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Family Law Equality at a Crossroads

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FAMILY LAW EQUALITY AT A CROSSROADS

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INTRODUCTION

No area of law has been more transformed by the demands of equality in the past half century than family law. Modern notions of equality have, of course, powerfully reshaped other fields as well, from education and employment to criminal justice and election law. But none more than family law, where traditional inequalities reflecting bedrock assumptions about the separate and distinctive capacities of men and women, and adults and children, were written into the very grain of family law. It was, after all, as recently as the 1970s that state statutes expressly commanded the subservience of wives to their husbands as the natural "head of the family";[1] today,

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1. Such "Head of Household" statutes, found across the United States, commonly provided: "'The husband is the head of the family. He may choose any reasonable place or mode of living and the wife must conform thereto.'" *See, e.g.*, Bowbells Pub. Sch. Dist. No. 14 v. Walker, 231 N.W.2d 173, 177 (N.D. 1975) (quoting N.D. CENT. CODE § 14-07-02 (1975)); Porter v. Porter, 267 N.E.2d 299, 302 (Ohio 1971) (quoting OHIO REV. CODE ANN. §

such subordination is so plainly offensive to prevailing egalitarian norms that it cannot be made legally effective even if the parties choose it freely for themselves.[2]

In this Article, I take stock of the impressive, even stunning, gains for equality made in recent decades and then speculate on the shape of the challenges to come in the decades ahead. My thesis is that we are at a turning point of sorts in the search for equality in family law. While recent history has been dominated by bold, transformative strokes for family equality, the road ahead is likely to be characterized by smaller, hard-fought gains often won at the price of other worthy values—sometimes even other equality values. If past landmark victories appear in hindsight to have had obvious, one-sided answers—think *Loving v. Virginia*,[3] *Levy v. Louisiana*,[4] or *Stanley v. Illinois*[5]—the equality battles of the future are likely to be more closely contested and to be decided ultimately not on the basis of clear, ringing principles, but on factual shadings and trade-offs between competing goods.

Looking back on the transformation at the dawn of the twenty-first century, Dean Herma Hill Kay observed that "[t]he movement of twentieth century family law in the United States has been away from a patriarchal model and toward a more egalitarian one."[6] The progress has been so rapid and encompassing, successively toppling classifications relating to gender, race, disability, marital status, sexual orientation, and more, that observers could be forgiven for imagining that the eradication of stereotype and bias from family law was just around the next corner. Yet, the messy reality suggested by more recent litigation is that future claims for equality in family law are likely to occur in more fact-bound settings and to be resolved from case to case in ways that yield less certain guidance for other claimants. On

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3103.02 (1971)); *see also* Allison Anna Tait, *A Tale of Three Families: Historical Households, Earned Belonging, and Natural Connections*, 63 HASTINGS L.J. 1345, 1355 (2012).

2. *See* Spires v. Spires, 743 A.2d 186, 192 (D.C. 1999) (Schwelb, J., concurring) (refusing to enforce a marital contract requiring a wife's submission to her husband on grounds that it was offensive to public policy); State v. Donkers, 170 Ohio App. 3d 509, 2007-Ohio-1557, 867 N.E.2d 903, at ¶ 196 (rejecting a wife's claim of criminal non-liability on the ground that she was merely following her husband's dictates as required by her religion, stating that "[i]n today's society, regardless of what individual couples believe and practice, the law does not recognize the husband as the 'one public voice' or as the automatic head of household with supreme authority over his non-responsible feme covert").

3. 388 U.S. 1 (1967) (striking down Virginia's anti-miscegenation law under the Equal Protection Clause).

4. 391 U.S. 68 (1968) (striking down a Louisiana law permitting legitimate children, but not illegitimate children, to recover for the wrongful death of a parent).

5. 405 U.S. 645 (1972) (striking down an Illinois law excluding unwed fathers from being considered a "parent" of their children).

6. Herma Hill Kay, *From the Second Sex to the Joint Venture: An Overview of Women's Rights and Family Law in the United States During the Twentieth Century*, 88 CALIF. L. REV. 2017, 2019 (2000).

this more micro level, the search for equality in family law will continue—and, indeed, will never end.

I. WHERE WE'VE COME: AN EQUALITY REVOLUTION

The past fifty years have been marked by enormous change in family law, much of it focused on casting off age-old classifications defined by gender, sexuality, race, and other notions of difference.[7] This transformative, "inexorable advance of ideas of equality and individual liberty" in family law can trace its roots earlier still, at least to reforms in the early- to mid-nineteenth century.[8] But the pace of change has plainly accelerated in recent decades. In large part, the upheaval has reflected changing social attitudes and been expressed through legislative action or judicial opinions that backed away from rigid enforcement of stereotypes. Yet evolving notions of equality in constitutional law have also been an important spur for family law reform.[9]

Before surveying the present landscape to forecast the future, it is worth pausing to take in the range and scale of upheaval in family law's "equality revolution"—and to appreciate just how quickly it happened in the grand scheme of things.

A. Gender

Traditional family law was, of course, a fortress of gender prescriptions. At common law, the duties and privileges of family life and status were strictly gendered. Upon marriage, men, but not women, assumed a legal duty to support their spouse; women, but not men, lost independent authority to transact with their own property or to sue or enter into other contracts; men, but not women, were empowered to impose moderate "domestic chastisement" for a spouse's errant ways.[10] This regime was so comprehensive that its shadow extended beyond marriage, effectively prescribing the legal entitlements of single women according to their gender.[11] Although notions of equality began to swirl in family law reform as early as the nineteenth century—evident in the Married Women's Property Acts, which

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7. *See* Michael Grossberg, *How to Give the Present a Past? Family Law in the United States 1950-2000*, *in* CROSS CURRENTS: FAMILY LAW AND POLICY IN THE UNITED STATES AND ENGLAND 1, 3, 4 (Sanford N. Katz, John Eekelaar & Mavis Maclean eds., 2000).

