The (dis)establishment of gender: Care and gender roles in the family as a constitutional matter

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This article reasons that for women, as constitutional subjects, the emancipatory promise of constitutionalism was—from its inception—fundamentally limited by the entrenchment of the separate spheres tradition. Focusing on evolving constitutional jurisprudence in the US, Germany and Italy, the article describes a gradual and still imperfect process of (dis) establishment of the originally enshrined gender order, as it has unfolded since the 1970s in US and European constitutionalism. It is argued that these processes have allowed the constitutional doctrine of sex equality to challenge the most forthright expressions of the separate spheres ideology, denying the possibility of according men and women a different legal status of rights and duties and keeping women away from the marketplace. In spite of this, to this day, the sex constitutional equality doctrine has been an inadequate tool to fully subvert the pre-established gender order in both its transatlantic iterations. In the US, we find assimilationist workerism with its anti-stereotyping conception of gender equality, providing no support for working women, and in Europe accommodationist workerism, wherein special measures are fostered at the risk of entrenching rather than subverting existing gender roles. The article then describes recent evolutions in constitutionalism pointing to a promising third way, with Nordic inspiration, which, challenging traditionally accepted notions of family privacy and foregrounding fatherhood as opposed to just motherhood, would allow us to retain the central importance attached to care and reproduction, but at the same time assist in the process of overcoming traditional gender assumptions and stereotypes built around them.

1. Introduction

Constitutionalism brought the promise of a new basis of legitimacy for the political order. Yet the understanding that there were two separate domains—the public, built around civil society, the market, and the state apparatus, as the domain in which

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the modern promise of egalitarianism was to deploy its effects, and the private, built around the marital family, where nature and biology were supposed to continue their own normative and ordering dictates—was simply accepted as part of the material constitution, or superstructure, of the societies of the time. This understanding was central to the "constitutionalization" of the two genders (embodied in the two sexes), and thus responsible for coining, in a more or less explicit manner, a gender specific conception of citizenship marking the forms of human flourishing, self-realization, and communal contribution expected from each of the sexes, paradigmatically assigning the role of reproduction and care within the family to women.

The conquest of men's rights by women, such as the enfranchisement of women, which only occurred after the turn of the twentieth century, and, in many countries, not until after World War II, finally turned women into political citizens, but did not challenge the expectation of women's devotion to the family in any significant way. The gradual, though still imperfect, incorporation of women in the male-dominated employment domain, an incorporation facilitated by increasingly powerful and often constitutionally embedded equality law, was also crucial in the expansion of women's citizenship, and has significantly challenged the often unstated assumption that women's natural place and role in society was just to be mothers, to nurture and to care for others. Yet, despite these concrete advances, the emancipatory promise of constitutionalism has remained *fundamentally* limited by the constitutional entrenchment of the separate spheres tradition, around which the constitutional "state gender order" revolved since its inception, with expectations surrounding the division of care labor in the family that continue to limit women's incorporation to the public sphere playing a central role.

In the new millennium, we observe the proliferation of constitutional struggles around the (dis)establishment of this gender order. The explicit challenge to the normative legacy of the separate spheres tradition—and the gendered understanding of both personhood and citizenship embedded in it—is finding jurisprudential and normative expression in recent constitutionalism. New approaches are proposed which focus not only on what constitutional sex equality provisions mean, allow for, or even demand, but also, crucially, on the *domains* in which they are to apply, pushing the boundaries of what, to this day, have remained institutionally protected and deeply gendered spheres of individual and collective autonomy and self-organization. To mention perhaps the clearest example, lively constitutional debates and new parity framings have mushroomed around the world during the last two and a half decades along with the adoption of legislative gender parliamentary quotas as measures intended to "feminize" the public sphere, addressing the persistent political under representation of women which the historical conquest of women's suffrage did not remedy.[1]

[1] *See* Ruth Rubio-Marín, *The Achievement of Female Suffrage in Europe: On Women's Citizenship*, 12(1) Int'l J. Const. L. 4 (2014). On the constitutional struggles generated around the adoption of gender quotas *see* Blanca Rodríguez-Ruiz and Ruth Rubio-Marín, *The Gender of Representation: On Democracy, Equality and Parity*, 6(2) Int'l J. Const. L. 287 (2008) and Ruth Rubio-Marín, *A New European Parity-Democracy Sex Equality Model and Why it Won't Fly in the United States*, 60 Am. J. Comp. L. 99 (2012).

Important as these struggles are, since the turn of the century, we also find increasing constitutional recognition for the fact that the dismantling of the sexual contract must also penetrate family walls, and that the private realm and domestic life must be correspondingly "masculinized." This recognition represents the acknowledgment that gender roles and the valuation and distribution of care responsibilities and work within the household are, to some extent at least, matters of constitutional substance.[2] This incipient but groundbreaking shift, potentially expanding the content and domain of application of constitutional sex equality doctrines, has largely escaped the analysis of constitutional scholarship so far. Likewise, the elements in constitutional doctrine facilitating or instead rendering this shift unlikely under different constitutional traditions have been little explored.

This article, which contrasts European and US constitutionalism,[3] primarily relying on German and Italian constitutional sources for the latter, describes the process of the constitutional embedding of the gender order since the dawn of constitutionalism (Section 2), and depicts what I claim were only modest disruptions to this order that came about with the sanctioning of female suffrage and the prohibition of sex discrimination that characterized early post-World War II constitutionalism. Section 3 describes an era of constitutional market sex equality (between the 1970s and 1990s), which took place both in the US and Europe, as formal discriminations were abolished from the legal system and the incorporation of women to the employment market came to be seen as the paradigmatic achievement of emancipatory constitutional gender equality doctrines. I argue that, in spite of some important commonalities (especially in the affirmation of an equal legal status for men and women as a minimum constitutional threshold), this constitutionalism took slightly different shapes on each side of the Atlantic. In the US, it took the form of *assimilationist workerism* (with a gradual emphasis on strict gender neutrality and a central preoccupation with combatting all forms of gender stereotypes, especially those keeping women at home). In Europe, an *accommodationist workerism* prevailed, helped by both the explicit and

[2] *See* Jennifer Nedelsky, *The Gendered Division of Household Labor: An Issue of Constitutional Rights*, *in* Feminist Constitutionalism: Global Perspectives 15 (Beverley Baines, Daphne Brak-Erez, & Tsvi Kahana eds., 2012).

[3] A note on methodology: because the focus of this article is on constitutionalism, Europe and the US were chosen as the regional cradles of constitutionalism. That said, talking about "European" constitutionalism (unless one refers specifically to the constitutionalism of the European Union which is not my intent here) is always a gross oversimplification, given that different European countries each have their distinctive constitutional traditions. In view of this, the coining of a model as a "European constitutional model," for the purposes of this article, means that the model, which is in contrast to a US model, is the most representative in Europe and/or that it is one around which there is an increasing convergence across Europe. As we shall see, this convergence has sometimes been facilitated by the supranational forces of European law and policies. The interest in *constitutional* (as opposed to legal) gender models explains why I have chosen to focus on the US as well as on two European countries, Germany and Italy, in which constitutionalism (as opposed to just parliamentarism/law making) has been a central element in the consolidation of their democracies. The fact that Germany and Italy are the oldest constitutional democracies established in post-World War II Europe, and that they incorporated a system of judicial review of legislation is precious when it comes to assessing what is specifically "constitutional" in substance and how changing sociological understandings of gender relations since the 1950s—the historical moment of cultural glorification of the breadwinner family model—have been facilitated or not by constitutional structures pre-dating them, as well as for the identification of judicially constructed doctrines which have facilitated their adaptation.

traditional centrality given to motherhood under European constitutionalism, and a substantive equality doctrine foregrounding the need to correct social inequalities.

After describing the virtues and shortcomings of both constitutional models, I point to signs in contemporary European constitutionalism signaling the potential of a more promising third way: a constitutionalism which retains the central importance traditionally attached to care and reproduction as matters of individual and collective responsibility, but at the same time assists in the process of overcoming old gender assumptions and stereotypes. Section 4 traces the evolution of European policies as well as jurisprudential and textual advances in constitutional law in Europe and beyond, signaling the shifts required for the successful challenge of the breadwinner family model, as the cornerstone of the original gender order. These include: (i) the de-gendering of care roles—something which in turn requires a new constitutional understanding of fatherhood; (ii) the overcoming of the myth of state neutrality regarding the internal organization of the family—something which requires changes in our constitutionally protected notions of privacy and formal equality in the family; and (iii) the need to constitutionally conceptualize care through the lens of citizenship by foregrounding not just rights, but also notions of individual and collective responsibility. The article concludes (in Section 5) with a plea for humanity, and the possibility of a gender constitutionalism allowing men and women to fully develop all their capabilities, taking this as the standard against which to measure the original promise of equal citizenship that has animated constitutionalism since its inception.

2. The constitutional embedding of a gender order and its modest disruption in early post-World War II constitutionalism (from the beginning through the 1960s)

Nineteenth-century, as well as early twentieth-century, constitutionalism was built on the assumption of women's relegation to, and subordination within, the private sphere. Marriage, as a contract, was key to understanding the inner contradictions of this new order, i.e., modernity. It was the fiction of marriage as a contract (as Carole Pateman brilliantly explained in *The Sexual Contract*)[4] that allowed to simultaneously affirm and overcome women's status order characteristic of pre-modern times—a fiction rooted in women freely "contracting into" an institution that secured patriarchy and affirmed their obedience to men. With modernity then, women's place in society and in the polity came to be centered around a separate-spheres tradition articulated along a double axis: the axis of subordination, inherited from pre-modernity; and the axis of separation or complementarity, more typically modern, which the marriage contract was supposed to legitimate, with the very consolidation of family law as a separate legal discipline during precisely this time reflecting the historical transformation of the household into a nuclear family accompanying the move to modern industrialist social order.[5]

[4] Carole Pateman, The Sexual Contract (1988).

[5] *See* Janet Halley & Kerry Rittich, *Critical Directions in Comparative Family Law: Genealogies and Contemporaty Studies of Family Law Exceptionalism*, 58 Am. J. Comp. L. 756 (2010).

Whether implicitly assumed or explicitly articulated, it was the understanding of the traditional family (supported by family and marital law) that primarily shaped women's legal status and citizenship. Major family law reforms to ensure women's civic equality (not in the market place or civil society, as civic equality was traditionally understood by and for men, but specifically within the family and marriage) became a reality starting only in the 1970s as a legacy of second-wave feminism's direct confrontation with the sexual contract and the traditional family.

As constructed primarily in the early years of the Industrial Revolution and lasting until the mid-twentieth century, this "traditional" family was defined in express contrast with the world of the marketplace, thus delimiting a second-order private sphere for women.[6] The marketplace, expected to be inhabited largely by men, was associated with money, choice, and negotiation through contract. Its counterpart was the home, associated with love and self-sacrifice, and identified with women and children. In this traditional home, the notions of hierarchy and community prevailed over equality and individuality, and roles and status were determined through reference to age and gender.[7] Increasingly, love was supposed to be the glue keeping it all together by ensuring the identity of interests of the spouses. Even as the elements of hierarchy came, in time, to be gradually toned down, equality between the spouses gradually becoming the aspired goal, the romanticized cultural construct of the differentiated gender roles proved most resilient.

Whether explicitly or implicitly sanctioned, this concept of family was the cornerstone of the gender order from the dawn of constitutionalism in both Europe and the US. Dating back to 1787, the US Constitution remains one of the few major written constitutions, which, to this date, and after long and failed attempt of incorporation through an Equal Rights Amendment, still lacks a provision declaring the equality of the sexes. Moreover, expressive of the revolutionary period's emphasis on foregrounding the individual (and breaking away from the *ancien regime*'s privileging of intermediate bodies and status), the US Constitution, not unlike other revolutionary texts, is for the most part silent on the family. This silence reflects not the denial of the family's central importance as a structuring cell in society, but rather the "normalization" or "de-politicization" of the marital family-based political order.[8] Moreover, in spite of this constitutional silence, the direct link between the construction of the family organization and marriage, on the one hand, and the exclusion of women from the public sphere—interpreted as including both the marketplace and politics—on the other hand, can easily be confirmed through the gendered subtexts present in many of the Supreme Court's early decisions. Consider, for instance, Justice Bradley's concurring opinion in *Bradwell v. State*, denying women the right to practice law, focusing on the petitioner's status as a married woman:

[6] *See* Stephanie Coontz, Marriage, A History: How Love Conquered Marriage (2005).

