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The Canon of Family Law

Jill Elaine Hasday

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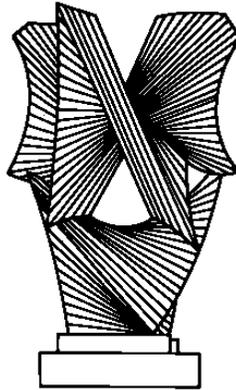
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THE CANON OF FAMILY LAW

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The Canon of Family Law

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The Canon of Family Law
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INTRODUCTION 1

I. THE RELATIONSHIP BETWEEN FAMILY LAW AND SOCIAL INEQUALITY 8

 A. *Overstating Change over Time* 9

 1. *Status and Contract* 10

 2. *Coverture* 17

 3. *Property Norms in the Law of Parenthood* 24

 B. *Understating Distinctions Between Families* 31

 1. *The Canonical Examples* 32

 2. *The Noncanonical Examples* 38

 C. *The Consequences of the Canon and the Possibilities for Change: The Debate over Divorce Law* 43

II. THE RELATIONSHIP BETWEEN FAMILY LAW AND FEDERALISM 48

 A. *The Exclusion of Federal Law from the Family Law Canon* 49

 B. *The Consequences of the Canon and the Possibilities for Change: The Debates over the Violence Against Women Act and the Defense of Marriage Act* 63

III. THE RELATIONSHIP BETWEEN FAMILY LAW AND WELFARE LAW 72

 A. *The Exclusion of Welfare Law from the Family Law Canon* 73

 B. *The Consequences of the Canon and the Possibilities for Change: The Debate over the Personal Responsibility Act* 77

CONCLUSION 79

INTRODUCTION

What is the “canon” of family law? By canon, I mean the ways of thinking about family law that are widely shared by legal scholars and especially by legal authorities, like legislators and judges. The existing literature on canons, which has long centered on the literary canon and has recently turned to the constitutional law canon,¹ has most commonly understood a canon to be a set of foundational texts that exemplify, guide, and constitute a discipline.² In part, the family law canon tracks this traditional focus on the inclusion and exclusion of texts, even if the family law canon does not take the form of a short and definitive reading list. Some of the

¹ For some of the scholarship on the literary canon, see HAROLD BLOOM, *THE WESTERN CANON: THE BOOKS AND SCHOOL OF THE AGES* (1994); HENRY LOUIS GATES, JR., *LOOSE CANONS: NOTES ON THE CULTURE WARS* (1992); LAWRENCE W. LEVINE, *THE OPENING OF THE AMERICAN MIND: CANONS, CULTURE, AND HISTORY* (1996). For some of the scholarship on the constitutional law canon, see LEGAL CANONS 331-433 (J.M. Balkin & Sanford Levinson eds., 2000); J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963 (1998); David Fontana, *A Case for the Twenty-First Century Constitutional Canon: Schneiderman v. United States*, 35 CONN. L. REV. 35 (2002); Jerry Goldman, *Is There a Canon of Constitutional Law?*, 2 LAW & POL. BOOK REV. 134 (1992); Sanford Levinson, *Slavery in the Canon of Constitutional Law*, 68 CHI.-KENT L. REV. 1087 (1993); David E. Marion, *The State of the Canon in Constitutional Law: Lessons from the Jurisprudence of John Marshall*, 9 WM. & MARY BILL RTS. J. 385 (2001); Richard A. Primus, *Canon, Anti-Canon, and Judicial Dissent*, 48 DUKE L.J. 243 (1998) [hereinafter Primus, *Canon, Anti-Canon, and Judicial Dissent*]; William J. Rich, *Taking “Privileges or Immunities” Seriously: A Call to Expand the Constitutional Canon*, 87 MINN. L. REV. 153 (2002); Gerald N. Rosenberg, *Brown Is Dead! Long Live Brown!: The Endless Attempt to Canonize a Case*, 80 VA. L. REV. 161 (1994); Brad Snyder, *How the Conservatives Canonized Brown v. Board of Education*, 52 RUTGERS L. REV. 383 (2000); Symposium, *The Canon(s) of Constitutional Law*, 17 CONST. COMMENT. 187 (2000); Richard Primus, *The Canon Has a History*, 14 YALE J.L. & HUMAN. 221 (2002) (reviewing LEGAL CANONS (J.M. Balkin & Sanford Levinson eds., 2000)). For some of the scholarship on legal canons more generally, see LEGAL CANONS, *supra*, at 3-328; Judith Resnik, *Constructing the Canon*, 2 YALE J.L. & HUMAN. 221 (1990); Judith Resnik, *Revising the Canon: Feminist Help in Teaching Procedure*, 61 U. CIN. L. REV. 1181 (1993); Symposium, *Multiple Cultures and the Law: Do We Have a Legal Canon?*, 43 J. LEGAL EDUC. 1 (1993).

² See, e.g., BLOOM, *supra* note 1, at 15 (“[T]he Canon’s true question remains: What shall the individual who still desires to read attempt to read, this late in history?”); GATES, *supra* note 1, at 32 (“Our task will be to bring together the ‘essential’ texts of the canon, the ‘crucially central’ authors, those whom we feel to be indispensable to an understanding of the shape, and shaping, of the tradition.”); Fontana, *supra* note 1, at 37 n.10 (“I use the term ‘canon’ throughout this Article in the way the term traditionally has been used in discussions of the legal ‘canon.’ A canon is the collection of the most important or illuminating items in a particular field. A canon is the collection of important cases.”) (citation omitted); Goldman, *supra* note 1, at 134 (“Does constitutional law have a canon? By ‘canon’ I mean a widely accepted body of rules, principles, and norms exemplified in a common set of Supreme Court opinions.”); Marion, *supra* note 1, at 387 (“[A] number of legal scholars have been openly considering whether it makes sense to speak of a constitutional law canon, a set of defining or formative cases that should shape the study and discussion of constitutional law.”); Primus, *Canon, Anti-Canon, and Judicial Dissent*, *supra* note 1, at 243 (“Several legal theorists have recently explored the idea that constitutional law has a canon, a set of greatly authoritative texts that above all others shape the nature and development of constitutional law.”); Snyder, *supra* note 1, at 385-86 (“The constitutional canon is the set of foundational texts that undergird our socio-legal discourse, influencing the way academics, judges, policymakers, and political commentators think about constitutional law.”).

shared ways of thinking about family law address which official legal sources, such as statutes and judicial decisions, fall within family law and which fall outside of it. But canons are not necessarily limited to texts like cases and statutes.³ Stories and examples can also be part of a canon. In fact, there is widespread agreement among legal authorities and legal scholars that certain stories and examples explain and describe family law and its governing principles. The family law canon consists of both official legal sources and these stories and examples.

No one has examined family law as a field that might have a canon. Yet the family law canon importantly determines what counts as family law, what constitutes a good reason or a convincing argument in a family law debate, what explanations have to be given, and what does not have to be explained. The family law canon operates, moreover, at the level of common sense, powerful enough that its tenets are taken to require no reappraisal. Indeed, the family law canon casts stark light on a feature of canons that has been given too little attention in the scholarship on the literary canon and even in the scholarship on the constitutional law canon: the practical consequences that a canon can have in the world. The family law canon, for example, has enabled state legislatures and state courts enacting and defending changes in divorce law to contend that family law no longer supports women's inequality and so no longer needs to worry about women's position upon divorce. The family law canon has allowed courts, judges, judicial organizations, congressmen, and legal scholars to mount powerful and effective campaigns against federal statutes simply on the ground that the statutes constitute federal family law and

³ A few scholars describing canons other than the family law canon have begun to recognize this. Most prominently, Balkin and Levinson note that the constitutional law canon includes "characteristic forms of legal argument, characteristic approaches to problems, underlying narrative structures, unconscious forms of categorization, and the use of canonical examples." Balkin & Levinson, *supra* note 1, at 970. For other definitions of "canon" not limited to texts, see Fran Ansley, *Recognizing Race in the American Legal Canon*, in LEGAL CANONS, *supra* note 1, at 238, 242 ("I will approach the legal canon in a way that cuts across various kinds of materials and audiences, focusing on its role as a source of cultural literacy, a collection of core narratives (or 'stock stories') that Americans tell themselves about the nation's history and its system of law.") (footnote omitted); Carol M. Rose, *Canons of Property Talk, or, Blackstone's Anxiety*, in LEGAL CANONS, *supra* note 1, at 66, 67 ("Instead of discussing particular cases, treatises, or texts as the canon of property law, . . . I propose to take up as 'canonical' the strategies for property talk that Blackstone so interestingly prefigured. By calling them canonical, I mean that despite some ebbs and flows, each of these strategies has enjoyed a certain constancy over time. They are canonical too in the sense that the adherents to each seem confident of the foundations of their own respective perspectives, regarding them as the more or less unproblematically proper stance for discussing property."); Mark Tushnet, *The Canon(s) of Constitutional Law: An Introduction*, 17 CONST. COMMENT. 187, 187 (2000) ("Any discipline has a canon, a set of themes that organize the way in which people think about the discipline."); see also ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW 287-88 (2000) ("[R]esults in the law . . . are influenced . . . by how people think, categorize, tell stories, deploy rhetorics, and make cultural sense as they go about interpreting and applying rules, requirements, and theories.").

are supposedly unprecedented and inappropriate for that reason alone. The family law canon has permitted courts and Congress to avoid explaining why the law employs very different rules to regulate the familial rights and responsibilities of the poor.