8. MARY ANN GLENDON, THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE 88-89 (1989).

9. *See* Kay, *supra* note 6, at 2062-64; David D. Meyer, *The Constitutionalization of Family Law*, 42 FAM. L.Q. 529 (2008).

10. 1 WILLIAM BLACKSTONE, COMMENTARIES *432-33.

11. *See* Ariela R. Dubler, *In the Shadow of Marriage: Single Women and the Legal Construction of the Family and the State*, 112 YALE L.J. 1641, 1655-56 (2003).

restored to married women independent legal control over their own property and legal affairs, and the eroding entitlement of fathers to custody of their children—the elaborate edifice of gender rules remained essentially secure well into the 1960s and 1970s.

After all, it was only in the 1970s that the U.S. Supreme Court held for the first time that sex discrimination was presumptively unconstitutional.[12] And as late as 1979, federal courts were still just reaching the judgment that state laws designating husbands as the legal head of household—or, in Louisiana's more colorful parlance, "head and master"—with sole power to dictate major family decisions or convey community property were constitutionally troublesome.[13]

During this period, it took scarcely more than a decade to upend a wide array of traditional family law rules assigning obligations or entitlements on the basis of strict gender roles: laws limiting alimony awards only to women;[14] marital support obligations only to husbands;[15] and custody and child support according to the sex of both the parent and the child.[16]

In place of these laws came gender-neutral substitutes: in "best interests" or "primary caregiver" custody standards, or assigning alimony according to need or property according to the "equities." These rules often played out differently for men and women, of course, given entrenched gender differences in wealth and social roles, but gender was largely eradicated as a formal matter from family law in relatively compact, dramatic strokes.[17]

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12. The Supreme Court first held sex discrimination unconstitutional in 1971 in *Reed v. Reed*, 404 U.S. 71, 76-77 (1971), under a nominal application of rational-basis review. It was not until 1976, in *Craig v. Boren*, 429 U.S. 190, 208-10 (1976), that the Court first held that gender classifications are presumptively unconstitutional and subject to heightened constitutional scrutiny.

13. *See* Kirchberg v. Feenstra, 450 U.S. 455, 456 (1981) (affirming the unconstitutionality of a Louisiana statute that designated a husband as the "head and master" of a married couple's community property, with sole authority to convey it to others).

14. *See* Orr v. Orr, 440 U.S. 268, 270, 283 (1979) (invalidating an Alabama law limiting eligibility for alimony support only to wives).

15. *See, e.g.*, Jersey Shore Med. Ctr.-Fitkin Hosp. v. Estate of Baum, 417 A.2d 1003, 1007-10 (N.J. 1980) (invalidating a law assigning liability under a necessaries doctrine only to husbands; remedying the defect by extending liability equally to husbands and wives).

16. *See* Stanton v. Stanton, 421 U.S. 7, 8-9, 17-18 (1975) (overturning a Utah law requiring that parents support boys until age twenty-one, while ending the support obligation to girls at age eighteen); *Ex Parte* Devine, 398 So. 2d 686, 695 (Ala. 1981) (holding that the tender-years doctrine's preference for custody with mothers denied equal protection).

17. *See* LINDA C. MCCLAIN, THE PLACE OF FAMILIES: FOSTERING CAPACITY, EQUALITY, AND RESPONSIBILITY 60-61 (2006); Susan Frelich Appleton, *Missing in Action? Searching for Gender Talk in the Same-Sex Marriage Debate*, 16 STAN. L. & POL'Y REV. 97, 111-16 (2005) (noting that "[t]oday . . . explicit gender-based family laws have all but vanished").

B. Race

A decade earlier, equality concerns similarly drove formal racial classifications from family law. In 1964, the U.S. Supreme Court struck down a Florida statute criminalizing interracial cohabitation.[18] Three years later, in *Loving v. Virginia*, the Court overturned Virginia's law against interracial marriage as well, dismissing the state's objection that the law guaranteed equality by punishing equally all who crossed the color line to marry.[19] *Loving*'s sharp intolerance of racial barriers to marriage was quickly extended to Jim Crow adoption laws and, in 1984, to custody decisions disfavoring interracial families.[20] Federal legislation in the 1990s, prominently including the Multi-Ethnic Placement Act, extended this hostility to racial matching to foster care and adoption.[21]

As with gender, constitutional attacks on embedded racial classifications were initially resisted on the theory that family law was specially cordoned off from federal equal-protection scrutiny, as a sphere of exclusive state law under the Tenth Amendment.[22] Also as with gender, however, when constitutional review overcame that objection, it rushed in and left family law transformed—at least as a formal matter—in a relatively short span.[23]

C. Nonmarital Families

Marital status still carries great public significance, of course. Beyond the myriad public benefits and responsibilities incident to marriage, state

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18. *See* McLaughlin v. Florida, 379 U.S. 184, 184 (1964).

19. *See* Loving v. Virginia, 388 U.S. 1, 2 (1967).

20. *See In re* Adoption of Gomez, 424 S.W.2d 656, 657, 659 (Tex. Civ. App. 1967); Compos v. McKeithen, 341 F. Supp. 264, 265, 268 (E.D. La. 1972); Palmore v. Sidoti, 466 U.S. 429, 430, 434 (1984).

21. *See* Howard M. Metzenbaum Multiethnic Placement Act of 1994, Pub. L. No. 103-382, §§ 551-54, 108 Stat. 3518, 4056-57 (1994), *repealed by* Small Business Job Protection Act of 1996, Pub. L. No. 104-188, § 1808, 110 Stat. 1755, 1903-04 (1996) (codified at 42 U.S.C. § 671(a)(18) (2006 & Supp. 2012)); *see also* David D. Meyer, Palmore *Comes of Age: The Place of Race in the Placement of Children*, 18 U. FLA. J.L. & PUB. POL'Y 183 (2007).