[7] *Id.*

[8] It is also telling that the Amendments to the US Constitution did not include an explicit reference to the institution of family or marriage other than for the purpose of federalism. In spite of the US constitutional silence on marriage and the family, in the 1920s, on the basis of the *Lochner* era's contractual and economic liberty, the Supreme Court for the first time recognized some protection for parental prerogatives in the education and raising of children, grounding it on Sixteenth Amendment substantive due process guarantees: *see* Meyer v. Nebraska and Pierce v. Society of Sisters, 628 U.S. 510 (1925). The family, constitutionally speaking, thus came to be primarily conceived as a sphere of privacy or non-state intervention.

> The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting distinct and independent career from that of her husband. . . . It is true that many women are unmarried and not affected by any of the duties, complications, and incapacities arising out of the married state, but these are exceptions to the general rule. The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases.[9]

In Europe, early post-revolutionary, nineteenth-century constitutions had remained for the most part silent on the family in a similar attempt to foreground the individual.[10] We must turn to the short-lived constitutional experiences of the inter-war period to find a much more explicit recognition of the central political importance attributed to the marital family as a foundational cell in society. These inter-war family traces signal the growing preoccupation of the welfare state model in Europe, with the protection of the institution of the family as the institution to which the social function of care was assigned, and motherhood as a supposedly vulnerable condition in need of protection.[11] Democratic constitutionalism, however, failed to establish itself solidly until the second half of the twentieth century—first hindered by monarchical reactionary forces and thereafter by fascist and totalitarian regimes.

Due to the significant overlap in time between the heyday of the breadwinner-family model—in the 1950s and early 1960s, coinciding with a strong post-war pronatalist movement—and the early post-World War II wave of European constitutionalism, the features of the "traditional" family remained entrenched in this new constitutionalism, even though it also picked up and furthered the interwar constitutionalism seeds of expression of sex equality which had mostly served to challenge women's political disenfranchisement. From the perspective of the gender order, the post-World War

[9] *See* Bradwell v. State, 83 U.S. 130, 141–142 (1873) (Bradley concurring).

[10] *See* Pierre Murat, *La Constitution et le mariage: regard d'un privatiste*, 39(2) Les Nouveaux cahiers du conseil constitutionnel 19, 20–21 (2013) (arguing that it is not until the Preamble to the 1946 Constitution that the institution of the family gains meaningful constitutional recognition in France—and this mostly as a reflection of an increasing concern of the welfare state with social matters reinforced by post-World War I natalism—and that this is in conformity with the effort of classic constitutionalism to break away from the projection of family structures into the political universe.)

[11] The 1919 Weimar Constitution, for instance, recognized the social centrality and political relevance of the family structure. Article 119 (under a chapter devoted to "Life within Community") provides:

> Marriage, as the foundation of the family and the preservation and expansion of the nation, enjoys the special protection of the constitution. It is based on the equality of both genders. It is the task of both the state and the communities to strengthen and socially promote the family. Large families may claim social welfare. Motherhood is placed under state protection and welfare.

In Europe, then, the constitutional idea of the family emerges not only as a sphere of private autonomy, but of active state concern at the formative period of the welfare state, a welfare state designed to reflect the breadwinner and the family wage system, having women as primary caretakers, domestic workers, and, at best, secondary wage earners. *See* Ann Shola Orloff, *Gender and the Social Rights of Citizenship: The Comparative Analysis of Gender Relations and Welfare States*, 58 Am. Soc. Rev. 303, 328 (1993).

II European constitutional movements are thus better interpreted as a mix between continuity and progressive change, rather than as a full rupture with the underlying social, political, and economic order established since modernity. In short, in spite of the ever growing consensus on the need to explicitly articulate the equality between the sexes and/or a prohibition of discrimination on the grounds of sex, the active disestablishment of the separate spheres traditions dictating men's and women's distinctive roles in society was *not* a core element of the early agenda of post-World War II constitutionalism, and, to the extent it was an element at all, it was the subordination rather than the romanticized differentiation axis that was tackled.

If we look at the political domain, it is no doubt important that, after World War II, all those European countries that came to solidly embrace democratic constitutionalism, but had not yet enfranchised women, including France, or had done so only for a few years during the interwar period before the irruption of dictatorships, such as Spain, now felt the urge to do so, as the struggles long fought for by first-wave feminists were finally ready to be harvested. Yet, then again, in spite of women's political emancipation through enfranchisement, some explicit gender-based distinctions in the political-civic domain remained in the constitutions (and remain still today!), perpetuating women's exclusion from equality in citizenship functions and duties. This includes, paradigmatically, women's differential treatment regarding military duties,[12] but also, for instance, gender-discriminatory rules on the succession of the Crown in some parliamentary monarchies.[13]

More importantly, if we turn our eyes to the family domain, we realize that the early post-World War II constitutions kept recognizing the institution of the (often explicitly heterosexual and/or marital) family as the foundational cell of society, a repository of care and dependence, deserving state recognition and protection. Within this family domain, the specific centrality of motherhood, and not just parenting, was then often expressly acknowledged,[14] some of the new constitutions being in fact most explicit

[12] Thus, in 1956, when Germany finally came to have an army, the Constitution was amended. Article 12(4), however, exempted women from being required to render service in any unit of the armed forces by law, and prohibited women from being employed in any service involving the use of arms. Subsequently, in the 1968 amendment, art. 12(4) was deleted, and art. 12a (4) inserted, providing that women could be obliged to serve in the armed forces, especially in medical care units, but were not allowed to serve in any units involving the use of arms. On Dec. 23, 2000, this sentence was changed, and now the text only makes reference to the impossibility of *forcing* women to serve in the armed units of the military, something they were *allowed* to do from Jan. 1, 2001. Notice that also art. 13 of the Swedish Constitution's equality clause provides that "no act of law or other provision may imply the unfavorable treatment of anyone on grounds of gender, unless the provision forms part of efforts to promote equality between men and women or relates to compulsory military service or other equivalent official duties."

[13] *See* Constitución Española (C.E.), B.O.E. n. 311, Dec. 29, 1978, art. 57.1 (Spain).

[14] Grundgesetz für die Bundesrepublik Deutschland [Grundgesetz] [GG] [Basic Law], May 23, 1949, BGBl I, art. 6.1, devoted to the family, provides that "[m]arriage and family enjoy the special protection of the State", whereas art. 6.2 acknowledges that "care and upbringing of children are the natural right of the parents and a duty primarily incumbent on them, a duty over which the State is to watch." Telling, for our purpose, is the fact that, according to art. 6.4, "every *mother* is entitled to the protection and care of the community" (my emphasis).

about women's expected roles within the breadwinner-family model.[15] In other words, whatever the meaning initially attached to constitutional gender equality provisions, they were seen as compatible with (rather than a challenge to) the existence of a social order structured around marital families within which men and women were expected to perform different (and sometimes subordinate) roles. This was then rendered explicit by the first decisions of courts in charge of interpreting the constitutional provisions. Let us take a look at some telling examples.

In Italy, for instance, although article 3 of the 1947 Italian Constitution refers to "all citizens having equal social dignity and being equal before the law, without distinction of sex," major gender-egalitarian reforms were not passed until the 1970s, including the first major family code reform which was approved in 1975. As a result, the Italian Constitutional Court (ICC) was confronted with explicitly discriminatory provisions several times during the 1960s. Its case law, as shown in the two examples discussed below, reflects a patriarchal and hierarchical understanding of the family and the implicit breadwinner model. In 1961, the court upheld a criminal code provision making the wife's adultery a criminal offence, yet qualifying the husband's as such only when it was performed within the household or "notoriously" elsewhere, considering the distinction justified on the basis of the social consensus around the different meanings of men's and women's adultery, as well as by the fact, taken as self-evident, that the wife's adultery constituted a more serious attack on family unity.[16] Similarly, in 1967, the court validated a norm of the civil code wherein, in case of consensual separation, a husband had to provide for all of his wife's needs regardless of the latter's financial situation (the wife being only obliged to do so in case of the husband's having insufficient means of subsistence). The differential treatment was justified this time by the allegedly superior status within the family granted to the

[15] This is, for instance, the case in Italy's 1947 Constitution. Indeed, under Costituzione [Cost.] 1947, Pt II, Title II, devoted to "Ethical and Social Relations," the Italian Constitution includes a series of provisions which leave little doubt as to the expected social function of the marital family, and of women's role within it. Article 29.1 recognizes the family as a "natural association founded on marriage," and although art. 29.2 provides that marriage entails "the moral and legal equality of the spouses," it also foresees that such equality is to take place "within legally defined limits to protect the unity of the family." Also, although Art. 30 (on parental duties and rights) refers indistinctively to the duty and right to support, instruct, and educate the children, including those born out of wedlock, art. 31.1 makes it the state's duty to further family formation and the fulfillment of related tasks by means of economic and other provisions, with special regard to large families, and 31.2 adds that the Republic protects *maternity*, infancy and youth, supporting and encouraging institutions needed for this purpose. Even more telling are the provisions on labor, wages, and equality of women at work, included under Title III on "Economic Relations." Article 36.1 explicitly refers to the family wage concept (literally, "workers are entitled to remuneration commensurate with the quantity and quality of their work, and in any case sufficient to ensure to them and their families a free and honorable existence"); and art. 37, after recognizing in paragraph 1 that "working women are entitled to equal rights and, for comparable jobs, equal pay as men", recognizes in paragraph 2 that "working conditions have to be such as to allow women to fulfill *their essential family duties* and ensure an adequate protection of mothers and children" (emphasis added).

[16] *See* Corte Cost., 28 novembre 1961, n. 64 (It.). Only a few years later, the court would depart from this doctrine. *See* Corte Cost., 16 dicembre 1968, n. 126 (It.); Corte Cost., 16 dicembre 1968, n. 127 (It.); Corte Cost., 27 novembre 1969, n. 147 (It.).

husband by law, which in turn was said to imply the husband's "marital authority" as well as his obligation to provide for his wife.[17]

The German starting point was slightly different. The German Basic Law of 1949 also contained a reference (art. 3.2) to men and women having equal rights, as well as a prohibition (art. 3.3) of discrimination on the grounds of gender. And there too the first major sex egalitarian reforms of family law were not passed until 1977.[18] The main difference between Germany and Italy was that, already from the start, the German court understood the subordination element of the traditional family to be incompatible with the new constitutional gender order. Yet, the same could not be said about the separation/differentiation axis. Thus, in interpreting the gender equality and the sex antidiscrimination clauses in the Constitution, the early jurisprudence of the Federal Constitutional Court (FCC) held that different treatment on account of gender was constitutionally forbidden, except when it could be grounded in "objective biological or functional" sexual differences and be to the advantage of women,[19] a rhetoric which not surprisingly had its peak during the 1950s and 1960s.[20] "Separate but equal" treatment, so to speak, was constitutionally acceptable as long as *equal worth* was attached to men and women's roles within the family (i.e., the breadwinner and the housewife).[21] This doctrine allowed the court, for instance, to uphold a rule granting widowers a pension only if the deceased wives had been the main breadwinners, whereas a widow's pension was granted regardless of similar considerations.[22] Essential to the support of breadwinner-family model was also the narrative of state neutrality and marital privacy, which the court based on article 6.1 GG, as encompassing the autonomy of the couple to decide about the internal structure of the family, including whether one or both spouses would be income earners.[23] As we shall see (in Section 4), it is the interpretation of this doctrine that has come to be challenged in recent years, and it is this challenge that is facilitating the first signs

[17] *See* Corte Cost., 12 dicembre 1967, n. 144, overturned by Corte Cost., 24 giugno 1970, n. 133 (It.). For a critical analysis of this case law and the way the concept of family unity was initially used by the Court to entrench gender stereotypes based on a patriarchal family model, *see* Barbara Pezzini, *La Struttura di Genere della Famiglia nella Giurisprudenza Costituzionale*, *in* Come il Genere Costruisce il Diritto e il Diritto Costruisce il Genere 23 (Barbara Pezzini ed., 2012).

