Trump v. Hawaii*, 138 S. Ct. 2392, 2408 (2018) (upholding the travel ban).

⁸³ *Id.* (“The sole prerequisite set forth in § 1182(f) is that the President ‘find[]’ that the entry of the covered aliens ‘would be detrimental to the interests of the United States.’ The President has undoubtedly fulfilled that requirement here.”) (internal citations omitted).

does not constrain the President's delegated authority to suspend entry by aliens or classes of aliens,⁸⁴ and that the travel ban did not violate the Establishment Clause.⁸⁵

In contrast with tougher judicial scrutiny of the Bush administrations' detention policies,⁸⁶ the Court in *Trump v. Hawaii* deferred fully to the President. As Justice Sotomayor commented in her dissent, although the Court "took the important step of finally overruling *Korematsu*,"⁸⁷ a repudiation of a "shameful precedent" that is "long overdue," it unfortunately also "redeploys the same dangerous logic underlying *Korematsu* and merely replaces one 'gravely wrong' decision with another."⁸⁸ The decision in *Trump v. Hawaii* ignored the President's anti-Muslim statements and the evidence that the ban was unnecessary for national security.⁸⁹ The consequence is "prolonged separation from family members . . . [and] diminished membership of the

⁸⁴ *Id.* at 2414 ("The distinction between admissibility—to which § 1152(a)(1)(A) does not apply—and visa issuance—to which it does—is apparent from the text of the provision, which specifies only that its protections apply to the 'issuance' of 'immigrant visa[s],' without mentioning admissibility or entry. Had Congress instead intended in § 1152(a)(1)(A) to constrain the President's power to determine who may enter the country, it could easily have chosen language directed to that end.") (internal citations omitted).

⁸⁵ *Id.* at 2421 ("The Proclamation is expressly premised on legitimate purposes: preventing entry of nationals who cannot be adequately vetted and inducing other nations to improve their practices. The text says nothing about religion."). The Court applied a rational basis review to the Establishment Clause challenge regarding entry of foreign nationals. *Id.* In addition, the Court held that *Korematsu* was wrongly decided and is officially overruled. *Id.* at 2423.

⁸⁶ See *Boumediene v. Bush*, 553 U.S. 723, 800 (2008); *Hamdi v. Rumsfeld*, 542 U.S. 507, 516–21 (2004).

⁸⁷ *Trump v. Hawaii*, 138 S. Ct. 2392, 2448 (2018) (Sotomayor, J., dissenting) (citing *Korematsu v. United States*, 323 U.S. 214 (1994)).

⁸⁸ *Id.* See also Anita Sinha, Opinion, *The Supreme Court's Travel Ban Ruling—Replacing, Not Overruling Korematsu*, THE HILL (July 1, 2018), <http://thehill.com/opinion/judiciary/395087-the-supreme-courts-travel-ban-ruling-replacing-not-overruling-korematsu> [<https://perma.cc/QD5K-R6UC>]; Abigail Simon, *The Supreme Court Finally Said Her Father Was Right About Japanese Internment. But Karen Korematsu Isn't Happy*, TIME (June 28, 2018), <http://time.com/5324434/supreme-court-travel-ban-karen-korematsu/> [<https://perma.cc/N72B-QJL4>] (noting Chief Justice Roberts "dismissed the comparison between Trump's travel ban and Japanese internment").

⁸⁹ See *Trump v. Hawaii*, 138 S. Ct. 2392, 2435–45 (Sotomayor, J., dissenting); see also Katherine Shaw, *Beyond the Bully Pulpit: Presidential Speech in the Courts*, 96 TEX. L. REV. 71 (2017) (arguing that in some cases a degree of judicial reliance on presidential speech is appropriate, including cases in which that speech reflects a clear manifestation of intent to enter the legal arena). The evidence establishes, according to Sotomayor, a likelihood of success for the plaintiffs under the Establishment Clause claim. *Trump v. Hawaii*, 138 S. Ct. 2392, 2435–45 (Sotomayor, J., dissenting).

[Muslim] Association.”⁹⁰ Furthermore, Justice Sotomayor emphasized that while Muslim Ban 3 *formally* offers waivers for those with close family members in the United States,⁹¹ one thousand individuals, including parents and children of United States citizens, many of whom technically qualified for waivers,⁹² had been denied.⁹³ The waiver option, concluded Sotomayor, creates a façade of legality.⁹⁴ Indeed, data suggests that waivers are still rarely granted, and the waiver process is the subject of ongoing litigation.⁹⁵ Telling stories about the wrenching consequences of the ban for families remains a key feature of liberal critique.⁹⁶ *Trump v. Hawaii*’s extreme deference to the President enables the government to separate and disregard Muslim families whether or not they pose a real national security risk.⁹⁷

⁹⁰ *Id.* at 2445 (Sotomayor, J., dissenting) (quoting *Hawai’i v. Trump*, 265 F. Supp. 3d 1140, 1159 (D. Haw. 2017)).

⁹¹ Muslim Ban 3, *supra* note 79, at § 3(c)(iv)(D).

⁹² *Trump v. Hawaii*, 138 S. Ct. 2392, 2431 (2018) (Breyer, J., dissenting) (citing Brief for Labor Organizations as Amici Curiae at 15–18); *see also* Brief for Pars Equality Center et al. as Amici Curiae at 12–28, *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

⁹³ *Trump v. Hawaii*, 138 S. Ct. 2392, 2445 (Sotomayor, J., dissenting) (quoting Brief for Pars Equality Center et al. as Amici Curiae at 11, 13–28) (noting that “waivers under the Proclamation are vanishingly rare” and reporting numerous stories of deserving applicants denied waivers).

⁹⁴ *Id.* (“[N]one of the features of the Proclamation highlighted by the majority supports the Government’s claim that the Proclamation is genuinely and primarily rooted in a legitimate national-security interest . . . the primary purpose and function of the Proclamation is to disfavor Islam by banning Muslims from entering our country.”).

⁹⁵ *See* *Emami v. Nielsen*, 365 F. Supp. 3d 1009 (N.D. Cal. 2019) (granting defendants’ motion to dismiss on state constitutional law claims but denying motion to dismiss on Administrative Procedure Act claims); *Pars Equal. Ctr. v. Pompeo*, No. C18-1122JLR, 2018 WL 6523135 (W.D. Wash. Dec. 12, 2018) (granting motion to transfer venue to allow consolidation with *Emami v. Nielson*). *See also* *Exclusive: Only 6 Percent of Those Subject to Trump Travel Ban Granted U.S. Waivers*, REUTERS (Apr. 4, 2019), <https://www.reuters.com/article/us-usa-immigration-visas-exclusive/exclusive-only-6-percent-of-those-subject-to-trump-travel-ban-granted-u-s-waivers-idUSKCN1RG30X> [<https://perma.cc/5LST-LUZZ>].

⁹⁶ *See, e.g.*, Matt Katz, *A Life ‘On Hold’ For Engaged Couple Separated By Trump’s Travel Ban*, GOTHAMIST (Apr. 26, 2019), http://gothamist.com/2019/04/26/engaged_couple_iran_trump.php [<https://perma.cc/U7WG-5KRS>] (telling the story of a couple who met while studying landscape architecture at SUNY College of Environmental Science and Forestry).

⁹⁷ On the issue of deference to the executive branch in emergencies, *see generally* Jenny S. Martinez, *Process and Substance in the “War on Terror,”* 108 COLUM. L. REV. 1013 (2008); David Dyzenhaus, *Schmitt v. Dicey: Are States of Emergency Inside or Outside the Legal Order?*, 27 CARDOZO L. REV. 2005 (2006); Samuel Issacharoff & Richard H. Pildes, *Emergency Contexts Without Emergency Powers: The United*

B. War on Immigration

In 2016, the Trump administration declared a war on immigration as a top priority. Since then, it dramatically increased the visibility, intentionality, and aggressiveness of immigration policies at the southern border.⁹⁸ These policies often exploit basic longstanding myths about immigrants and crime. They turn on the criminality of individual bad actors.

States' Constitutional Approach to Rights During Wartime, 2 INT'L J. CONST. L. 296, 296–97 (2004); David Cole, *Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis*, 101 MICH. L. REV. 2565 (2003); Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011 (2003); Mark Tushnet, *Defending Korematsu?: Reflections on Civil Liberties in Wartime*, 2003 WIS. L. REV. 273, 306 (2003); ERIC A. POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* 15–18 (2007).

⁹⁸ See generally Bill Ong Hing, *Entering the Trump Ice Age: Contextualizing the New Immigration Enforcement Regime*, 5 TEX. A&M L. REV. 253 (2018) (comparing the Trump Administration's immigration actions with policies under other administrations); SARAH PIERCE & ANDREW SELEE, *MIGRATION POL'Y INST., IMMIGRATION UNDER TRUMP: A REVIEW OF POLICY SHIFTS IN THE YEAR SINCE THE ELECTION* (2017) (outlining the Trump Administration's major changes to the U.S. immigration system). As many have importantly observed, however, the Obama administration had draconian immigration policies as well. In the eight years of the Obama administration, over two million foreign nationals were deported and there was vast expansion of family immigration detention centers. See Ingrid Eagly et al., *Detaining Families: A Study of Asylum Adjudication in Family Detention*, 106 CALIF. L. REV. 785, 787 (2018) (“The United States currently detains more migrant families than any other nation in the world. Since 2001, parents and their children have been held in five different detention facilities in New Mexico, Texas, and Pennsylvania as they seek asylum in the United States.”) (internal citations omitted); Jennifer M. Chacón, *Immigration and the Bully Pulpit*, 130 HARV. L. REV. F. 243, 244 (2017) (“Old laws and policies have generated the vulnerabilities that the Trump Administration now seeks to exploit.”); OFF. IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SEC., 2015 YEARBOOK OF IMMIGRATION STATISTICS 103 tbl.39 (2016), https://www.dhs.gov/sites/default/files/publications/Yearbook_Immigration_Statistics_2015.pdf [<https://perma.cc/6LZ4-YB9J>]; Matt Welch, *Opinion, Trump May Have Bad Intentions, But Obama Was a Deportee-in-Chief Too*, L.A. TIMES (Feb. 17, 2017), <http://www.latimes.com/opinion/op-ed/la-oe-welch-immigration-enforcement-obama-trump-20170216-story.html> [<https://perma.cc/U4CF-HH7Q>].

1. The Individual Criminal Immigrant

Myths and stereotypes linking immigrants and crime have long pervaded American culture.⁹⁹ They appear regularly in film, television, and the media,¹⁰⁰ and they influence public opinion.¹⁰¹ As of 2017, close to half of Americans agreed that immigrants worsen crime.¹⁰² In times of increased immigration, economic hardship, or national crisis, these perceptions rise.¹⁰³ Since the 1980s, large-scale immigration into the United States has accelerated,¹⁰⁴ and lawmakers and politicians have embraced these myths.¹⁰⁵ For example, addressing the nation on immigration reform in 2006, President George W. Bush announced, “illegal immigration puts pressure on public schools and hospitals, it

⁹⁹ For critical analysis of the myth, see RUBÉN G. RUMBAUT & WALTER A. EWING, *THE MYTH OF IMMIGRANT CRIMINALITY* (2007), reprinted in SSRC, *BORDER BATTLES: U.S. IMMIGR. DEBATES* (2007), <https://items.ssrc.org/border-battles/the-myth-of-immigrant-criminality/> [<https://perma.cc/75XB-GTNW>]; see also IMMIGRATION AND CRIME: ETHNICITY, RACE, AND VIOLENCE (Ramiro Martinez, Jr. & Avel Valenzuela, Jr. eds., 2006).

¹⁰⁰ See, e.g., *THE GODFATHER* (Paramount Pictures 1972); *MIAMI VICE* (Universal Pictures 2006); *The Sopranos* (HBO television broadcast 1999–2007).

¹⁰¹ According to the National Opinion Research Center’s 2000 survey, interviewing a nationally representative sample of adults, about 73% of Americans believed that immigration increases crime, 60% believed that “more immigrants were [somewhat or very] likely to cause Americans to lose jobs,” and 56% thought that “more immigrants were [somewhat or very] likely to make it harder to keep the country united.” Rubén G. Rumbaut & Richard D. Alba, *Perceptions of Group Size and Group Position in “Multi-Ethnic United States,”* Presentation Before the Annual Meeting of the American Sociological Association (Aug. 2003); see also Richard D. Alba et al., *A Distorted Nation: Perceptions of Racial/Ethnic Group Sizes and Attitudes toward Immigrants and Other Minorities*, 84 SOC. FORCES 901, 901–19 (2005).

¹⁰² See Anna Flagg, *The Myth of the Criminal Immigrant*, N.Y. TIMES (Mar. 30, 2018), <https://www.nytimes.com/interactive/2018/03/30/upshot/crime-immigration-myth.html> [<https://perma.cc/3FMV-HER5>] (citing *Immigration*, GALLUP, <https://news.gallup.com/poll/1660/immigration.aspx> [<https://perma.cc/6TJH-AK6S>]).

¹⁰³ See RUMBAUT & EWING, *supra* note 99, at 1.

¹⁰⁴ *Id.* (reporting that, in 2006, “the number of immigrants—both ‘legal’ and ‘illegal’—coming to the United States has been the largest in its history in absolute terms. However, the percentage of the U.S. population that is foreign-born remains below the post-1850 highs recorded by each decennial census from 1860 through 1920, when immigrants comprised more than 13 percent of the population . . . [I]n 2006[,] the foreign-born population totaled about 38.1 million, or just under 13 percent of the U.S. population.”).

¹⁰⁵ See, e.g., Hazleton, Pa., Ordinance 2006–18: *Illegal Immigration Relief Act Ordinance* §§ 2(C), 2(F) (Sept. 12, 2006) (declaring that “illegal immigration leads to higher crime rates” and seeking to protect the city’s legal residents and citizens from “crime committed by illegal aliens”).

strains state and local budgets, and brings crime to our communities.”¹⁰⁶ Unsurprisingly, this myth of the criminal migrant has been a central theme in Donald Trump’s rise to power; he has repeatedly referred to Central American immigrants as criminals, drug dealers, and rapists.¹⁰⁷

In reality, however, crime and immigration are unconnected.¹⁰⁸ Studies have consistently shown that while immigrant populations have been growing for decades, crime in the same period has declined.¹⁰⁹ The national rate of violent crime today is below its rate in 1980.¹¹⁰ A recent large-scale study comparing immigration rates with crime rates in 200 metropolitan areas revealed that a large majority of these areas have

¹⁰⁶ Press Release, White House, President Bush Addresses the Nation on Immigration Reform (May 15, 2006), <https://georgewbush-whitehouse.archives.gov/news/releases/2006/05/20060515-8.html> [<https://perma.cc/26VC-VX7P>].

¹⁰⁷ See, e.g., *30 of Donald Trump’s Wildest Quotes*, CBS NEWS, <https://www.cbsnews.com/pictures/wild-donald-trump-quotes/9/> [<https://perma.cc/M8VC-HX8B>] (quoting Trump as saying, during his announcement of his run for GOP nomination on June 16, 2015, “[w]hen Mexico sends its people, they’re not sending the best. They’re sending people that have lots of problems and they’re bringing those problems. They’re bringing drugs, they’re bringing crime. They’re rapists.”); *Full Text: Donald Trump 2016 RNC Draft Speech Transcript*, POLITICO (July 21, 2016), <https://www.politico.com/story/2016/07/full-transcript-donald-trump-nomination-acceptance-speech-at-rnc-225974> [<https://perma.cc/NM97-TH3T>] (“The number of new illegal immigrant families who have crossed the border so far this year already exceeds the entire total from 2015. They are being released by the tens of thousands into our communities with no regard for the impact on public safety or resources.”); *Donald Trump: We Need to Get out ‘Bad Hombres,’* CNN (Oct. 19, 2016), <https://www.cnn.com/videos/politics/2016/10/19/third-presidential-debate-trump-immigration-bad-hombres-sot.cnn> [<https://perma.cc/WFT4-C5HA>].

¹⁰⁸ See RUMBAUT & EWING, *supra* note 99, at 1 (“Both contemporary and historical data, including investigations carried out by major government commissions over the past century, have shown repeatedly and systematically that immigration actually is associated with *lower* crime rates . . . [a]t the same time that immigration—especially undocumented immigration—has reached and surpassed historic highs, crime rates in the United States have *declined*, notably in cities with large immigrant populations.”) (emphasis in original); Leisy Abrego et al., *Making Immigrants into Criminals: Legal Processes of Criminalization in the Post-IIRIRA Era*, 5 J. MIGRATION & HUM. SECURITY 694, 694–95 (2017) (arguing that laws passed in the 1990s created the notion of “criminal alienhood,” which “slowly but purposefully redefined what it means to be unauthorized in the United States such that criminality and unauthorized status are too often considered synonymous”).