22. *See, e.g.*, Naim v. Naim, 87 S.E.2d 749, 756 (Va. 1955).

23. *See generally* RANDALL KENNEDY, INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION (2003). This is not to say, of course, that race no longer plays a role in family law. To the contrary, it continues to exert a powerful practical influence in both the private and public construction of families, to the consternation of a range of critics. *See, e.g.*, ELIZABETH BARTHOLET, NOBODY'S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE 130-40 (1999); DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE (2002); R. Richard Banks, *The Color of Desire: Fulfilling Adoptive Parents' Racial Preferences Through Discriminatory State Action*, 107 YALE L.J. 875 (1998).

marriage recognition also confers, as the Supreme Court recently emphasized, "a dignity and status of immense import."[24] Yet, the legal and social significance of marriage is significantly diminished today as compared with a few decades ago. Nonmarital cohabitation now presents a ready alternative for many couples, and the proportion of Americans who are married is at an all-time low.[25]

The causes for this shift are varied, but one contributor is certainly the retreat of traditional measures to channel adults into marriage. Family law once made marriage the exclusive gateway to legitimate family life, but today the hardest edges of discrimination between married and unmarried persons have been worn away by constitutional challenge and social change:

- In the area of "legitimacy," laws that once crudely excluded nonmarital children from inheritance or support were set aside.[26]
- Laws categorically presuming the unfitness of unwed fathers were toppled, clearing a path at least for men who had "seized the opportunity" to provide for their children to assert parental rights.[27]
- And marriage's exclusive hold over formal family formation has been displaced by a wave of alternative, nonmarital forms: domestic partnerships, civil unions, reciprocal beneficiaries, designated beneficiaries, and more.[28]

These emergent rights of nonmarital children and adults, and the near collapse of social stigma against nonmarital families, have greatly weakened the weight of continuing legal distinctions.

D. Autonomy Rights Protected Through Equality

The other major drivers of constitutional change in family law—due process and privacy rights—have also been closely entangled with equality concerns.

Early family-privacy cases, such as *Meyer v. Nebraska*[29] and *Pierce v. Society of Sisters*,[30] were decided before the Equal Protection Clause packed much punch in constitutional litigation. Nevertheless, the cases grounded

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24. United States v. Windsor, 133 S. Ct. 2675, 2692 (2013).

25. *See The Fraying Knot*, ECONOMIST (Jan. 12, 2013), http://www.economist.com/news/united-states/21569433-americas-marriage-rate-falling-and-its-out-wedlock-birth-rate-soaring-fraying.

26. *See* Levy v. Louisiana, 391 U.S. 68, 72 (1968); Martha F. Davis, *Male Coverture: Law and the Illegitimate Family*, 56 RUTGERS L. REV. 73, 95-96 (2003).

27. *See* David D. Meyer, *Family Ties: Solving the Constitutional Dilemma of the Faultless Father*, 41 ARIZ. L. REV. 753, 758-62 (1999).

28. *See* David D. Meyer, *Fragmentation and Consolidation in the Law of Marriage and Same-Sex Relationships*, 58 AM. J. COMP. L. 115 (2010).

29. 262 U.S. 390 (1923).

30. 268 U.S. 510 (1925).

their protection of parental rights in part in the view that the Constitution did not permit the state to "standardize" family life so narrowly, implying the effective constitutional equality among different family choices.

Later decisions often relied directly on a more robust understanding of the Equal Protection Clause to enforce—and extend—fundamental privacy rights in the family. In *Eisenstadt v. Baird*,[31] for example, in 1972, the Supreme Court famously transformed the right of "marital privacy" recognized in *Griswold v. Connecticut*[32] into a broader, equal right of unmarried individuals, reasoning that "[i]f the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted government intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[33]

Subsequent cases have further melded equality and liberty interests in protecting family-related interests. This includes cases like *Zablocki v. Redhail*[34] that rely on equal protection to trigger heightened scrutiny of state action discriminating with respect to fundamental rights of family privacy. And cases like *Lawrence v. Texas*[35] or Massachusetts's decision in the *Goodridge v. Department of Public Health* case[36] that expressly blend values of equality and autonomy in justifying stronger and broader conceptions of family liberties.

Taking a step back, it becomes clear: If one of family law's basic and historical functions has been, as Carl Schneider has observed, to channel individuals toward socially preferred ways of intimate life,[37] a major theme of the past fifty years has been a retreat from channeling and a broader acceptance of multiple ways of organizing and expressing family life.[38]

The marriage-equality cases argued before the Supreme Court during the 2012 term represent the dramatic culmination of these trends. *Hollingsworth v. Perry* involved a challenge to the constitutionality of Proposition 8, a voter referendum that had amended the California Constitution to overturn an earlier state court judgment permitting same-sex couples to marry.[39] *United States v. Windsor* presented the question whether a provision of the federal Defense of Marriage Act (DOMA) refusing to recognize same-sex marriages for purposes of federal law violated the guarantees of

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31. 405 U.S. 438 (1972).
32. 381 U.S. 479 (1965).
33. *Eisenstadt*, 405 U.S. at 453.
34. 434 U.S. 374 (1978).
35. 539 U.S. 558 (2003).
36. 798 N.E.2d 941 (Mass. 2003).
37. *See* Carl E. Schneider, *The Channelling Function in Family Law*, 20 HOFSTRA L. REV. 495 (1992).
38. *See* William N. Eskridge, Jr., *Family Law Pluralism: The Guided-Choice Regime of Menus, Default Rules, and Override Rules*, 100 GEO. L.J. 1881 (2012).
39. Hollingsworth v. Perry, 133 S. Ct. 2652, 2659 (2013).

equal protection and due process.[40] The high public attention riveted on the Court during the term might seem to confirm that the trend toward the "constitutionalization" of family law, through equality litigation, is gaining critical momentum.[41] After all, a Court famously wary of entangling itself in the parochial squabbles of "domestic relations"[42] plunged into family law in three of the highest profile cases of the term. Indeed, the stunningly rapid shift of legal fortune for same-sex marriage might suggest that the strategy of driving social change through constitutional litigation has never been more potent.