The silence about the family law canon does not indicate the absence of a family law canon, but it does reflect more general trends in the work of academic theorists. Academic theorists have devoted much less attention to family law than they have spent on thoroughly examining legal subjects like constitutional law.⁴ Academic theorists have also frequently written about legal canons as if they emanate only from prestigious, powerful, centralized, and federal institutions like the United States Supreme Court.⁵ These theorists may have ignored the

⁴ As many family law scholars and family law casebooks have noted, family law has relatively low status in the legal academy and the legal profession, particularly when compared to an extremely high status field like constitutional law. In many respects, the low status of family law is puzzling, given the sheer volume of family law cases, the importance of family law in structuring people's lives and interaction with the legal system, and the goods (monetary and psychological) at stake. See, e.g., LESLIE J. HARRIS & LEE E. TEITELBAUM, FAMILY LAW, at xxxv (2d ed. 2000) ("[S]ome students may bring a bias against [family law] because it does not enjoy the prestige of, say, antitrust—although the total number of antitrust cases in one year makes up a good day's work in an urban domestic relations court."); WALTER O. WEYRAUCH ET AL., CASES AND MATERIALS ON FAMILY LAW: LEGAL CONCEPTS AND CHANGING HUMAN RELATIONSHIPS 1 (1994) ("While [family law] is a course that students like to study, many consider it less difficult and less serious than courses in commercial law, constitutional law, or taxation. Some consider family law a 'marginal' course rather than part of the 'core' curriculum."); Martha Minow, "Forming Underneath Everything that Grows:" Toward a History of Family Law, 1985 WIS. L. REV. 819, 819 ("Family law is . . . 'underneath' other areas of the law. Its low status within the profession is well-known.").

⁵ The debate on the constitutional law canon, for example, has largely centered on the opinions of the United States Supreme Court. One article in the literature on the constitutional law canon, for instance, tracks the Supreme Court cases that appear in the most constitutional law casebooks. See Goldman, *supra* note 1, at 134-35 (finding that eleven constitutional law casebooks all include the following ten Supreme Court cases as principal cases: *Brown v. Board of Education*, *Griswold v. Connecticut*, *Roe v. Wade*, *Garcia v. SAMTA*, *Gibbons v. Ogden*, *Lochner v. New York*, *McCulloch v. Maryland*, *Marbury v. Madison*, *New York Times v. United States*, and *Youngstown Sheet and Tube v. Sawyer*). Other articles explore the canonical or anti-canonical status of particular Supreme Court cases. See Primus, *Canon, Anti-Canon, and Judicial Dissent*, *supra* note 1, at 250 ("Any theory of canonical dissent must account for Holmes's dissent in *Lochner* and Harlan's dissent in *Plessy*. To those two I would add the set of free speech dissents by Justices Holmes and Brandeis."); Rosenberg, *supra* note 1, at 171 ("Why is defending the efficacy of *Brown* so important? The answer, I think, is that *Brown* is the symbol of the use of courts to produce significant social reform. It provides legitimacy and a sense of purpose to liberal-leaning legal academics.") (footnote omitted); Snyder, *supra* note 1, at 384 ("Any modern judge or legal scholar who does not agree that *Brown* was correctly decided is considered a crackpot."); Cass R. Sunstein, *In Defense of Liberal Education*, 43 J. LEGAL EDUC. 22, 26 (1993) ("[A]n approach to constitutional interpretation is unacceptable if it entails the incorrectness of *Brown v. Board of Education*."). Still more articles nominate a Supreme Court case to be added to the constitutional law canon. See Fontana, *supra* note 1, at 37 ("*Schneiderman v. United States* should be a part of the constitutional law canon, as it is a good case to teach in any point in history.") (footnotes omitted); Sanford Levinson, *Why the Canon Should Be Expanded to Include The Insular Cases and the Saga of American Expansionism*, 17 CONST. COMMENT. 241, 243 (2000) ("*The Insular Cases* deserve an important place within each of [the constitutional law] canons . . .") (footnote omitted). For an argument that the constitutional law canon devotes too much attention to Supreme Court opinions, see Balkin & Levinson, *supra* note 1, at 1003-06.

family law canon because they incorrectly assumed—ironically, because of the power of the family law canon itself—that an institution like the Supreme Court has played little role in the development of family law.

This Article examines the family law canon, analyzes the consequences of the way that the canon is constructed, and explores how contesting the canon’s construction might make a difference in practical terms. As it reveals, legislatures, courts, and legal scholars have created the family law canon, and the family law canon has in turn shaped how these legal authorities and scholars think about family law, and how they teach their students and successors to view the field. Legislatures and courts have the most influence over the family law canon because they affect family law most directly. Their work has inherent and independent legal force, regardless of whether legal scholars or practicing lawyers endorse or approve of it.⁶ Legal scholars, in turn, influence the family law canon through their scholarship and their teaching. The academic community’s scholarship helps to create, promulgate, and reinforce the widely shared ways of thinking about family law, and legal scholarship can influence legislatures and courts. Legal scholars also help to form and perpetuate the family law canon through their family law courses and their family law casebooks that structure the content and focus of many family law courses.⁷ How family law is taught—what is included and excluded, what stories are told about family law and what examples are used—helps determine how the next generation of lawyers, including

⁶ In this way, legal canons differ from literary canons. The content of the literary canon is primarily in the hands of literature scholars who decide what they will teach and write about. *See* Balkin & Levinson, *supra* note 1, at 1001 (“Liberal arts scholars have more control over the academic theory canon of their discipline than do legal academics. They teach the courses, assign the books, and become the arbiters of quality and taste in intellectual production and in significant parts of ‘high culture.’ . . . [C]onstitutional law professors have much less control over the content of the academic theory canon of their discipline. This canon is largely shaped and controlled by forces beyond their direct control — the courts and the political branches.”); Paul D. Carrington, *Teaching American Civil Procedure Since 1779*, in LEGAL CANONS, *supra* note 1, at 155, 155 (“[W]e have considerably less freedom than teachers of literature, for the reason that there is but one law applicable to the deeds and misdeeds of our fellow citizens, and it is not made, selected, or necessarily approved by us, and our students know that.”); Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 746 (1982) (“There can be many schools of literary interpretation, but as Jordan Flyer put it, in legal interpretation there is only one school and attendance is mandatory.”); *see also* GATES, *supra* note 1, at 32 (noting that “scholars” and “writers” make literary canons).

⁷ In their work on the constitutional law canon, Balkin and Levinson distinguish between constitutional law’s “pedagogical canon,” the “key cases and materials [that] should be taught in constitutional law courses and reprinted in constitutional law casebooks,” and constitutional law’s “academic theory canon,” the “key cases and materials any serious legal academic . . . should know and any serious theory of constitutional law must take into account.” Balkin & Levinson, *supra* note 1, at 975-76. This distinction between a pedagogical canon and an academic theory canon does not appear to be present in family law.

some future legal authorities and legal scholars, will understand family law and its guiding principles.

At present, the family law canon misdescribes both the content of family law and its governing principles. The family law canon distorts how legal authorities and legal scholars understand family law in a way that can distort their judgments about specific family law disputes. Challenging the family law canon's construction—opening to scrutiny and question what is now taken to be a matter of common sense—can reorient our perspective on family law and our ways of thinking about the field. It is the first step toward changing the family law canon and restructuring family law debates, altering the terms on which they take place, transforming what counts as a convincing argument, and reforming how decisions are made.

To illustrate how the family law canon now operates, the effects it has had, and how it might be challenged, this Article focuses on three of the family law canon's most prominent themes. The first theme, examined in Part I, involves the relationship between family law and social inequality. As we will see, the family law canon classifies almost every inequality in family law as part of the past rather than the present. It both overstates the changes that have occurred in family law over time and understates the distinctions that family law currently draws between families. This construction of the family law canon has allowed legal authorities considering and enacting family law policies that might harm historically subordinated groups to argue that family law no longer supports social inequality and need no longer worry about the status of historically subordinated people. For instance, the state legislatures and state courts that have made and defended a wide variety of changes in divorce law in recent years have relied heavily on the canonical understanding of the relationship between family law and social inequality to contend that family law no longer needs to be concerned about women's status at divorce because family law now upholds women's equality.

Challenging the family law canon's construction, however, reveals that there are aspects of modern family law that continue to sustain social inequality, including the social inequality of women. It makes clear that it is simply not a convincing argument in a family law debate, like the divorce debate, to contend that family law already supports social equality firmly and completely. Equality concerns cannot be assumed away like that. Instead, an important issue in any family law debate is whether the particular family law measure in question is consistent with

equality or not.

The second theme, considered in Part II, involves the relationship between family law and federalism. The family law canon contends that family law is, and has always been, a matter of exclusively local jurisdiction. This construction of the family law canon suggests that a crucial and unsettled question in family law is whether the federal government can or should make family law at all. It has permitted legal authorities and legal scholars to oppose specific instances of federal family law on the ground that any kind of federal family law is unprecedented and inappropriate by definition, even where the authorities and scholars concede that the particular law at issue would otherwise advance worthy goals and purposes.