¹⁰⁹ See RUMBAUT & EWING, *supra* note 99, at 1.

¹¹⁰ See Flagg, *supra* note 102.

many more immigrants today than they did in 1980 and fewer violent crimes.¹¹¹ Another survey concluded that there was either no relation between crime and immigration, or that migrant communities actually enhance economic and cultural growth.¹¹²

2. The Family Separation Policy

The Trump administration's war on immigration began shortly after he took office.¹¹³ The administration called for, among other things, increasing the number of enforcement agents,¹¹⁴ limiting "chain migration,"¹¹⁵ streamlining removal,¹¹⁶ expanding detention, constructing a wall along the United States-Mexico Border,¹¹⁷ and shutting down

¹¹¹ See *id.* ("[T]he study's data suggests either that immigration has the effect of reducing average crime, or that there is simply no relationship between the two . . . This was a consistent pattern in each decade from 1980 to 2016, with immigrant populations and crime failing to grow together.").

¹¹² See *id.*

¹¹³ See Chacón, *supra* note 98, at 244 ("Upon election, President Trump spent his first four weeks in office rolling out immigration enforcement policies with a great deal more fervor than competence.").

¹¹⁴ See Kari E. Hong, *The Costs of Trumped-Up Immigration Enforcement Measures*, 2017 CARDOZO L. REV. DE NOVO 119, 127–28 (2017).

¹¹⁵ See, e.g., Alan Gomez, *What Is 'Chain Migration' and Why Does President Trump Want to End It?*, USA TODAY (Jan. 11, 2018) ("'[C]hain migration' is a derogatory term used to describe the ability of U.S. citizens and green card holders to bring their extended family into the country."); see also Philip Bump, *How 'Chain Migration' Brought Us the Trump White House*, WASH. POST (Jan. 29, 2018), https://www.washingtonpost.com/news/politics/wp/2018/01/29/how-chain-migration-brought-us-the-trump-white-house/?noredirect=on&utm_term=.d31ce7eb8856 [<https://perma.cc/A23K-XL7C>]; White House *Outlines Trump's Immigration Proposal*, NPR (Jan. 25, 2018), <https://www.npr.org/2018/01/25/580858256/white-house-releases-draft-immigration-plan> [<https://perma.cc/MD6N-3MSS>] ("The White House also wants changes to the legal immigration system, including policies that prioritize family members 'to spouses and minor children only [sic].'") (internal citations omitted).

¹¹⁶ See, e.g., *The Immigrants Deported to Death and Violence*, NEW YORKER (Jan. 8, 2018), <https://video.newyorker.com/watch/the-immigrants-deported-to-death-and-violence> [<https://perma.cc/T4R5-7Z7M>] (describing a woman who was deported and eventually murdered in her home country); Haley Sweetland Edwards, *'No One is Safe.' How Trump's Immigration Policy Is Splitting Families Apart*, TIME (Mar. 8, 2018), <http://time.com/longform/donald-trump-immigration-policy-splitting-families/> [<https://perma.cc/B768-4KTT>] (describing how an undocumented immigrant with no criminal record who has lived and worked in the country for over ten years was detained and deported, leaving behind his wife and two U.S. citizen daughters).

¹¹⁷ See, e.g., *Remarks by President Trump at Cabinet Meeting*, WHITE HOUSE (Apr. 9, 2018), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-cabinet-meeting-7/> [<https://perma.cc/T4HK-NMJ5>] (transcribing Trump's comments as: "We need a wall. Whether you're a Republican or Democrat, we

sanctuary cities.¹¹⁸ The administration has also significantly narrowed the eligibility of victims of domestic abuse to obtain asylum¹¹⁹ and broadened officials' discretion to deny visa applications.¹²⁰

On May 7, 2018, then-Attorney General Jeff Sessions announced a “zero-tolerance” policy for adults entering the country unlawfully, declaring that the “Department of Homeland Security is now referring 100 percent of illegal Southwest Border crossings to the Department of Justice for prosecution.”¹²¹ Under the “zero tolerance” policy, any

need a wall. And it will stop your drug flow. It will knock the hell out of the drug flow.”); Sarah Almkhtar & Josh Williams, *Trump Wants a Border Wall. See What's in Place Already*, N.Y. TIMES (Feb. 5, 2018), <https://www.nytimes.com/interactive/2018/02/05/us/border-wall.html> [<https://perma.cc/6PYT-PBUF>] (stating that the “government has built nearly 700 miles of wall and fencing since 2006, mostly on federal land and where the terrain does not provide a natural barrier”).

¹¹⁸ See Gabe Ortiz, *Trump Keeps Claiming Immigrants 'Breed' Crime, and a New Study Shows Why He's Very Wrong*, DAILY KOS (Mar. 30, 2018), <https://www.dailykos.com/stories/2018/3/30/1753235/-Trump-keeps-claiming-immigrants-breed-crime-and-a-new-study-shows-why-he-s-very-wrong> [<https://perma.cc/FXM4-D3TU>] (quoting Trump as saying, “every day, sanctuary cities release illegal immigrants, drug dealers, traffickers, gang members back into our communities. They're safe havens for just some terrible people.”).

¹¹⁹ See U.S. CITIZENSHIP & IMMIGR. SERVS., PM-602-0162, GUIDANCE FOR PROCESSING REASONABLE FEAR, CREDIBLE FEAR, ASYLUM, AND REFUGEE CLAIMS IN ACCORDANCE WITH *MATTER OF A-B-* (July 11, 2018), <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-06-18-PM-602-0162-USCIS-Memorandum-Matter-of-A-B.pdf> [<https://perma.cc/2Z6Q-HJY3>] (implementing Attorney General Sessions' opinion in *Matter of A-B-*, 27 I & N Dec. 316 (A.G. 2018) that domestic violence against women is not a sufficient basis for asylum); see also Nermeen Arastu et al., *What Jeff Sessions' Efforts to Deny Asylum to Domestic Violence Victims Look Like on the Ground*, SLATE MAG. (July 16, 2018), <https://slate.com/news-and-politics/2018/07/what-jeff-sessions-efforts-to-deny-asylum-to-domestic-violence-victims-look-like.html> [<https://perma.cc/YPN2-CXHQ>]; Mark Joseph Stern, *Jeff Sessions Just Barred Most Domestic Violence Victims from Applying for Asylum*, SLATE MAG. (June 11 2018), <https://slate.com/news-and-politics/2018/06/jeff-sessions-bars-most-domestic-violence-victims-from-asylum.html> [<https://perma.cc/ZGR7-B3JY>].

¹²⁰ See U.S. CITIZENSHIP & IMMIGR. SERVS., PM-602-0163, ISSUANCE OF CERTAIN RFEs AND NOIDS; REVISIONS TO ADJUDICATOR'S FIELD MANUAL (AFM) CHAPTER 10.5(A), CHAPTER 10.5(B) (July 13, 2018), https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/AFM_10_Standards_for_RFEs_and_NOI_Ds_FINAL2.pdf [<https://perma.cc/GPE4-2RGA>] (“[G]uidance to [USCIS] adjudicators regarding the discretion to deny an application, petition, or request without first issuing a Request for Evidence (RFE) or Notice of Intent to Deny (NOID) if initial evidence is not submitted or if the evidence in the record does not establish eligibility”); see also Sara O'Brien, *Visa Policy Change Will Make it Easier for Trump Administration to Deny Applications*, CNN POLITICS (July 17, 2018), <https://www.cnn.com/2018/07/16/politics/visa-policy-changes/index.html> [<https://perma.cc/5MXP-7PY4>].

¹²¹ See Press Release, U.S. Att'y Gen., Attorney General Sessions Delivers Remarks Discussing the Immigration Enforcement Actions of the Trump Administration (May 7, 2018), <https://www.justice.gov/>

migrant, including those seeking asylum, apprehended crossing the border somewhere other than a port of entry was detained for criminal prosecution, and any migrant crossing with minor children was separated from their children.¹²² Thousands of children were separated from their parents at the southern border.¹²³ Only after extensive media coverage, international expressions of horror, nationwide protests, and several legal challenges¹²⁴ did President Trump reverse course, announcing that “[i]t is also the policy

opa/speech/attorney-general-sessions-delivers-remarks-discussing-immigration-enforcement-actions [https://perma.cc/T2X6-3N7Y]. Although unlawful entry has been a crime since 1929, it was commonly treated as a civil offense for all but those deemed by federal prosecutors as “the worst of the worst.” Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U.L. REV. 1281, 1297 (2010) (observing that criminal prosecution for illegal border crossing has been escalating since the 1990s); *see also* Abrego et al., *supra* note 108, at 700–02 (describing how the new zero-tolerance policy and related program called “operation streamline” contribute to criminalization of immigrants and subject immigrants to “dehumanizing experience[s]” related to being labeled a criminal in a formal court setting).

¹²² *See* SARAH HERMAN PECK, CONG. RESEARCH SERV., LSB10180: FAMILY SEPARATION AT THE BORDER AND THE MS. L. LITIGATION 2 (Jul. 31, 2018) (explaining that once parents were detained, children were treated as “unaccompanied minors” and transferred to the Department of Health and Human Services’ Office of Refugee Resettlement). There were also some cases in which parents presenting themselves at legal ports of entry and asking for asylum were separated from their children. *See* Ms. L. v. U.S. Immigr. & Customs Enf’t, 302 F. Supp. 3d 1149, 1154 (S.D. Cal. 2018) (including statement by the lead plaintiff, Ms. L, alleging she sought asylum with her minor daughter at the San Ysidro Port of Entry in San Diego, California).

¹²³ *See* Catherine E. Shoichet, *The Government Separated Immigrant Families. But Officials Still Won’t Say Exactly How Many Kids Are in Custody*, CNN (July 5, 2018), <https://www.cnn.com/2018/07/03/us/separated-families-countdown/index.html> [https://perma.cc/4QYA-TTDD] (stating that although officials did not state the exact number, estimates are between 2,000 and 3,000 children); Miriam Jordan, *‘I Can’t Go Without My Son,’ A Mother Pleaded as She Was Deported to Guatemala*, N.Y. TIMES (June 17, 2018), <https://www.nytimes.com/2018/06/17/us/immigration-deported-parents.html> [https://perma.cc/H9EU-CWHJ]; Nelson Renteria, *El Salvador Demands U.S. Return Child Taken from Deported Father*, REUTERS (June 21, 2018), <https://www.reuters.com/article/us-usa-immigration-el-salvador/el-salvador-demands-u-s-return-child-taken-from-deported-father-idUSKBN1JH3ER> [https://perma.cc/8U4B-Y8UY].

¹²⁴ *See* Ms. L., 302 F. Supp. 3d at 1161–62 (holding that plaintiffs stated a legally cognizable claim for violation of their substantive due process rights to family integrity under the Fifth Amendment, based on their allegations the Government had separated plaintiffs from their minor children while plaintiffs were held in immigration detention and without a showing of parental unfitness or danger to their children). In addition, seventeen states filed a complaint against the Federal Government challenging the family separation practice. *See* Compl., Washington et al. v. United States, No. 18-cv-0939 (W.D. Wash. June 26, 2018); Petition for Habeas Corpus & Compl., Mejia-Mejia v. U.S. Immigr. & Customs Enf’t, No. 1:18-cv-01445-PLF (D.D.C. June 19, 2018); Compl., M.H.U. v. Nielsen, No. 1:18-cv-01458 (D.D.C. June 20, 2018); Compl., W.S.R. v. Sessions, No. 1:18-cv-04265 (N.D. Ill. June 6, 2018); Compl., C.D.A. v. Sessions, No. 1:18-cv-04291 (N.D. Ill. June 20, 2018); Compl., Padilla v. U.S. Immigr. & Customs Enf’t, No. 2:18-cv-928 (W.D. Wash. June 25, 2018); Compl., Ramirez v. Sessions, No. 1:18-cv-01516-PLF (D.D.C. June 26, 2018); Compl., Gonzalez-Garcia v. Sessions, No. 1:18-cv-11340-GAO (D. Mass. June 27, 2018); Compl., Sw. Envtl. Ctr. v. Sessions, No. 2:18-cv-00632 (D.N.M. July 4, 2018); Compl., Lopez Sales v. Sessions, No. 1:18-cv-01700-ABJ (D.D.C.

of this Administration to maintain family unity, including by detaining alien families together where appropriate and consistent with law and available resources.”¹²⁵ Trump blamed Congress and the courts for “failure to act,” and for “put[ing] the Administration in the position of separating alien families to effectively enforce the law.”¹²⁶ He declared his commitment “to enforce this and other criminal provisions of the INA until and unless Congress directs otherwise.”¹²⁷

As the widespread outcry unfolded in June 2018, the Trump administration adopted what Masha Gessen has called “Rule by Nobody.”¹²⁸ That is, nobody took responsibility for removing toddlers and children from their parents and placing them in cages and detention facilities: “Donald Trump said that the democrats made him do it. Jeff Sessions, the[n] Attorney General, said it was the Bible. Kirstjen Nielsen, the[n] Secretary of Homeland Security, said it was the law. They all said it wasn’t them.”¹²⁹ By deflecting

July 20, 2018); Compl., *M.M.M. v. Sessions*, No. 1:18-cv-01759-PLF (D.D.C. July 27, 2018); Compl. *E.S.R.B. v. Sessions*, No. 1:18-cv-06654 (S.D.N.Y. July 24, 2018); Compl., *Dora v. Sessions*, No. 1:18-cv-01938-PLF (D.D.C. Aug. 17, 2018). For a compendium of the litigation dockets in each of these cases, see *Litigation Documents & Resources Related to Trump Policies on Family Separations and Asylum*, LAWFARE, <https://www.lawfareblog.com/litigation-documents-resources-related-trump-policies-family-separations-and-asylum> [<https://perma.cc/6JH9-VDMS>].

¹²⁵ See Exec. Order No. 13,841 § 2(a)(i), 83 Fed. Reg. 29,435 (June 20, 2018) (defining “alien family” as “any person not a citizen or national of the United States who has not been admitted into, or is not authorized to enter or remain in, the United States, who entered this country with an alien child or alien children at or between designated ports of entry and who was detained”); *id.* at § 1 (asserting that “[i]t is the policy of this Administration to rigorously enforce our immigration laws,” and that “[w]hen an alien enters or attempts to enter the country anywhere else, that alien has committed at least the crime of improper entry and is subject to a fine or imprisonment.”).

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ Masha Gessen, *By Separating Families at the Border, the Trump Administration Enforces the “Rule by Nobody,”* NEW YORKER (June 20, 2018), <https://www.newyorker.com/news/our-columnists/by-separating-families-at-the-border-the-trump-administration-enforces-the-rule-by-nobody> [<https://perma.cc/3GAX-747G>] (“In a fully developed bureaucracy there is nobody left with whom one [can] argue, to whom one [can] present grievances, on whom the pressure of power [can] be exerted.”) (internal citations omitted). For other examples of moral outcry, see O’Brien, *supra* note 120 (quoting Senator Elizabeth Warren (D-MA)) (“[T]he president’s deeply immoral actions have made it obvious we need to rebuild our immigration system from top to bottom starting with replacing ICE with something that reflects our morality and values. This moment is a moral crisis for our country. Dr. Martin Luther King said[,] ‘there comes a time when silence is betrayal.’ We will not be silent. We cannot be silent.”).

¹²⁹ Gessen, *supra* note 128.

responsibility for their actions, those who separated children from their parents became anonymous, making no one accountable for what happened.

3. Judicial Review

The legality of the family separation policy was immediately challenged by asylum-seeker plaintiffs who claimed that it violated their due process rights.¹³⁰ Concluding that under certain circumstances asylum seekers have a “due process right to family integrity,”¹³¹ the court found a likelihood of success on two grounds. First, although families “may lawfully be separated when the parent is placed in criminal custody, the same general rule does not apply when a parent and child present together lawfully at a port of entry seeking asylum.”¹³² An asylum-seeking parent has committed no crime “and absent a finding the parent is unfit or presents a danger to the child, it is unclear why separation of [the plaintiff or similarly situated class members] would be necessary.”¹³³ The court extended its holding to parents who had been criminally prosecuted for crossing unlawfully, but were not reunited with their children after serving their sentences.¹³⁴ Second, the government’s separation policy was “implemented without any effective system or procedure for (1) tracking the children after they were separated from their parents, (2) enabling communication between the parents and their children after separation, [or] (3) reuniting the parents and children after the parents are returned to immigration custody following completion of their criminal sentence.”¹³⁵

¹³⁰ See Order Granting Plaintiffs’ Motion for Classwide Preliminary Injunction, *Ms. L. v. U.S. Immigr. & Customs Enf’t*, 310 F. Supp. 3d 1133, 1135 (S.D. Cal. 2018).