Together, the marriage-equality cases—the Proposition 8 and DOMA cases—presented the Court with the opportunity to recognize gays and lesbians as entitled to heighted protection against discrimination and to use that principle to establish their right to be recognized as married, under both state and federal law. In short, the cases offered the Court a platform to make as bold a blow for equality in family law as any decision in the past fifty years.

It was clear from the oral argument in the cases that the justices might not be inclined to seize the opportunity for a bold strike.[43] And when the decisions were handed down in June, the results were mixed. The Court declined to reach the merits in the Proposition 8 case—the case that presented the readiest vehicle for making a decisive national blow for marriage equality—on the ground that the petitioners who defended the law below lacked standing to press the appeal.[44] The Court reached the merits in *Windsor* and struck down DOMA's definition of marriage as unconstitutional.[45] In doing so, Justice Kennedy's opinion for the Court spoke soaringly of the equal "personhood and dignity" of gays and lesbians, but it qualified the reach of its holding.[46] The Court passed on the opportunity to declare discrimination on the basis of sexual orientation as "suspect" or "quasi-suspect," or to recognize an entitlement of same-sex couples to marry on privacy grounds, and instead confined itself instead to holding that the fed-

40. United States v. Windsor, 133 S. Ct. 2675, 2682-83 (2013).

41. *See* Meyer, *supra* note 9.

42. *See, e.g.*, *Ex parte* Burrus, 136 U.S. 586, 593-94 (1890) (noting that "[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states, and not to the laws of the United States"); Ankenbrandt v. Richards, 504 U.S. 689, 700-01 (1992) (interpreting a federal diversity statute to impliedly adopt the Court's century-old practice of avoiding entanglement in "domestic relations" cases); *Windsor*, 133 S. Ct. at 2691-92 (recounting the strength of federal disinclination to encroach on state purview over "domestic relations").

43. *See* Adam Liptak, *Justices Say Time May Be Wrong for Gay Marriage Case*, N.Y. TIMES (Mar. 26, 2013), http://www.nytimes.com/2013/03/27/us/supreme-court-same-sex-marriage-case.html.

44. *See Hollingsworth*, 133 S. Ct. at 2668.

45. *See Windsor*, 133 S. Ct. at 2696.

46. *See id.*

eral government must defer to states on the question of whether such marriages are legal. The conclusion of the Court's opinion emphasized its limited reach and appeared to ground the result in the language of rational-basis review, the most deferential standard of constitutional scrutiny.[47]

The majority's strategy in *Windsor* appeared to track closely the approach taken a decade earlier in Justice Kennedy's majority opinion in *Lawrence v. Texas*, deploying the language of rational-basis review to support a decision whose sweep appeared more far-reaching.[48] In *Lawrence*, too, the Court insisted that its decision was narrow and did not imply a right of same-sex couples to marry.[49] And in *Lawrence*, as again in *Windsor*, Justice Scalia protested emphatically in dissent that the asserted limitations were illusory and that the logic of the majority's opinion led inexorably to recognition of a right of same-sex marriage.[50]

In fact, Justice Scalia appears to be correct in forecasting the implications of both *Lawrence* and *Windsor*. While disclaiming to reach the question whether states must recognize same-sex marriage, both decisions rested on recognition of the essential equivalence of the intimate relationships of same-sex and opposite-sex couples and condemned as constitutionally illegitimate state actions meant to dignify one more than the next. In *Windsor*, the Court found that Congress's impulse to enact DOMA in response to some states' movement toward allowing same-sex marriage smacked of illicit hostility toward gays and lesbians; the Court found telling that Congress was stirred to act in a political climate of anxiety over the empowerment of gays and lesbians and that its effort to bar their access to marriage was termed a "defense" of the institution.[51] As Justice Scalia observed, the same motivations and smoking guns of moral disapproval of gays and lesbians could readily be found in the legislative histories of the so-called "mini-DOMAs" widely enacted by states across the country. Yet, the majority was unprepared to acknowledge the full import of its reasoning in *Windsor*, leaving that to be worked out in future cases to follow.

Nevertheless, William Eskridge was correct in forecasting, while the marriage-equality cases were still pending before the Court, that these will stand as "landmark cases," quite apart from whether the Court's resolution

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47. *See id.* (finding "no legitimate purpose" supporting Congress's denial of recognition to marriages lawfully contracted in states allowing same-sex unions, and noting that "[t]his opinion and its holding are confined to those lawful marriages").

48. *See* Lawrence v. Texas, 539 U.S. 558, 578 (2003) (concluding that "[t]he Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual").

49. *See id.*

50. *See id.* at 604-05 (Scalia, J., dissenting); *Windsor*, 133 S. Ct. at 2709-10 (Scalia, J., dissenting).