[18] Until Mar. 31, 1953, it was foreseen that laws contrary to gender equality clause of art 3(2) GG would remain in force. The deadline lapsed without any major reforms. The Gesetz über die Gleichberechtigung von Mann und Frau auf dem Gebiet des bürgerlichen Rechts (Gleichberechtigungsgesetz—GleichberG) [First Equal Treatment Act], June 18, 1957, BGBl. I S. 609, which entered into force July 1, 1958, covered civil aspects of marriage and family. Certain patriarchal features of the civil code were "overlooked" in this reform, and this led to several constitutional challenges. The first act comprehensively reforming marriage and family law (Erstes Gesetz zur Reform des Ehe- und Familienrechts (1.EheRG), June 14, 1976, BGBl. I S. 1421) entered into force only on July 1, 1977. *See* Barbelies Wiegemann, *Der Hürdenlauf der Frauen im Rechtseit 1900*, *in* Frauen und Recht Reader 28 (Swantje Stephan ed., 2003).

[19] See Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] 3, 225, Dec. 18, 1953 (Ger.).

[20] See Blanca Rodríguez Ruiz & Ute Sacksofsky, *Gender in the German Constitution*, *in* The Gender of Constitutional Jurisprudence 149, 152 (Beverley Baines & Ruth Rubio-Marín eds., 2005).

[21] *See id.*, at 152.

[22] *See* BVerfGE 17, 1, July 24, 1963 (Ger.).

[23] *See*, for all, BVerfGE 6, 55, at 58, Jan. 17, 1957 (Ger.) and BVerfGE 9, 237, at 22, Apr. 14, 1959 (Ger.).

of a more complete subversion of the gender order entrenched in the constitutional project since its inception.

3. The era of market equality: the potential and limitations of assimilationist and accommodationist sex equality (the 1970s–1990s)

In terms of gender order disestablishment, the first breakthrough moment came in the 1970s, and was directly related to the second-wave feminism's challenge to women's relegation to the private sphere. It was then that the courts started to read out of their constitutions the need to overcome women's distinct marital status and expand women's role beyond the family, increasingly focusing on ensuring women's market equality. Yet, constitutionally speaking, this was articulated in two different ways on each side of the Atlantic. Let us see.

3.1. The United States: the boundaries of assimilationist workerism

In the United States it was women's rights' advocates who, starting in the 1970s, persuaded the Supreme Court to read the guarantees of gender equality into the Equal Protection Clause.[24] *Frontiero v. Richardson*,[25] decided in 1973, was the first case in which the court articulated the now orthodox view that laws based on gender stereotypes are unconstitutional. The case was brought by a wage-earning wife holding the unstereotypical position of lieutenant in the US Air Force, who sought benefits including housing and medical insurance for her husband, and gave the court the occasion to recognize the fundamental role that marriage law had played in keeping women subordinate to men.[26] In just a few years after being adopted, the doctrine started deploying its effects, turning anti-gender-stereotyping into the essence of the anti-sex discrimination principle and serving both men and women alike.

Interestingly, Justice Bader Ginsburg, at the time head of the American Civil Liberties Union and a leading force in the decade-long campaign to consolidate the constitutional doctrine fighting gender inequality in the form of sex stereotypes, drew some of her inspiration from Europe. In particular, Ginsburg was inspired by her studies of Swedish law and by Sweden's approach to women's rights, seeking not only the opening of the public sphere to women, but also, since the early 1960s, the opening of the home to men.[27] In the US, this doctrine found synergies with anti-racism

[24] The first case was Reed v. Reed, holding it irrational, and thus unconstitutional under the Equal Protection Clause, for the state of Idaho to prefer "males to females" as estate administrators when the degree of relationship to the decedent was otherwise equal. *See* Reed v. Reed, 404 U.S. 71, 74 (1971).

[25] Frontiero v. Richardson, 411 U.S. 677 (1973).

[26] Literally, "throughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes. Neither slaves nor women could hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children" (*id.* at 685).

[27] *See* Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y. L. Rev. 83, 98–99 (2010).

theories which became the focus of attention of social scientists already in the 1940s and 1950s.[28] The anti-gender stereotyping constitutional doctrine had an impact on family law in the 1970s, when the entrenched explicit sex-based distinctions were overcome, including those that also imposed limiting gender stereotypes on men. In 1975, for instance, in *Weinberger v. Wiesenfeld*, the Supreme Court held that denying survivor's benefits to a widower would have discriminated both against his deceased wife as wage earner, and against him as the surviving caregiver to their child.[29] Most tellingly, that same year, in *Stanton v. Stanton*, the Supreme Court struck down differential ages of majority for boys and girls for the purposes of determining a divorced father's support obligations towards children.[30]

From then on, whatever the statistical evidence would say about the enduring "functional" differences between the sexes (including, most tellingly, whether women in fact continued to bear most of the childrearing and care responsibilities), any law that generalized on the basis of such evidence, would be interpreted as "normalizing," sanctioning, or entrenching different gender roles, and hence as discriminatory. Thus, rather than reflecting and accommodating actual functional differences between the sexes, norms were supposed to ignore them as a way of freeing the individual from the expectations that might be imposed on them. Even in the paradigmatic domain of male citizenship—the military—generalizations about talents and capacities based on gender gradually ceased to be acceptable.[31] Functional differences could not be accommodated, in contrast to so-called "real differences," typically grounded in a very narrow interpretation of biological distinctions.[32] And even the latter faced growing challenge as the cultural construction of biological features was increasingly acknowledged.

Moreover, as a matter of constitutional doctrine, intent has been required to prove sex discrimination, also limiting the scope and the kinds of norms and treatment that could be constitutionally challenged, leaving out of purview those legal norms that, coined in gender neutral terms, arguably still reflect the breadwinner-family model, having a disparate impact on women's enjoyment of a full set of rights. Also, although the Supreme Court, at least in its early jurisprudence, did not rule out that a differential treatment could be established as some form of compensation for past

[28] *Id.*, at 105–107.

[29] *See* Weinberger v. Wiesenfeld, 420 U.S. 636 (1975), holding unconstitutional the provision granting social security survivor's benefits only to mothers and not to fathers.

[30] *See* Stanton v. Stanton, 421 U.S. 7, 14–15 (1975). *See also* Orr v. Orr, 440 U.S. 268, 278–280 (1979), stating that husbands had to be eligible for alimony equally with wives, and declaring the state's purpose of reinforcing a model of "allocation of family responsibilities under which the wife plays a dependent role . . . no longer valid to justify a statute that discriminates on the basis of gender."

[31] *See* United States v. Virginia 518 U.S. 515, 533 (1996), striking down a scheme placing female would-be cadets in a separate, but decidedly unequal, girls' school lacking Victoria Military Institute's funding and prestige. In the decision, the Supreme Court once again underscored the fact that gender stereotypes are the antithesis of gender equality.

[32] For instance, the statutory rape protecting underage girls but not boys was held to reflect merely a natural asymmetry: the heavy burdens of possible pregnancy would deter girls from underage sex, but boys needed the added disincentive of criminal law: *see* Michael M. v. Super. [Ct. of Sonoma County], 450 U.S. 464, 473 (1981).

discrimination,[33] its general evolution towards an anti-classification and a symmetrical approach to the Equal Protection Clause translated in the application of a heightened (concretely, an intermediate) standard of review to be applied to all forms of gender-based distinctions, among other things, to screen out apparent "preferences" that are in reality "confining," "protectionist," or "paternalistic" (sometimes described as affirmative action for "ladies" as opposed to "women").

Together, the stringent limitations to the forms of constitutionally valid protections under the anti-stereotyping interpretation of the gender equality doctrine, as well as broader understandings about the limited role of the state in correcting social inequalities, as part of the country's overall liberal political economy, has affected the possibility of protecting pregnancy and motherhood. These protections, according to Ginsburg, who was well familiarized with their generalized existence in Europe, raised a troubling concern. In her own words, "patriarchal rules long sequestered women at home. . . . It is not always easy to separate rules that genuinely assist mothers and their children by facilitating a woman's pursuit of both paid world and parenting, from laws that operate to confine women to their traditional subordinate status."[34] As a result, in the US, specific protections for motherhood have always been minimal, and have had a legislative, rather than constitutional, basis, especially after 1974, when the Supreme Court rejected the claim that pregnancy-based discrimination amounted to sex discrimination.[35] Protections have been constructed in a gender-neutral way, mostly proceeding by way of assimilating pregnancy and motherhood into any other sickness or family care related employment leaves.[36] Thus, although the goal of the drafters of

[33] Thus, applying an intermediate scrutiny test, *see* Schlesinger v. Ballard, 419 U.S. 313 (1975), upholding preference in allowing women more years to prove their worth in an up-or-out naval officer promotion scheme, and literally stating that "the different treatment of men and women under [the challenged provisions] does not reflect archaic and overbroad generalization, but instead, the demonstrable fact that male and female line officers in the navy are not similarly situated with respect to opportunities for professional service"; or Califano v. Webster, 430 U.S. 498 (1977), upholding preference of counting fewer of women's low-wage years in calculating social security retirement payouts to compensate for presumed wage discrimination.

[34] Ruth Bader Ginsburg & Deborah Jones Merritt, *Affirmative Action: An International Human Rights Dialogue*, 21 Cardozo L. Rev. 253 (1999)

[35] *See* Geduldig v. Aiello, 417 U.S. 484 (1974), where the Supreme Court argued that, although only women could become pregnant, not all women became pregnant. The case was brought by pregnant employees, alleging that California's disability insurance system violated the Equal Protection Clause because it excluded pregnancy-related disabilities, an exclusion which was not seen as gender discrimination.

[36] Title VII's prohibition of discrimination on the basis of sex was amended for that purpose in 1978: *see* Pregnancy Discrimination Act of 1978, Pub. L. Nos. 95–555, 92 Sat. 2076 (1978), 42 U.S.C. § 2000e. The Act came to play a central role in enabling women to obtain paid maternity leave, because it increasingly forced wage replacement during maternity leave to be included in an employer's temporary disability insurance plan. To this day, Title VII continues to serve as the main recourse that feminists and advocates for work–life balance turn to in their attempts to achieve legal protection for pregnant women and employees with family responsibilities, but the fight is always fought in gender-neutral terms: the worker without family obligations being the standard against which the individual is measured. On the dysfunctional protection of pregnancy and motherhood needs through medical leaves, *see* Julie Suk, *Are Gender Stereotypes Bad for Women? Rethinking Antidiscrimination Law and Work-Family Conflict*, 110 Col. L. Rev. 1, 16 (2010).

the anti-stereotyping theory of sex equality, including Ginsburg herself, was not the denial of the central value of human reproduction and care, but rather the challenge to gender roles and expectations around them, equality in terms of sameness of treatment, or, in other words, assimilationist equality taking men as the point of reference, and hence, assimilationist workerism, became the trend, especially since the flourishing of the New Right conservative agenda in the 1980s.