¹³¹ Order Granting in Part & Denying in Part Mot. to Dismiss, *Ms. L. v. U.S. Immigr. & Customs Enf’t*, 302 F. Supp. 3d 1149, 1167 (S.D. Cal. 2018) (finding a due process right to family integrity and that the plaintiffs’ “allegations sufficiently describe government conduct that arbitrarily tears at the sacred bond between parent and child”).

¹³² *Ms. L.*, 310 F. Supp 3d at 1143.

¹³³ *Id.* at 1143–44 (adding that “*Ms. L.* is an example of this family separation practice expanding beyond its lawful reach, and she is not alone[;] . . . asylum seekers like *Ms. L.* and many other class members may be fleeing persecution and are entitled to careful consideration by government officials. Particularly so if they have a credible fear of persecution.”).

¹³⁴ *Id.* at 1143.

¹³⁵ *Id.* (“The unfortunate reality is that under the present system migrant children are not accounted for with the same efficiency and accuracy as property. Certainly, that cannot satisfy the requirements of due process.”).

Unfortunately, by the time the Trump administration repealed the family separation policy, over 2,000 children had already been separated from their families under the zero-tolerance policy. On June 23, 2018, the Department of Homeland Security (DHS) claimed that it had set up a “well-coordinated” process for reunification.¹³⁶ But reuniting children with their parents took much longer than anticipated, in part because of poor mechanisms for tracking separated individuals as family units and because some parents had already been deported.¹³⁷ Further, in January 2019, the Department of Health and Human Services Office of the Inspector General released a report finding that perhaps thousands of other children were separated from their families prior to implementation of the “zero tolerance” policy and that little to no effort was underway to identify and reunite them with their families.¹³⁸

Of the current administration’s various war on immigration policies (one of which—the border wall—caused a thirty-five-day government shutdown),¹³⁹ the family separation policy best illustrates our main point: This policy is based explicitly on stopping individual (allegedly) bad actors from entering the country. Ignoring the fact that families are destroyed, traumatized, and dehumanized,¹⁴⁰ this policy uses the threat of family

¹³⁶ See *Fact Sheet: Zero-Tolerance Prosecution and Family Reunification*, U.S. DEP’T OF HOMELAND SEC., <https://www.dhs.gov/news/2018/06/23/fact-sheet-zero-tolerance-prosecution-and-family-reunification> [<http://perma.cc/T5C4-CPLM>].

¹³⁷ See U.S. DEP’T OF HEALTH & HUM. SERV., OEI-BL-18-00511, SEPARATED CHILDREN PLACED IN OFFICE OF REFUGEE RESETTLEMENT CARE (2019), <https://oig.hhs.gov/oei/reports/oei-BL-18-00511.pdf> [<https://perma.cc/4HTC-WFTE>] (finding that tracking of separation was done only informally, and HHS and DHS had to piece together data in retrospect in response to the court order).

¹³⁸ See *id.*; see also Angelina Chapin, *Trump Admin Says It’s Too Hard to Reunite Thousands of Separated Families: Court Filing*, HUFFINGTON POST (Feb. 2, 2019), https://www.huffpost.com/entry/report-trump-admin-does-not-plan-to-reunite-families-separated-before-zero-tolerance_n_5c55c3c4e4b0871047553e468 [<https://perma.cc/VFB2-VAG3>] (quoting Trump administration officials claiming that HHS does not have the capacity to undertake reunification).

¹³⁹ See Nicholas Fandos et al., *Trump Signs Bill Reopening Government for 3 Weeks in Surprise Retreat from Wall*, N.Y. TIMES (Jan. 25, 2019), <https://www.nytimes.com/2019/01/25/us/politics/trump-shutdown-deal.html> [<https://perma.cc/YCX2-25GG>].

¹⁴⁰ See *New Images Reveal Migrant Children Separated from Parents Living in Cages*, GLOBAL NEWS (June 18, 2018), <https://globalnews.ca/video/4280085/new-images-reveal-migrant-children-separated-from-parents-living-in-cages> [<https://perma.cc/YF26-CQP7>]; Reflect, *Horrrifying Video Shows Immigrant Children in Cages*, YOUTUBE (June 18, 2018), <https://www.youtube.com/watch?v=dys990kJCQ4> [<http://perma.cc/4DK9-9955>].

separation to deter people, who often face genuine existential physical or financial threats, from migrating to the United States.¹⁴¹

II. The Right Family

In Part I, we described how liberals oppose the Trump administration's immigration policies by calling on the sanctity of the family. In this Part, we see a role reversal. Liberals challenge family-oriented policies with arguments that the individuals or corporations involved are not part of meaningful families. We look first at agricultural subsidies and the use of the concept of the "family farm" to justify those subsidies. Liberal critique of these subsidies is grounded, in part, in claims that these subsidies support profitable businesses rather than traditional family farmers. Next, we consider the religious rights of closely held corporations. Like family farms, family businesses have long been celebrated and given special legal treatment. In assessing the religious rights of these businesses, the Supreme Court regularly invokes the family. By contrast, dissenters have focused on the businesses themselves.

In both contexts, we observe that structuring policy around families is a vehicle for conferring state benefits. More importantly, we emphasize the consequences: the beneficiaries of these laws and policies are mostly white and Christian, and many of them are employers. Their employees, who are not considered part of the family, often pay the costs of these family-centric policies.

A. Empowering American Farmers

Although only a small number of Americans—around two million—are farmers, the profession remains a critical part of the American imagination and plays an outsized role in federal policy. The myth of the hardworking Jeffersonian farmer and the celebration of farm families justify a set of policies that benefit a small number of family farm owners, while entrenching racial and economic hierarchies within the food system.

1. The Myth of the Family Farm

Family farms loom large in the myth, law, and politics of agriculture. Even in the modern era, numerous policies protect and subsidize family-run agricultural operations. As modern agrarian philosopher Wendell Berry explains, "[t]he center of an agrarian farm is the household. The function of the household economy is to assure that the farm

¹⁴¹ Trump's attack on families is also apparent in his attack on so called "chain migration." See Gomez, *supra* note 115.

family lives so far as possible from the farm.”¹⁴² Although the farmer himself is the mythical figure, the farm family is the key unit of analysis.¹⁴³ Today, family-owned farms constitute 98.8% of all farms.¹⁴⁴ In a speech to the American Farm Bureau Federation, President Trump described farmers as embodying “hard work, grit, self-reliance[,] and sheer determination.”¹⁴⁵ He said that revisions to tax law would benefit family farms and allow farms to stay in families and closed with “[a] phrase I’ve heard all my life, but I will repeat right now—very simple, but very, very accurate and concise: farm country is God’s country. So true.”¹⁴⁶

Although the agricultural economy has changed significantly, the family farm remains a central unit of analysis in farm law and politics. Throughout the twentieth century, the number of farmers in the United States steadily declined.¹⁴⁷ Fewer farmers produce more food due to farmland consolidation, mechanization, and development of genetic technologies.¹⁴⁸ Industrialization in American agriculture dramatically changed

¹⁴² Wendell Berry, *The Whole Horse*, in *THE NEW AGRARIANISM: LAND, CULTURE, AND THE COMMUNITY OF LIFE* 68 (Eric T. Freyfogle ed., 2001).

¹⁴³ See WENDY BROWN, *UNDOING THE DEMOS: NEOLIBERALISM’S STEALTH REVOLUTION* 100–06 (2015) (exploring the tension between neoliberalism’s focus on the individual and its focus on family as the key unit of analysis).

¹⁴⁴ See ECON. RESEARCH SERV., U.S. DEP’T OF AGRIC., *ECON. INFO. BULL. NO. 185, AMERICA’S DIVERSE FAMILY FARMS* (2017), <https://www.ers.usda.gov/webdocs/publications/86198/eib-185.pdf?v=43083> [<https://perma.cc/5SLP-UWK3>] (noting that only 1.2% of farms—just under 25,000 farms—are not family-owned). Family farms are responsible for about 90% of all farm production. *Id.* at 20. Farm lobby organizations frequently tout this fact, perpetuating the idea that family farms should be celebrated. See, e.g., FARM POLICY MYTHS AND FACTS, <https://www.fb.org/issues/farm-policy/farm-policy-myths-and-facts> [<http://perma.cc/7EFC-65MU>] (explaining that “family owned farms continue to be the backbone of the agriculture industry”).

¹⁴⁵ Donald J. Trump, President of the United States, Remarks at the American Farm Bureau Annual Convention (Jan. 8, 2018), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-american-farm-bureau-annual-convention-nashville-tn/> [<https://perma.cc/3DNU-ZJs5>] (stating that “our country was founded by farmers. Our independence was won by farmers. Our continent was tamed by farmers. So true. Our armies have been fed by farmers and made up of farmers.”).

¹⁴⁶ *Id.*

¹⁴⁷ See U.S. DEP’T OF AGRIC., *2012 CENSUS OF AGRICULTURE: U.S. FARMS & FARMERS* (2012) (finding that the number of farms leveled off at approximately 2.2 million farms around 1992).

¹⁴⁸ See WILLARD W. COCHRANE, *THE DEVELOPMENT OF AMERICAN AGRICULTURE: A HISTORICAL ANALYSIS* (2d ed. 1993).

the practice of farming, which became more capital intensive.¹⁴⁹ As the scale of production changed, protecting “family farmers” from the rise of agribusiness became a prominent policy priority.¹⁵⁰ The 1977 “Congressional Reaffirmation of Policy to Foster and Encourage Family Farms” captured this public nostalgia.¹⁵¹ Congress declared that “maintenance of the family farm system of agriculture is essential to the social well-being of the Nation,” and that “any significant expansion of nonfamily owned large-scale corporate farming enterprises will be detrimental to the national welfare.”¹⁵² The focus here is not on the farmer, or even on the farm business, but on the “family farm.”¹⁵³ It is family farms that protect the social fabric of our society.¹⁵⁴

¹⁴⁹ See Newsletter article by David Saxowsky & Marvin Duncan for the North Dakota State Univ., *Ten Impacts of Agricultural Industrialization?* (June 1999) (on file with the Iowa State Univ. Agric. Decision Maker). As a result of this intensive development, “[l]iterally millions of farm families [were] forced off the land.” COCHRANE, *supra* note 148, at 461.

¹⁵⁰ The decline of family farming may also have shaped our modern reading of Thomas Jefferson as an agrarian. According to agricultural philosopher Paul Thompson:

The importance of Jefferson as a spokesman for rural America may be more celebrated now than at any time in the past. When 70 percent of Americans were family farmers, Jefferson was read as an advocate of the people against aristocracy, and as a supporter of individual liberty against government power . . . [A]dvocates for farming interests of all manner read the passages extolling farming more literally, and reject (indeed, never consider) the possibility that Jefferson was using the farmer as a stand-in for entrepreneurs or for the common man.

Paul B. Thompson, *Thomas Jefferson and Agrarian Philosophy*, in *THE AGRARIAN ROOTS OF PRAGMATISM* 119 (Paul B. Thompson & Thomas C. Hilde, eds., 2000).

¹⁵¹ 7 U.S.C. § 2266 (2012).

¹⁵² *Id.*

¹⁵³ Policies seeking to preserve family farming occurred in parallel to and in reaction to other policies encouraging consolidation of farmland, operation of farms as businesses, and application of capital-intensive agricultural technology. See, e.g., Traci Bruckner, *Agricultural Subsidies and Farm Consolidation*, 75 *AM. J. ECON. & SOC.* 623 (2016) (noting that the net effect of federal agricultural subsidies has been to drive up farmland costs and “squeeze” many smaller farms out of business).

¹⁵⁴ The precise role of family farms in protecting the social fabric of society is less clear. One common justification is that family farms are critical to rural community development. See, e.g., Steven C. Bahls, *Preservation of Family Farms—the Way Ahead*, 45 *DRAKE L. REV.* 311, 322–23 (1997).

Today, a variety of state and federal laws provide substantive protections to family-owned farms.¹⁵⁵ Some states go so far as banning corporate ownership of farmland.¹⁵⁶ Protections exist in bankruptcy law, estate law, and agricultural credit law.¹⁵⁷ The 1986 Family Farming Bankruptcy Act exemplifies this trend.¹⁵⁸ The Act provides special bankruptcy protections for family-owned farms. Passed during a time of economic crisis for many farms, the goal of the law was to give “family farmers facing bankruptcy a fighting chance to reorganize their debts and keep their land.”¹⁵⁹

Family status also dictates eligibility for agricultural commodity subsidies. Under the Farm Bill, farmers of commodity crops, including corn, soybeans, wheat, rice, cotton, peanuts, oats, and barley, are eligible for subsidies.¹⁶⁰ Although the precise form of these supports has changed considerably since the 1930s, federal law has consistently provided farmers with financial support.¹⁶¹ Currently, eligible participants may receive up to

¹⁵⁵ The USDA defines a “family farm” as a farm “where the majority of the business is owned by the principal operator . . . and individuals related to the principal operator.” ECON. RESEARCH SERV., *supra* note 144, at 2.

¹⁵⁶ See generally Anthony B. Schutz, *Corporate-Farming Measures in A Post-Jones World*, 14 DRAKE J. AGRIC. L. 97, 98 (2009) (describing these laws and constitutional challenges under the Dormant Commerce Clause).

¹⁵⁷ See Bahls, *supra* note 154; Schutz, *supra* note 156; Matthew M. Harbur, *Anti-Corporate, Agricultural Cooperative Laws and the Family Farm*, 4 DRAKE J. AGRIC. L. 385 (1999); Jim Chen & Edward S. Adams, *Feudalism Unmodified: Discourses on Farms and Firms*, 45 DRAKE L. REV. 361, 396 (1997).

¹⁵⁸ Bankruptcy Judges, United States Trustees, and Family Farmers Bankruptcy Act of 1986, Pub. L. No. 99-554, 100 Stat. 3088 (codified at 11 U.S.C. §§ 1201–31 (2012)). For a thorough history, see David Ray Papke, *Rhetoric and Retrenchment: Agrarian Ideology and American Bankruptcy Law*, 54 MO. L. REV. 871 (1989).

¹⁵⁹ H.R. REP. NO. 99-958, at 48 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5246, 5249.

¹⁶⁰ 7 U.S.C. § 9011(6) (2012). Other eligible commodity crops include sorghum, dry peas, lentils, chickpeas, and certain oil seeds. *Id.*; see also 7 U.S.C. § 1518 (defining commodity crop). Most fruits and vegetables are treated as “specialty crops.” See *What is a Specialty Crop?*, USDA AGRIC. MARKETING SERV., <http://www.ams.usda.gov/services/grants/scbgrp/specialty-crop> [<https://perma.cc/9XQH-YDTK>].

¹⁶¹ See SAHAR ANGADJIVAND, CONG. RESEARCH SERV., U.S. FARM COMMODITY SUPPORT: AN OVERVIEW OF SELECTED PROGRAMS 1–3 (2018) (describing the history of commodity subsidies from the 1930s to the present). The farm bill is omnibus legislation passed every four to seven years governing federal farm programs including commodity subsidies, crop insurance, agricultural conservation, and nutrition assistance. Under the current version of the program, farmers can choose between Price Loss Coverage, which provides support if the national average price of a commodity drops below a statutory reference price, or Agricultural Risk Coverage, which provides support if revenue per acre falls. 7 U.S.C. § 9016 (2012) (Price Loss Coverage); 7 U.S.C. § 9017 (2012) (Agriculture Risk Coverage); see also SAHAR ANGADJIVAND, CONG.

\$125,000 per year under the main program.¹⁶² Before 2018, eligible individuals included those “actively engaged in farming” and their spouses.¹⁶³ In addition, any adult family member receiving farm income may also be considered “actively engaged in farming.”¹⁶⁴ Previous Farm Bills defined family to include siblings, lineal ancestors, and lineal descendants of those actively engaged in farming.¹⁶⁵ The 2018 Farm Bill expanded eligibility by changing the definition of family to include first cousins, nieces, and nephews.¹⁶⁶ While alleging to support family farms, this bill obliterates meaningful limits on subsidy dollars per farm.¹⁶⁷ Each eligible individual can receive a subsidy and there is

RESEARCH SERV., U.S. FARM COMMODITY SUPPORT: AN OVERVIEW OF SELECTED PROGRAMS 3 (2018). Farmers opting for Agricultural Risk Coverage can choose between county-level coverage, which tracks county-level revenue data and is decoupled from actual on-farm planting, or individual level data, which is based on actual planting. 7 U.S.C. § 9017 (2012). These programs were introduced in the 2014 farm bill and remain essentially the same after the 2018 farm bill. Agricultural Improvement Act of 2018, Pub. L. 115-334, §§ 1106–1107 (2018) (making a series of small changes to 7 U.S.C. §§ 9016, 9017).

¹⁶² 7 U.S.C. § 1308(b) (2012).

¹⁶³ 7 U.S.C. § 1308-1(c)(6) (2012) (establishing that if one spouse is determined to be “actively engaged in farming,” the other spouse is deemed so as well).