For instance, judges and judicial organizations never challenged the substantive aims of the civil rights remedy in the federal Violence Against Women Act of 1994 (VAWA),⁸ which created a federal civil right to be free from gender-motivated violence.⁹ But judges and judicial organizations (dubiously) identified VAWA's civil rights remedy as a form of federal family law, and then used claims about the inherently local nature of family law to secure significant limitations on the civil rights remedy before it was enacted by Congress. The argument that federal family law is unprecedented and categorically inappropriate also played a pivotal part in the Supreme Court decision that ultimately found even VAWA's modified civil rights remedy to be unconstitutional.¹⁰ Congressmen and legal scholars have similarly employed the claim that family law is inherently and exclusively local to oppose the third section of the federal Defense of Marriage Act of 1996 (DOMA),¹¹ which defines "marriage" for purposes of all federal statutory and administrative law as "a legal union between one man and one woman as husband and wife."¹² The legislative and scholarly critics of DOMA take this argument from federalism to be powerful enough to convince even people opposed to same-sex marriage.

Yet contesting the family law canon's construction reveals the existence and extent of

⁸ 42 U.S.C. § 13981 (2000) (found unconstitutional 2000).

⁹ *See id.*

¹⁰ *See United States v. Morrison*, 529 U.S. 598, 601-02, 612-13, 615-16 (2000).

¹¹ 1 U.S.C. § 7 (2000).

¹² *Id.*

federal family law. It makes clear that a federal law cannot be convincingly dismissed simply by identifying it as a form of family law. Even if VAWA, or DOMA, or other federal statutes are forms of federal family law, the federal government has long regulated family rights, responsibilities, and relationships. The relevant question in considering any example of federal family law is not whether the federal government can or should intervene in family law. It is whether the specific law at issue is desirable on its own terms, in light of its particular substantive merits and the possible (state or federal) alternatives. Challenging the exclusion of federal law from the family law canon helps to establish that one of the leading arguments that legal authorities and legal scholars now wield against federal family law measures is logically unconvincing, pushing the opponents of these measures to defend their opposition on new grounds, if at all.

The third theme, explored in Part III, involves the relationship between family law and welfare law. The family law canon treats family law and welfare law as wholly separate categories. When legal authorities identify a statute or situation as part of welfare law, they assume for that reason that the statute or situation cannot be part of family law at the same time. The exclusion of welfare law from the family law canon has allowed legal authorities to avoid explaining why the law applies very different rules to govern familial rights and responsibilities in poor families. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996,¹³ for example, structures familial rights and responsibilities in poor families in many ways that are directly contrary to the law's regulation of wealthier households. The Personal Responsibility Act is highly interventionist, while the family law applied to more affluent families is often reluctant to intervene into decisions about childbearing or the structure of family living arrangements. Yet the Congress that enacted the Personal Responsibility Act, and the courts that have upheld the act's provisions, have never felt the need to acknowledge that the Personal Responsibility Act applies different rules to govern the familial rights and responsibilities of the poor, much less to explain why this should be so. Challenging the construction of the family law canon reveals that many statutes, like the Personal Responsibility Act, and situations now classified exclusively within welfare law are actually forms of family law as well. It makes clear that poor families are subject to a different family law and that the

¹³ 42 U.S.C. §§ 601-619 (2000).

difference must be explained or eliminated.

In sum, contesting the family law canon's construction is the first step to changing the family law canon and restructuring the terms on which family law debates take place. It is important to realize, however, that it is not the only step required. By definition, the family law canon is hard to alter and resistant to lone reform efforts. After all, the canon consists of ways of thinking about family law that are widely shared and widely accepted. If this Article convinces you that much in the family law canon should change, we have to consider what else is needed to achieve practical reform. The Article concludes by arguing that the next steps that should be taken to reshape the family law canon need to focus on the process by which legal scholars in one generation transmit the family law canon to their students and successors. Through our scholarship and especially our teaching, legal scholars can work to change the family law canon by shaping the minds and imaginations of the next generation to think about family law in different ways. We can use our academic writing, our courses, and our casebooks to subject the family law canon to scrutiny, question, and challenge. We can discuss and draw attention to the persistence of inequality in family law, and to the family law canon's role in disguising, protecting, and perpetuating that inequality. We can examine the federal law and welfare law now excluded from the family law canon, and explore the consequences of those exclusions. The process of reforming the family law canon by intervening in its intergenerational transmission will not be easy or immediate. But as we will see, the effort is well justified because much is at stake.

Let's turn to the family law canon.

I. THE RELATIONSHIP BETWEEN FAMILY LAW AND SOCIAL INEQUALITY

The family law canon almost always identifies any inequalities in family law as rooted in past rather than present practices. It overstates the changes that have occurred in family law over time and understates the distinctions that family law currently draws between families. This construction of the family law canon has permitted legal authorities debating and instituting family law policies that might injure historically subordinated groups to deny that there are existing and continuing inequalities in family law, and to argue that family law no longer needs

to be concerned about the status and position of historically subordinated people. Yet there is substantial evidence, now excluded from the family law canon, that establishes the persistence of many forms of inequality within family law. Challenging the family law canon's construction reveals that it is not a convincing argument in a family law debate to insist that family law already supports social equality thoroughly and completely. Social equality is an important goal for family law, but declaring its accomplishment is significantly premature. Instead, a crucial question in any family law discussion has to be whether the specific policy at issue is consistent with equality concerns or not.

This part examines the canonical understanding of the relationship between family law and social inequality, and explores its systematic inaccuracies. It then turns to the recent debate over divorce law, in which state legislatures and state courts enacting and defending a number of changes in divorce law have relied on the canonical understanding of the relationship between family law and social inequality to contend that family law no longer needs to worry about women's status upon divorce because family law no longer supports women's inequality. This divorce debate illustrates some of the consequences of the family law canon's construction. It also indicates how challenging the family law canon's construction can be the first step to changing the canon and restructuring family law debates, altering what counts as a good reason and reforming how decisions are made.

A. *Overstating Change over Time*

Let's begin by considering how the family law canon overstates the changes that have occurred in family law over time. One of the best places to observe this aspect of the family law canon is within three of the canonical stories that legal authorities and legal scholars repeatedly use to explain and describe family law and its governing principles. These stories are that family law has moved from status to contract, that common law coverture principles no longer shape the law of marriage, and that common law property norms no longer shape the law of parenthood. Each of these canonical stories presents a limited and even deceptive picture of family law and its animating principles, overstating the changes that have occurred in family law over time and denying and concealing the persistence of inequality in family law. Consider the three canonical

stories in turn.

1. *Status and Contract*

The first, and perhaps most prominent, canonical story that legal authorities and especially legal scholars tell about family law is that family law has moved from status to contract. This story contends that family law was once governed by status rules that were set by the state and unalterable by the individuals involved, but is now a matter of contract, so that individuals can structure their family relationships as they see fit. The story celebrates the rise of contractualization as a triumph of individual freedom and equality.

The status-to-contract story originated at least as early as the nineteenth century, with Henry Sumner Maine's famous declaration in an 1861 treatise "that the movement of the progressive societies" in family law "has hitherto been a movement *from Status to Contract*."¹⁴ Modern scholarly reiteration and endorsement of the status-to-contract story abounds. Legal scholars repeatedly explain that "Maine was more right than he knew and probably more right than he wanted to be,"¹⁵ that "[t]he legal system increasingly views family members as business associates and contract partners,"¹⁶ that "[m]odern family law has steadily moved toward contract as its governing principle,"¹⁷ that "[a]n accelerated movement from status to contract is discernible in the realm of family relations,"¹⁸ that in "the law of marriage, scholars have come to understand our legal rules as resting mainly on imputed bargains that are susceptible to alteration by actual bargains,"¹⁹ that "[n]owhere has modern law's shift from status to contract been more

¹⁴ HENRY SUMNER MAINE, *ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY, AND ITS RELATION TO MODERN IDEAS* 170 (London, John Murray 1861).

¹⁵ MARY ANN GLENDON, *THE NEW FAMILY AND THE NEW PROPERTY* 43 (1981).

¹⁶ Janet L. Dolgin, *The Family in Transition: From Griswold to Eisenstadt and Beyond*, 82 *GEO. L.J.* 1519, 1534 (1994).

¹⁷ MILTON C. REGAN, JR., *FAMILY LAW AND THE PURSUIT OF INTIMACY* 35 (1993).

¹⁸ Walter Otto Weyrauch, *Metamorphoses of Marriage*, 13 *FAM. L.Q.* 415, 417 (1980).