This trend was consolidated and constitutionally affirmed with the passing of the Family and Medical Leave Act (FMLA) in 1993. With the explicit goal of promoting equal employment opportunity for women and for men,[37] and recognizing that "the primary responsibility for family caretaking often falls on women, and [that] such responsibility affects the working lives of women more than it affects the working lives of men,"[38] the FMLA entitled covered employees to twelve weeks of unpaid leave annually to care for a newborn baby or a newly adopted child, a sick family member, or their own serious health condition.[39] In its 2003 decision, *Nevada Department of Human Resources v. Hibbs*, the Supreme Court upheld the FMLA as a valid exercise of Congress's Fourteenth Amendment § 5 power to enforce the Equal Protection Clause,[40] relying heavily on the fact that the leave guaranteed by the Act was gender neutral, thus cementing the notion that equal protection principles require strict gender neutrality in any form of action intended to protect parenting.[41]

It has been argued that the prevalence of this assimilationist workerism has forced late feminists to focus on non-family circumstances, and that, in this context, the agenda of "family values" has been for the most part unnecessarily handed over to the cultural right.[42] Legal feminists embracing gender neutrality as an ideal in the family domain, some critical voices have claimed, have not duly recognized how this goal may not only be elusive, but in the end also risk marginalizing parenting and reproduction.[43] This is particularly the case whenever, in spite of its neutral framing, the legal system still rests on the assumption of the family as the natural repository of "inevitable dependency." This construction might have allowed dependency to be allocated away from the state to the private grouping, and, in doing so, facilitated the continuation of gendered-role divisions that are largely embraced by society.[44] In other words, it seems that the US's constitutional anti-stereotyping gender equality doctrine has not accommodated, for well-founded fear of entrenching, the underlying social reality of a gendered division of roles and spheres, yet without having done enough

[37] 29 U.S.C. § 2601(b)(5) (2006).

[38] *Id.* § 2601(a)(5).

[39] *Id.* 2612(a)(1).

[40] Nevada Department of Human Resources v. Hibbs, 538 U.S. 721 (2003).

[41] *See* Reva Siegel, *You've come a Long Way, Baby: Rehquist's New Approach to Pregnancy Discrimination in Hibbs*, 58 Stan. L. Rev. 1871, 1884 (2006). In a later case, the Supreme Court declared that the FMLA's medical leave based on the "self-care," as opposed to the family care, provision exceeded Congress's § 5 power so that the provisions were to be understood as binding only on private employers: *see* Coleman v. Court of Appeals of Maryland, 132 S. Ct. 1327 (2012).

[42] Martha A. Fineman, The Neutered Mother, the Sexual Family and Other Twentieth Century Tragedies 88 (1995).

[43] *Id.*

[44] *Id.* at 161–162.

to subvert it. In so doing, it might have contributed to rendering the social value of human reproduction invisible. Arguably, this evolution has also been facilitated by a constitutional doctrine of family privacy strictly anchoring care and reproduction in the domain of privacy, impenetrable to gender equality considerations.[45]

3.2. Europe: the boundaries of accommodationist workerism

The European account reveals a different landscape resulting, broadly speaking, in a constitutional gender discrimination doctrine that does not "privatize" and silence pregnancy and motherhood, but rather seeks the adoption of measures to facilitate the combination of paid employment and unpaid care labor, but mostly *for women*, thereby accommodating and entrenching, rather than ignoring or subverting, women's unique role in reproduction and family sustenance as well as generalized gender stereotypes surrounding it. Constitutionally speaking, we find a moment of convergence in the US and Europe around the 1970s, when formal equality between the sexes in every domain, including the family and the marketplace, is simultaneously affirmed, fuelled by the expansion of market forces as well as the challenge to women's confinement to the home and family domains, often reflected in openly discriminatory legal norms, by second wave feminism.

In Italy, for instance, already in the late 1960s and early 1970s, the Italian Constitutional Court explicitly abandoned its precedent justifying women's subordinate position in the family.[46] Soon thereafter, most of the remaining explicit sex-based differentiations came to be seen as contrary to the principle of equality, and legal reforms followed suit to remove them from the legal order. The main reform, in this sense, was that of family law tackling several articles in the 1942 Civil Code in 1975. Similarly, in Germany, in the 1970s, formal equality was first strongly affirmed in the family domain, as defining the relationship between husband and wife.[47] With the first

[45] The right to family life—family understood as autonomy and privacy, not as an institution deserving the active protection of the state—was only affirmed for the first time in Griswold v. Connecticut, 381 U.S. 479 (1965) (which was concerned with marital privacy regarding the use of contraceptives). It has since expanded to cover a whole set of family-related autonomy rights (sometimes recognized as pertaining to the individual, and sometimes to the marital unit, but always framed as negative or non-interference rights), including the right to marry, procreate, terminate pregnancy, cohabitate with extended family, raise children, and engage in sexual intimacy. Again, the family was simply assumed as the underlying cell in the social structure in the US. This can also be supported by the fact that, in Griswold, when the court first affirmed the notion of marital privacy, it referred to a zone of privacy derived from several constitutional amendments; in fact, marital privacy was treated as (an implicit) "right older than the Bill of rights," thus hinting at both its foundational and presumably natural character. *See* David D. Meyer, *The Paradox of Family Privacy*, 53 Vand. L. Rev. 527 (2000).

[46] *See* Corte Cost., 16 dicembre 1968, n. 126 (It.), departing from its precedent (Corte Cost., 28 novembre 1961, n. 64 (It.)) regarding women's differential treatment with respect to adultery. *See also* Corte Cost., 24 giugno 1970, n. 133, overturning Corte Cost., 12 dicembre 1967, n. 144 (It.), and declaring contemporary conception of spousal relationships to no longer be based on the superior status of the husband.

[47] For instance, the Federal Constitutional Court recognized that in a marriage between a German and a foreigner, it was discriminatory to grant the children German citizenship only if the father was German: *see* BVerfGE 37, 217, Mar. 21, 1974. The court also struck down the Civil Code's provisions requiring all family members to take the husband's family name, and wives, wanting to keep their birth name, to add it to their husband's: *see* BVerfGE 48, 327, May 31, 1978 (Ger.).

legal reform of marriage and family law of 1976, traditional family roles, whereby the husband was responsible for the income and the wife had to take care of the household (the so-called *Hausfrauenehe*), were abolished in the German Civil Code (BGB).[48] Jurisprudentially, this reform was manifested in the fact that challenging or claiming differentiated or undifferentiated treatment on the basis of the assumption of women's greater housework was declared unconstitutional. For instance, in 1979, a provision that had been designed to facilitate women's "double shift," granting women working outside the house one paid "housework" holiday a month, but denied the same advantage to men, was declared unconstitutional.[49]

For a short period of time, it seemed that in constitutionalism, things might go the same way as in the US, with some anti-gender stereotyping policies already being adopted in the Nordic countries, and sex neutrality becoming the new paradigm.[50] But in the end, European constitutionalism, as developed mostly in countries with traditionalist family systems, remained largely loyal to the longstanding tradition of acknowledging the distinctive role and the needs of motherhood, reflecting the imprint of a protectionist welfare state expecting the state to actively intervene to assist mothers, rather than take on a direct responsibility for human reproduction and care. In Europe then, an accommodationist and maternalist logic prevailed, which translated into a constitutional validation (indeed requirement) of measures seeking to provide pregnant women and working mothers with the actual means to combine paid and unpaid labor as a way of ensuring that they could be present in the labor market while also being mothers and caretakers. In reality, this model has had equally serious shortcomings, for, more often than not, it has entailed women's distinctive and limited form

[48] Erstes Gesetz zur Reform des Ehe- und Familienrechts, June 14, 1976, BGBl. I, 1421 (Ger.).

[49] BVerfGE 52, 369, Nov. 13, 1979 (Ger.). Around the same time, in 1975, the Federal Constitutional Court denied the claim that the refusal to make the cost of childcare a tax deduction discriminated against women who carried out paid work on the basis that, if both spouses shared the role of the breadwinner, they presumably also shared children and housework. *See* BVerfGE 39, 169, Mar. 12, 1975).

[50] Scandinavian countries' exceptionally early departure from the accommodationist model and their adoption of an active anti-gender stereotyping agenda have been linked to the specific features of the process of transformation of the Nordic countries from agrarian to modern societies, and, in particular, to the way this transition skipped the bourgeois phase, avoiding the entrenchment of the separate spheres which in so many other European countries accompanied modernity and industrialization. Scandinavian countries granted property rights to all women rather early on. Marriage legislation reform also took place several decades before it did in most other European countries, providing for equal property rights, divorce liberalization, and complete abolition of male authority, as well as equal custody of the children. This explains why Scandinavian women were among the first to get the right to vote, but also why the welfare state developed hand in hand with (instead of prior to) family reform legislation in a non-paternalistic, gender-egalitarian framing of care as a collective responsibility. Against this background, it is not surprising that, starting in the 1960s, the Nordic countries in general, and Sweden in particular, have gradually done away with woman-protective labor legislation, mostly extending protections formerly reserved for women to men, while encouraging the latter to play a more active role in the home, and making sure that the State provides care resources. At the same time, the centrality of the acceptance of state responsibility for the provision of needs related to care clearly distinguishes the Scandinavian gender equality conception from that dominant in the US. For a historical analysis of the Nordic welfare state and its connection to the family model, *see also* The Nordic Model of Marriage and the Welfare State 27 (Kary Melby et al. eds., 2000).

of inhabiting the labor market. Indeed, attending to the existing gendered realities by facilitating women's double shift has often translated into women being placed on a separate track, the so-called "mommy track," a track with different forms of glass ceilings and characterized by market segregation, with more women than men in the informal sector, working part time, with lower pay.

One of the engines behind the increasing European convergence towards this accommodationist workerist model has been the European integration process, with a full-bodied anti-gender discrimination law developed since the 1970s, often boosted by the case law of the European Court of Justice (ECJ), affecting the evolution of national antidiscrimination law. Tellingly, this law has also recognized, rather than denied or ignored, the centrality of pregnancy and maternity. It has accommodated, but also arguably entrenched, under a doctrine of indirect discrimination and a substantive equality/equality of opportunities framing, women's distinctive forms of inhabiting the labor market, such as by performing more part time work than men, mostly to reconcile employment and family life.[51] Normative motherhood (i.e., the expectation that women should be mothers and that the State should facilitate and accommodate women's specific roles as mothers) has been largely prevalent in Europe, some of the Nordic countries never joining the Union and others doing so as late as the mid 1990s.

Constitutionally speaking, several doctrinal elements, reflective of Europe's constitutional synthesis combining elements of the welfare and the liberal state tradition, have shaped Europe's constitutional, anti-gender discrimination model, including its potential and shortcomings. We can illustrate and distill them from the German FCC's case law. As early as the 1980s, following a substantive equality/anti-subordination logic, the court departed from the formal equality paradigm, and validated differential treatment, when it saw that such different treatment was intended to ensure women's equal opportunities, especially in view of their roles as mothers, mostly by addressing the need to overcome undervaluation of the part-time employment option. In other words, giving advantages to women that could help them overcome their disparate chances became more important than using equality law and gender neutrality as expressive

[51] Treaty Establishing the European Community, art. 141, Feb. 26, 2001, 2001 O.J. (C325) 33, 96 (hereinafter EC Treaty) (ex-art. 119 EEC), in force since 1957, requires that men and women receive equal pay for equal work. The first Equal Treatment Directive, adopted in 1976, defines equal treatment as "no discrimination whatsoever on the grounds of sex, but also provides that this is without prejudice to the provisions concerning the protection of women, particularly as regards pregnancy and maternity": *see* Council Directive 76/207, art. 2 1976, 1976 O.J. (L. 039) (EC). In cases litigated under art. 141 of the EC Treaty (ex-art. 119 EEC) since the 1970s, the ECJ has interpreted this treaty to require parity in compensation between part-time and full-time workers, unless there is some objective justification for the difference. For, under a doctrine of indirect discrimination, the contrary would amount to sex discrimination because of the disproportionate effect it has on women, who are the ones most commonly relying on this form of employment because of family reasons: see 96/80, Jenkins v. Kingsgate, 1981, E.C.R. 911, 925–926. Part-time workers have also been protected on similar grounds under the more recent Council Directive 2006/54 on Equal Pay and Equal Treatment of Men and Women in Employment, art. 1, 2006 O.J. (L 204), 23, 26 (EC). In addition to the lower hourly wages of part-time workers, the equal-pay provision has been invoked to invalidate the exclusion of part-time workers from pension schemes: *see* 170/84, Bilka-Kaufhaus GmbH v. Weber con Hartz, 1986 E.C.R. 1620, 1630.

tools to combat sexual stereotypes.[52] This commitment to substantive equality notions became only more obvious when, in October 1994, article 3.2 GG (declaring equal rights between men and women) was amended, explicitly making it the state's duty to promote the effective implementation of equality of rights for women and men. The challenge remains of course to decide, in every single instance, if *prima facie* protective or compensatory measures may confirm, instead of subverting, women's subordination, either by perpetuating gender stereotypes and/or by presumably limiting women's market options.[53] This is a challenge that the FCC has been aware of, and which, as of recently, has led it to support the need, if not to reduce, at least to distribute more evenly the social costs of the protection of motherhood in the workplace.[54]

However, unlike in the US and similar to Italy, in Germany, it has remained uncontroversial that mothers and pregnant women deserve special constitutional protection at work (something the German Court derives from art. 6.4 GG), a duty of protection that, according to explicit constitutional mandate, does not fall to the state alone, but to the community as a whole.[55] And although the protections for pregnant women and working mothers have typically come through legislation, such as legislation on maternity leave—seen as a key component in gender-equality policies throughout Europe[56]—the FCC, like many of its European counterparts, has never hesitated to

[52] *See* Rodríguez Ruiz & Sacksofsky, *supra* note 20, at 154. For the Federal Constitutional Court, proper protections were, however, to be distinguished from paternalistic protections that de facto limited women's opportunities. *See* BVerfGE 85, 191, Jan. 28, 1992 (Ger.), striking down a law forbidding women to work at night.