¹⁶⁴ This special treatment is available if family participants make up the majority of participants in the farming operation. 7 U.S.C. § 1308-1(c)(2) (2012).

¹⁶⁵ Food, Conservation, and Energy Act of 2008, Pub. L. 110-234, § 1603(b)(1)(C)(2) (2008).

¹⁶⁶ Agriculture Improvement Act of 2018, Pub. L. 115-334, § 1703 (2018).

¹⁶⁷ See, e.g., *2018 Farm Bill Drilldown: Commodity Programs and Crop Insurance*, NAT’L SUSTAINABLE AGRIC. COAL., (Dec. 14, 2018), <http://sustainableagriculture.net/blog/2018-farm-bill-commodity-subsidies-crop-insurance/> [<https://perma.cc/Q5V4-BCHC>] (describing the consequences); Chris Clayton, *Farm Bill Loosens Payment Rules*, PROGRESSIVE FARMER (Apr. 16, 2018), <https://www.dtnpf.com/agriculture/web/ag/news/world-policy/article/2018/04/16/farm-bill-changes-expand-legal> [<https://perma.cc/QAZ9-FUV6>] (explaining the purpose). Further, the 2018 law extends similar benefits to partnerships, allowing individual partners to collect the subsidy rather than providing a single subsidy per partnership. Teaganne Finn, *Sugar, Farm Subsidies Seen Headlining Farm Bill Floor Debate*, BLOOMBERG GOV’T (May 17, 2018), <https://web.archive.org/web/20180517235622/https://about.bgov.com/blog/sugar-farm-subsidies-seen-headlining-farm-bill-floor-debate/> [<https://perma.cc/4YY3-SPSH>]. Several other laws designed to protect family farms extend benefits to farms organized as corporations if one family holds 50% of the equity. See, e.g., 11 U.S.C. § 101(18)(B) (2012).

no overall cap.¹⁶⁸ The “family farm” remains the central organizing principle and a regular rallying cry for policy.¹⁶⁹

2. Subsidizing Family Farms

One standard liberal critique of commodity subsidies is that they conflate farm families and farm businesses. Specifically, critics point out that commodity subsidies direct state support into large-scale, profitable enterprises.¹⁷⁰ Family farms come in all sizes, and large-scale family farms, which constitute 2.9% of all farms, are responsible for 45% of all farm production.¹⁷¹ At the federal level, subsidies under the 2014 Farm Bill benefit the largest and most profitable farms such that distributions to farms in the top 5%

¹⁶⁸ In an effort to limit the per farm payouts, the 2014 law contained a provision authorizing the USDA to limit the number of individuals per farm eligible for the payment but exempted family farms from this limit. Agricultural Act of 2014, Pub. L. 113-79, § 1604(a)(2), (c) (2014); *see also* 7 C.F.R. § 1400.201 (2019) (defining “actively engaged in farming”).

¹⁶⁹ Supporters of the bill tout its protection for family farms. *See, e.g.*, Press Release, Rep. Steve King (R. IA), Swift Enactment of House Farm Bill Will Protect Our Family Farms (Jun. 21, 2018), <https://steveking.house.gov/media-center/press-releases/king-swift-enactment-of-house-farm-bill-will-protect-our-family-farms> [<https://perma.cc/FLY7-E2SL>] (“The rural economy is hurting, and we need to get the House’s Farm Bill enacted into law as quickly as possible to ensure a vibrant farm economy that will protect our family farms.”).

¹⁷⁰ *See, e.g.*, Gracy Olmstead, *The Farm Bill Ignores the Real Troubles of U.S. Agriculture*, N.Y. TIMES: OPINION (Dec. 14, 2018), <https://www.nytimes.com/2018/12/14/opinion/farm-bill-agriculture.html> [<http://perma.cc/UZ9D-AX6M>] (observing that “[f]rom 1996 to 2016, the top ten percent of the companies that received the Farm Bill’s commodity subsidies—the biggest operations in sales—accounted for 77 percent of the total. This year’s bill continues to offer enormous subsidies to large corporations rather than prioritizing the needs of struggling small farmers.”). During the Farm Bill reauthorization process, even many republicans opposed the commodity subsidy provisions on this ground. For instance, Iowa Senator Chuck Grassley released a statement saying, “we have a Farm Bill that is intentionally written to help the largest farmers receive unlimited subsidies from the federal government. There is no other way to characterize what the conference committee has done.” Press Release, Chuck Grassley, Sen., Grassley Remarks on the Passage of the 2018 Farm Bill (Dec. 11, 2018), <https://www.grassley.senate.gov/news/news-releases/grassley-remarks-passage-2018-farm-bill> [<https://perma.cc/QX5Q-GQCT>]; *see also* Letter from Mark R. Meadows, Rep., et al. to Hon. Pat Roberts, Chairman, Comm. Agric., Nutrition, & Forestry, U.S. Senate, et al. (Sept 26, 2018), https://meadows.house.gov/uploadedfiles/letter_to_farm_bill_conferees_about_actively_engaged_provisions.pdf [<https://perma.cc/DW76-P7PS>] (reflecting bipartisan effort to induce Farm Bill conferees to consider reforms targeting abuses of subsidy payments).

¹⁷¹ *See* ECON. RESEARCH SERV., *supra* note 144, at 2–3.

of crop sales nearly equaled the amount distributed to farms in the bottom 90%.¹⁷² In other words, agribusinesses may be structured as family farms, but they bear little resemblance to the Jeffersonian farmer whose image justifies these policies.¹⁷³

As discussed above, the notion of the family farm arises in part from the expectation that family members would provide much of the labor to work the farm. The farms which are beneficiaries of “family farm” policies do not, however, rely exclusively on family labor; on large-scale fruit and vegetable farms, seasonal and migrant workers do the majority of the labor.¹⁷⁴ These workers have no familial relation to the farm owner and often are not even directly employed by the farmer.¹⁷⁵ Labor contractors recruit laborers from abroad, arrange their travel, and provide them housing.¹⁷⁶ On commodity farms, the majority of the work is mechanized.¹⁷⁷ Thus, while many farmers still depend on the free labor of their families, this labor is insufficient to support the work of the farm.¹⁷⁸ The

¹⁷² See ANTON BEKKERMAN ET AL., WHERE THE MONEY GOES: THE DISTRIBUTION OF CROP INSURANCE AND OTHER FARM SUBSIDY PAYMENTS 4 (2018). For further discussion of how commodity programs work, see RANDY SCHNEPF, CONG. RESEARCH SERV., FARM SAFETY-NET PAYMENTS UNDER THE 2014 FARM BILL: COMPARISON BY PROGRAM CROP (2017); DENNIS A. SHIELDS, CONG. RESEARCH SERV., FEDERAL CROP INSURANCE: BACKGROUND (2015) (describing federal crop insurance which is available primarily on a crop by crop basis).

¹⁷³ See, e.g., Arthur Delaney, *New Farm Bill Won't Save Small Farmers*, HUFFINGTON POST (Dec. 12, 2018), https://www.huffingtonpost.com/entry/farm-bill-small-farmers_us_5c116676e4b0449012f64078 [<https://perma.cc/J9D7-U7YH>]; Brian Barth, *Congress Finally Passed a New Farm Bill and It Continues to Pay Homage to the Cult of Corn and Soy*, MODERN FARMER (Jan. 7, 2018), <https://modernfarmer.com/2019/01/congress-finally-passed-a-new-farm-bill-and-it-continues-to-pay-homage-to-the-cult-of-corn-and-soy> [<https://perma.cc/N2R9-TQRQ>] (arguing that “forms of agriculture that promise better societal outcomes lack subsidies”).

¹⁷⁴ See *Occupational Employment Statistics: Farm Labor Contractors*, BUREAU OF LABOR STATISTICS, <https://www.bls.gov/oes/current/oes131074.htm> [<https://perma.cc/3GEY-GBXS>].

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ See Ilan Brat, *Robots Step into New Planting, Harvesting Roles*, WALL ST. J. (Apr. 23, 2015), <https://www.wsj.com/articles/robots-step-into-new-planting-harvesting-roles-1429781404> [<https://perma.cc/JCW3-VGC8>].

¹⁷⁸ In the early twentieth century, women and children participated in farmstead activities such as tending to the gardens, raising chickens, canning produce, and doing the laundry. See *The People in the Pictures: Stories from the Wettach Farm Photos: The Role of Women on the Farm in the Early 20th Century* (Iowa Public Television broadcast 2003). In modern times, the family continues to provide labor; for instance, some children learn to operate heavy farm machinery by age eleven. See *From Generation to Generation on the*

farm resembles a more traditional business, relying on a large waged-labor force and capital investments in farm equipment.

In addition, liberal commentators have observed that emphasis on the family also perpetuates inequality across generations.¹⁷⁹ Launching a modern farm business requires substantial start-up capital.¹⁸⁰ Family farm businesses allow a new generation to enter the business without this investment.¹⁸¹ Although a small number of farm subsidy programs are designed to provide financial assistance to new and beginning farmers, including socially disadvantaged farmers, the level of support is tiny when compared to the traditional subsidy system described above.¹⁸² And those traditional subsidies themselves form a barrier to entry as they tend to be capitalized into agricultural land values, making access to farmland even more expensive.¹⁸³ Thus, the notion of the family farm extends a particular family's farm ownership into the future.

Far from propping up a nationwide system of independent family farms, agricultural subsidies represent a vast wealth transfer from taxpayers to agribusiness. A small number

Farm, MONSANTO (May 20, 2017), <https://monsanto.com/innovations/modern-agriculture/articles/family-farming-generations/> [<https://perma.cc/XQ7Z-JB4G>]; CAROLYN SACHS, GENDERED FIELDS 123–40 (1996) (observing that “agrarian ideologies continue to bolster patriarchal authority and privileges in rural areas through idealized portrayals of agrarian and rural life that conceal the oppressive living conditions of women”).

¹⁷⁹ See COOPER, *supra* note 4.

¹⁸⁰ Most farms become profitable when they gross over \$50,000 and achieving that level of gross requires an asset base (in land and equipment) of over \$1.9 million. See MARY AHEARN & DORIS NEWTON, U.S. DEP'T OF AGRIC., ECON. INFO. BULL. NO. 53, BEGINNING FARMERS AND RANCHERS 19 (2009).

¹⁸¹ See LORRAINE GARKOVICH ET AL., HARVEST OF HOPE: FAMILY FARMING/FARMING FAMILIES 83 (1995) (repeating the old joke that the only way to start a farm is to inherit it or marry into it).

¹⁸² For instance, the USDA sets aside a small percentage of funding for its loan programs for veteran farmers, new and beginning farmers, and socially disadvantaged farmers. See BEGINNING, SOCIALLY DISADVANTAGED, AND VETERAN FARMERS AND RANCHERS, <https://www.ers.usda.gov/agriculture-improvement-act-of-2018-highlights-and-implications/beginning-socially-disadvantaged-and-veteran-farmers-and-ranchers/> [<https://perma.cc/4U2P-UZJT>].

¹⁸³ See, e.g., Saleem Shaik et al., *The Evolution of Farm Programs and Their Contribution to Agricultural Land Values*, 87 AM. J. AGRIC. ECON. 1190 (2005).

of farm families are the winners.¹⁸⁴ Indeed, this is by design.¹⁸⁵ The United States Department of Agriculture (USDA) and many other agriculture policymakers have long supported consolidation, encouraging farmers to “get big” and celebrating the growing number of people that an individual farmer can feed. This parallel policy track, which ignores (or even champions) its costs for “family farms,” reinforces our conclusion that the myth of the Jeffersonian farmer is a distraction from a set of policies that strengthen structural racism and economic inequality in the food system.

3. The White Family Farm

In both agrarian mythology and modern demographic reality, most farm families are white and have a male head of household.¹⁸⁶ These racial dynamics have always been an

¹⁸⁴ Farmers share the fiscal benefits of federal support with absentee landowners, agricultural land speculators, and agricultural input manufacturers (i.e., pesticides, farm equipment etc.). See Brian M. Riedel, *How Farm Subsidies Harm Taxpayers, Consumers, and Farmers, Too*, HERITAGE FOUND. (Jun. 19, 2007), <https://www.heritage.org/agriculture/report/how-farm-subsidies-harm-taxpayers-consumers-and-farmers-too> [<https://perma.cc/4DDV-SAEU>] (discussing some economic consequences of subsidies).

¹⁸⁵ See Nathan Rosenberg & Bryce Wilson Stucki, *The Butz Stops Here: Why the Food Movement Needs to Rethink Agricultural History*, 13 J. FOOD L. & POL’Y 12 (2017) (arguing that federal policy makers have supported large scale agriculture since the New Deal).

¹⁸⁶ See Philip Martin & Douglas Jackson-Smith, *An Overview of Farm Labor in the United States*, 8 RURAL CONNECTIONS 21, 21 (2013); see also NAT’L RES. CONSERVATION CTR., U.S. DEP’T OF AGRIC., LABOR & MANAGEMENT: FARM LABOR AND RELATED SERVICES, https://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/nrcs143_009349.pdf [<https://perma.cc/6LJN-922M>]; PHILIP MARTIN & J. EDWARD TAYLOR, REGIONAL MIGRATION STUDY GROUP, RIPE WITH CHANGE: EVOLVING FARM LABOR MARKETS IN THE UNITED STATES, MEXICO, AND LATIN AMERICA 3 (2013). Today, only 288,264 out of a total 2,109,303 “principal operators” of farms are women. U.S. DEP’T OF AGRIC., 2012 CENSUS OF AGRICULTURE, RACE/ETHNICITY/GENDER PROFILE (2012), https://www.agcensus.usda.gov/Publications/2012/Online_Resources/Race,_Ethnicity_and_Gender_Profiles/cpd99000.pdf [<https://perma.cc/SUWU-STGR>]. “Farm wives” continue to provide labor. Indeed, many actually participate in farming, although they do not necessarily call themselves farmers. See, e.g., Elaine Froese, *6 Important Roles for Farm Wives and How to Rejuvenate Them*, ELAINE FROESE BLOG (July 19, 2017), <https://elainefroese.com/farm-women/6-important-roles-farm-wives-rejuvenate/> [<https://perma.cc/YUL2-78J2>]. Support for farm families obscures the gender dynamics occurring within families. See, e.g., BROWN, *supra* note 143, at 105–06 (describing how women’s work in the household occurs outside of the market economy and is not counted); see also Thompson, *supra* note 150, at 137. This image of the white male independent farmer repeats within the modern “food movement,” which celebrates “local” food production often through “[b]ucolic depictions of farmer livelihoods [that] draw on an ‘agrarian imaginary,’ an idealized image of the small-scale farmer.” Laura-Anne Minkoff-Zern, *Farmworker-Led Movements Then and Now: United Farm Workers, and the Potential for Farm Labor Justice*, in THE NEW FOOD ACTIVISM: OPPOSITION, COOPERATION, AND COLLECTIVE ACTION 160 (Alison Hope Alkon & Julie Guthman eds. 2017).

integral part of American agriculture.¹⁸⁷ For instance, Thomas Jefferson was a slave owner who (while claiming to oppose the institution of slavery) “clearly believed the black slaves of Virginia to be of inferior character and intelligence.”¹⁸⁸ Today, non-white farmers make up less than 7% of all farmers, and they constitute even fewer—less than 3%—of commodity-subsidy recipients.¹⁸⁹

Although farm ownership declined for all demographics throughout the twentieth century, it declined more precipitously for black families.¹⁹⁰ One of many causes was institutional discrimination at the USDA.¹⁹¹ In *Pigford v. Glickman*, a class action lawsuit brought against the agency on behalf of black farmers, a district court documented extensive racism in administration of USDA loan programs and approved a multi-billion dollar settlement compensating black farmers for decades of racist practices.¹⁹²

¹⁸⁷ See, e.g., John J. Green et al., *From the Past to the Present: Agricultural Development and Black Farmers in the American South*, in *CULTIVATING FOOD JUSTICE: RACE, CLASS, & SUSTAINABILITY* 47 (Alison Hope Alkon & Julian Agyeman eds., 2011).

¹⁸⁸ Thompson, *supra* note 150, at 136.

¹⁸⁹ This is evidenced by data from the 2012 USDA Agricultural Census. Note that this includes data on up to three operators per farm, and, because a farmer could self-identify in multiple racial categories, the sum of operators exceeds the total number surveyed. U.S. DEP’T OF AGRIC., 2012 CENSUS OF AGRICULTURE, 1 GEOGRAPHIC AREA SERIES PT. 51 (2014). See the full table below. See also HOSSAIN AYAZI & ELSADIG ELSHEIKH, HAAS INST. FOR A FAIR & INCLUSIVE SOC’Y, *THE US FARM BILL: CORPORATE POWER AND STRUCTURAL RACIALIZATION IN THE UNITED STATES FOOD SYSTEM* 59 (2015); Chen & Adams, *supra* note 157, at 392 (characterizing family farm preferences as a *de facto* preference for white enterprise).