¹⁹ John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 *YALE L.J.* 625, 630 (1995) (footnote omitted).

apparent than in family law.”²⁰

In fact, the status-to-contract story is so much a part of the family law canon, and its outlines are so well-worn into the fabric of the family law literature, that scholars tend to use the same examples to illustrate the status-to-contract story. Scholars explaining family law’s past emersion in status rules, for instance, frequently employ as their quintessential illustration the Supreme Court’s statement in *Maynard v. Hill* (1888)²¹ that when people marry “a relation between the parties is created which they cannot change.”²² Scholars describing the current contractualization of family law, in turn, most often cite the availability of no-fault divorce,²³ the

²⁰ WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* 271 (1999); *see also* Stephen J. Morse, *Family Law in Transition: From Traditional Families to Individual Liberty*, in *CHANGING IMAGES OF THE FAMILY* 319, 339 (Virginia Tufte & Barbara Myerhoff eds., 1979) (“[T]he law does not ban spouses from creating almost any kind of relationship that satisfies them.”).

²¹ 125 U.S. 190 (1888).

²² *Id.* at 211. Note that *Maynard*’s 1888 statement came twenty-seven years after Maine had already declared family law’s movement from status to contract. For scholarly use of the *Maynard* example in telling the status-to-contract story, see REGAN, *supra* note 17, at 10 (“Nineteenth-century judges and scholars were explicit in emphasizing that marriage was a status rather than simply a contract. As the Supreme Court stated in *Maynard v. Hill*”); Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1456 (“Although marriage has often been described as a civil contract, until recently it was the state, and not the parties, that set the terms of this contract. Parties could choose whether to enter into marriage, but they could not define the terms of their union. As the Supreme Court explained in *Maynard v. Hill*”) (footnote omitted); Cynthia Starnes, *Divorce and the Displaced Homemaker: A Discourse on Playing with Dolls, Partnership Buyouts and Dissociation Under No-Fault*, 60 U. CHI. L. REV. 67, 106-07 (1993) (“Early efforts to identify the nature of the marriage relationship focused on whether marriage is a contract or a status. At the heart of this dispute lay the very practical question of who should fix the terms of the relationship—the parties, the church, or the state. The state ultimately won. As the U.S. Supreme Court observed in 1888”) (footnote omitted).

²³ *See* JANET L. DOLGIN, *DEFINING THE FAMILY: LAW, TECHNOLOGY, AND REPRODUCTION IN AN UNEASY AGE* 35-36 (1997) (“In the late 1960s state legislators began to permit divorce upon agreement of the parties: no-fault divorce. . . . [W]ithin a decade the law transferred a great part of the responsibility for regulating marriage and divorce from the state to the parties involved. . . . As with business partners, spouses can design the terms of their relationships’ beginnings and endings, and the law will enforce the agreements they reach.”); REGAN, *supra* note 17, at 38 (“All states now provide for some form of no-fault divorce, with all but two authorizing divorce on the motion of only one party. In contrast to the Victorian notion of marriage as a relationship involving the performance of certain socially important duties, a no-fault regime reflects a conception of marriage as a private matter, controlled by the preferences of the parties.”) (footnotes omitted); Singer, *supra* note 22, at 1445 (“The no-fault divorce revolution is perhaps the most obvious example of this privatization process. Under the fault-based divorce system, the state determined when and whether a couple could divorce. . . . Under the current no-fault system, by contrast, the spouses themselves—and often one spouse acting unilaterally—can choose whether and when to terminate a marriage. . . . The no-fault divorce revolution is highly significant in and of itself. It is also emblematic of a much larger revolution in family law—the transformation from public to private ordering of behavior.”) (footnote omitted).

enforceability of prenuptial agreements about property distribution,²⁴ and the enforceability of agreements between nonmarital partners.²⁵

The status-to-contract story has some foundation. As it notes, there are areas of family law that are more contractualized than they once were. But the status-to-contract story overstates the changes that have occurred in family law over time. It obscures the substantial evidence that supports a counter-narrative that could be told about family law, but is not: the story of the persistence of status rules denying individuals choice about the structure of their relationships.

Status rules are probably most apparent in the law of parenthood.²⁶ However, the illustrations used to support the status-to-contract story focus on the law of marriage, so I will focus there as well in demonstrating the persistence of status. Marriage law alone provides ample evidence.

The persistence of status is evident, for example, in the continued limits that family law

²⁴ See DOLGIN, *supra* note 23, at 36 (“A further example of the process of defining and treating the family as a collection of separate individuals rather than as a unit of social value beyond the individuals involved, appears in antenuptial agreements in contemplation of divorce. Dismissed by courts everywhere only a few decades ago as violative of state public policy, such agreements are now widely recognized and enforced.”); REGAN, *supra* note 17, at 37 (“Receptivity to private ordering of the terms of family life is underscored by greater willingness of courts to enforce marital contracts. Courts traditionally were reluctant to enforce most antenuptial agreements between spouses for fear that they might alter the ‘essential incidents’ of marriage or that provision for property division or support upon divorce might encourage marital dissolution. With the decline of consensus about the terms of marriage, and with the prevalence of divorce, most states have adopted the view that it is unreasonable to regard marital contracts as contrary to public policy.”) (footnotes omitted); Singer, *supra* note 22, at 1460 (“Even where state-imposed marital obligations remain as the background legal regime, spouses today have considerable freedom to alter those background obligations by private contract, either before or during marriage. For example, the Uniform Premarital Agreement Act, which has been adopted by sixteen states since its promulgation in 1983, authorizes prospective spouses to contract with each other with respect to their property rights and support obligations, as well as ‘any other matter, including their personal rights and obligations, not in violation of public policy or a statute imposing a criminal penalty.’”) (footnote omitted).

²⁵ See DOLGIN, *supra* note 23, at 36 (“Legal acknowledgement that the spousal relationship is no longer uniquely defined by an encompassing and fixed set of rights and obligations is further indicated by the increasing willingness of courts and legislatures to recognize cohabitation agreements between parties never formally married.”); REGAN, *supra* note 17, at 40 (“Greater willingness to enforce contracts between unmarried cohabitants reflects the mutually reinforcing character of increased deference to private ordering and the declining significance of status.”); Singer, *supra* note 22, at 1449-51 (“Another way the law traditionally privileged marriage over nonmarital intimate relationships was by denying unmarried cohabitants access to the judicial system for resolving financial disputes arising out of their relationship. . . . Over the past fifteen years, this traditional rule has eroded significantly. . . . [C]ourts in many states [have] applied both express and implied contract remedies to resolve disputes about property and financial arrangements arising out of cohabitation relationships. . . . Consistent with the modern emphasis on private ordering, however, most courts have been unwilling to grant nonagreement-based support rights to unmarried cohabitants or to extend statutory divorce obligations, such as the payment of attorneys fees.”).

²⁶ See *infra* Part I.A.3.

places on marriage formation. All states prohibit polygamous marriages,²⁷ prohibit marriages between some relatives,²⁸ and prohibit marriages before a certain age.²⁹ All states but one prohibit same-sex marriages.³⁰ These laws are status rules set by the government and unalterable by the individuals involved. They limit a person's ability to choose whom he will marry and when he will marry.

The persistence of status rules is also evident in continued and important limitations on the organization of ongoing marital relationships. Consider, for instance, marital rape exemptions, which persist in some form in a majority of states. These exemptions treat rape more leniently if it occurs in marriage: They recognize a smaller range of conduct as criminal, place less severe sanctions on the marital rape they do criminalize, and/or impose additional

²⁷ See, e.g., ARIZ. CONST. art. 20, para. 2 (“Polygamous or plural marriages, or polygamous cohabitation, are forever prohibited within this State.”); IDAHO CONST. art. I, § 4 (“Bigamy and polygamy are forever prohibited in the state, and the legislature shall provide by law for the punishment of such crimes.”); N.M. CONST. art. XXI, § 1 (“Polygamous or plural marriages and polygamous cohabitation are forever prohibited.”); OKLA. CONST. art. 1, § 2 (“Polygamous or plural marriages are forever prohibited.”); UTAH CONST. art. III, § 1 (“[P]olygamous or plural marriages are forever prohibited.”).

²⁸ See, e.g., COLO. REV. STAT. ANN. § 18-6-301(1) (West 1999) (“Any person who knowingly marries . . . an ancestor or descendant, . . . a brother or sister of the whole or half blood, or an uncle, aunt, nephew, or niece of the whole blood commits incest, which is a class 4 felony.”); FLA. STAT. ANN. § 826.04 (West 2000) (“Whoever knowingly marries . . . a person to whom he or she is related by lineal consanguinity, or a brother, sister, uncle, aunt, nephew, or niece, commits incest, which constitutes a felony of the third degree”); N.Y. PENAL LAW § 255.25 (McKinney 2000) (“A person is guilty of incest when he or she marries . . . a person whom he or she knows to be related to him or her, either legitimately or out of wedlock, as an ancestor, descendant, brother or sister of either the whole or the half blood, uncle, aunt, nephew or niece.”); 18 PA. CONS. STAT. ANN. § 4302 (West Supp. 2003) (“A person is guilty of incest, a felony of the second degree, if that person knowingly marries . . . an ancestor or descendant, a brother or sister of the whole or half blood or an uncle, aunt, nephew or niece of the whole blood. The relationships referred to in this section include blood relationships without regard to legitimacy, and relationship of parent and child by adoption.”).