[53] *See* BVerfGE 85, 191, Jan. 28, 1992 (Ger.), striking down a provision that prohibited women's work at night because it perpetuated an image of women both as mothers and as defenseless creatures, reinforcing women's subordination; and BVerfGE 92, 91, Jan. 24, 1995 (Ger.), striking down provisions in force in the states of Baden-Württemberg and Bavaria, which obliged men to pay a contribution to firefighting forces in lieu of physical service, because both the duty and the proxy, although seemingly favorable to women, sustained the traditional sexual stereotypes, portraying men as protectors and women as in need of protection.

[54] *See* BVerfGE 109, 64, Nov. 18, 2003, on employers' contribution to maternity leave. This decision struck down § 14(1) of the German Act on Maternity Protection (Gesetz zum Schutze der erwerbstätigen Mutter (Mutterschutzgesetz—MuSchG), as amended Apr. 18, 1968, BGBl. I S. 315, and subsequent amendments), arguing that even though the obligation of the employer to contribute to the maternity leave allowance of its female employees, and the resulting financial burden, was not in itself a violation of art. 12 GG, the possible discriminatory effects of the legislation (resulting in employers hiring less women) should also be taken into account, and forcing the legislator to either extend the pay-as-you-go system that it had adopted to protect smaller enterprises to larger undertakings, or to resort to different means to eliminate the discriminatory effect on employment opportunities for women caused by MuSchuG, § 14(1) (Rn. 133).

[55] According to art. 6.4 GG, "every mother is entitled to protection by and care of the community."

[56] Legislated and often mandatory maternity leaves, which are only one of the forms of support for working parents common in European countries, have a long history in Europe, dating back, in some cases, to the nineteenth century and the formation of the welfare state. The early legislation was typically paternalistic in its concern for the health of the child and mother (prenatal and postnatal leave being compulsory and supplementary income support or job-protection seldom provided). After World War II, the pronatalist rationale became very explicit in social policies across Europe, many wishing women to return to the home in the heyday of the breadwinner model. Yet, the late 1960s had launched two decades of change during which the concept of maternity leave evolved from a prohibition on employing women during the period surrounding pregnancy to one of time off work to care for newborns and young children, combined with job security for the parents. Countries with compulsory leave added prohibitions against dismissal from employment of both pregnant workers and workers on maternity or paternity leave, the logic becoming one of allowing mothers to work rather than keeping them in the home.

intervene when legislative protection was inadequate. This was the case, for instance, in 1991, after the reunification of the country, when a civil service reorganization scheme had been adopted which the court deemed insufficiently protective of pregnant women.[57] In Europe, then, special protections for maternity and pregnancy have hardly ever been challenged or seen as in conflict with notions of gender equality. In fact, they have been seen as required by a substantive interpretation of gender equality. Similarly, pregnancy-related discrimination, very broadly understood, has been considered to qualify as constitutionally forbidden gender discrimination.

Additionally, the acceptance of disparate impact discrimination under the clear influence of EU law has allowed the FCC to check whether formally neutral norms or acts could have a disparate, negative impact on women in their legal and social (and not just biological) realities, i.e., because of their *de facto* greater contribution to care labor in the household;[58] because of women's specific position within a sex-segregated employment market;[59] or even because of women's enjoyment of legal protections linked to motherhood, including, most recently, in the highly politicized context of immigration.[60] Yet, the FCC has not, for the most part, until most recently, remarked that accepting, accommodating, and compensating women as mothers, could be a discriminatory way of entrenching existing gender roles and stereotypes.

It is significant that, in both the US and European constitutional traditions, the division of tasks within the family, and by extension the perpetuation of social and cultural gender norms and expectations, at least until very recently, has been relegated to the so-called domain of constitutional family privacy, free of state interference, thereby limiting the scope of application of constitutional substantive equality even

[57] *See* BVerfGE 84, 133, 155 *et seq.*, Apr. 24,1991 (Ger.).

[58] *See* BVerfGE 113, 1, Apr. 5, 2005, declaring professional pension fund rules for members of the Baden-Württemberg bar contrary to art. 3(2) GG, in as far as they do not exempt members from paying the contribution during the time they stay at home, and are without income to take care of their children, arguing that such a provision will usually place female members at a disadvantage in contrast to male members.

[59] *See* BVerfGE 126, 29, Apr. 14, 2010, finding, in the context of the privatization of hospitals in Hamburg, the state's decision to provide employment to all employees previously employed when the hospitals were held by the *Land* with the exception of the persons employed in the cleaning services, to be in violation of art. 3(1), and also in violation of art. 3(2), because this measure predominantly affected women, who usually formed the majority in the sector for cleaning services.

[60] *See* BVerfGE 132, 72, July 10, 2012, striking down a legislative provision making it conditional for third-country nationals possessing a residence permit for humanitarian or political reasons, or on other grounds of public international law, to receive education and parental allowances by the German state only in case they were integrated into the labor market. The court held that the provision was discriminatory and, more specifically, infringed the prohibition of non-discrimination on the basis of gender in art. 3(3) GG, in view of the fact that the eligibility criteria to receive educational and parental allowance are more difficult to fulfill for women than for men (Rn. 70). According to the court, women are discriminated against because after they have given birth, the law prohibits them from working; as a result, unlike men, women are unable to fulfill the requirement of being integrated in the labor market. Furthermore, even after the minimum period of obligatory maternity leave, mothers often still need to breastfeed their children, which makes it more difficult for them to find adequate employment (Rn. 71). In the court's view, legislative acts that are not directly linked to unique traits of women or men, but which place women at a disadvantage due to *legal* or *biological* differences, are subject to very strict justification standards under art. 3(3) GG—standards which were not met this case (Rn. 73).

in Europe.[61] Indeed, as we shall see, the FCC has systematically and explicitly affirmed the State's duty to remain neutral with respect to the internal organization of the family. Yet, this neutrality has been easier said than done. For years, calling on it served to sanction the continuation of the breadwinner family model, and still today true neutrality proves to be an elusive goal.

3.3. So far ...

To summarize, post-World War II constitutionalism, especially as it developed since the 1970s, has allowed sex equality, understood as formal equality, to challenge the most blatant expressions of the separate-spheres ideology and denied the possibility of according men and women a different legal status of rights and duties. The most significant exception to this rule has been the articulation of pregnancy/motherhood employment accommodation measures targeting women, especially in Europe, where they have been said to be justified by a commitment to substantive equality notions. However, the constitutional gender equality doctrine has been an inadequate tool for undermining the separate-spheres ideology and the implicit sexual contract. This is true of the US, where the prevailing understanding of the state's limited role in shaping market forces together with an anti-stereotyping conception of gender equality, has restricted the possibilities of catering to the gender-specific needs of working women, and ended up relegating not only motherhood, but parenting and care mostly to the private domain. European constitutionalism has allowed, and even fostered, specific measures enabling women to combine work inside and outside the home. Yet, the European constitutional model risks entrenching, rather than subverting, gendered roles when it implicitly or explicitly underscores the "special relationship between a woman and her child," providing protection measures which can backfire against market forces in ways that restrict women's actual chances to be hired, retained and promoted, and implicitly endorsing a limited understanding of the importance and nature of fatherhood. Moreover, both constitutional traditions have failed to do one thing, which is moving past formal equality and gender neutrality *beyond* the market domain. Constitutionally entrenched notions of family privacy have justified the courts' resistance to interference with presumably freely chosen internal family arrangements, and gender-neutral norms have not been systematically assessed as to their effects concerning the possible perpetuation of gender-differentiated roles.

[61] In Europe, where the institutional approach to family and marriage has prevailed at the constitutional level, the first post-World War II constitutional texts did not contain the notion of a right to family privacy, and made only reference to the inviolability of the home, intended to protect against undue searches and seizures (see, for instance art. 13 GG and art. 14 of the Italian Constitution). This changed in the 1950s when the European Convention on Human Rights recognized the right to private and family life under art. 8, as well as the right to marriage under art. 12. Other European constitutions would consequently follow suit, and recognize marriage (often coined as a fundamental right and/or institution) and family (often expressed as an institution) separately. The Spanish Constitution constitutes an example of this (art. 39 refers to the family as an institution that deserves state protection, and art. 32 refers to the fundamental right that a man and a woman have to marry). But even where it was not explicitly spelled out, the right to family privacy has often been doctrinally derived, as did the FCC in Germany, grounding it on art. 6.1 GG, which simply states that marriage and family enjoy the protection of the State.

This has allowed *de facto* gender inequalities to continue unchecked in some of the domains which, since modernity, have shaped women's distinctive citizenship, such as the family.

4. Gender constitutionalism in the new millennium: care and gender roles in the family as a constitutional matter

In the new millennium, the unequal distribution of roles, tasks, and power between women and men has become an increasingly contested subject. Several new approaches are being proposed that not only go beyond gender neutrality and formal equality, but also beyond rights, crucially targeting institutions. Several legislative and policy agendas seeking the active disestablishment of gender roles in both the public and private spheres of participation are proliferating at the same time, and a new overall constitutional gender equality conception seems to be emerging, showing increasing convergence in departing from traditionalist and embracing sex egalitarian understandings of the family instead.

To some extent, constitutionalism is facilitating, or at least not getting in the way of this transformative agenda. Yet, in many contexts, constitutionalism is also acting as a reactionary force, especially in older constitutional democracies where, as we have seen, constitutional law and doctrine had been created to emulate, rather than subvert, the separation between the public and the private and the breadwinner-family model. Among the many hot points in contemporary constitutional gender struggles (including same-sex marriage or unions, gender quotas, sex change, and abortion rights), one of the most interesting and underexplored issues shows how, in recent years, the division of gender and care roles within the family is gaining in constitutional significance, and is increasingly seen as being connected to constitutional gender-equality provisions. This section provides examples of these evolutions, drawing inspiration mostly from Europe, and signals the constitutional shifts required for the successful challenge of the breadwinner family model, as the cornerstone of the original gender order.