USDA Agricultural Census Racial Category	Total Number of Operators
Spanish, Hispanic, or Latino	99,734
American Indian or Alaska Native	71,947
Asian	24,067
Black or African American	46,582
Native Hawaiian or Pacific Islander	3,846
Total Non-White	246,176
Total White	3,051,472

¹⁹⁰ See Rosenberg & Stucki, *supra* note 185, at 14.

¹⁹¹ Jess Gilbert et al., *The Loss and Persistence of Black-Owned Farms and Farmland: A Review of the Research Literature and Its Implications*, 18 S. RURAL SOC. 1 (2002). Pete Daniel, *Farmland Blues: The Legacy of USDA Discrimination*, S. SPACES (Oct. 30, 2013), <https://southernspaces.org/2013/farmland-blues-legacy-usda-discrimination> [<https://perma.cc/T8N9-3T53>].

¹⁹² 185 F.R.D. 82 (D.D.C. 1999), *aff’d*, 206 F.3d 1212 (D.C. Cir. 2000), *enft denied sub nom.* *Pigford v. Schafer*, 536 F. Supp. 2d 1 (D.D.C. 2008). Interestingly, “family” made an appearance in the court’s decision

Another story of racial discrimination in American agriculture is that of migrant and seasonal farmworkers. As of 2016, there were between two and three million farmworkers in the United States: 83% were Hispanic, 69% were born in Mexico, and only 51% had work authorization.¹⁹³ In contrast to the extensive public financial support for farm-owning families, farmworkers receive relatively few legal protections. Farmworkers lack a federal right to engage in collective bargaining¹⁹⁴ and they are not entitled to overtime pay.¹⁹⁵ Scholars have identified expressly racist origins of these exclusions, arguing that they were designed to preserve “an exploited, economically deprived non-white agricultural labor force” in the South.¹⁹⁶ These limited legal protections affect farmworkers’ economic and physical conditions.¹⁹⁷

only once. *Id.* at 95–96 (holding that, in the absence of documentation that a complaint was filed with the USDA, a claimant may submit a declaration from “a person who is not a member of the claimant’s family” stating that he or she has first-hand knowledge that the claimant filed the complaint”) (internal citations omitted).

¹⁹³ See EMP’T & TRAINING ADMIN., U.S. DEP’T OF LABOR, FINDINGS FROM THE NATIONAL AGRICULTURAL WORKERS SURVEY (NAWS) 2015–2016: A DEMOGRAPHIC AND EMPLOYMENT PROFILE OF UNITED STATES FARMWORKERS 1 (2018), https://www.doleta.gov/naws/pages/research/docs/NAWS_Research_Report_13.pdf [<https://perma.cc/2JAG-3GMU>]. This estimate is likely low because farmworkers self-reported and responses from those who chose not to answer were excluded. See FARMWORKER JUST., SELECTED STATISTICS ON FARMWORKERS (2014), <https://www.farmworkerjustice.org/sites/default/files/NAWS%20data%20factsht%201-13-15FINAL.pdf> [<https://perma.cc/GQS4-9JVJ>] (estimating that as many as 70% of farmworkers are undocumented).

¹⁹⁴ 29 U.S.C. § 152 (2006) (excluding farmworkers from the National Labor Relations Act definition of employee).

¹⁹⁵ 29 U.S.C. § 213(b)(12) (2006) (exempting agricultural workers from the maximum hours requirements of the Fair Labor Standards Act). Eleven states extend minimum wage protections to agricultural workers, but none extend overtime protections. See Sarah O. Rodman et al., *Agricultural Exceptionalism at the State Level: Characterization of Wage and Hour Laws for U.S. Farmworkers*, 6 J. AGRIC., FOOD SYSTEMS & COMMUNITY DEV. 89, 90 (2015).

¹⁹⁶ Juan F. Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act*, 72 OHIO ST. L.J. 95, 127, 131–32 (2011) (observing that while the “color of those most affected has changed . . . the basic operation and effects of the agricultural exclusion have not”); see also Marc Linder, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 TEX. L. REV. 1335 (1987); Guadalupe Luna, *An Infinite Distance?: Agricultural Exceptionalism and Agricultural Labor*, 1 U. PA. J. LAB. & EMP. L. 487, 488 (1998) (arguing that “exclusion reinforces and promotes [farmworker] status as outsiders within mainstream agricultural law and policy.”).

¹⁹⁷ Farmworkers receive low wages (about one third earned less than \$7.25/hour and only 25% worked more than nine months per year), and 55% are food insecure. See Minkoff-Zern, *supra* note 186, at 159. Physical risks include chemical exposure, sexual harassment, and unsanitary living conditions. See Janet K. Ehlers et

One subset of workers, those in the United States under guest worker visas, face particular challenges.¹⁹⁸ Each year, tens of thousands of farmworkers enter the country through H-2 visa programs, which allow employers to sponsor guest workers for seasonal work. By law, guest workers leave their families behind in order to participate.¹⁹⁹ And, because guest workers are bound to the employer who sponsored their visa, they are vulnerable to exploitation.²⁰⁰ Similarly, due to fear of immigration enforcement, undocumented farmworkers tend to underreport employer violations and face reduced freedom of movement.²⁰¹

The industry's widespread reliance on, and exploitation of, a workforce that is either undocumented or minimally documented is a structural feature of the food system. Reform is politically unpalatable because it would drive up the costs of food production

al., *Health and Safety Hazards Associated with Farming*, 41 AM. ASS'N OCCUP. HEALTH NURSES J. 414 (Sept. 1993); Eyal Press, *Something in the Air*, INTERCEPT (July 19, 2018), <https://theintercept.com/2018/07/19/moroni-utah-turkey-farm-workers-norbest/> [<https://perma.cc/ZA36-T37U>] (investigating report on chemical exposure in poultry processing plants). In animal agriculture, workers also face other risks related to exposure to animal waste. See Anna Moloczniak, *Time of Farmers' Exposure to Biological Factors in Agricultural Working Environment*, 11 ANN. AGR. ENVTL. MED., 85, 86 (2004).

¹⁹⁸ A recent report from the Southern Poverty Law Center likened guest worker visa program to slavery, documenting wage theft, near captivity, debt servitude, and squalid living conditions. S. POVERTY L. CTR., CLOSE TO SLAVERY: GUESTWORKER PROGRAMS IN THE UNITED STATES (2013), https://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/Close_to_Slavery [<https://perma.cc/QRD2-83B2>]; see also FARMWORKER JUST., NO WAY TO TREAT A GUEST: WHY THE H-2A AGRICULTURAL VISA PROGRAM FAILS U.S. AND FOREIGN WORKERS, <https://www.farmworkerjustice.org/sites/default/files/documents/7.2.a.6%20fwj.pdf> [<https://perma.cc/7PCK-97D2>] [hereinafter FARMWORKER JUST., NO WAY TO TREAT A GUEST]; Suzanne E. Cevasco, Note, *Nation of Immigrants, Nation of Laws: Agriculture as the Achilles Heel of Enforcement-Only Immigration Legislation*, 37 SETON HALL LEGIS. J. 175 (2012).

¹⁹⁹ See S. POVERTY L. CTR., *supra* note 198 (noting that many guest workers mortgage their family homes to pay for visa application and travel costs, and that many states deny workers' compensation benefits to family members of farmworkers killed on the job if those family members are non-residents and non-U.S. citizens).

²⁰⁰ See *id.*; see also FARMWORKER JUST., NO WAY TO TREAT A GUEST, *supra* note 198; Cevasco, *supra* note 198, at 175.

²⁰¹ This is particularly true in areas where Border Patrol has jurisdiction. Farmworkers experience isolation and have difficulty visiting friends and family and accessing services. See TERESA M. MARES, LIFE ON THE OTHER BORDER: FARMWORKERS AND FOOD JUSTICE IN VERMONT (2019) (documenting the consequences of border patrol activity along the Canadian border).

and thus the cost of food.²⁰² White farm-owners and their families are characterized as hardworking and celebrated for their role in feeding America and the world.²⁰³ The legal regime treats them as a unit whose interest in running a profitable business and maintaining ownership of the farm must be protected across generations. By contrast, brown farmworkers are treated as individual laborers without meaningful family relationships, whose bodies can be exploited through forced labor, sex, dangerous working conditions, and near-captivity living conditions.

B. Extending Religious Rights to Corporations

In many ways, the family business is the mythological successor in interest to the family farm, which has declined significantly in numbers and relative economic importance.²⁰⁴ We turn here to examine how the celebration of the family business helps to channel wealth and political power to private enterprise. Where the owners of these enterprises are Christian, we see not just increased political influence but also flourishing religious sovereignty. As with family farms, liberal critique emphasizes that the family and the business are not coterminous.

1. The Myth of the American Entrepreneur

Entrepreneurship is situated at the core of the American dream of upward mobility. Like the family farmer, the entrepreneur is celebrated for his independence and hard work.²⁰⁵ As President Reagan proclaimed at the start of Small Business Week in 1983, “[o]ur Founding Fathers envisioned a nation whose strength and vitality would emerge

²⁰² The extent of price increases per consumer to support healthy working conditions and living wages is often quite small. See CHRIS BRENNER & SARU JARAYAMAN, UC BERKELEY LABOR CTR., *A DIME A DAY: THE IMPACT OF THE MILLER/HARKIN MINIMUM WAGE PROPOSAL ON THE PRICE OF FOOD* 1–3 (2012).

²⁰³ The role of U.S. farmers in feeding the world is often cited as reason not to regulate food production. See Margaret Mellon, *Let’s Drop “Feed the World”: A Plea to Move Beyond an Unhelpful Phrase*, UNION OF CONCERNED SCIENTISTS BLOG (Aug. 30, 2013), <https://blog.ucsusa.org/margaret-mellon/lets-drop-feed-the-world-a-plea-to-move-beyond-an-unhelpful-phrase-229?> [<https://perma.cc/HL5B-FADU>].

²⁰⁴ See *supra* Part II.A.

²⁰⁵ In 2015, President Barack Obama said, “[e]ntrepreneurship means ownership and self-determination, as opposed to simply being dependent on somebody else for your livelihood and your future.” Barack Obama, President of the United States, Remarks at the Global Entrepreneurial Summit (Jul. 25, 2015), <https://obamawhitehouse.archives.gov/the-press-office/2015/07/25/remarks-president-obama-global-entrepreneurship-summit> [<https://perma.cc/7926-3L3A>].

from the ingenuity of its people and their commitment to individual liberty.”²⁰⁶ The nation’s prosperity can be attributed, said Reagan, to “American entrepreneurs and small business owners [who] enthusiastically embraced the challenges of freedom and through the miracle of the marketplace set in motion the forces of economic growth that made our Nation uniquely productive.”²⁰⁷

As with the farmer, the political rhetoric about small business owners involves their family membership, ethical virtue, and religious faith. In the words of President Reagan, these are “the owners of that store down the street, the faithfuls who support our churches, schools, and communities, the brave people everywhere who produce our goods, feed a hungry world, and keep our homes and families warm while they invest in the future to build a better America.”²⁰⁸ Business owners are “faithful,” “brave,” and patriotic supporters of their communities.²⁰⁹ An economy succeeds when “[g]overnments reduce deficits by controlling spending and stimulating new wealth, wealth from investments of brave people with hope for the future, trust in their fellow man, and faith in God.”²¹⁰

²⁰⁶ Ronald Reagan, President of the United States, Proclamation No. 5028: Small Business Week 1983, 97 Stat. 1555 (Mar. 7, 1983), <https://www.gpo.gov/fdsys/pkg/STATUTE-97/pdf/STATUTE-97-Pg1555.pdf> [<https://perma.cc/T2L9-K567>]; *see also* Crawford, *supra* note 16, at 34–35 (explaining that Congress has repeatedly relied on the assumption that small businesses are key to national prosperity without any macroeconomic analysis).

²⁰⁷ *Id.*; *see also* Recording: Ronald Reagan Radio Address to the Nation on Small Business (May 14, 1983) (on file with the Presidential Library & Museum), <https://www.reaganlibrary.gov/research/speeches/122786a> [<https://perma.cc/WX3G-LRMG>] (referring to entrepreneurs as “unsung heroes”).

²⁰⁸ Recording: Ronald Reagan Radio Address to the Nation on Small Business, *supra* note 207 (grouping farmers and small business owners together); *see also* *The Importance of Keeping a Business Going*, in 17 ILL. PRAC. ESTATE PLANNING & ADMIN. § 59:1 (4th ed.) (“The family business, if it has been profitable, provides an excellent avenue to success for succeeding generations. It keeps sons and grandsons well employed, and in their home community. It can give them prestige and affluence. When that business is terminated, the family tends to scatter.”).

²⁰⁹ *Id.*; *see also* Press Release, President Donald J. Trump, President Donald J. Trump Proclaims April 29 through May 5, 2018, as Small Business Week (Apr. 29 2018), <https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-proclaims-april-29-may-5-2018-small-business-week/> [<https://perma.cc/Y694-5JR9>] (“Small businesses are the heart of our nation.”); Channel 90, *VP Mike Pence Remarks at the National Small Business Week Awards Program*, YOUTUBE (May 1, 2017), <https://www.youtube.com/watch?v=ZNsFVMGhUkc> [<https://perma.cc/LC5M-7J4X>] (describing small businesses as the “foundation of our community and pillars of the American economy” and celebrating their role in community-scale philanthropy).

²¹⁰ Recording: Ronald Reagan Radio Address to the Nation on Small Business, *supra* note 207.

This ethos of the family business plays a critical role in two strands of political economic debates. First, in the debate about the appropriate scope of regulation, the plight of small businesses more generally, and family businesses in particular, is often invoked to justify deregulatory agendas.²¹¹ Anecdotes about ruined family businesses humanize the anti-regulatory rhetoric, pitting “Mom and Pop” businesses against overzealous regulators.²¹² The fight over the estate tax exemplifies this trend.²¹³ Prior to the 2017 tax reform, Congressman Paul Ryan described the tax as “one of the greatest killers of intergenerational transfer of small businesses . . . from one family to the next.”²¹⁴ Only eighty farms and small businesses per year would need to pay any estate

²¹¹ For examples of reports calling for deregulation to protect small businesses, see WILLIAM LAFFER, HERITAGE FOUND., *HOW REGULATION IS DESTROYING AMERICAN JOBS* (1993), <https://www.heritage.org/government-regulation/report/how-regulation-destroying-american-jobs> [<https://perma.cc/D62T-42E3>]; KEVIN A. HASSETT, AM. ENTER. INST., *THE BIG PROBLEM FOR SMALL BUSINESS* (2013), <http://www.aei.org/publication/the-big-problem-for-small-business/> [<https://perma.cc/DN2B-VK3R>]; SEAN HACKBARTH, U.S. CHAMBER OF COMMERCE, *HOW REGULATIONS AT EVERY LEVEL HOLD BACK SMALL BUSINESS* (2017), <https://www.uschamber.com/series/above-the-fold/how-regulations-every-level-hold-back-small-business> [<https://perma.cc/YE9U-26Z4>].

²¹² In a 2017 speech at the National Small Business Week Awards, Vice President Mike Pence articulated the current administration’s deregulatory agenda. He called for repealing the ACA, streamlining infrastructure regulation, rolling back Dodd-Frank, and generally “slashing through red tape, [and] reign[ing] in unelected bureaucrats so they can’t cripple the economy from the comfort of their tax-payer funded metal desks.” Channel 90, *supra* note 209. Pence relates to the audience by identifying himself and President Trump as having grown up in small family businesses. *Id.*; see also POL’Y & TAXATION GROUP ADMIN., *FAMILY BUSINESSES SURVEY REVEALS STRENGTHS, CHALLENGES AHEAD* (2017), <http://policyandtaxationgroup.com/estate-tax/family-businesses-survey-reveals-strengths-challenges-ahead/>; Jennifer DePaul, *Here’s One Example Of Regulations Killing A Small Business*, BUSINESS INSIDER (Nov. 13, 2011), <http://www.businessinsider.com/heres-one-example-of-regulations-killing-a-small-business-2011-11> [<https://perma.cc/D484-MEHB>]; Allen Puckett III, *How EPA Put My Family Business on the Verge of Ruin*, U.S. CHAMBER OF COMMERCE (Jan. 8, 2014), <https://www.uschamber.com/above-the-fold/how-epa-put-my-family-business-the-verge-ruin> [<https://perma.cc/3VFA-62JV>].