²⁹ See, e.g., DEL. CODE ANN. tit. 13, § 123(a) (1999) (“No male under the age of 18 nor any female under the age of 16 shall marry.”); N.D. CENT. CODE § 14-03-02 (1997) (“A marriage license may not be issued to any person below the age of sixteen, notwithstanding the consent of the parents or guardian of said person.”); OR. REV. STAT. § 106.010 (2001) (“Marriage is a civil contract entered into in person by males at least 17 years of age and females at least 17 years of age, who are otherwise capable, and solemnized in accordance with ORS 106.150.”); S.C. CODE ANN. § 20-1-250 (Law. Co-op. Supp. 2002) (“A marriage license must not be issued when either applicant is under the age of sixteen.”); see also *Moe v. Dinkins*, 669 F.2d 67, 68 (2d Cir. 1982) (per curiam) (upholding constitutionality of New York law requiring “that all male applicants for a marriage license between ages 16 and 18 and all female applicants between ages 14 and 18 must obtain the consent of their parents, and that a female between ages 14 and 16 must obtain judicial approval as well as parental consent”).

³⁰ See *infra* notes 129-130 and accompanying text.

procedural hurdles on marital rape prosecutions.³¹ All of these marital rape exemptions are status rules. They are set by the state, and the parties to a marriage cannot come to a legally enforceable agreement to alter them.

Interspousal tort immunities, which persist in some form in at least eight states, are also status rules governing the marital relation. These immunities exempt a tortfeasor from liability in some circumstances because he has inflicted the tort on his spouse. Some states, for instance, limit the torts that can be the basis of an interspousal tort suit.³² Some states prohibit interspousal tort suits unless the marital relationship is functionally or legally over.³³ All of these interspousal tort immunities are established by the state and unwaivable by the parties involved.

Similarly, at least thirty-three states recognize some form of the doctrine of necessities. Under this doctrine, spouses are prohibited from suing each other directly for support, but are obligated to pay each other's debts, if the debts are for necessary expenses.³⁴ The doctrine

³¹ See Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CAL. L. REV. 1373, 1375 & nn.1-3 (2000).

³² They provide that spouses can sue each other only for negligent torts, see *Beattie v. Beattie*, 630 A.2d 1096, 1100-01 (Del. 1993), or only for intentional torts, see *Stoker v. Stoker*, 616 P.2d 590, 590, 592 (Utah 1980), or only for torts arising from a motor vehicle accident, see *Rupert v. Stienne*, 528 P.2d 1013, 1017 (Nev. 1974); *Richard v. Richard*, 300 A.2d 637, 641 (Vt. 1973), or only for torts that do not implicate "marital or nuptial privileges, consensual acts and simple, common domestic negligence," *Tevis v. Tevis*, 400 A.2d 1189, 1192 (N.J. 1979), or only for torts that do not involve "personal injuries between married persons [that] will not justify a recovery of damages," *Brown v. Brown*, 409 N.E.2d 717, 719 (Mass. 1980) (citation omitted); see also *Nogueira v. Nogueira*, 444 N.E.2d 940, 940-41 (Mass. 1983).

³³ They provide, for example, that spouses can sue each other in tort only if they were separated at the time the tort occurred, see *Harris v. Harris*, 313 S.E.2d 88, 89-90 (Ga. 1984); see also GA. CODE ANN. § 19-3-8 (1999), or only if they have divorced by the time the suit is filed, see *Duplechin v. Toce*, 497 So. 2d 763, 765 (La. Ct. App. 1986); see also LA. REV. STAT. ANN. § 9:291 (West 2000).

³⁴ See, e.g., CAL. FAM. CODE § 914(a) (West Supp. 2003) ("[A] married person is personally liable for the following debts incurred by the person's spouse during marriage: (1) A debt incurred for necessities of life of the person's spouse while the spouses are living together. (2) Except as provided in Section 4302, a debt incurred for common necessities of life of the person's spouse while the spouses are living separately."); N.Y. JUD. CT. ACTS LAW § 412 (McKinney 1999) ("A married person is chargeable with the support of his or her spouse and, if possessed of sufficient means or able to earn such means, may be required to pay for his or her support a fair and reasonable sum, as the court may determine, having due regard to the circumstances of the respective parties."); OHIO REV. CODE ANN. § 3103.03(C) (West Supp. 2003) ("If a married person neglects to support the person's spouse in accordance with this section, any other person, in good faith, may supply the spouse with necessities for the support of the spouse and recover the reasonable value of the necessities supplied from the married person who neglected to support the spouse unless the spouse abandons that person without cause."); 23 PA. CONS. STAT. ANN. § 4102 (West 2001) ("In all cases where debts are contracted for necessities by either spouse for the support and maintenance of the family, it shall be lawful for the creditor in this case to institute suit against the husband and wife for the price of such necessities and, after obtaining a judgment, have an execution against the spouse contracting the debt alone; and, if no property of that spouse is found, execution may be levied upon and satisfied out of the

determines significant rights and responsibilities associated with marriage and denies marital partners the right to change them. The states enforcing the doctrine of necessities decide which debts count as necessities,³⁵ they set how much liability each spouse will bear for the other spouse's debts,³⁶ and they impose liability for a spouse's debts even if the marital partners never agreed to share debts, never informed third parties that they would assume each other's debts,

separate property of the other spouse.”); S.D. CODIFIED LAWS § 25-7-2 (Michie 1999) (“If a person neglects to make adequate provision for the support of his or her spouse, any other person may in good faith supply the spouse with reasonable necessities for the spouse’s support and recover the reasonable value thereof from that person, except in cases where by law the person is not liable for the spouse’s support.”); TEX. FAM. CODE ANN. § 2.501(b) (Vernon 1998) (“A spouse who fails to discharge the duty of support is liable to any person who provides necessities to the spouse to whom support is owed.”); VA. CODE ANN. § 55-37 (Michie 1995) (“The doctrine of necessities as it existed at common law shall apply equally to both spouses, except where they are permanently living separate and apart, but shall in no event create any liability between such spouses as to each other.”); Landmark Med. Ctr. v. Gauthier, 635 A.2d 1145, 1152 (R.I. 1994) (“[T]he common-law necessities doctrine should be expanded in Rhode Island to impose a mutual burden on both spouses”); Richland Mem’l Hosp. v. Burton, 318 S.E.2d 12, 13 (S.C. 1984) (“We . . . hold that the necessities doctrine allows third parties providing necessities to a husband or wife to bring an action against the individual’s spouse.”); Kilbourne v. Hanzelik, 648 S.W.2d 932, 934 (Tenn. 1983) (holding that suit for necessities cannot be dismissed because husband rather than wife incurred debts).

³⁵ See, e.g., COLO. REV. STAT. § 14-6-110 (2002) (“The expenses of the family and the education of the children are chargeable upon the property of both husband and wife, or either of them, and in relation thereto they may be sued jointly or separately.”); CONN. GEN. STAT. ANN. § 46b-37(b) (West Supp. 2003) (“[I]t shall be the joint duty of each spouse to support his or her family, and both shall be liable for: (1) The reasonable and necessary services of a physician or dentist; (2) hospital expenses rendered the husband or wife or minor child while residing in the family of his or her parents; (3) the rental of any dwelling unit actually occupied by the husband and wife as a residence and reasonably necessary to them for that purpose; and (4) any article purchased by either which has in fact gone to the support of the family, or for the joint benefit of both.”); N.D. CENT. CODE § 14-07-08(3) (1997) (“The husband and wife are liable jointly and severally for any debts contracted by either, while living together, for necessary household supplies of food, clothing, and fuel, and for shelter for themselves and family, and for the education of their minor children.”); WASH. REV. CODE ANN. § 26.16.205 (West 1997) (“The expenses of the family and the education of the children, including stepchildren, are chargeable upon the property of both husband and wife, or either of them, and they may be sued jointly or separately. When a petition for dissolution of marriage or a petition for legal separation is filed, the court may, upon motion of the stepparent, terminate the obligation to support the stepchildren. The obligation to support stepchildren shall cease upon the entry of a decree of dissolution, decree of legal separation, or death.”).