4.1. The de-gendering of care: towards a new constitutional father?

Parallel to, and concurrently with, the movement for the empowerment of women in decision-making positions (often articulated through the adoption of gender quotas), we can observe an expansion of the agenda to change how human reproduction and care are conceptualized and accommodated within the workplace as well as within the household. We find that European countries, with the Nordic ones in the lead since the accession of Sweden and Finland to the EU in 1995, and European institutions are actively involved. This move represents an attempt to go beyond the widespread, traditional accommodationist European model (seeking to protect pregnant women and working mothers), and aims at ensuring work/family balance for all, as well as the sharing of care responsibilities between men and women as a further step to disestablishing gender roles and guaranteeing equality for women. Constitutionally speaking,

this development therefore represents a synthetic third way which promises to retain the best of the traditional US and European constitutional models, overcoming both the shared and separate limitations of each. In essence, the third way consists in constitutionally retaining the social and political centrality attached to reproduction and care, while at the same time remaining focused on actively challenging traditional gender roles.

In Europe, the mid-1990s marked a turning point in the understanding of care/family and work/life balance, and its relation to the genders. If, in its original 1961 version, the European Social Charter had envisaged a right to maternity or parental leave exclusively for employed women; the 1996 Revised European Social Charter required member state parties "to provide a possibility for either parent to obtain, during a period after maternity leave, parental leave to take care of a child [with a view to ensure the exercise of the right to equality of opportunity and treatment for men and women workers with family responsibilities and between such workers and other workers]."[62] Almost at the same time, the Committee of Ministers of the Council of Europe approved Recommendation No. R (96)5 on reconciling work and family life,[63] urging member states to enable women and men, without discrimination, to better reconcile their working and family lives (I). That same year, at the EU level, a Parental Leave Framework Agreement was approved in the form of a Directive providing "men and women workers an individual right to parental leave on the grounds of the birth or adoption of a child to enable them to take care of that child, for at least three months, until a given age up to 8 years [to be defined by Member States and/or management and labour" (2.1), but also providing that such leave should, in principle, be granted on a non-transferable basis to promote equal opportunities and equal treatment between men and women (2.2).[64]

The turn of the century saw this agenda evolve further (though mostly through soft-law instruments). In 2000, for the first time, the EU Charter of Fundamental Rights included a provision devoted to both family and professional life (art. 33). And although it still refers to maternity, and not to paternity, leave (and only in terms of the necessary protection from dismissal of a worker on leave), it also includes a gender-neutral reference to parental leave, spelling out the specific goal of reconciling family and professional life. In 2002, the Parliamentary Assembly of the Council of Europe adopted a Resolution on Parental Leave, explicitly alluding to the need to ensure a

[62] In particular art. 8 of the Revised European Social Charter (May 3, 1996, entry into force July 1, 1999) established that "with a view to ensuring the effective exercise of the right of employed women to protection, the Contracting Parties undertake (1) to provide either by paid leave, by adequate social security benefits or by benefits from public funds for women to take leave before and after childbirth up to a total of at least 12 weeks."

[63] Committee of Ministers of the Council of Europe, Recommendation No. R (96) 5 on Reconciling Work and Family Life, adopted June 19, 1996 at the 569th meeting of the Ministers' Deputies.

[64] Council Directive 96/34/EC of June 3, 1996 on the Framework Agreement on parental leave concluded by UNICE [Union of Industrial and Employers' Confederations of Europe], CEEP [European Centre of Enterprises with Public Participation and of Enterprises of General Economic Interest], and the ETUC [European Trade Union Confederation] gave effect to that agreement, which had been entered into on those cross-industry representative organizations on Dec. 14, 1995.

"genuine partnership in the sharing of responsibilities between women and men in both the private and public sphere,"[65] and in 2007, the Committee of Ministers passed a Recommendation (on gender equality standards and mechanisms), endorsing measures to reconcile private/family life and professional/public life, such as the adoption and extension of paid maternity leave, paid parental leave equally accessible to both parents, and paid non-transferable paternity leave, as well as other measures to allow the fulfillment of family responsibilities, including care and assistance to the sick or disabled, children, or dependents.[66] Recently, both the Court of Justice of the European Union (CJEU)[67] and the European Court of Human Rights (ECtHR)[68] have also entered the debate, validating the agenda of fighting gender stereotypes around care roles.

Although still implemented across Europe only to a limited extent, the recommendations and policies are foregrounding a renewed understanding of fatherhood. Given the privileged place of motherhood in many constitutions, constitutional courts have sometimes been asked to take a position. The Italian case provides a good example of the fact that a new understanding of fatherhood is required, but also of the limited reach that such understanding has achieved so far both in law and in constitutional doctrine. In spite of the Constitution's explicit sanctioning of the importance of motherhood duties within the family,[69] what we have observed since the late 1980s and early 1990s, up to the present, is a series of cases agreeing on the extension of legislative maternity leave granted to fathers (relying on a joint reading of art. 3's equality principle and art. 29's recognition of spousal equality in marriage).[70]

[65] *See* Resolution 1274(2002) on Parental leave (§§ 1–3), urging member states, if they have not already done so, to take the necessary steps to ensure that their legislation recognizes different types of family structure and, accordingly, to introduce the principle of paid parental leave including adoption leave.

[66] *See* Committee of Ministers of the Council of Europe, Recommendation Rec. (2007) 17 on gender equality standards and mechanisms, adopted Nov. 21, 2007 at the 1011th meeting of the Ministers' Deputies, § 36.

[67] In 2010, the Court of Justice of the European Union (CJEU) condemned Spain, in the case of C-104/09, Roca Álvarez v. Sesa Start España ETT, 2010 E.C.R. I-08661 (Sept. 30, 2010), for sex discrimination in a provision denying a half-hour reduction in the working day for the purpose of feeding a baby to employed fathers (unless the mother was also an employed person), while employed mothers were always entitled to such leave (including when their husbands were self-employed).

[68] In Konstantin Markin v. Russia, App. No. 30078/06, ECtHR, Grand Chamber, Mar. 22, 2012, and confirmed by the Grand Chamber in 2012 (Konstantin Markin v. Russia, App. No. 30078/06, ECtHR, Oct. 7, 2010), the ECtHR overturned its own precedent (from 1998), and declared the norm in the Russian legislation granting only military servicewomen, but not military servicemen, a three-year parental leave contrary to the right to family life in relation to the principle of gender equality (art. 8 in relation to art. 14 of the Constitution). An overview of the emergence of an anti-stereotyping strand in the gender equality doctrine of the ECtHR can be found in Alexandra Timmer, *Toward an Anti-Stereotyping Approach for the European Court of Human Rights*, 11(4) Hum. Rts L. Rev. 707 (2011).

[69] Notice that art. 37.2 of the Constitution provides that working conditions must allow *women* to fulfill their essential *family duties*, and ensure an adequate protection of mothers and children (italics are mine).

[70] In doing so, the Constitutional Court has departed from the distinction between the general principle of sex equality (*ex* art. 3 of the Constitution) and the principle of spousal equality in marriage (*ex* art. 29 of the Constitution), a distinction it had previously defended, arguing that with respect to family matters, the article that should be taken into consideration is art. 29 and not art. 3, because the former concerned women's equality *within the family entity*, while the latter concerned women's equality as individuals *in society*: *see* Corte Cost., 16 dicembre 1968, n. 126, §§ 5–6 (It.) and Corte Cost., 27 novembre 1969, n. 147, § 6 (It.), both concerning adultery regulation. This public–private separation, which hides the

This case law has validated a more equitable distribution of care, and it represents a gradual, albeit imperfect, process of gender role disestablishment. Moving past an exclusive focus on maternity as a purely physical condition, and the supposedly unique biological feature of the mother–child relationship, the Italian court has increasingly considered the parent–child relationship beyond the rigid focus on traditional gender roles.[71] As a result, fathers have been increasingly granted the rights and obligations established by the Constitution for parents in general.[72]

Full disestablishment, however, has not yet been fully achieved: the legislator has not provided for it, and the Constitutional Court has not deemed this to be problematic as of yet. Indeed, a close reading of the court's case law shows a narrative that foregrounds the principle of the best interest of the child (interpreted as justifying preferential access to the mother in the first months of life), which the court has extracted from the Italian order considered as a whole, much more than gender equality.[73] Underscoring the idea of family privacy, the court has kept referring to the need to allow parents to freely manage their family organization, and the distribution of productive and reproductive work among

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interrelationship between the societal and family spheres, persisted until the court started to analyze working parents' care activities. It is at this point that we can see that the boundaries between public and private start to blur, and that the court starts resolving cases relying on arts. 3 and 29: see Corte Cost., 15 luglio 1991, n. 341, § 3 (It.); Corte Cost., 21 aprile 1993, n. 179, § 5 (It.), and Corte Cost., 14 ottobre 2005, n. 385, § 6 (It.).

71 *See* Corte Cost., 14 gennaio 1997, n. 1 (It.) (establishing a right to paid paternity leave and paid daily rest for biological fathers employed as dependent workers in case of death or serious illness of the mother dependent worker on the basis of arts. 3, 29(1), 30(1), 31 and 37 of the Italian Constitution, arguing that the non-extension would amount to discrimination against working fathers and minor children who can only rely on their fathers' care. In support of its decision extending the benefits to fathers, the court observed that, in addition to pursuing the aim of protecting mothers' health immediately after giving birth, a maternity leave "also protects the relationships that necessarily develops between mother and child during that time, not only in relation to strictly biological needs, but also with respect to the relational and emotional needs which are connected to the development of the child's personality" (Corte Cost., 14 gennaio 1997, n. 1, § 6 "Legal Grounds"). Similarly, the court stressed that paid daily rest periods were no longer related to breastfeeding, and that consequently "their aim [had] now become that of allowing the mother to attend to the delicate and challenging tasks connected with the assistance to the child during his first year of life" (Corte Cost., 14 gennaio 1997, n. 1, § 7 "Legal Grounds").

72 Following the jurisprudential line of Corte Cost., 14 gennaio 1997, n. 1, *see* Corte Cost., 15 luglio 1991, n. 341 (It.), including foster fathers among the dependent workers allowed access to paid paternity leave; Corte Cost., 21 aprile 1993, n. 179, Apr. 2, 1993 (It.), extending the scope of the right to paid daily rest for biological fathers employed as dependent workers beyond the cases of widowhood or serious illness of the mother, as envisaged by judgment No. 1/1987, to include all situations where the mother, as dependent worker, had renounced her own right to paid daily rest; and Corte Cost., 14 ottobre 2005, n. 385 (It.), recognizing the right to paid paternity leave of fathers who are freelance workers as an alternative to freelance mothers, provided that the latter have renounced this right.

73 This is particularly visible in Corte Cost., 15 luglio 1991, n. 341, § 3 (It.); Corte Cost., 21 aprile 1993, n. 179, § 5 (It.); and Corte Cost., 14 ottobre 2005, n. 385, § 6 (It.). Thus, typically, the court cites a whole set of constitutional principles as being involved in a similar matter, including the constitutional principles of maternity protection; the autonomous interest of the child; equal rights and obligations between spouses; and sex equality in the field of employment (enshrined in arts. 3, 29, 30, 31, and 37 of the Italian Constitution), but in its reasoning, only foregrounds the interest of the child.

them.[74] And although, in every instance, it has agreed to the extension of maternity leaves to plaintiff fathers, sometimes even explicitly referring to changing perceptions around gender roles,[75] in all the cases, fathers have been allowed to access work benefits related to childcare *only when* working mothers either renounced or were unable to enjoy them, a distinction which the Court was still willing to justify in 1994 on the basis of "the more important character of the mother's presence during the first year of the child ('the call of nature')."[76] This is normative motherhood at play.

In short, although we can identify a growing rhetorical consensus around the importance of work/family balance for all, the diffusion of legal instruments to ensure that fathers can, and do, exercise care duties, is still clearly insufficient. This shows that Europe's traditional recognition of the centrality of reproduction and the care that occurs in the family has the potential of giving care and reproduction their social and political centrality if duly supplemented by an active gender disestablishment agenda, which is still far from being fully achieved, even in the Nordic countries where it was first conceived. And while the progression towards a gender-neutral/egalitarian framing of parenthood and care-enabling measures that such an agenda would require would make it at least constitutionally more viable in the US, as we saw in *Hibbs*, the mandatory nature of maternity or, eventually, paternity leave (allowing workers not to be pressured against taking such leaves) would doom these measures

[74] *See* Corte Cost., 15 luglio 1991, n. 341, § 3 (It.) and Corte Cost., 21 aprile 1993, n. 179, § 5 (It.): "the delicate choice of the parent who can better attend to the child's needs by being absent from work must be entrusted to an agreement between spouses themselves, in a spirit of loyal collaboration, and in the exclusive interest of their child."