²¹³ A 2001 law phased out the tax, but Congress restored it in 2010, and as of 2017, only estates valued at over \$5.49 million, about 2 in 1000 estates, were affected. The 2017 tax reform law increased the threshold to over \$10 million. See Tim Borchers, *Estate and Gift Taxes Under the New 2018 Tax Law*, BORCHERS TR. L. (Jan. 14, 2018), <http://www.borcherslaw.com/estate-gift-taxes-2018-tax-law/> [<https://perma.cc/74D8-5YVH>].

²¹⁴ Fox Business, *Speaker Ryan: We Want to Get Rid of the Estate Tax*, YOUTUBE, (June 20, 2017), <https://www.youtube.com/watch?v=IDYljxpjVrE> [<https://perma.cc/P4T4-Y88T>].

tax,²¹⁵ but this trope that the tax kills family businesses is often repeated.²¹⁶ Stories about beleaguered family businesses and farms were key to building momentum to repeal the tax.²¹⁷ Second, small businesses (including family farms) are often portrayed by fiscal conservatives as “the lifeblood of small communities and large communities all over the country.”²¹⁸ In these descriptions, businesses are more than drivers of the economy; they are support networks, providing funding for community activities and social services. This rhetoric is important in light of parallel agendas to roll back public social safety nets.²¹⁹ Celebration of small businesses situates responsibility for caring for the socially weak with these businesses rather than with the public sector.

Such attitudes towards the family business have produced numerous laws and policies that shield businesses from allegedly existential threats. Legal protections for family businesses include the near-repeal of the federal estate tax,²²⁰ other federal laws designed to minimize the effects of the estate tax on family businesses,²²¹ state estate tax

²¹⁵ See Chye-Ching Huang & Chloe Cho, *Ten Facts You Should Know About the Federal Estate Tax*, CTR. BUDGET & POL’Y PRIORITIES (Oct. 30, 2017), <https://www.cbpp.org/research/federal-tax/ten-facts-you-should-know-about-the-federal-estate-tax> [<https://perma.cc/9AJH-NA4R>].

²¹⁶ See Stephen Moore, *The Death Tax Must Die*, INV.’S BUS. DAILY (Oct. 24, 2017), <https://www.investors.com/politics/columnists/the-estate-tax-destroys-family-businesses-and-hurts-the-economy-but-yields-little-revenue/> [<https://perma.cc/XGE2-U7PY>]; Curtis Dubay, *Estate Tax a Killer for Family-Owned Businesses and Their Workers*, HERITAGE FOUND. (Nov. 19, 2009), <https://www.heritage.org/taxes/report/estate-tax-killer-family-owned-businesses-and-their-workers> [<https://perma.cc/UTS7-AUMK>].

²¹⁷ See MICHAEL J. GRAETZ & IAN SHAPIRO, DEATH BY A THOUSAND CUTS: THE FIGHT OVER TAXING INHERITED WEALTH 45–53 (2005) (describing a 1995 essay called “Death Tax Devastation: Horror Stories from Middle-Class America,” which recounted the stories of three farms and twelve businesses affected by the tax); see also William Blatt, *The American Dream in Legislation: The Role of Popular Symbols in Wealth Tax Policy*, 51 TAX L. REV. 287, 315–16 (1996).

²¹⁸ Channel 90, *supra* note 209, at 7:27 (concluding “you can’t hardly go to a softball game without seeing the banner of a local business hanging on the fence . . . every worthy cause in communities finds an ally in a small business.”); see also CLE WEBINARS, KEEPING IT IN THE FAMILY: BUSINESS SUCCESSION Planning (Am. Bar Assoc. 2012) (offering, as one reason for protecting family businesses, that “[f]amily businesses often exert a powerful influence for good in the local community”).

²¹⁹ See BROWN, *supra* note 143, at 105 (describing how rollbacks of social welfare burdens women).

²²⁰ See *supra* notes 213–217 and accompanying text.

²²¹ See Crawford, *supra* note 16, at 4–5 (describing some of these laws).

laws shielding family businesses, and relaxed labor laws for family businesses.²²² These laws reflect the notion that family-business owners are virtuous citizens and their businesses are central to the American economy and American communities.

2. Elevating Christian Family Businesses

The Supreme Court's decision in *Burwell v. Hobby Lobby* (2014) elevates the status of the family business by extending to it a religiously-based license to discriminate.²²³ *Hobby Lobby* allows individual corporations to evade generally applicable law because of the religious identity of their owners. This case centered around the Patient Protection and Affordable Care Act of 2010 (ACA), which requires employer group health plans to cover "preventive care and screenings" for women without "any cost sharing requirements."²²⁴ The Department of Health and Human Services (HHS) interpreted this provision to require coverage of contraceptives, including four contraceptives that prevent an already-fertilized egg from implanting in the uterus.²²⁵ Recognizing that many religious groups would object, HHS provided an exemption for religious employers, such as churches and religious nonprofit organizations.²²⁶ It provided no such exemption to for-profit corporations, such as Hobby Lobby, which sued the government, arguing that this violated both the Free Exercise Clause and the Religious Freedom Restoration Act (RFRA).²²⁷ The Supreme Court agreed with Hobby Lobby's claim.²²⁸

The family played a starring role in *Hobby Lobby*.²²⁹ The majority opinion repeatedly mentioned not the businesses seeking religious exemptions but the *families* that owned

²²² See 29 U.S.C. § 203(s)(2) (2018) (including "relationships such as brother, sister, grandchildren, grandparents, and in-laws but not distant relatives from separate households."); 29 C.F.R. § 779.234 (2019).

²²³ 134 S. Ct. 2751 (2014).

²²⁴ 42 U.S.C. § 300gg-13(a)(4) (2010).

²²⁵ Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 8,456 (Feb. 6, 2013).

²²⁶ *Id.*

²²⁷ *Hobby Lobby*, 134 S. Ct. at 2759.

²²⁸ *Id.*

²²⁹ For analysis of the implications of *Hobby Lobby* for corporate law, see Lyman P.Q. Johnson & David K. Millon, *Corporate Law After Hobby Lobby*, 70 BUS. L. 1 (2015); Elizabeth Pollman, *Corporate Law and*

them: the Hahns and the Greens.²³⁰ Justice Alito told us, “Norman and Elizabeth Hahn and their three sons are devout members of the Mennonite Church,”²³¹ and “David and Barbara Green and their three children are Christians who own and operate two family businesses.”²³² Justice Alito returned to the Hahns and the Greens throughout the opinion.²³³ The family status of ownership seemed to assure the Court of the sincerity of religious beliefs. This was not a case where “unrelated shareholders—including institutional investors with their own set of stakeholders” must agree as to the religious beliefs of the corporate institution.²³⁴ Justice Alito invoked the American dream when he noted, “Norman Hahn started a woodworking business *in his garage*.”²³⁵ David Green started “an arts-and-crafts store that has grown into a nationwide chain.”²³⁶ That Norman Hahn worked in his garage has no legal relevance, but it conjures the image of the self-made man, and invokes a deep tradition of resisting government interference with his hard work.

Hobby Lobby allows religious family businesses to take advantage of the benefit of the corporate form without maintaining a strict separation between the individual owners

Theory in Hobby Lobby, in *THE RISE OF CORPORATE RELIGIOUS LIBERTY* 149 (Micah Schwartzman et al. eds., 2016).

²³⁰ See, e.g., *Hobby Lobby*, 134 S. Ct. at 2775, 2778–79; *id.* at 2776 (“As an initial matter, it entirely ignores the fact that the Hahns and Greens and their companies have religious reasons.”).

²³¹ *Id.* at 2764.

²³² *Id.* at 2765.

²³³ *Id.* at 2774; see also Maureen Johnson, *You Had Me at Hello: Examining the Impact of Powerful Introductory Emotional Hooks Set Forth in Appellate Briefs Filed in Recent Hotly Contested U.S. Supreme Court Decisions*, 49 *IND. L. REV.* 397, 451 (2016) (observing that the briefs sought to humanize the corporations by “essentially characterizing [them] as . . . homespun mom-and-pop family business[es]” and identifying striking similarities between the briefs and the majority opinion).

²³⁴ *Hobby Lobby*, 134 S. Ct. at 2774. The holding ultimately does not turn on whether a family owns the business in question. Indeed, the court’s analysis could apply to any closely held business. The IRS defines a closely held corporation as a business other than a “personal service corporation” that “[a]t any time during the last half of the tax year, more than 50% of the value of its outstanding stock is, directly or indirectly, owned by or for five or fewer individuals, including certain trusts and private foundations. *INTERNAL REVENUE SERV.*, PUBLICATION NO. 542 3 (2016).

²³⁵ *Hobby Lobby*, 134 S. Ct. at 2764 (emphasis added).

²³⁶ *Id.* at 2765.

and the corporation.²³⁷ Although corporate law typically emphasizes the importance of this demarcation,²³⁸ the majority insists that “Corporations, ‘separate and apart from’ the human beings who own, run, and are employed by them, cannot do anything at all.”²³⁹ This runs in the face of decades of corporate law that allows only those who maintain separation between themselves and their businesses to access the financial benefits of the corporate form.²⁴⁰ As Justice Ginsburg pointed out in her dissent, the choice to incorporate is voluntary, and those who enter it should abide by its rules.²⁴¹

At the same time that the majority in *Hobby Lobby* relied on the plaintiffs’ family status in order to extend them the right to discriminate against others, the dissent did the opposite. Justice Ginsburg assiduously separated the Hahns and the Greens from their businesses; she mentioned them only once, toward the end of the opinion, simply to agree that they are unquestionably individuals with sincerely held religious beliefs.²⁴² But it is their companies (Hobby Lobby, Conestoga, and Mardel) that enter into health insurance contracts. These companies, objected Ginsburg, do not have religious belief protections

²³⁷ *Id.* at 2767.

²³⁸ See Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 CORNELL L. REV. 1036, 1037 (1991) (stating that when there has been commingling of funds “courts disregard the separateness of the corporation and hold a shareholder responsible for the corporation’s action as if it were the shareholder’s own”); see also *Hobby Lobby*, 134 S. Ct. at 2797 (Ginsburg, J. dissenting) (“By incorporating a business, however, an individual separates herself from the entity and escapes personal responsibility for the entity’s obligations. One might ask why the separation should hold only when it services the interest of those who control the corporation.”); but see Stephen M. Bainbridge, *A Critique of the Corporate Law Professors’ Amicus Brief in Hobby Lobby and Conestoga Wood*, 100 VA. L. REV. ONLINE 1 (2014) (arguing that it is important not to overstate the legal significance of separateness because courts have long recognized that a corporation’s legal personhood will be set aside when appropriate).

²³⁹ *Hobby Lobby*, 134 S. Ct. at 2768.

²⁴⁰ See, e.g., Thompson, *supra* note 238 at 1037 (“Corporate obligations remain the liability of the entity and not of the shareholders, directors, or officers who own and/or act for the entity.”). Corporations also enjoy perpetual existence.

²⁴¹ *Hobby Lobby*, 134 S. Ct. at 2804 (Ginsburg, J., dissenting) (“When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on statutory schemes which are binding on others in that activity”) (quoting *United States v. Lee*, 455 U.S. 252, 261 (1982)).

²⁴² *Hobby Lobby*, 134 S. Ct. at 2798 (Ginsburg, J., dissenting) (observing that a court must accept that sincerity as true but must also undertake its own inquiry into whether or not those beliefs are “substantially burdened”).

under RFRA or the First Amendment *precisely because* they are not humans or families.²⁴³

3. Hobby Lobby's Effects

Demonstrating the main argument of our Article, the *Hobby Lobby* majority justified the freedom of corporations to discriminate against women by underscoring plaintiffs' *family units* rather than corporate form. The majority's emphasis on family and kinship in *Hobby Lobby* reflects a broader phenomenon: most businesses in the United States are family owned.²⁴⁴ *Hobby Lobby*'s erasure of the boundary between family and business has troubling costs.²⁴⁵ Most immediately, it allows business-owning families to exercise religious hegemony.²⁴⁶ A significant percentage of Americans work for family businesses.²⁴⁷ In the Contraceptives Mandate, Congress aspired to promote gender equality and recognized that women's health coverage is, on average, more expensive than men's²⁴⁸ and that greater reproductive choice promotes equal participation of women in the workplace.²⁴⁹ Indeed, as Ginsburg's dissent stresses, female employees and their family members may now have to endure lack of coverage or prohibitive out-of-pocket

²⁴³ *Id.*

²⁴⁴ See Benjamin Means, *The Contractual Foundation of Family-Business Law*, 75 OHIO ST. L.J. 675, 676, 678 (2014) (arguing that legal scholars have paid inadequate attention to family relationships within businesses: "As extensions of family life, family businesses are defined by broader economic goals and more intimate associations.").

²⁴⁵ See, e.g., Brandon L. Garrett, *The Constitutional Standing of Corporations*, 163 U. PENN. L. REV. 95 (2014) (arguing that *Hobby Lobby* threatens to erase the boundary between corporations and their owners).

²⁴⁶ See *Hobby Lobby*, 134 S. Ct. at 2787 (Ginsburg, J., dissenting) (observing that RFRA "accommodation of a for-profit corporation's religious beliefs" generates impacts for "third parties who do not share the corporation owners' religious faith—in these cases, thousands of women employed by Hobby Lobby and Conestoga or dependents of persons those corporations employ").

²⁴⁷ See Joseph H. Astrachan & Melissa Carey Shankar, *Family Businesses' Contribution to the U.S. Economy: A Closer Look*, XVI FAM. BUS. REV. 211, 218 (2003) (estimating between 27% and 62% of Americans work for family businesses, although this estimate includes some businesses that would not qualify for a RFRA exemption because they are not closely held).

²⁴⁸ See Berhanu Alemayehu & Kenneth E. Warner, *The Lifetime Distribution of Health Care Costs*, 39 HEALTH SERV. RES. 3 (2004).

²⁴⁹ Congress also recognized a compelling public health interest in providing coverage for contraceptives, which, in addition to preventing unwanted pregnancy, can prevent cancer, combat pelvic pain, and manage menstrual disorders. See *Hobby Lobby*, 134 S. Ct. at 2789.

expenses.²⁵⁰ Furthermore, in the post-*Obergefell* era, *Hobby Lobby* and its rationale has become the primary vehicle used to bypass LGBT equality.²⁵¹ The rule of law is weakened when individuals and corporations can choose which laws to follow.²⁵²

Hobby Lobby also creates economic advantages for family-owned businesses. Just as agricultural subsidies channel state financial support to white-owned businesses, *Hobby Lobby* elevates Christian-owned businesses by giving them an economic advantage over non-religious counterparts. Companies that fail to include coverage for the contested contraceptives could be fined \$100 per day, per employee.²⁵³ The Court recognized that

²⁵⁰ *Id.* at 2799–800 (observing that an IUD costs nearly a full month’s pay at minimum wage and that “almost one-third of women would change their contraceptive method if costs were not a factor”). In subsequent cases, the Court considered whether the less restrictive substitute it identified in *Hobby Lobby* may itself violate RFRA. This alternative, which HHS implemented for non-profits, and which the court in *Hobby Lobby* directed HHS to make available to for-profit companies, allowed companies to submit a form either to the health insurance company with which it contracts or to HHS declaring a religious objection to certain forms of contraception. Following receipt of the form, HHS or the insurance company will then provide the same coverage to plan participants but will bear the cost itself. Several non-profits objected that by submitting the form they were complicit in provision of the coverage even if they were not paying for it. *See* *Wheaton Coll. v. Burwell*, 134 S. Ct. 2806 (2014); *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (vacating and remanding to Courts of Appeals to decide on supplemental briefing describing a new accommodation option). *See also* *Zubik*, 136 S. Ct. at 1561–62 (Sotomayor, J., concurring) (concurring to the extent that the remand gives lower courts opportunity to ensure continuous contraceptive coverage, but objecting to any option that might require individual women to opt in to stand-alone contraceptive coverage plans).

²⁵¹ *See* NeJaime & Siegel, *supra* note 39 (arguing that such claims to religious freedom are distinctive because they have the potential to inflict material and dignitary harms on others); Ira C. Lupu, *Hobby Lobby and the Dubious Enterprise of Religious Exemptions*, 38 HARV. J. L. & GENDER 35 (2015); Paul Horwitz, *The Hobby Lobby Moment*, 128 HARV. L. REV. 154 (2014) (arguing that development of LGBT rights is the critical background to *Hobby Lobby*). *But see* Luke W. Goodrich & Rachel N. Busick, *Sex, Drugs, and Eagle Feathers: An Empirical Study of Federal Religious Freedom Cases*, 48 SETON HALL L. REV. 353 (2018) (finding that Christians are underrepresented and religious minorities are overrepresented in RFRA cases). Others have suggested that this focus on religious rights distracts from *Hobby Lobby*’s implications for corporate personhood, which could be used to advance corporate social responsibility to workers and the environment. *See, e.g.*, Sean Nadel, Note, *Closely Held Conscience: Corporate Personhood in the Post-Hobby Lobby World*, 50 COLUM. J.L. & SOC. PROBS. 417 (2017).