51. *See Windsor*, 133 S. Ct. at 2693-94.

offered "landmark opinions."[52] Even with the Court's demurrer in *Hollingsworth* and its "half-loaf" vindication of same-sex marriage rights in *Windsor*, the cases have left their mark. It's worth recalling that when David Boies and Ted Olson set out on their journey to challenge Proposition 8 on federal constitutional grounds in the spring of 2009, their quest was considered to be quixotic or dangerously premature by many.[53] Today, just four years later, a dozen additional U.S. jurisdictions have allowed same-sex marriage (most by popular referendum or legislative action);[54] the district and Ninth Circuit courts embraced their constitutional arguments;[55] the President of the United States, public opinion polls, and a majority of the U.S. Senate now favor same-sex marriage.[56] Even Rush Limbaugh now considers it "inevitable" that same-sex marriage will ultimately prevail.[57] Quite apart from the Supreme Court's resolution of the merits, the cases helped to galvanize the ongoing evolution of social attitudes about family and equality.

It seems the writing is now on the wall, and—as seen in the hallways of the U.S. Senate, where only three Democrats have yet to endorse same-

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52. *See* Yale Law Sch., *William Eskridge Interview on SCOTUS and Marriage Equality*, VIMEO (Mar. 2013), http://vimeo.com/62649645.

53. *See* Michael A. Lindenberger, *Olson's Gay Marriage Gambit: Powerful but Risky*, TIME (June 4, 2009), http://content.time.com/time/nation/article/0,8599,1902556,00.html; David Von Drehle, *How Gay Marriage Won*, TIME (Mar. 28, 2013), http://swampland.time.com/2013/03/28/how-gay-marriage-won/.

54. At the time Boies and Olson announced their legal challenge in May 2009, three states (Connecticut, Iowa, and Massachusetts) allowed same-sex marriage, each of them as a result of a court mandate; since that time, seventeen additional jurisdictions (California, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey, New York, Rhode Island, Vermont, and Washington) have taken the same position, all but six of them by popular referendum or legislative enactment. *See 17 States with Legal Gay Marriage and 35 States with Same-Sex Marriage Bans*, PROCON.ORG, http://gaymarriage.procon.org/view.resource.php?resourceID=004857 (last updated Dec. 19, 2013).

55. *See* Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012), *vacated & remanded sub nom.* Hollingsworth v. Perry, 133 S. Ct. 2652, 2667-68 (2013).

56. *See* Jackie Calmes & Peter Baker, *Obama Says Same-Sex Marriage Should Be Legal*, N.Y. TIMES (May 9, 2012), http://www.nytimes.com/2012/05/10/us/politics/obama-says-same-sex-marriage-should-be-legal.html?_r=0; Lydia Saad, *In U.S., 52% Back Law to Legalize Gay Marriage in 50 States*, GALLUP (July 29, 2013), http://www.gallup.com/poll/163730/back-law-legalize-gay-marriage-states.aspx; Sunlen Miller, *Majority of Senate Supports Same-Sex Marriage*, ABC NEWS (Apr. 2, 2013, 12:15 PM), http://abcnews.go.com/blogs/politics/2013/04/another-gop-senator-endorses-same-sex-marriage/.

57. *See* Aaron Blake, *Rush Limbaugh: Gay Marriage 'Inevitable,' Conservatives 'Lost,'* WASH. POST (Mar. 28, 2013, 5:30 PM), http://www.washingtonpost.com/blogs/post-politics/wp/2013/03/28/rush-limbaugh-gay-marriage-inevitable-conservatives-lost.

sex marriage[58]—folks appear to be scrambling to get on the right side of history. When the other shoe ultimately drops, as Justice Scalia predicts, the Court's ruling may well be an equality pronouncement as bold and decisive as its ruling in *Loving* with respect to race. But the Court preferred to defer that to another day.

II. THE ROAD AHEAD: THE HARD WORK OF "CALIBRATING" EQUALITY

Yet, it is also possible to see in the cases before the Supreme Court last term the effective limits of the Constitution's utility in driving bold change in family law. Still fresh from the intense glare riveted on the argument in the marriage-equality cases, the justices almost immediately turned to take up another case, taking it deep into the heart of family law: the Baby Veronica Case, challenging the disruption of an adoption under the Indian Child Welfare Act.[59]

If the past fifty years have been marked by bold, revolutionary strides for equality in family life, the next fifty years are more likely to be dominated by the harder and less triumphal work of calibrating equality in particular cases. If the marriage-equality cases reflect the past in offering at least the potential for a bright-line win, the Baby Veronica case represents the future in its complicated and limiting cross-currents.

As it came before the Supreme Court, the Baby Veronica case was a case all about equality—but without the crisp, clean lines of *Loving* or *Windsor*. The case arose from a disrupted adoption. Veronica was born in Oklahoma in September 2009.[60] Her parents were engaged when she was conceived but broke up before her birth. As their relationship fell apart, the mother-to-be texted the father to ask whether he preferred to pay child support or relinquish his parental rights. He replied, by text, that he would give up his parental rights, although he later claimed to be confused about what this meant.

The mother, meanwhile, arranged to have the baby adopted by a couple in South Carolina, who were by all accounts exemplary in caring for the child. When the mother gave birth, the adoptive couple was in the delivery room, and the adoptive father cut the umbilical cord.

When the biological father was served with adoption papers, eight months after disclaiming his parental rights in the text, he resisted almost immediately and went to court.[61] Two years later, a court ruled that the fa-

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58. *See* Lindsey Boerma, *Then There Were 3: The Democratic Holdouts on Same-Sex Marriage*, CBS NEWS (Apr. 8, 2013, 6:14 PM), http://www.cbsnews.com/8301-250_162-57578538/then-there-were-3-the-democratic-holdouts-on-same-sex-marriage.

59. *See* Adoptive Couple v. Baby Girl, 133 S. Ct. 2552, 2556-57 (2013).