[75] *See, e.g.*, Corte Cost., 21 aprile 1993, n. 179, § 3 (It.), literally stating that "while not overlooking the social function of maternity, the prevailing interest of the child has acquired more and more importance and—moving past a rigid view on the different roles of parents and of the absolute priority of the mother—equal rights and obligations have been recognized to both spouses, together with their mutual integration in the care and psycho-physical upbringing of their child."

[76] *See* Corte Cost., 1994, n. 150, § 5 (It.), upholding the exclusion of working fathers married to women business owners from six-months maternity leave which women business owners did not enjoy either, even though husbands of women who were dependent workers were assigned such leave, just like women who were dependent workers: "Per la madre, invero, tale diritto può in certa misura qualificarsi proprio o 'primario,' per il padre esso ha in vece carattere derivato o 'sussidiario'. E ciò sia per la maggiore importanza della presenza della madre nel primo anno di vita del bambino ('natura clamat'), sia per i diversi riconoscimenti normativi." Currently, Italian law—and more specifically the so-called Testo Unicosulla Maternità e Paternità—envisages a period of mandatory absence from work (or mandatory maternity leave) for dependent workers as well as business owners, among other categories, during which they receive 80 percent of their salary. This period is flexible, but generally covers two months before the expected date of birth and three months following the birth of the child. Fathers may benefit from this leave of absence only in a subsidiary way, i.e. in case of death or serious illness of the mother, abandonment of the child by the mother, or exclusive custody. Women autonomous workers also receive 80 percent of the salary for the described period, although they are not obliged to be absent from work. In addition to this, working mothers and fathers are recognized the right to paid parental leave of absence for the first eight months of the child for a maximum total period of 11 months combined between the two parents. Recently, L. 28 giugno 2012, n. 136 has also established a mandatory absence from work for fathers (of one day) and a non-compulsory paternity leave of two days, but only as an alternative to that of the mother. During this leave, fathers will receive 100 percent of their salary.

in the US, given that they would be seen as paternalistic interferences with constitutionally sanctioned individual liberties (of both employers and employees).[77]

Be that as it may, the fact is that, even in Europe, where these constitutional hurdles are absent, apart from programmatic language and modest legal incentives, we find that progress has been slow, and, under the pressure of so-called austerity policies, risks to be even further slowed down. After all, in Europe, maternity leave continues to be mandatory in most instances, whereas paternity leave is typically optional and much shorter. More aggressive measures, such as requiring men to take some paternity leave, giving both the new mother and the new father fully paid non-transferable leave (instead of just adding a few additional nontransferable weeks or months when both parents take a leave), or, as some have suggested,[78] providing paid pregnancy and childbirth leave only to mothers and longer paid caregiving leave only to fathers, have not been taken. Ongoing protection of motherhood-centered care therefore threatens to perpetuate gender stereotypes.

4.2. Overcoming the constitutional myth of state neutrality: beyond privacy and formal equality in the family domain

So far, we have seen that the full disestablishment of the traditional gender order requires both the accommodation (instead of neglect) of reproduction, care, and human interdependence in the workplace, and that this accommodation be done through measures which are normatively detached from women and re-attached to personhood. Constitutionally, some progress has been made by extending formal equality notions to the interpersonal relationships between employers/employees and spouses/partners regarding the issue of care-related employment leave. Yet, even if fully accomplished, this path may still be insufficient. In the end, no subversion of existing gender roles will be complete unless it is accompanied by the recognition that, even after the necessary corrections to overcome remaining formal inequalities, the current gender neutral legal order may still not be sufficient to overcome the many implicit gendered ways of shaping interpersonal relations that are contained in the legal system. In other words, the goal of gender order disestablishment requires going beyond formal equality in every sphere (whether traditionally coined as "private" or "public"). This, in turn, would demand more decisive progress towards abandoning the myth of state neutrality, piercing the veil of family privacy, and drafting sex egalitarian default options, free of gender normative motherhood and care presuppositions.

In this respect, the evolution of the case law of the Federal Constitutional Court in Germany reveals the changes required, and the constitutional discussions that such changes are likely to stir up. From the beginning, the FCC has systematically maintained that article 6.1 GG, according to which "marriage and the family are under the special protection of the State," guarantees state neutrality with respect to families' internal organization. The problem is that state neutrality has been easier to promise than to deliver. And, until recently and with some exceptions, the promise of

[77] Suk, *supra* note 36.

[78] As proposed by *id.*

state neutrality has in fact been overwhelmingly interpreted as requiring respect for those couples wishing to stick to the traditional male breadwinner–female caregiver family model.

Let us draw an example from tax law. After World War II, Germany inherited a cumulative taxing system for married couples bringing the income of both spouses together for taxation purposes. Because of Germany's progressive taxation system, the cumulative method subjected marriages with double income to a greater financial burden than they would bear under separate taxation. In 1957, the FCC declared the system discriminatory, finding that it disadvantaged married couples (as compared to non-married couples or single persons), and dual income families (as compared to families with only one breadwinner, typically the husband.)[79] This led to a reform of income tax, the state seeking to live up to its promise of neutrality regarding the internal family structure. The new system allows married couples to choose between being taxed separately and, alternatively, embracing what is known as the "splitting" system, allowing the total earnings of the couple to be divided in two, and calculating the tax by doubling the amount of tax due on half their joint income. Once again, given the progressive nature of taxation, this system has the effect that a married couple pays less (or at most the same) as an unmarried couple with the same internal distribution of income; and the higher the difference in income levels, the more convenient the splitting system—something which clearly benefits marriages with only one breadwinner.[80] In the early 1980s, the FCC validated the splitting system, arguing that the advantages to marriage are justified on the basis of article 6.1's constitutional mandate sanctioning the protection of marriage.[81] Yet, given that the splitting system makes it unprofitable for both spouses to keep working unless they have similarly high incomes, its "neutrality" is illusory, for it does not encourage women's presence in the labor market.[82]

Although the court has never rhetorically abandoned its commitment to state neutrality, or to the preservation of a couple's autonomy when it comes to internal family arrangements, its jurisprudence in the new millennium shows a greater awareness of the impossibility of strict neutrality, and a greater willingness to foreground the constitutional mandate of gender equality when considering the range of constitutionally legitimate options. Interestingly, much of this jurisprudence is triggered by legislative measures recently passed with the explicit purpose of challenging the traditional division of roles in the family, and (re)conceptualizing fathers as caretakers and not just income providers.

[79] BVerfGE 6, 55, Jan. 17, 1957 (Ger.).

[80] Rodríguez Ruiz & Sacksofsky, *supra* note 20, at 164

[81] BVerfGE 61, 319, Nov. 3, 1982 (Ger.).

[82] Rodríguez Ruiz & Sacksofsky, *supra* note 20, at 164–165, also explain how the goal of state neutrality has shown to be equally unachievable with regard to the deduction of childcare costs, with married parents, single- or dual-income families, and single parents being either advantaged or disadvantaged by the possible options. For FCC case law on this matter, which, like in the taxation domain, has ultimately benefited traditional family arrangements, with special disadvantages for single mothers, see BVerfGE 61, 391, Nov. 3, 1982 (Ger.) and BVerfGE 68, 143, Oct. 17, 1984 (Ger.).

The most telling example is probably the one provided by a series of very recent cases concerning *parental leave allowances*. These cases all dealt with the constitutionality of several provisions in the 2006 Bundeselterngeld- und Elternzeitgesetzes (Federal Act on Parental Allowance and Parental Leave), fundamentally altering the method of calculating the amount of such allowances. Under the system prior to the reform, a maximum of 300 euros per month was awarded per child, depending on the net annual family income, reduced on a sliding scale basis, so that families with lower incomes received higher benefits. This policy, which was mainly concerned with income distribution between households with and without children, was then replaced by a policy aiming at facilitating work–life balance, increasing the fertility rate (including that of young professionals), as well as subverting traditional gender roles. According to the new system, the allowance is to be calculated according to the salary earned before childbirth by the parent who stays at home to take care of the child with a maximum amount of 1800 euros per month for up to 12 months. If the spouse staying in the house had never been employed, or had not been employed the year before the birth, only the 300 euros minimum would apply. This way, the act sought to increase the share of fathers taking parental leave (on account of there being an incentive for the person with higher income to be the one to take the leave), and reducing the long employment interruptions of German mothers (as there would be a strong disincentive for one of the income earners to stay without paid employment for more than one year, as this would entail the reduction of the amount to the minimum 300 euros).

The first challenge to the new system to reach the Federal Constitutional Court came from a woman who had had four children in eight years, and, being the primary caretaker, complained that she would only receive the minimum parental pay of 300 euros for the third child, as she had been on parental leave for the previous one prior to the birth of the youngest child. Interestingly, she argued (on the basis of the principles of equality (art. 3.1 GG), gender equality (art. 3.2 GG), and protection of family autonomy (art. 6.1 GG)), that the parental pay ought to be calculated on the basis of her income before having given birth to the first child. In its decision upholding the new system,[83] the FCC bluntly acknowledged that the challenged provision was more likely to affect women than men, given the traditional and widespread gender roles in the family. But in engaging with the gender-equality provision in the Constitution, the FCC replied that an interpretation as that requested by the claimant would actually be contrary to the spirit of article 3 (2) GG, because it might encourage one and the same parent to leave the employment market in the long term. As regards article 6(1) GG and its protection of the couple's freedom to decide on the organization of their marriage and family life, the court stated that it had been respected, given that the legislation left parents free to choose how to organize the education of their children, in fact enabling a model in which the parents themselves could take care of educating their children by temporarily leaving employment.[84] One can easily notice that this

[83] BVerfG 1 BvR 2712/09, June 6, 2011 (Ger.).

[84] *Id.* Rn. 9

understanding of family autonomy, as enabling a non-gender-biased combination of work and family life, with parents taking care of their children personally, instead of relying on external sources for such care, has nothing to do with an understanding of autonomy as requiring the state not to disadvantage the breadwinner-family model.[85] None of these understandings, however, can be said to be neutral. Either the social responsibility and/or detachment of gender normative assumptions from care roles is advanced, or it is not.

Just a few months later, a fairly similar reasoning helped the court sustain another provision of the same statute according to which the parental pay scheme, which allows for a two-month extension of the parental pay (commonly referred to *Vätermonate*) (from 12 to 14 months) only in case both parents take a leave, against the claim of a mother challenging the non-transferability of the two extra months. The plaintiff mother wanted to enjoy the two extra months, alleging her pre-term born baby's need for intensive and special care—special care which, according to her, only the mother could duly provide. Rejecting the constitutional claim, the FCC abandoned all pretense of state neutrality, and clearly referred to the *constitutional duty* imposed on the legislator by article 3(2) GG to enforce gender equality in social reality and overcome traditional gender roles in the future.[86] The court recalled that this social reality includes many prejudices against fathers taking "partner months."[87] In spite of the court's language, no constitutional *right* has been recognized as grounding the claim to a change in legislation targeting the perpetuation of gender roles in formally neutral legislation, even though the doctrine of indirect, or impact-based, discrimination could arguably lend itself to such interpretation.

Be that as it may, it is not surprising that the doctrinal advances challenging the predominance of the breadwinner-family model have been accompanied by a reevaluation of the father figure, in terms of care expectations, which is also reflected in the court's case law starting in the 1990s, but especially post-2000. During the 1980s, in a series of decisions concerning the rights of fathers regarding their natural children,[88] the FCC had validated the assumptions about men playing only a secondary

[85] Confirming this jurisprudential line, *see also* BVerfG, 1 BvR 1853/11, Nov. 9, 2011.