²⁵² *See* Ben-Asher, *Faith-Based Emergency Power*, *supra* note 39; Frederick Mark Gedicks, “Substantial” Burdens: How Courts May (and Why They Must) Judge Burdens on Religion Under RFRA, 85 GEO. WASH. L. REV. 94 (2017) (arguing that courts must be able to review whether laws indeed impose a substantial burden in order to preserve rule of law); MARCI A. HAMILTON, *GOD VS. THE GAVEL: THE PERILS OF EXTREME RELIGIOUS LIBERTY* (2d ed. 2014).

²⁵³ This would total about \$475 million per year for Hobby Lobby, \$33 million for Conestoga, and \$15 million for Mardel. *See Hobby Lobby*, 134 S. Ct. at 2776. If instead the companies chose to forgo providing

the cost of providing coverage is itself substantial.²⁵⁴ Thus, *Hobby Lobby* does more than provide religious business owners the right to opt out of federal laws that offend their beliefs; it gives them a possible economic advantage over non-religious business owners.²⁵⁵

Extending this power to religious businesses has racial implications as well. Like farms, family businesses are tools for intergenerational accumulation of wealth and power.²⁵⁶ There are significant racial disparities in business ownership in the United States. 3.8% of black workers are self-employed business owners, whereas 11.6% of white workers are.²⁵⁷ Black businesses also have much higher closure rates than white businesses.²⁵⁸ Research ties these racial disparities to differences in family histories.²⁵⁹ White business owners are more likely to have a family member who started or owned a

insurance at all, they could be fined \$2,000 per employee per year, resulting in a cost of \$26 million for Hobby Lobby, \$1.8 million for Conestoga, and \$800,000 for Mardel. *See id.*

²⁵⁴ *Id.* at 2776 (citing Brief for Religious Organizations, which estimates the total cost of employer-provided insurance at \$4,885 for individuals and \$11,786 for families).

²⁵⁵ *See* William Marshall, *Bad Statutes Make Bad Law: Burwell v. Hobby Lobby*, 71 SUP. CT. REV. 71, 127 (2014) (stating that “any claim put forth by a for-profit entity that would allow it to gain an economic advantage over its competitors should face judicial resistance”); *see also* Amicus Curie Brief of Corporate and Criminal Law Professors for Petitioners at 27, *Burwell v. Hobby Lobby*, 573 U.S. 682 (2014) (No. 13-354) (“Are federal courts prepared to adjudicate complex (and potentially intrusive) questions of whether a given corporation is invoking religion merely as a subterfuge to gain an economic advantage over competitors, rather than in ‘good faith’?”). Another economic consequence is, of course, that the cost of coverage is shifted to taxpayers.

²⁵⁶ *See* Benjamin Means, *Wealth Inequality & Family Businesses*, 65 EMORY L. J. 937, 939 (2016) (“[F]amily businesses implicate concerns regarding both inherited wealth and the concentration of economic power made possible by the corporate form.”).

²⁵⁷ *See* Robert W. Fairlie & Alicia M. Robb, *Why Are Black-Owned Businesses Less Successful than White-Owned Businesses? The Role of Families, Inheritances, and Business Human Capital*, 25 J. LABOR ECON. 289 (2007) (observing that this number has remained roughly constant for the past ninety years).

²⁵⁸ *See id.* at 292–94 (finding lower survival rates, lower profit rates, and smaller average sizes).

²⁵⁹ *See id.* at 294 (citing research suggesting that an individual with a self-employed parent is two to three times more likely to be self-employed as one who did not have a self-employed parent); *see also* Michael Hout & Harvey Rosen, *Self-Employment, Family Background, and Race*, 35 J. HUM. RESOURCES 670, 672 (2000) (observing that the legacy of slavery remains significant for black entrepreneurship because of “the strong intergenerational component in self-employment”).

business, and to have worked in that business themselves, meaning they have had more opportunity “to acquir[e] general and specific business human capital.”²⁶⁰

The advantages that *Hobby Lobby* confers on family businesses is better understood within the broader context of the growing legal power of corporations in the United States.²⁶¹ In *Citizens United v. Federal Election Commission*, the Supreme Court held that corporations have First Amendment rights to contribute money to election campaigns.²⁶² The decision simultaneously empowers corporations, by allowing them enhanced participation in the political process, and disempowers individuals, most of whom lack the resources to compete at the same level.²⁶³ Like *Hobby Lobby*, *Citizens United* allows those business-owning individuals and families who are also involved in corporate management to extend the reach of their beliefs.²⁶⁴ *Hobby Lobby* does so by enabling a family business to operate the business in keeping with religious beliefs through exemptions from generally applicable federal laws; *Citizens United* does so by allowing a business to contribute money to political candidates and causes of the business manager’s choice.

²⁶⁰ Fairlie & Robb, *supra* note 257, at 296–97, 303. (relying on data from the U.S. Census Bureau’s 1992 Characteristics of Business Owners survey and concluding that having a “family business background is important for small business outcomes” because of the opportunities this background creates for “informal learning or apprenticeship-type training”).

²⁶¹ Many scholars have argued that *Hobby Lobby* itself increases the spheres of corporate power in potentially problematic ways. See, e.g., Elizabeth Pollman, *Constitutionalizing Corporate Law*, 69 VAND. L. REV. 639 (2016) (arguing that *Hobby Lobby* and other recent cases free corporations from regulation and thus elevate the importance of state corporate governance law, which focuses only on shareholders, directors, and officers and does not address the needs of other corporate stakeholders such as employees and customers). *But see* Vincent S.J. Buccola, *States’ Rights Against Corporate Rights*, 2016 COLUM. BUS. L. REV. 595 (2016) (arguing that *Hobby Lobby* delegates power to states to control the scope of corporate rights).

²⁶² *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010).

²⁶³ See Leo E. Strine, *Corporate Power Ratchet: The Courts’ Role in Eroding ‘We the People’s’ Ability to Constrain Our Corporate Creations*, 51 HARV. C.R.-C. L. L. REV. 423 (2016) (identifying *Hobby Lobby* as part of a line of decisions that limits the power of legislatures to reign in corporate power).

²⁶⁴ In *Citizens United*, the power of owners (as opposed to managers) depends on the nature of the corporation. Unlike *Hobby Lobby*, which focuses entirely on the beliefs of owners, *Citizens United* “protect[s] the rights of corporate managers to make political donations that do not necessarily reflect the opinions of shareholders.” David Rosenberg, *The Corporate Paradox of Citizens United and Hobby Lobby*, 11 N.Y.U. J. L. & LIBERTY 308, 309 (2017) (noting that *Citizens United* “affirmed both the primacy of management over shareholders and the profit motive as central aspects of corporate governance and behavior”). In a corporation where management and ownership are one, this distinction falls away.

Hobby Lobby celebrates the Christian family. Relying on ideals of the self-made man and of the role of family businesses in communities, the Supreme Court elevated the interests of the religious business-owning family over its female employees. In a sense, the decision incorporates the religious business-owning family itself, allowing the family to exercise its beliefs through the corporation, giving it both religious hegemony over its employees and financial advantages over non-religious businesses.

III. Consequences

The family remains a focal point of attention in American law. The concept of family has become a guise for channeling state support and protection to private enterprise while shutting off support and protection to racial and religious minorities. Parts I and II explored a range of potential relationships between the family and the individual. In some cases, as illustrated in Part I, the individual is considered as an isolated unit, regardless of the consequences for families. At an extreme, the individual is considered so dangerous that their family can be used as a weapon against them. In other contexts, families are viewed as the primary unit of analysis and are thus able to garner benefits from the state. The side-by-side comparison of these policies reveals how both conservatives and liberals rely heavily on the idea of the family to justify or critique different policies.

This is not merely a “gotcha” moment. Critically, for both liberals and conservatives, situating individuals as family members serves as a tool to humanize them, while positing them as individual actors is a tool to de-humanize them. As we showed in Part II, the benefits of this humanization flow not just to individuals situated in anointed families but also to businesses. Business-owning families, predominantly white and Christian, are given increasing access to financial benefits and the powers of the corporate form; they have growing opportunities to self-govern and discriminate against others. By contrast, immigrant families are losing even the most basic presumption of family membership—the ability to stay together.

A. Humanizing Families and De-Humanizing Individuals

There is a deep connection in the American imagination between the intact family and morality. In 1992, when Vice President Dan Quayle blamed the Los Angeles riots on disintegrating family values, he called out the television character Murphy Brown for “mocking the importance of fathers, by bearing a child alone, and calling it just another ‘lifestyle choice.’”²⁶⁵ Blaming deep social problems on declining family values remains a

²⁶⁵ HLN Video Rewind, *May 19, 1992, Dan Quayle vs. Murphy Brown*, YOUTUBE (May 19, 2014), <https://www.youtube.com/watch?v=w8I065WZnms> [<https://perma.cc/74VK-8XW>]; see also Jacey Fortin,

central theme of conservative politics to this day.²⁶⁶ According to the logic of Quayle's accusation, individuals existing outside of traditional family structures are immoral and prone to violence. By contrast, the intact nuclear family is presented as the site of moral goodness.

As evident in the four main policies discussed in this Article, individuals or corporations who are perceived by *the lawmaker or policymaker* as members of families are humanized;²⁶⁷ those who are not are de-humanized. The discursive and actual isolation of individuals from their families should be viewed as a strategy to de-humanize them. As we saw in Part I, Muslim and Central American immigrants are characterized by the Trump administration as dangerous individuals, and the collateral consequences for their families are ignored or manipulated to deter bad behavior.²⁶⁸ In response, the

That Time 'Murphy Brown' and Dan Quayle Topped the Front Page, N.Y. TIMES (Jan. 26, 2018), <https://www.nytimes.com/2018/01/26/arts/television/murphy-brown-dan-quayle.html> [<https://perma.cc/9QRG-U2UP>] (referring to the incident as "an early skirmish in the culture wars"). In addition, conservatives have blamed the devastation of 9/11 on disintegrating family values. See, e.g., SUSAN FALUDI, *THE TERROR DREAM: MYTH AND MISOGYNY IN AN INSECURE AMERICA* (2008) (describing this phenomenon).

²⁶⁶ See generally COOPER, *supra* note 4. For a specific recent example, see *Professor Exposes What's Holding Down Minorities—It's NOT What Liberals Claim*, TEA PARTY (Sept. 25, 2017), <https://www.teaparty.org/professor-exposes-whats-holding-minorities-not-liberals-claim-267356/> [<https://perma.cc/L29H-QYJK>] (arguing that poverty among African Americans is caused not by the legacy of racism and structural racism but by the decline of traditional family structures).

²⁶⁷ See, e.g., Jonathan Matusitz, *Interpersonal Communication Perspectives in Hostage Negotiation*, 8 J. APPLIED SEC. RES. 24 (2013) (describing the importance of talking about family members during hostage negotiations); Sheila M. Crow et al., *Meeting the Family: Promoting Humanism in Gross Anatomy*, 24 TEACHING & LEARNING IN MED. 49 (2012) (concluding that having medical students meet the families of donor cadavers humanized their approaches to dissection); Dezra J. Eichhorn et al., *Family Presence During Invasive Procedures and Resuscitation: Hearing the Voice of the Patient*, 101 AMER. J. NURSING 48 (2001) (concluding that having the family present humanizes the patient to the doctors).

²⁶⁸ As the dissenters observed in *Trump v. Hawaii*, a key component of the case is the consequence of the travel ban for family reunification, but "family" gets little to no attention in the majority opinion. See *supra* notes 82–97 and accompanying text. Discussion of the ban's consequences for family was also evident in the media. See, e.g., Rick Gladstone, *Trump Travel Ban: How it Affects the Countries*, N.Y. TIMES (June 26, 2018), <https://www.nytimes.com/2018/06/26/world/americas/trump-travel-ban-effects.html> [<https://perma.cc/3YQJ-TVAR>] (highlighting instances in which the ban will prevent family reunification). Concerns about family reunification got little attention from supporters of the ban. See, e.g., John Binder, *Travel Ban Countries: U.S. Imported Foreign Population Nearly 4X the Size of Beverly Hills*, BREITBART (June 26, 2018), <https://www.breitbart.com/big-government/2018/06/26/travel-ban-countries-u-s-imported-foreign-population-nearly-4x-the-size-of-beverly-hills/> [<https://perma.cc/37P8-3CK6>]; Bill Mears, *Supreme Court Upholds Travel Ban on Some Muslim-Majority Nations*, FOXNEWS.COM (June 26, 2018), <http://www.foxnews.com>

vital and necessary liberal resistance to the ongoing assaults on Muslim and Central American immigrants has turned on family unity.²⁶⁹ Kinship is raised as a shield.²⁷⁰ The massive public outcry against separating families led the administration to reverse its inhumane policy.²⁷¹ Images of separated families provided an essential humanizing alternative to the government's stories about wanton terrorists and criminals.²⁷²

The family is also a tool for racial coding. The farm bill, discussed in Part II.A., is illustrative of this phenomenon. Although rhetoric about family farmers pervades debates about agricultural policy,²⁷³ analysis of the billions of dollars of subsidies doled out every year indicates that they are given primarily to *white* farmers to support large-scale

com/politics/2018/06/26/supreme-court-upholds-trump-travel-ban-on-some-muslim-majority-nations.html [https://perma.cc/P4SL-7DBU].

²⁶⁹ For examples on usage of family rhetoric by the press, see Elise Foley, *Trump's Executive Order Is Already Hurting Refugees, Muslims, and Families*, HUFFINGTON POST (Jan. 28, 2017), http://www.huffingtonpost.com/entry/trump-muslim-refugee-ban_us_588cb24ee4b0176377948a09 [https://perma.cc/JSZ6-6ZRK]; Michelle Gallardo & Eric Horng, *Families Splintered, Stranded by Trump's Immigration Order*, ABC NEWS (Jan. 30, 2017), <http://abc7chicago.com/news/families-splintered-stranded-bytrumps-immigration-order/1728752/> [https://perma.cc/XNT6-FB8M].

²⁷⁰ See, e.g., Abrams, *supra* note 17, at 248 (arguing that “today, courts will recognize family reunification as an interest of constitutional import, and will balance that interest against the genuine national security interests of the government”).

²⁷¹ See Jen Kirby & Emily Stewart, *Families Belong Together Protest Underway in More Than 700 Cities: Thousands are Marching Against the Administration's Family Separation and Detention Policies*, VOX.COM (June 30, 2018), <https://www.vox.com/2018/6/18/17477376/families-belong-together-march-june-30> [https://perma.cc/6HNX-6VWN]. In this context, the shield has thus far been more effective than it was in the travel ban case.

²⁷² See, e.g., *Why the ACLU Wants to Be More Like the NRA*, N.Y. TIMES (July 30, 2018), <https://www.nytimes.com/2018/07/30/podcasts/the-daily/aclu-nra-trump.html> [https://perma.cc/8YR9-6KKG] (asserting that the ACLU is replicating the NRA model of using storytelling, rather than dry legal claims, in advertising and litigation). A related de-humanizing strategy is policing the family itself. A wide range of policies target individuals for not fulfilling duties to their family members. Failure to fulfill such duties disqualifies individuals from eligibility for social welfare programs. For instance, Temporary Assistance for Needy Families (TANF) requires states to “increase their efforts to police, track down, and enforce paternity obligations, on the presumption that the biological father of a child on welfare should be forced to pay child support.” COOPER, *supra* note 4, at 67–68 (noting that the law also imposes sanctions on “mothers who did not sufficiently cooperate in helping welfare agencies locate the biological father of their children”). Numerous related policies target low-income and African American families and seek to justify denial of public benefits or even criminal sanctions for failure to behave responsibly within a family. See Roberts & Sangoi, *supra* note 22 (describing this trend in the context of child abuse laws).

²⁷³ See *supra* Part II.A.1.

farms.²⁷⁴ Even as federal policy has encouraged consolidation of farmland and the growth of agribusiness, politicians and farmers themselves have continued to advocate for emphasis on farm families.²⁷⁵ Thus, invocation of “family” becomes coded language. Politicians need not refer expressly to whiteness for white farmers to know that they are the target audience. Perhaps even more insidiously, for industry insiders, celebration of “family” is a gloss to hide economic concentration. The “family” label is incongruous with the fact that the top 1% of farms received 26% of all subsidies, at an average of \$1.4 million per farm.²⁷⁶ The repeated invocation of “family” provides cover for a program that supports the wealthiest farm businesses.

Ironically, the same farm bill that empowers (mostly white) family farms disempowers (mostly black) poor families. The Supplemental Nutrition Assistance Program (SNAP) provides eligible individuals with financial benefits that can be used to purchase food.²⁷⁷ A recent House-passed version of the Farm Bill (rejected in Conference Committee) significantly restricted access to SNAP benefits and added stringent work requirements even for single parents of young children.²⁷⁸ Supporters of these requirements, which impose disproportionate burdens on low-income women of color,²⁷⁹

²⁷⁴ See *supra* Part II.A.3.