60. *Id.*

61. *Id.* at 2558-59.

ther was entitled to wrest custody from the adoptive parents, and Veronica was moved from South Carolina back to Oklahoma, and to a new family she did not know.[62]

Because the biological father was a registered member of the Cherokee Nation, the case turned on the provisions of the Indian Child Welfare Act (ICWA).[63] In particular, that Act permits a "parent" of an Indian child to contest an adoptive placement before it is final, unless the parent is shown to be unfit by heightened proof standards.[64] An issue in the case is whether the biological father qualified as a "parent" to claim protection under the ICWA when he forfeited his rights as a parent under state law by failing to support or show interest in Veronica in the first months of her life.

The ICWA denies standing to an "unwed father where paternity has not been acknowledged or established."[65] One question is whether the adequacy of the father's efforts should be judged by state family law or by a federal standard implicit in the ICWA. Although the father failed to preserve his rights under state law, and could not be disregarded as a "parent" by that measure,[66] he later offered DNA evidence to prove his paternity[67] and contended that should count for establishment under federal law.[68]

Although the case is directly one of statutory interpretation, questions of equality hung over every turn—in complex and sometimes dizzying circles. The federal statute itself was enacted in response to an earlier Indian adoption policy that led large numbers of Indian children to be adopted into white homes.[69] In the nineteenth century, that policy made systematic efforts to assimilate Indian children by educating them in white-run boarding schools far from tribal influences.[70] The schools forced children to abandon their Indian heritage and to adopt English language and capitalist values in a calculated effort to, in the words of the founder of the influential Carlisle Indian School, "'Kill the Indian in him, and save the man.'"[71] In later years,

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62. *Id.* at 2559.

63. 25 U.S.C. §§ 1901-1963 (2006 & Supp. 2012).

64. *See id.* §§ 1911(c), 1912(f).

65. *See id.* § 1903(9) (excluding such men from the definition of "parent[s]" entitled to invoke the Act's protections).

66. *See Adoptive Couple*, 133 S. Ct. at 2560, 2562.

67. *See id.* at 2559.

68. Brief for Respondent Birth Father at 18, *Adoptive Couple*, 133 S. Ct. 2552 (No. 12-399).

69. *See* Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 32-36 (1989).

70. *See* Barbara Ann Atwood, *Flashpoints Under the Indian Child Welfare Act: Toward a New Understanding of State Court Resistance*, 51 EMORY L.J. 587, 602-05 (2002). *See generally* FREDERICK E. HOXIE, A FINAL PROMISE: THE CAMPAIGN TO ASSIMILATE THE INDIANS, 1880-1920 (2001).

71. Ann Murray Haag, *The Indian Boarding School Era and Its Continuing Impact on Tribal Families and the Provision of Government Services*, 43 TULSA L. REV. 149, 152 (2007) (quoting Captain Richard Henry Pratt).

child welfare agencies pursued an "Indian Adoption Project" that sought to save needy Indian children by placing them with white families.[72] These policies had initially been rationalized as a civil rights initiative of a sort, a step toward integration of families and communities. As Barbara Ann Atwood notes, "Through a combination of paternalism, assimilationist motives, and gross cultural insensitivity, welfare workers and state officials dedicated themselves to finding non-Indian homes for these 'at risk' Indian children."[73] In time, these child-saving initiatives came to be seen as grossly excessive, even genocidal, and the ICWA was adopted to curb the practice. Both the statute and the adoption policy it was responding to, therefore, sprang in a sense from competing conceptions of equality.

Moreover, the parties' statutory arguments were heavily shaped by competing concerns for constitutional equality. In resisting the ICWA's intervention to unsettle the adoption, the adoptive parents and Veronica's guardian ad litem contended that broadly reading the Act's protections to benefit a man not considered a parent under state law would raise "grave constitutional concerns" rooted in both equality and autonomy:[74]

- Giving Indian parents more rights than non-Indian parents would constitute discrimination based on ethnic or racial lineage, they argued.[75]
- It would also violate the fundamental privacy right of a custodial mother to make decisions concerning the adoption of her child without interference from a non-parent under state law.
- And, according to Veronica's guardian ad litem, it would violate her equality and liberty rights as well—specifically including her fundamental right to "maintain[] the only family bonds she has ever known" and to have questions of her adoption decided on the basis of her "best interests," free from considerations of race or lineage.[76]

In the end, the Supreme Court avoided the need to resolve these claims by interpreting the ICWA narrowly so as to render it inapplicable to the contested adoption. While the South Carolina courts had wrestled with whether the father qualified as a "parent" under the ICWA, thereby triggering the protections of the Act, including its insistence on heightened proof of child harm before terminating parental rights and its preference for cus-

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72. *See* Atwood, *supra* note 70, at 603; Ryan Seelau, *Regaining Control over the Children: Reversing the Legacy of Assimilative Policies in Education, Child Welfare, and Juvenile Justice That Targeted Native American Youth*, 37 AM. INDIAN L. REV. 63, 87 (2013).

73. Atwood, *supra* note 70, at 603.

74. Brief for Petitioners at 43, 44, 48, Adoptive Couple v. Baby Girl, 133 S. Ct. 2552 (2013) (No. 12-399); *see also* Brief for Guardian Ad Litem, as Representative of Respondent Baby Girl, Supporting Reversal at 53, 56, *Adoptive Couple*, 133 S. Ct. 2552 (No. 12-399) ("grave constitutional difficulties").