³⁶ They establish, for instance, joint and several liability, see, e.g., 750 ILL. COMP. STAT. 65/15(a)(1) (2000); IOWA CODE ANN. § 597.14 (West 2001); MASS. ANN. LAWS ch. 209, § 1 (Law. Co-op. 1994); MONT. CODE ANN. § 40-2-106 (2001); OKLA. STAT. ANN. tit. 43, § 209.1 (West 2001); OR. REV. STAT. § 108.040(1) (2001); WYO. STAT. ANN. § 20-1-201 (Michie 2003), secondary liability, see, e.g., HAW. REV. STAT. § 510-8(h) (1993); Bartrom v. Adjustment Bureau, Inc., 618 N.E.2d 1, 8 (Ind. 1993); Hawley v. Hawley, 904 S.W.2d 584, 585-86 (Mo. Ct. App. 1995); Cheshire Med. Ctr. v. Holbrook, 663 A.2d 1344, 1345 (N.H. 1995), or sex-linked liability with husbands more liable for their wives’ debts than the reverse, see KY. REV. STAT. ANN. § 404.040 (Michie 1999); NEB. REV. STAT. § 42-201 (1993); NEV. REV. STAT. 123.090, 123.110 (2001); Swogger v. Sunrise Hosp., Inc., 496 P.2d 751, 752 (Nev. 1972) (per curiam); Marshfield Clinic v. Discher, 314 N.W.2d 326, 327-28 (Wis. 1982).

and explicitly declared that they would not be responsible for each other's debts.³⁷

Family law's consistent refusal to enforce interspousal contracts for domestic services establishes yet another status rule. No state authorizes spouses to enter into legally enforceable agreements providing that one spouse will compensate the other for domestic services performed. When spouses have negotiated such agreements and attempted to enforce them in court, moreover, state courts have uniformly declined to recognize these agreements, even when they are explicit and specific.³⁸ State courts invalidating interspousal contracts for domestic services

³⁷ See, e.g., *Davis v. Baxter County Reg'l Hosp.*, 855 S.W.2d 303, 304-06 (Ark. 1993) (enforcing doctrine of necessities where husband "had never agreed to be responsible for [wife's] medical bills"); *St. Francis Reg'l Med. Ctr., Inc. v. Bowles*, 836 P.2d 1123, 1125, 1128 (Kan. 1992) ("The sole issue on appeal is whether Tamara is liable for Edward's medical expenses as a matter of law even though she did not contract with St. Francis for her husband's care. . . . [W]e hereby expand the common-law doctrine to apply to husbands and wives equally."); *Jersey Shore Med. Ctr.-Fitkin Hosp. v. Estate of Baum*, 417 A.2d 1003, 1010 (N.J. 1980) ("Normally a person is not liable for the debt of another in the absence of an agreement. The imposition of liability based on marital status alone is an exception to that rule. Nonetheless, it is a justifiable exception."); *N.C. Baptist Hosps., Inc. v. Harris*, 354 S.E.2d 471, 474 (N.C. 1987) ("Our decision is a recognition of a personal duty of each spouse to support the other, a duty arising from the marital relationship itself and carrying with it the corollary right to support from the other spouse. Because this obligation, like the husband's obligation to pay for the medical expenses of his wife, arises from the marriage relationship, attempts by the wife, as here, to disavow this duty have no effect.").

³⁸ See *Borelli v. Brusseau*, 16 Cal. Rptr. 2d 16, 20 (Ct. App. 1993) ("We . . . adhere to the longstanding rule that a spouse is not entitled to compensation for support, apart from rights to community property and the like that arise from the marital relation itself. Personal performance of a personal duty created by the contract of marriage does not constitute a new consideration supporting the indebtedness alleged in this case."); *Dep't of Human Res. v. Williams*, 202 S.E.2d 504, 506 (Ga. Ct. App. 1973) ("The law is that a husband is entitled to receive the domestic services of his wife.") (emphasis omitted); *Mays v. Wadel*, 236 N.E.2d 180, 183 (Ind. App. 1968) ("It is the law of this State that between husband and wife, while they are living together as such in a common household, that there can be no express or implied contract for compensation or payment for any services or acts performed or rendered in and about the home by either of them in the common support of that household."); *State v. Bachmann*, 521 N.W.2d 886, 888 (Minn. Ct. App. 1994) ("The fact that Bachmann's husband has offered to pay an hourly wage to her does not change our conclusion [that an interspousal contract for domestic services is not a recognizable employment contract]. . . . Bachmann has an obligation to care for her children regardless of whether she is paid to do so."); *In re Estate of Lord*, 602 P.2d 1030, 1031 (N.M. 1979) ("In *Tellez v. Tellez* this Court held that a contract whereby one spouse agrees to pay the other spouse for his or her care, which is part of the other's duties as a spouse, is against public policy and is therefore void. . . . We believe that *Tellez* states a proper principle, and we hereby reaffirm the public policy basis for that decision.") (citation omitted); *Church v. Church*, 630 P.2d 1243, 1250 (N.M. Ct. App. 1981) ("Under Virginia law a wife has a duty to provide household services to her husband and the husband has a duty to support his wife. . . . Having a duty to provide the services of a wife, those services are not a basis for relief for fraud, or breach of contract, or for an equitable award based on unjust enrichment."); *Kuder v. Schroeder*, 430 S.E.2d 271, 273 (N.C. Ct. App. 1993) ("Under the law of this State, there is a personal duty of each spouse to support the other, a duty arising from the marital relationship, and carrying with it the corollary right to support from the other spouse. So long as the coverture endures, this duty of support may not be abrogated or modified by the agreement of the parties to a marriage.") (citation omitted); *Matthews v. Matthews*, 162 S.E.2d 697, 698 (N.C. Ct. App. 1968) ("It is well settled that a contract between husband and wife whereby one spouse agrees to perform specified obligations imposed by law as a part of the marital duties of the spouses to each other is without consideration, and is void as against public policy. Under the law, a husband has the right to the services of his wife as a wife, and this includes his right to her society and her performance of her household and domestic duties.") (citations omitted); *Dade v. Anderson*, 439 S.E.2d 353, 354 (Va. 1994) ("In *Alexander v. Kuykendall* this Court held

have also authoritatively determined what counts as domestic services, regardless of the parties' understandings. Courts have applied the prohibition on interspousal contracts for domestic services, for instance, to unusually demanding and time-consuming work, such as the full-time care of an invalid spouse.³⁹ Like marital rape exemptions, interspousal tort immunities, and doctrines of necessities, this body of law establishes important benefits and burdens associated with marriage and gives the parties involved no right to change them.

In sum, the status-to-contract story, now firmly entrenched in the family law canon, offers an incomplete and even misleading description of family law and its governing principles. It overstates the changes that have occurred in family law over time, concealing and excluding the evidence of the persistence of status rules.

2. *Coverture*

A second, and related, story in the family law canon is that principles of common law coverture no longer shape and govern the law of marriage. This story asserts that the common law regime that denied married women most aspects of a separate legal identity by placing wives under their husbands' legal control, or *cover*,⁴⁰ has been vanquished and excised from the law of marriage. Even more than the status-to-contract story, the story of coverture's demise is a narrative of progress. It describes the replacement of a legal order that subordinated married

that one spouse may not recover in implied contract for services rendered to the other. We are asked in the present case to overrule *Alexander* and allow the plaintiff, June A. Dade, to recover from the estate of her deceased husband, Thomas Gwendol Dade, for services she rendered to him during a period of illness. We decline the request and affirm the dismissal of the plaintiff's claim.") (citation and footnote omitted).

³⁹ See *Borelli*, 16 Cal. Rptr. 2d at 17-18; *Mays*, 236 N.E.2d at 182-83; *In re Estate of Lord*, 602 P.2d at 1032; *Dade*, 439 S.E.2d at 354.

⁴⁰ William Blackstone offered the classic and most influential definition of coverture:

By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and *cover*, she performs every thing Upon this principle, of an union of person in husband and wife, depend almost all the legal rights, duties, and disabilities, that either of them acquire by the marriage.

1 WILLIAM BLACKSTONE, COMMENTARIES *430; see also ELIZABETH BOWLES WARBASE, THE CHANGING LEGAL RIGHTS OF MARRIED WOMEN, 1800-1861, at 5-9, 13-14, 22-24 (1987); Hasday, *supra* note 31, at 1389-92.

women with one that recognizes and respects married women's legal equality.

Proclamations of coverture's demise are ubiquitous in the family law jurisprudence. The Supreme Court, for instance, has declared that:

Nowhere in the common-law world—indeed in any modern society—is a woman regarded as chattel or demeaned by denial of a separate legal identity and the dignity associated with recognition as a whole human being. Chip by chip, over the years those archaic notions have been cast aside so that “[n]o longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas.”⁴¹

Many lower courts, joined by family law scholars and family law casebooks,⁴² have similarly announced the end of coverture, explaining that “[t]he old common law doctrine that a husband and wife are to be regarded as one entity has long since been discarded in modern jurisprudence,”⁴³ that “[t]he old fiction of the unity of person of the husband and wife has been completely abrogated,”⁴⁴ that “the notions that a woman should be regarded as her husband's chattel and deprived of her dignity and recognition as a whole human being through the denial of

⁴¹ *Trammel v. United States*, 445 U.S. 40, 52 (1980) (quoting *Stanton v. Stanton*, 421 U.S. 7, 14-15 (1975)); *see also* *Planned Parenthood v. Casey*, 505 U.S. 833, 897 (1992) (noting “our rejection of the common-law understanding of a woman's role within the family”); *Orr v. Orr*, 440 U.S. 268, 279-80 (1979) (“*Stanton v. Stanton* held that the ‘old notio[n]’ that ‘generally it is the man's primary responsibility to provide a home and its essentials,’ can no longer justify a statute that discriminates on the basis of gender. ‘No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas.’”) (citations omitted); *Stanton v. Stanton*, 421 U.S. 7, 14-15 (1975) (“Notwithstanding the ‘old notions’ to which the Utah court referred, we perceive nothing rational in the distinction No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas.”).