²⁷⁵ See Garkovich et al., *supra* note 181, at 83 (observing that “besides the emotional support and security found in working with family and the value of maintaining a family tradition, the family farm [provides] a reservoir of cheap family labor, the detailed and historic understanding of the natural resources associated with the place . . . and . . . lower costs to enter the business.”).

²⁷⁶ See Press Release, Env'tl. Working Group, Mega-Farms Reap Billions from Taxpayers in Farm Subsidies (Nov. 2, 2017) (on file with Env'tl. Working Group), <https://www.ewg.org/release/ewg-mega-farms-reap-billions-taxpayers-farm-subsidies#.W1ccmthKjeQ> [<https://perma.cc/GC8Z-PBVV>] (evaluating data from 1995 to 2016).

²⁷⁷ See RANDY ALISON AUSSENBERG & KIRSTEN J. COLELLO, CONG. RESEARCH SERV., DOMESTIC FOOD ASSISTANCE – SUMMARY OF PROGRAMS (2018).

²⁷⁸ H.R. 2 § 4015, 115th Cong. (1st Sess. 2017) (imposing a twenty hour per week work requirement on all adults between eighteen and sixty but allowing exemption for adults with children under age six). The current law contains a similar restriction for working age adults *without any* dependents. 7 U.S.C. § 2015(o)(2), (o)(3)(C) (2012) (limiting access to three months for individuals who do not meet the requirement).

²⁷⁹ See, e.g., Dottie Rosenbaum, *House Farm Bill's SNAP Changes are a Bad Deal for States and Low-Income Households*, CTR. FOR BUDGET & POLICY PRIORITIES (May 15, 2018), <https://www.cbpp.org/research/food-assistance/house-farm-bills-snap-changes-are-a-bad-deal-for-states-and-low-income> [<https://perma.cc/Q2JD-BVUU>]; see also BROWN, *supra* note 143, at 105 (arguing that this kind of “responsibilization” policy “uniquely penalizes women to the extent that they remain disproportionately responsible for those who cannot be responsible for themselves”).

rarely talk about families. They talk about “productive citizens,”²⁸⁰ “able-bodied adults,”²⁸¹ and “work capable SNAP recipients.”²⁸² Rather than presenting them as valuable and dignified citizens and families, these impersonal, clinical terms paint SNAP recipients as immoral, lazy, and in need of redirection.

B. Corporate and Religious Sovereignty

The modern corporation wields both economic and political power, exercising what some argue amounts to “corporate sovereignty.”²⁸³ A growing body of literature critically examines trends of privatization, deregulation, and corporate influence over politics.²⁸⁴ Corporations have won key victories in the Supreme Court.²⁸⁵ A common theme in these

²⁸⁰ Tamar Hallerman, *Sonny Perdue Takes Lead Role Selling Food Stamp Work Requirements*, AJC (May 11, 2018), <https://politics.myajc.com/blog/politics/sonny-perdue-takes-lead-role-selling-food-stamp-work-requirements/xLOKcXfC02q5NAd4u24hSN/> [<https://perma.cc/ANQ5-NR6B>].

²⁸¹ Press Release, Rep. Doug LaMalfa (R-CA), LaMalfa Supports Passage of Farm Bill (June 21, 2018) (on file with U.S. House of Representatives), <https://lamalfa.house.gov/media-center/press-releases/lamalfa-supports-passage-of-farm-bill> [<https://perma.cc/THP6-D7HQ>]; Press Release, Rep. Bob Goodlatte (R-VA), House Ag Committee Approves Farm Bill (Apr. 18, 2018) (on file with U.S. House of Representatives), <https://web.archive.org/web/20180618164341/https://goodlatte.house.gov/news/documentsingle.aspx?DocumentID=1197> [<https://perma.cc/SU4L-BXMB>].

²⁸² Mike Conaway & Lee Bowes, *Food Stamp Work Requirements Will Lift Americans Out of Poverty*, USA TODAY (Apr. 20, 2018), <https://www.usatoday.com/story/opinion/2018/04/12/food-stamp-work-requirements-reduce-poverty-column/506713002/> [<https://perma.cc/3QFV-A2CS>]. In this op-ed, Chairman Conaway mentions families only once. After many paragraphs of pitching the program as a pathway out of poverty, Conaway asserts the program will simultaneously “support families in need” and “creat[e] new opportunities that emphasize work and independence.” *Id.*

²⁸³ See JOSHUA BARKAN, CORPORATE SOVEREIGNTY: LAW AND GOVERNMENT UNDER CAPITALISM (2013) (“Corporate power should be rethought as a model of political sovereignty.”); Allison D. Garrett, *The Corporation as Sovereign*, 60 ME. L. REV. 129, 132 (2008) (“A comparison between the often analogous social, political, and economic characteristics of nation-states and corporations can provide a new and useful way for scholars to analyze the activities and powers of modern-day corporations.”).

²⁸⁴ See BROWN, *supra* note 143; SAMUEL MOYN, NOT ENOUGH: HUMAN RIGHTS IN AN UNEQUAL WORLD (2018); David Singh Grewal & Jedediah Purdy, *Introduction: Law and Neoliberalism*, 77 L. & CONTEMP. PROBS. 1, 1 (2014).

²⁸⁵ See, e.g., *Wal-Mart v. Dukes*, 564 U.S. 338 (2011) (raising the evidentiary burden for plaintiffs to establish “commonality” to achieve class certification); Richard Lazarus, *Advocacy Matters*, in BUSINESS AND THE ROBERTS COURT 65–66 (Jonathan H. Adler, ed. 2016) (attributing some of this success to the emergence of a highly specialized and elite Supreme Court bar “that disproportionately represents business interests”); Lee Epstein, William M. Landes, & Richard A. Posner, *How Business Fares in the Supreme Court*, 97 MINN.

cases is a preference for private ordering.²⁸⁶ In labor and employment disputes, for instance, courts have “push[ed] for the private resolution of workplace disputes.”²⁸⁷ Stepping aside, courts essentially free businesses to self-govern.²⁸⁸ Corporate power, as scholars have long observed, perpetuates racialized social hierarchies and state-sanctioned violence.²⁸⁹

In the wake of *Hobby Lobby*, another sovereignty emerged in American jurisprudence: religious sovereignty.²⁹⁰ Political scientist Jean Cohen has observed that while claims for religious exemptions are often framed as protecting minority rights, they are better understood as “assertions of *unique* prerogatives of autonomy (from regulation

L. REV. 1431, 1471–72 (2013) (concluding, based on an empirical assessment of 1,759 cases from 1946 to 2011, that “the Roberts Court is much friendlier to business than either the Burger or Rehnquist Courts, which preceded it”); Erwin Chemerinsky, *The Roberts Court at Age Three*, 54 WAYNE L. REV. 947, 962 (2008) (stating that “[t]he Roberts Court is the most pro-business Court of any since the mid-1930s” and describing wins on punitive damages, employment discrimination, and preemption of state law); *but see* Jonathan H. Adler, *Getting the Roberts Court Right: A Response to Chemerinsky*, 54 WAYNE L. REV. 983, 1002–08 (2008) (refuting this characterization).

²⁸⁶ This preference for private ordering, demonstrated by the courts, parallels a recent trend of privatization, in which traditional government functions, such as defense, road building, and even administration of the law are delegated to private entities.

²⁸⁷ Matthew T. Bodie, *Employment Law in the Roberts Court*, in BUSINESS AND THE ROBERTS COURT 264 (Jonathan H. Adler, ed. 2016) (arguing that the Roberts Court has “adopt[ed] an approach that is solicitous toward human resources departments and concerns . . . reflect[ing] a willingness to empower these private institutional players”); *see also* Zachary D. Clopton, *Procedural Retrenchment and the States*, 106 CALIF. L. REV. 411, 420 (2018) (describing how decisions on arbitration, standing, class actions, summary judgment, and pleading reduce accessibility of federal courts for dispute resolution, but arguing that many state courts remain more open).

²⁸⁸ This hypothesis of corporate sovereignty is a more literal corollary of the supposition that corporations serve as a secular God. *See* Douglas Litowitz, *The Corporation as God*, 30 J. CORP. L. 501, 502 (2005) (arguing that “[t]he corporation is essentially a magical and mysterious entity that smooths over the contradictions in our culture and makes inequities seem natural”).

²⁸⁹ *See* Francisco Valdes & Sumi Cho, *Critical Race Materialism: Theorizing Justice in the Wake of Global Neoliberalism*, 43 CONN. L. REV. 1513, 1562 (2011) (arguing that multinational companies have emerged as de facto sovereigns and that “[t]his dynamic similarly continues historical processes that link colonialism, imperialism, and globalization to white supremacy, patriarchy and other subordinating identity-based hierarchies”).

²⁹⁰ Another case, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, also exemplifies this trend. 565 U.S. 171 (2012). In that case, a religious school used the First Amendment as a shield against Americans with Disabilities Act liability. *Id.* at 196 (holding that the school could not be held liable for firing a teacher as retaliation for filing an ADA complaint because this particular teacher was a “minister”).

by civil law) and corporate self-government (effective law-making immune to civil oversight).”²⁹¹ Indeed, in *Hobby Lobby*, the phenomena of corporate power and Christian sovereignty merge. The family businesses of the Hahns and the Greens became instruments through which these families could exercise religious (Christian) sovereignty. The decision in *Hobby Lobby* reestablishes corporate sovereignty for those businesses whose owners can now call on another source of authority (religion) when they seek to avoid a generally applicable law.²⁹²

Exercise of religious sovereignty through the mechanism of the corporation is particularly problematic, as Justice Ginsburg warned, because it can harm vulnerable third parties.²⁹³ Expanding the religious rights of business owners gives the religious family-business owner a powerful tool through which to evade antidiscrimination laws. The majority’s conflation of family and business in *Hobby Lobby* elevates the business, evoking sympathy for the hard-working and the faithful—sympathy that would be more difficult to garner for multimillion-dollar companies and their billionaire owners.²⁹⁴ By contrast, Justice Ginsburg’s dissent identifies the corporation itself as the correct unit of analysis. Ginsburg de-emphasizes the Hahns and the Greens *as families*, and instead focuses on how corporate avoidance of ACA provisions harms tens of thousands of female employees. The majority’s strategic emphasis on *families* served to enhance

²⁹¹ Jean L. Cohen, *Freedom of Religion, Inc.: Whose Sovereignty?*, 44 NETH. J. LEGAL PHIL. 169, 169–70 (2015) (arguing that such assertions “have a deep structure of presumed jurisdictional prerogative that poses a serious challenge to liberal democratic understandings of constitutionalism, justice, sovereignty, and legitimacy of the civil state”); *see also* Jean L. Cohen, *Sovereignty, the Corporate Religious, and Jurisdictional/Political Pluralism*, 18 THEORETICAL INQUIRIES L. 547, 549 (2017); Katharine Jackson, *Disaggregating Corpus Christi: Illiberal Implications of Hobby Lobby’s Right to Free Exercise*, 14 FIRST AMEND. L. REV. 375, 422–23 (2016); Madhavi Sunder, *Piercing the Veil*, 112 YALE L.J. 1399, 1402 (2003) (criticizing human rights law for continuing to “define religion as sovereign” and thus calling for reason only in the public sphere while allowing for fundamentalism and despotism in the private sphere); *supra* notes 237–43 and accompanying text (discussing concerns about religious sovereignty in the *Hobby Lobby* context).

²⁹² *See* Ben-Asher, *supra* note 39.

²⁹³ *Burwell v. Hobby Lobby*, 134 S. Ct. 2751, 2787 (2014) (Ginsburg, J., dissenting); *see also* Jackson, *supra* note 291, at 422–23 (identifying “the illiberal implications of granting rights to certain groups without first inquiring into the internal governance structures of those groups” and distinguishing between churches, whose members “join because they expressly consent to the church’s tenets” and corporations, whose employees are dependent on them for wages).

²⁹⁴ The majority does not mention that the families are wealthy. For instance, as of Apr. 22, 2019, David Green and his family were worth \$7.7 billion and ranked 209th among global billionaires. #209, DAVID GREEN & FAMILY, <https://www.forbes.com/profile/david-green/#2627961c4ef0> [<https://perma.cc/A746-WM74>].

plaintiffs' ability to discriminate,²⁹⁵ while the dissent's emphasis on *corporations* prioritizes third party injuries incurred when corporations get statutory rights to discriminate.²⁹⁶

The religious sovereignty established in *Hobby Lobby* has provided a foundation for those who wish to evade marriage equality and state or federal antidiscrimination laws. In *Masterpiece Cakeshop* (2018), for example, the Supreme Court, albeit on narrow grounds, affirmed the opportunity for businesses to use religion to evade generally applicable antidiscrimination laws.²⁹⁷ The owner of Masterpiece Cakeshop was sued by a same-sex couple after he refused (based on his religious objection, as a devout Christian, to same-sex marriage) to bake a cake for their wedding.²⁹⁸ The Supreme Court ruled in the baker's favor on the ground that the Colorado Civil Rights Commission demonstrated animus toward his religious beliefs and thus violated his free exercise right.²⁹⁹ This seemingly narrow inroad for religious sovereignty is perhaps just the tip of the iceberg.

CONCLUSION

Many laws and policies affect us as individuals, as family members, or as both. In this Article we examined four areas of lawmaking and policymaking, underscoring how

²⁹⁵ For articles discussing the consequences of *Hobby Lobby* for anti-discrimination law, see *supra* note 291 and accompanying text.

²⁹⁶ See *supra* note 246–249 and accompanying text.

²⁹⁷ *Masterpiece Cakeshop v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018). For another recent example of the expansion of religious sovereignty to a private entity, see Letter from Steven Wagner, Principal Deputy Ass't Sec'y, Admin. of Children & Families, Dep't Health & Hum. Servs., to Henry McMaster, Gov., S.C. (Jan. 23, 2019), <https://governor.sc.gov/sites/default/files/Documents/newsroom/HHS%20Response%20Letter%20to%20McMaster.pdf> [<https://perma.cc/7UBK-YWSP>] (allowing South Carolina to distribute federal funding to a faith-based foster agency that discriminates on the basis of religion and sexual orientation).

²⁹⁸ *Masterpiece Cakeshop*, 138 S. Ct. at 1726. The Colorado Civil Rights Commission rejected his claims and ordered him to provide the same service to same-sex couples as he would to heterosexual couples. *Id.* The Committee also ordered Phillips to provide his staff with training in compliance with Colorado's public accommodation laws. *Id.*

²⁹⁹ *Id.* at 1729–31 (observing that the Commission “disparage[d]” Phillips’ religion as “despicable” and “merely rhetorical”). Although the Court did not reach the question of whether the business may ultimately engage in discrimination against same-sex couples, it affirms the general principle that, although “religious and philosophical objections are protected, . . . such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law.” *Id.* at 1727.

in each of them the framing of the principal unit of analysis—as an individual or a family—has determined the consequent laws and policies. We illustrated how both liberals and conservatives turn to the unit of “family” and its sacredness to promote and protect their proposed laws and policies. Liberals emphasize the sacredness of the family when attempting to defend immigrants from Muslim-majority countries and Central America against exclusionary policies. Conservatives turn to family values to empower family farms and closely held corporations. They then flip roles: Conservatives downplay the family crisis of Muslims impacted by the travel ban and of families who have been separated at the southern border. Liberals downplay the need to support family farms and extend religious exemptions to closely held family businesses.

For both sides (liberals and conservatives), the reliance on the sacredness of the family is useful because it appeals to a basic American sense that is mostly shared across liberal and conservative lines—that the family is the central and most vital social institution. Herein lies the problem. The ultimate winner on *any* given law or policy—those we discussed here and many others that we have not—will often depend on the choice to consider the family or not. Those in power can determine who will benefit *as a family* and who will be ignored *as an individual wrongdoer*. In the policies examined in this Article, liberals mostly lost, and conservatives mostly won. The fates of many humans have depended, and still depend, on whether they are in the right family (white farmer, Christian corporate) or the wrong one (immigrant, Muslim).

The comparison between these policies reveals a fundamental problem with the use of family values in American politics. Tying the outcome of allocation of rights to the choice between family and individual is a dangerous game. Victories won in either direction may be short-lived. If we persist in fighting for rights in the name of family values, the victors will always be susceptible to recharacterization. The concern is not just that the right family suddenly becomes the wrong family; this is a standard shifting of political tides. The concern is that the right family is subject to collateral attack; family members are no longer even identified as such and thus have no access to the benefits of membership. The choice between family and individual sets the terms of debate, obscuring comparison across laws and making it impossible to engage in honest debate about human rights and the allocation of political spoils.