75. Brief for Petitioners, *supra* note 74, at 44-47.

76. Brief for Guardian Ad Litem, *supra* note 74, at 55-56.

todial placements within an Indian tribe, the Supreme Court held that the Act's protections were inapplicable even if the father counted as a "parent."[77] The Act's substantive curbs on termination of parental rights, including the requirements of heightened proof of harm and the exhaustion of remedial efforts to preserve the Indian family, were applicable only in cases where state intervention threatened to disrupt an existing custodial relationship between the child and an Indian parent, the Court ruled.[78] Because Veronica's father had never established such a relationship, the Court reasoned, these provisions were inapplicable. Likewise, because no other party had formally sought to adopt Veronica, the Court concluded that the ICWA's directive that courts prefer a placement within the Indian tribe was inoperable; the Act's "preferences are inapplicable in cases where no alternative party has formally sought to adopt the child."[79] Justice Alito's majority opinion allowed, without further elaboration, that a broader interpretation of the Act would indeed "raise equal protection concerns," but held that the narrow statutory construction avoided them.[80]

Yet, even if the Court had waded into the merits of the equality and liberty claims swirling in the Baby Veronica case, its resolution was unlikely to result in broad constitutional pronouncements or wide-scale impacts. This stems less from doubts about the validity of the claims as from doubts about their significance in operation.

Why the change? Because I think we are turning to a new era in the constitutionalization of family law in which the constitutional claims, to equality, liberty, or some blend of the two, are more likely to be fact bound and qualified by other important interests.

A. Fewer Rigid Classifications

In the past, as in the marriage-equality cases argued last term, the constitutional challenges with the widest impact were directed against rigid classifications or heavy-handed presumptions that allowed for little account of individual circumstances. The defect in Virginia's anti-miscegenation law was not that it improperly weighed the competing interests or factual claims, but that it threw up a rigid, categorical ban against all marriages

77. *See Adoptive Couple*, 133 S. Ct. at 2560.

78. *See id.* at 2560-63.

79. *Id.* at 2564.

80. *Id.* at 2565. In a concurring opinion, Justice Thomas agreed that "constitutional avoidance" compelled the Court's narrow construction of the statute, but pointed to a different constitutional concern: the asserted lack of congressional power to legislate with respect to Indian custodial rights. *See id.* at 2565-70 (Thomas, J., concurring). In Justice Thomas's view, "[b]ecause adoption proceedings like this one involve neither 'commerce' nor 'Indian tribes,' there is simply no constitutional basis for Congress' assertion of authority over such proceedings." *Id.* at 2571.

crossing the color line. Similarly, in *Orr v. Orr*,[81] the problem with Alabama's alimony law was not that it miscalculated the ex-husband's need, but that it categorically defined who *could* be needy by gender.

The drive of earlier equality litigation was to push state decision makers to soften their illicit presumptions and account for individual circumstance. Today, claimants can still allege bias or error in the *application* of facially neutral family laws, but resolution will more often turn on the facts rather than broad declarations of principle.

B. Recognition of More Conflicting (and Thus Qualified) Interests

In addition, the Baby Veronica case reflects the trend of recent cases in asserting the rights of multiple, potentially conflicting rights holders. By the claimants' accounts, a broad reading of the Indian Child Welfare Act implicated the separate and distinctive equality and liberty rights of Veronica, her birth mother, and the adoptive parents.

Recognizing that disputes within families can present conflicts among competing rights holders, the Court has responded in past decisions by qualifying the strength of protection accorded to any one right. In a context in which one parent's right to custody conflicts with another's, a near absolute entitlement (such as through traditional strict scrutiny) cannot be assigned to either.[82] Instead, the Court has pushed pragmatically toward murky forms of protection that allow for more flexible balancing of the competing interests:

- For example, in *Troxel v. Granville*,[83] a patchwork majority of justices qualified the constitutional entitlement of a parent to control visitation decisions involving a grandparent on the ground that the matter potentially implicated the competing rights—or at least very strong interests—of children and other caregivers as well. Thus, the strict scrutiny used by the court below was replaced with a murky standard that simply directed courts to give unspecified "special weight" to the parent's interest, along with a collection of other factual considerations.[84]
- In *Elk Grove Unified School District v. Newdow*, the Court sidestepped a father's claimed constitutional prerogative to control whether his daughter recited the Pledge of Allegiance at her public school on the ground that his assertion might conflict with that of his daughter or her mother.[85]
- In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the watered-down "undue burden" test for reviewing state controls on abortion prior to fetal viability was justified by a concern that a woman's own decision concerning a pregnancy might compromise the weighty interests of the would-be fa-

81. 440 U.S. 268, 278, 281, 283 (1979).

82. *See* David D. Meyer, *The Constitutional Rights of Non-Custodial Parents*, 34 HOFSTRA L. REV. 1461, 1473, 1479-80 (2006).

83. 530 U.S. 57 (2000).

84. *See id.* at 69, 73.

85. 542 U.S. 1, 15 (2004).

> ther or child—requiring more leeway to state actors in mediating the conflicting interests through reasonable regulation.[86]

The result of this muddling scrutiny is that often courts balance and resolve constitutional equality or liberty claims from case to case, not in broad strokes, but in a way fundamentally similar to non-constitutional family law.[87] The parties' briefs in the Baby Veronica case pointed in the same direction: Advocates for the child contended that the father's interest in claiming custody must be balanced against Baby Veronica's own in preserving her adoptive family.[88] Answering their claim to constitutionalize the "best interests" standard in resolving Veronica's placement, opposing counsel denied the duty, but then plunged headlong into a "best interests" debate: Was Veronica's welfare best served by continuity with her adoptive family, as some evidence and advocates suggested, or by enforcing a stronger preference for ties with a fit biological parent, as the lower courts had opined?[89]

In this way, the very success of rights talk and constitutionalization in family law has, in effect, diminished its significance. The Court's receptivity to assertions of new constitutional interests—hinted at in the justices' opinions in *Troxel* and *Newdow*, for example—leaves it unable to assign conclusive weight to anyone.[90] The Court's appreciation of the complexity and diversity of family life and the need to move cautiously in remolding actual, here-and-now families according to broad-brush principles is leading to a more qualified, softer constitutional doctrine defined by incrementalism rather than revolution.