[86] BVerfG, 1 BvL 15/11, Aug. 19, 2011, Rn. 17.

[87] *Id.* Rn. 19. In fact, the FCC pointed to the fact that, since the adoption of the challenged legal provision in 2007, the number of fathers taking paid parental leave had increased from 15.4 percent to 23.9 percent at the end of 2009 (*id.* Rn. 23).

[88] *See* BVerfGE 56, 363, Mar. 24, 1981 (Ger.). In these cases, the FCC upheld the legislation, no longer in force, granting mothers exclusive custody of children, even when mother and father lived together and wished to share their children's custody. In doing so, it underscored the importance of the tie that is formed between mother and child from birth, and the need to avoid disharmony by granting fathers entitlements that they could exercise against the mothers' wish. None of this was seen as contrary to the gender-equality provision (art. 3.2 GG), even though the underlying assumption seemed to be "that fatherhood does not have the same impact upon men as motherhood has upon women, a father's attachment to his children building only indirectly through their relationship with the children's mother; that men are mostly interested in relationships while women give priority to caring for their offspring." *See* Rodríguez Ruiz & Sacksofsky, *supra* note 20, at 167.

role in childrearing. This started to change in the 1990s.[89] Yet, only after the turn of the century, has the equal role of fatherhood, both with regards to the individual man and the welfare of the child, been acknowledged, including, most tellingly, in the immigration context—a context which both in Germany and elsewhere often lends itself to greater judicial deference.[90]

4.3. Beyond rights and privacy: care as citizenship duties and participation

We have seen how the shifting constitutional doctrines in established democracies are gradually validating the expansion of the sphere of application of the gender-equality principle from the "public" to the "private" domain, daring to go beyond formal equality and gender neutrality, if not to fully replace individual and collective autonomy, at least to set up egalitarian default options. It seems that Europe's constitutional gender-equality tradition, which accepts the need to minimally accommodate parenting, care, and interdependence, as well as substantive equality notions, allowing the state to intervene to correct preexisting imbalances and to challenge indirect discrimination embedded in formally neutral legislation, has the greatest transformative potential, as long as it is accompanied by an active gender-roles disestablishment agenda. So far, progress has been limited, because normative motherhood is still deeply rooted in much of Europe's constitutional culture. Moreover, progress in this direction requires not only the contestation of gender roles within households, but also a greater acceptance of the social contribution, and hence responsibility for reproduction and childcare. Because of this, the current economic crisis and the demise of the welfare state ideology provide a serious challenge to this agenda.

Indeed, at the European level, with the effects of the financial crisis and widespread austerity policies looming large in many member states, the late 2010s showed the first signs of stagnation. Thus, 2010 saw the revision of the Parental Leave Framework Agreement, modestly extending the duration of parental leave from three to four months, and quantifying its minimum length (one month), which should be non-transferable to encourage a more equal taking of leave by both parents.[91] However, more aggressive proposals have failed. For instance, the Work–Life Balance Package[92] that was presented by the European Commission in 2008, which encouraged member states, among other things, to extend the duration of maternity leave from 14 to 18 weeks, and to introduce paternity leave, did not meet member states'

[89] For example in BVerfGE 84, 168, May 7, 1991 (Ger.), the FCC confirmed that, as a general rule, single mothers must be granted the exclusive custody of their children, but that joint custody should be allowed where both mother and father wished to embrace this solution, as one can see in some of the case law of the time.

[90] *See* BVerfGE 114, 357, Oct. 25, 2005.

[91] *See* Council Directive 2010/18/EU of March 8, 2010 on the application of the revised Framework Agreement on parental leave between BUSINESSEUROPE, UEAPME, CEEP, and the ETUC, replacing Directive 96/34/EC.

[92] *See* European Commission, 'Work-life balance package', Press Release, MEMO/08/603 (Oct. 3, 2008), *available at* http://europa.eu/rapid/press-release_MEMO-08-603_en.htm?locale=en.

approval; and so the proposed amendments to the Pregnant Workers Directive have not been adopted.[93] More recently, in 2010, a new proposal for a Directive amending the Pregnant Workers Directive was presented by the European Parliament, but has not been adopted, either.[94] It envisaged the extension of maternity leave to at least 20 weeks, as well as the introduction of a provision specifically devoted to paternity leave.

In short, what we find is that (still modest) signs of progress, in terms of policies seeking the "gender disestablishment" of care roles, are coinciding with signs of stagnation or even regression in terms of the social and political acceptance of the centrality of care. In other words, men and women are increasingly (though still far from fully) expected to renegotiate their roles, and encouraged to strive for a more fulfilling and balanced life as well as an egalitarian marriage, but care, human interdependence, and reproduction are only slowly and hesitantly coming out of the shadows of private life and the family repository to gain the recognition they deserve as dimensions of citizenship.

In the end, in terms of constitutional framing, we need to go beyond both the US and Europe, for it is some of the recently adopted constitutions that can be a source of inspiration. Such new constitutions embody the most explicit articulation of the social relevance of care as well as of the constitutional obligation to disestablish gender roles and inequalities within the family, in general, and as relates to care, in particular. This shift is expressed in multiple ways. One of the most recurring provisions is the explicit ban of violence against women within the family.[95] Similarly telling is the language referring not only to rights, but also to opportunities, endorsing substantive equality rhetoric, specifically in the family domain.[96] Increasingly, we find that references to motherhood, as a constitutionally protected status, are being replaced by a reference to parenting and to fatherhood, sometimes with an explicit mention of the need to disestablish traditional gender-specific parenting roles.[97] Yet, most revolutionary,

[93] *See* Eugenia Caracciolo di Torella, *Brave New Fathers for a Brave New World? Fathers as Caregivers in an Evolving European Union*, 20 Eur. L. J. 88, 101–102 (2014).

[94] European Parliament legislative resolution of 20 Oct. 20, 2010 on the proposal for a directive of the European Parliament and of the Council amending Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (COM(2008)0637—C6-0340/2008—2008/0193(COD)). *See* Michelle Weldon-Johns, *EU Work-Family Policies: Challenging Parental Roles or Reinforcing Gendered Stereotypes?*, 19(5) Eur. L.J. 662 (2013).

[95] *See* Constitucion Politica del Estado Plurinacional de Bolivia [Political Constitution of the Multi-national State of Bolivia], Feb. 7, 2009, art. 15.II: all people, *especially women*, are entitled to *freedom from physical, sexual or psychological violence*, both within the *family and in society.*

[96] *See id.*, art. 62. The state recognizes and protects the *family* as the fundamental unit of society, and ensures social and economic conditions necessary for their development. All members have *equal rights, obligations, and opportunities.*

[97] Constitucion Politica de Colombia [Political Constitution of Colombia], 1991, art. 69: (1) *Responsible motherhood and fatherhood* shall be encouraged; and the mother and father shall be obliged to take care, raise, educate, feed, and provide for the integral development and protection of the rights of their children, especially when they are separated from them for any reason . . . (5) The state shall promote the *joint responsibility of both mother and father*, and shall monitor fulfillment of the *mutual duties and rights* between mothers, fathers, and children.

although still comparatively rare, are clauses referring to the need to re-conceptualize care both as productive work (thus overcoming the dichotomy between productive and reproductive work on which liberal capitalist societies are based), and care as citizenship duties.

In this regard, let me conclude with an example of what, at the dawn of constitutionalism, would have been considered nothing less than science fiction.

Under Chapter Nine, devoted to Responsibilities, the new Ecuadorian Constitution of 2008 contains a provision (art. 83) that lists the duties and obligations of Ecuadorians. Together with such duties as to abide by, and enforce, the Constitution and the law (art. 83.1), or to defend the territorial integrity of Ecuador and its natural resources (art. 83.3), the Constitution recognizes, in article 83.16, the duty to "help, feed, educate and raise one's children," acknowledging this duty to be "a *joint responsibility of mothers and fathers, in equal proportion.*" In article 333, the Constitution then considers "unpaid work of self-sustenance and *care-giving,* carried out in the home" to be "recognized as productive work". Consistently, it acknowledges:

> the need for the State to strive towards a labor system that works in harmony with the needs for human *care-giving,* and that facilitates suitable services, infrastructure and work schedules; it shall, in particular, provide *services for child care,* care for persons with disabilities, and other services as needed for workers to be able to perform their labor activities; it shall furthermore foster the *joint responsibility and reciprocity of men and women in domestic work and family obligations.*

It is furthermore recognized that, in this system, "social service protection shall be progressively extended to persons who are responsible for unpaid family work at home." Clearly, many of these provisions are merely framed in programmatic terms, but they are certainly reflective of a cultural shift. In doing so, they question the contours of spheres thus far defined as public and private, and of the corresponding genders associated with them. They disestablish gender, and do so as a constitutional enterprise.

5. Concluding reflections

To conclude, the new millennium is witnessing progress in the disestablishment of gender roles. Measures are proactively being taken to ensure that women, and not only men, inhabit the world of public and private governance; to ensure that forms of interpersonal support, solidarity, and commitment, grounded in love and affection, can compete with heterosexual marriage in ways that are more inclusive for all women and for gay men; and to ensure that fathers, and not only mothers, share in the joys and responsibilities of the care that the perpetuation of the human species requires, as the community increasingly recognizes human interdependence as the norm, acknowledging the central value of care for all.

Progress so far has been limited. Resistance and counter-mobilization agendas have developed to contain the dissolution of the hegemony of the heterosexual marriage. Corporate boards, parliaments, and—more generally—public authorities are still predominantly male, and predominant is also the expectation and reality of women's greater involvement in care and parenting. Moreover, in the midst of a

globalized economy, with increasing global inequality and endangered welfare states cutting down on social expenditure, it is unlikely that we will see families, parents, and women significantly relieved from their overwhelming care work by the state and the community taking on a greater share of the burden of social reproduction. Nor are we likely to see men and women encouraged to lead balanced lives, which combine paid employment, the joys of parenting, and, more broadly speaking, shared child-care responsibilities. The *homo economicus*, now also the *mulier economica*, remains the central figure in the public culture, reproduction and care still mostly being either silenced as personal, optional, or residual, or quietly relegated to the "invisible hand," operating this time not only in the marketplace, but also in the family. A culture of life, unapologetic and non-gender normative, is missing, including one that would encourage, or at least make it possible, by creating the adequate default options, that all people, men and women, can live out each and every one of his or her capabilities to their fullest potential as a possible form of good life.

Constitutional traditions that have simultaneously recognized substantive gender equality notions and the centrality of the family, as a scene of care, and the specific role of motherhood, have the potential to allow for that centrality to be retained, resisting commodification and privatization, while at the same time expanding it so as to give due visibility to the equal centrality of fatherhood, as well as of parenting as a shared responsibility. The task is not easy, and in many instances may require overcoming rather explicit constitutional and legal privileging of motherhood as the single care/reproduction figure deserving state and communal protection. Moreover, constitutionally speaking, traditional doctrines of family privacy must be adapted, and contemporary gender-neutral legal systems acknowledged to be insufficient to overcome long-lasting and tacitly embedded gender roles. It is time to recognize that the notion of state neutrality and the protection of collective forms of autonomy and self-organization (of political parties, of corporations, but also of families) has, at least to some extent, served as a fiction providing an alibi for such gender roles, perpetuating the status quo. If the gender order is to be fully disestablished, constitutional sex equality cannot be contained, in terms of domains, and should instead inspire a transformative agenda addressed at all those structures and institutions around which the separate spheres ideology, and the very definition of gender, has been established.

Once the illusion of neutrality is overcome, the greatest challenge will be to protect us all from the economic logic of profit-oriented markets, which see persons primarily as producers and consumers, relegating human reproduction and care—and thus nothing less than human life—to the category of private interests. In this regard, new constitutions, which refer to care as a part of citizenship and challenge the old distinction between productive and reproductive work, indicate a promising cultural paradigm shift. Without adequate public policies, though, the actual shift will not take place, and the constitutions will remain, like so many times in constitutional history, dead letter.