⁴² *See, e.g.*, EVAN GERSTMANN, *SAME-SEX MARRIAGE AND THE CONSTITUTION* 23 (2004) (“[T]he West . . . has traditionally granted men and women such different, and unequal, legal rights within marriage. These differences have been entirely eliminated in almost all the Western world [T]he sexist laws that required a woman to occupy the legally inferior role have been eliminated”); CARL E. SCHNEIDER & MARGARET F. BRINIG, *AN INVITATION TO FAMILY LAW: PRINCIPLES, PROCESS, AND PERSPECTIVES* 168 (2d ed. 2000) (“The old principles [that governed family law], based in important ways on different roles for men and women, were rejected.”); LYNN D. WARDLE & LAURENCE C. NOLAN, *FUNDAMENTAL PRINCIPLES OF FAMILY LAW* 464 (2002) (“Marriage [at common law] was not a partnership as it is today, rather it was a guardianship, profitable to the husband.”); Morse, *supra* note 20, at 321 (“Whereas the law formerly proclaimed that husband and wife were one and the husband was ‘the one,’ this view is now considered outrageous, an affront to the dignity and autonomy of women.”). For a contrary account suggesting that coverture rules and principles may persist, *see* Joan Williams, *Is Coverture Dead?: Beyond a New Theory of Alimony*, 82 *GEO. L.J.* 2227, 2236 (1994) (“In a sense, then, coverture has been updated rather than abolished. At common law, coverture cut wives off from ownership by formally denying them the right to own property. Although today ownership is formally open to all, in practice most wives are cut off from property rights in the key family asset—the wage of the ideal worker.”) (footnote omitted).

⁴³ *In re Luby*, 89 B.R. 120, 125-26 (Bankr. D. Or. 1988).

⁴⁴ *Burns v. Burns*, 518 So. 2d 1205, 1210 (Miss. 1988).

a separate legal identity have been thoroughly rejected.”⁴⁵

Indeed, courts have been recounting the story of coverture’s demise since long before the advent of modern sex discrimination jurisprudence made coverture constitutionally vulnerable by applying equal protection principles to the legal treatment of women. The Supreme Court, for example, did not strike down any statute on the ground that it denied women the equal protection of the laws until 1971.⁴⁶ But as early as 1960, the Court announced that “a wife’s legal submission to her husband has been wholly wiped out, not only in the English-speaking world generally but emphatically so in this country.”⁴⁷ In 1961, the Court reported “the enlightened emancipation of women from the restrictions and protections of bygone years” in the process of upholding a statute that limited women’s jury service.⁴⁸

The story of coverture’s demise can be such an old story in the family law canon because the courts recounting the story, whether in the middle of the twentieth century or more recently, have relied on evidence from the nineteenth century to prove their case, to the extent that they have cited any specific evidence at all. The married women’s property acts, which many states enacted starting in the 1830s, gave married women the rights to sue and be sued, make contracts, own separate property, and keep their wages.⁴⁹ Courts repeating the story of the end of coverture take the enactment of these statutes as their central piece of proof. They explain that the married

⁴⁵ *People v. M.D.*, 595 N.E.2d 702, 710 (Ill. App. Ct. 1992); *see also* *Immer v. Risko*, 267 A.2d 481, 484 (N.J. 1970) (“Although the original basis for the common law immunity doctrine was the theory of legal identity of husband and wife, this metaphysical concept cannot be seriously defended today.”); *Robinson v. Trousdale County*, 516 S.W.2d 626, 631 (Tenn. 1974) (“We do not believe that the common law disability of coverture has any sanction in our jurisprudence or any relevance in our society.”).

⁴⁶ *See Reed v. Reed*, 404 U.S. 71, 76-77 (1971).

⁴⁷ *United States v. Dege*, 364 U.S. 51, 54 (1960).

⁴⁸ *Hoyt v. Florida*, 368 U.S. 57, 61-62 (1961); *cf. Bradwell v. State*, 83 U.S. (16 Wall.) 130, 142 (1873) (Bradley, J., concurring in the judgment) (upholding women’s exclusion from the bar while noting “[t]he humane movements of modern society, which have for their object the multiplication of avenues for woman’s advancement, and of occupations adapted to her condition and sex, have my heartiest concurrence”).

⁴⁹ *See* NORMA BASCH, *IN THE EYES OF THE LAW: WOMEN, MARRIAGE, AND PROPERTY IN NINETEENTH-CENTURY NEW YORK* 158-59, 164 (1982); JAMES SCHOULER, *A TREATISE ON THE LAW OF THE DOMESTIC RELATIONS* 16 (Boston, Little, Brown, & Co. 1870); Richard H. Chused, *Late Nineteenth Century Married Women’s Property Law: Reception of the Early Married Women’s Property Acts by Courts and Legislatures*, 29 *AM. J. LEGAL HIST.* 3, 3 (1985); Richard H. Chused, *Married Women’s Property Law: 1800-1850*, 71 *GEO. L.J.* 1359, 1398, 1410-11 (1983); Reva B. Siegel, *Home as Work: The First Woman’s Rights Claims Concerning Wives’ Household Labor, 1850-1880*, 103 *YALE L.J.* 1073, 1082-83, 1142-43, 1180-81 (1994).

women's property acts were "[t]he beginning of the end of coverture,"⁵⁰ that "the common law unity concept . . . was largely dissipated by the widespread enactment of 'Married Women's Acts' in the mid-nineteenth century,"⁵¹ that the married women's property acts "fully and effectively eradicated the common law disability of coverture."⁵²

The married women's property acts were in some respects an important strike against coverture, and the coverture regime that controlled the law of marriage at the beginning of the 1830s has certainly not survived perfectly intact to the present day. But the canonical story of coverture's demise overstates the changes that have occurred in family law over time. There is substantial evidence within family law to support a counter-narrative that the end of coverture story excludes from the family law canon and denies: the story of the persistence of coverture principles and rules.

Consider again, for instance, the marital rape exemption, interspousal tort immunity, the prohibition on interspousal contracts for domestic services, and the doctrine of necessities. All of these status rules originated as part of common law coverture, and each continues to preserve substantial elements of the coverture regime.

Let's begin with the marital rape exemption. At common law, a husband was completely exempt from prosecution for raping his wife.⁵³ Courts and treatise writers defended the exemption with the same reasoning they employed to defend all of marital status law and common law coverture. A wife, they explained, gave her irrevocable consent to marital sex when she agreed to marry, just as her agreement to marry constituted her irrevocable consent to the rest of marital status law and to the other legal disabilities associated with common law coverture.⁵⁴ Starting in the last quarter of the twentieth century, states made two changes to this common law regime. First, a majority of states modified the scope of their marital rape exemptions so that the exemptions were no longer absolute, and a minority of states eliminated

⁵⁰ *Bartrom v. Adjustment Bureau, Inc.*, 618 N.E.2d 1, 4 n.2 (Ind. 1993).

⁵¹ *Immer v. Risko*, 267 A.2d 481, 482 (N.J. 1970).

⁵² *Robinson v. Trousdale County*, 516 S.W.2d 626, 632 (Tenn. 1974).

⁵³ *See Hasday, supra* note 31, at 1392-93.

⁵⁴ *See id.* at 1396-1400.

their exemptions.⁵⁵ Second, almost every marital rape exemption was rewritten in sex-neutral terms, so that it shielded “spouses” rather than husbands from marital rape prosecution.⁵⁶ The first change was important. It is now at least formally possible to prosecute some marital rapes, something that was impossible in any state before the 1970s. But the modern law of marital rape preserves substantial elements of the common law order. Modern marital rape exemptions may speak in a sex-neutral idiom, for example, but that has essentially no effect on how the exemptions operate in fact. All the available evidence indicates that husbands commit virtually every act of marital rape. Indeed, law enforcement authorities have found only a handful of cases that may have involved a woman raping any adult man.⁵⁷ In virtually all instances, men are the “spouses” who continue to receive legal protection when they commit marital rape, and women are the “spouses” who are legally unprotected when they are the victims of marital rape. As a matter of practice, marital rape exemptions continue to define a man’s rights in marriage to include sexual control over his wife.

Let’s turn to interspousal tort immunity. Courts created doctrines of interspousal tort immunity in the middle of the nineteenth century. Before then, there was no possibility of interspousal litigation, because married women were prohibited from filing any kind of suit. The married women’s property acts, however, granted wives the right to sue in their own names.⁵⁸ The acts did not specifically give married women the right to sue their husbands,⁵⁹ but they raised the specter of interspousal litigation for the first time. Courts promptly responded by establishing a common law rule of interspousal tort immunity and interpreting the married women’s property acts to leave that rule undisturbed.⁶⁰ Interspousal tort immunity functioned to limit the reach of the married women’s property acts and to preserve an important element of common law

⁵⁵ *See id.* at 1375 & nn.1-3.

⁵⁶ *See id.* at 1500 & n.465.

⁵⁷ *See id.* at 1494-95 & nn.444-45.

⁵⁸ *See supra* text accompanying note 49.

⁵⁹ *See* Carl Tobias, *Interspousal Tort Immunity in America*, 23 GA. L. REV. 359, 375 (1989) (“[N]o legislation, as originally passed or even as amended until the twentieth century, specifically provided both for personal injury actions and for such suits between husbands and wives.”).