Justice Breyer, concurring in the Baby Veronica case, emphasized essentially the same caution in hewing to the narrowest possible decision. While the Court's decision founds the ICWA's protections for parental rights inapplicable to a father who had early on disclaimed interest in his daughter's upbringing and declined to support her, Justice Breyer was keen to leave room for different outcomes in future cases with slightly different family facts: "[T]his case does not involve a father with visitation rights or a father who has paid 'all of his child support obligations,'" Breyer wrote.[91] "Neither does it involve special circumstances such as a father who was deceived about the existence of the child or a father who was prevented from supporting his child."[92]

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86. *See* 505 U.S. 833, 876, 895 (1992).

87. *See* David D. Meyer, Lochner *Redeemed: Family Privacy After* Troxel *and* Carhart, 48 UCLA L. REV. 1125, 1173 (2001).

88. *See* Brief for Guardian Ad Litem, *supra* note 74, at 56-58.

89. Brief for Respondent Birth Father, *supra* note 68, at 52-54.

90. *See* Meyer, *supra* note 9, at 560-70.

91. Adoptive Couple v. Baby Girl, 133 S. Ct. 2552, 2571 (2013) (Breyer, J., concurring).

92. *Id.*

Justice Breyer suggested that the ICWA itself might provide greater protection to such fathers,[93] but the scenarios he identified are also ones that have given rise to stronger constitutional protection in past cases. The Supreme Court's unwed-father cases had previously extended constitutional protection, under both the Due Process and Equal Protection Clauses, to a man who had "'act[ed] as a father toward his children'"[94] by previously coming forward to assume "some measure of responsibility for the child's future."[95] Likewise, some state and lower federal courts had extended this constitutional protection to men who had been thwarted from doing so by a mother's deception or obstructions.[96]

Whether located through statutory or constitutional interpretation, the impulse reflected in Justice Breyer's concurrence stems from a recognition that family relationships are often complex and variegated, and that judicial pronouncements of the legal entitlements of any family member must take sensitive account of the interests of the facts and competing family interests. This is likely to set the tone for most family law disputes raising claims of equality in the future.

III. A BACKDROP OF RISING FAMILY INEQUALITY

There is another reason why the search for equality in family law in the years ahead will be more complex and full of trade-offs, a reason wholly apart from developments in constitutional doctrine. While family law has made great strides in accommodating a wider diversity of family forms, through the retreat of channeling and social stigma for unconventional choices, diverging patterns of family life have contributed to rising social and economic inequality.

The widening "marriage gap" between rich and poor, and along lines of race and ethnicity, suggests the possibility that the age of unprecedented equality in family *law* may be hardening the inequalities of family *life*.[97] The rise of assortative marriage, in which individuals with similar economic prospects are more likely to pair off with one another, would aggravate economic inequalities even if all were equally likely to marry. But, in fact, mar-

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93. *Id.*

94. Lehr v. Robertson, 463 U.S. 248, 261 (1983) (quoting Caban v. Mohammed, 441 U.S. 380, 389 n.7 (1979)).

95. *Id.* at 262. *See generally* Nancy E. Dowd, *Fathers and the Supreme Court: Founding Fathers and Nurturing Fathers*, 54 EMORY L.J. 1271 (2005).

96. *See* Meyer, *supra* note 27, at 762-69.

97. *See generally* RALPH RICHARD BANKS, IS MARRIAGE FOR WHITE PEOPLE? HOW THE AFRICAN AMERICAN MARRIAGE DECLINE AFFECTS EVERYONE (2011); June Carbone, *Unpacking Inequality and Class: Family, Gender and the Reconstruction of Class Barriers*, 45 NEW ENG. L. REV. 527 (2011); Amy L. Wax, *Engines of Inequality: Class, Race, and Family Structure*, 41 FAM. L.Q. 567 (2007).

riage is more common and more durable among those with more education and resources, and in retreat among those who might benefit most from a stable economic partnership.[98] The result, as June Carbone has observed, is the emergence of "a class continuum that includes a privileged middle class that continues to embrace somewhat traditional marital norms, an increasingly separate working class cycling in and out of marriage, and an underclass for whom marriage has effectively disappeared."[99] And, given the economic benefits associated with stable marriage, this pattern has compounded the divergent economic prospects of the well-off and the struggling.

This raises the prospect in the years ahead that those who care about equality among families must be concerned not only with barriers to choice in constructing intimate life—the focus of many past landmark battles for family equality, from *Meyer* and *Pierce* through *Loving*, *Griswold*, and *Lawrence*—but also with the need to support or encourage choices that will promote a more equal and just society. In other words, the future quest for equality may require hard choices about how to calibrate freedom with channeling, as well as hard trade-offs in resource commitments in support of families on the margin.

CONCLUSION

In closing, we plainly have important work ahead in realizing more fully the promise of equality in family law. Indeed, at a time of deepening inequalities in the life chances of children and adults, the work is every bit as urgent now as before.

Yet, the inequalities we will confront in the decades ahead are likely to be knottier and more complex and less susceptible to eradication by pronouncements of constitutional principle. Instead, our progress will be incremental, will more often rest on empirical judgments than principles, and will require difficult trade-offs. But, for the children and families affected, the stakes remain every bit as high.

98. *See* PAUL TAYLOR ET AL., PEW RESEARCH CTR., WOMEN, MEN AND THE NEW ECONOMICS OF MARRIAGE 1, 5 (2010), *available at* http://www.pewsocialtrends.org/files/2010/11/new-economics-of-marriage.pdf.

99. June Carbone, *Out of the Channel and into the Swamp: How Family Law Fails in a New Era of Class Division*, 39 HOFSTRA L. REV. 859, 862 (2011).