⁶⁰ *See id.* at 383-91.

coverture. Today, notable aspects of this regime remain in place. At least eight states retain some form of interspousal tort immunity, preserving a rule that courts created to protect coverture in the face of the married women's property acts.⁶¹

The prohibition on interspousal contracts for domestic services reflects a similar pattern. Under common law coverture, a husband had a right to his wife's domestic services. The married women's property acts, which granted wives the rights to contract and to keep their own earnings,⁶² created the possibility that married women might be able to enter into enforceable agreements with their husbands that entitled the women to compensation for their household labor. Here too, however, courts quickly moved to protect a husband's prerogatives under common law coverture from the potential threat that the married women's property acts posed. Courts uniformly interpreted the married women's property acts to prohibit interspousal contracts for domestic services.⁶³ Today, substantial elements of this regime remain. It is still the case that no state is willing to enforce interspousal contracts for domestic services.⁶⁴ Courts now phrase the prohibition on these contracts in sex-neutral terms, explaining that each spouse has the right to the other's uncompensated domestic labor.⁶⁵ But today, as in the nineteenth century, a wife is much more likely to be the spouse who provides domestic services in marriage and is denied an enforceable right to compensation for those services because of the prohibition on interspousal contracts for domestic labor. In this way, the law continues to protect a husband's right to his wife's domestic services.

Finally, let's consider the doctrine of necessities. This doctrine existed because coverture denied married women the legal rights necessary to support themselves (the rights to keep their own earnings, contract, sue, and own property), and also denied wives the right to sue their husbands directly for support if support was not forthcoming. Under the doctrine of necessities,

⁶¹ See *supra* text accompanying notes 32-33.

⁶² See *supra* text accompanying note 49.

⁶³ See Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860-1930*, 82 GEO. L.J. 2127, 2127-31 (1994).

⁶⁴ See *supra* text accompanying notes 38-39.

⁶⁵ See, e.g., *Borelli v. Brusseau*, 16 Cal. Rptr. 2d 16, 20 (Ct. App. 1993) ("If the rule denying compensation for support originated from considerations peculiar to women, this has no bearing on the rule's gender-neutral application today.").

a woman could buy necessary items from a third party on her husband's credit, and if the husband refused to pay the third party, the third party could sue the husband for the debt.⁶⁶ Courts often contend that the judiciary created the doctrine of necessities to mitigate the harshness of coverture for married women.⁶⁷ But from another perspective, the doctrine of necessities functioned to preserve the legal disabilities on married women, by giving wives a means of securing support that did not challenge coverture and thus avoiding other possible solutions to the problem of married women's support.

Indeed, it is fair to say that the doctrine of necessities was an attractive, or even a plausible, answer to the problem of wifely support, only if one started from the premise that the law needed to preserve married women's legal disabilities by preventing them from suing their husbands directly and by denying them the legal rights that made self-support possible. From the start, the doctrine of necessities had a tremendous flaw: It relied on third parties to enforce a husband's support obligation, but gave third parties little incentive to assume that function. A merchant could collect for necessities from a recalcitrant husband only if the merchant sued the husband and won. Litigation would be costly, and the doctrine of necessities gave merchants no guarantee of success because it left the precise definition of a necessary expense unclear.⁶⁸

Yet today, the doctrine of necessities survives in some form in at least thirty-three

⁶⁶ See HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* § 6.3, at 189-92 (1968); JOHN F. KELLY, *A TREATISE ON THE LAW OF CONTRACTS OF MARRIED WOMEN* § 21, at 164-78 (Jersey City, F.D. Linn & Co. 1882); JAMES SCHOULER, *A TREATISE ON THE LAW OF THE DOMESTIC RELATIONS* §§ 63-71, at 101-19 (Boston, Little, Brown, & Co. 5th ed. 1895).

⁶⁷ See, e.g., *Bartrom v. Adjustment Bureau, Inc.*, 618 N.E.2d 1, 3 (Ind. 1993) ("The doctrine of necessities was developed to obviate some of the victimization which coverture would otherwise have permitted."); *Med. Bus. Assocs., Inc. v. Steiner*, 588 N.Y.S.2d 890, 892 (App. Div. 1992) ("[T]he necessities doctrine served, in the words of one commentator, as a 'protective remedy for the hapless wife and children facing economic abandonment by the husband.'" (citation omitted); *id.* at 896 ("The necessities doctrine originally evolved as a safeguard to ensure that the essential needs of a dependent wife and children were provided for, and at the heart of this common law rule 'is a concern for the support and the sustenance of the family and the individual members thereof.'" (citation omitted); *Landmark Med. Ctr. v. Gauthier*, 635 A.2d 1145, 1150 (R.I. 1994) ("The doctrine [of necessities] . . . attempted to 'obviate some of the victimization which coverture would otherwise have permitted' . . .") (citation omitted).

⁶⁸ Courts, for instance, adjusted their definition of a necessary item according to the married couple's socio-economic class. See, e.g., CLARK, *supra* note 66, § 6.3, at 190; KELLY, *supra* note 66, § 21, at 167. This meant that if a merchant suspected that a woman's husband might not pay her bills, the merchant had good reason to decline to sell to that woman, thus leaving her husband's support obligation unenforced and the wife without access to necessities. As the Iowa Supreme Court noted as early as 1873, a wife could "find it difficult, if not impossible, to obtain a continuous support" through the doctrine of necessities because "dealers and professional men would be unwilling to supply their articles or services if thus compelled to resort to litigation in order to secure their pay." *Graves v. Graves*, 36 Iowa 310, 313 (1873).

states.⁶⁹ Most states,⁷⁰ although not all of them,⁷¹ have made the doctrine facially sex-neutral, recognizing that modern sex discrimination jurisprudence is much more hostile to laws that draw explicit sex-based distinctions.⁷² But even in states with facially-neutral doctrines of necessities, economic disparities between men and women make it much more likely that the spouse who needs to rely on the doctrine of necessities to have her necessary expenses paid will be the wife. The modern doctrine of necessities preserves a regime in which the spouse in need of support, usually the wife, is unable to enforce her marital rights directly and instead has to make her claims through third parties.

As these examples make clear, substantial evidence within family law documents the persistence of rules and principles from common law coverture. The story of coverture's demise is embedded in the family law canon, but its description of family law is partial and misleading. It overstates the changes that have occurred in family law over time, and excludes and obscures the evidence indicating the persistence of inequality.

3. *Property Norms in the Law of Parenthood*

A third story in the family law canon is that common law property norms no longer shape the law of parenthood. This story contends that the law of parenthood is now structured around children's interests, having shed a common law tradition that used property norms to guide the

⁶⁹ See *supra* text accompanying notes 34-37.

⁷⁰ For states that have doctrines of necessities phrased in sex-neutral language, see sources cited *supra* notes 34-37.

⁷¹ For states that still have sex-specific doctrines of necessities, see sources cited *supra* note 36.

⁷² See, e.g., *St. Francis Reg'l Med. Ctr., Inc. v. Bowles*, 836 P.2d 1123, 1128 (Kan. 1992) ("We hold the doctrine of necessities in its historical form violates the Equal Protection Clause of the Fourteenth Amendment, and we hereby expand the common-law doctrine to apply to husbands and wives equally."); *Cheshire Med. Ctr. v. Holbrook*, 663 A.2d 1344, 1346 (N.H. 1995) ("We find that as traditionally formulated, the necessities doctrine is unconstitutional, and should be revised to impose reciprocal responsibilities upon husbands and wives."); *Med. Bus. Assocs., Inc. v. Steiner*, 588 N.Y.S.2d 890, 890 (App. Div. 1992) ("[W]e find that as traditionally formulated, the necessities doctrine violates the Equal Protection Clause, and that its unconstitutionality should be remedied by extending the common-law rule to both spouses."); *Kilbourne v. Hanzelik*, 648 S.W.2d 932, 934 (Tenn. 1983) ("To impose liability upon the husband for providing necessities to his wife while denying such liability of the wife for providing necessities to her husband . . . cannot pass constitutional muster under the equal protection guarantees of the state and federal constitutions . . .").

law of parenthood and that granted parents (especially fathers) rights of custody and control over their children that were strong enough to be the functional equivalent of property rights. Much like the story of the end of coverture, this story is presented as a narrative of progress and equality. It asserts that a common law regime that failed to recognize children's legitimate interests has been supplanted by a legal order that prioritizes children's interests.

Reiterations of this story appear throughout family law scholarship, family law casebooks, and family law jurisprudence. Family law scholars state that the law of parenthood has rejected a common law tradition “[m]oored in the medieval equation of legal rights with property ownership.”⁷³ They explain that the law of parenthood has “shift[ed] away from its emphasis on married fathers’ common law rights to a view of children with interests of their own.”⁷⁴ Family law casebooks similarly report that the law of parenthood has “shift[ed]” from a regime that treated children as “chattels” rather than “persons.”⁷⁵ They note that “[h]istorically, the law regarded children as the property of their parents, particularly of their father,” and declare that “[t]oday, the law increasingly views children as individuals with their own distinct interests.”⁷⁶ Courts agree that “[p]arents do not have a property right in their children” under the modern law of parenthood,⁷⁷ that “[n]either parent’s interests with regard to his or her children

⁷³ MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA* 235 (1985).

⁷⁴ Judith T. Younger, *Responsible Parents and Good Children*, 14 *LAW & INEQ.* 489, 497 (1996); *see also* Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 *HARV. L. REV.* 835, 864 (2000) (“While the legal system of the feudal era accorded a family patriarch the right to bind his children as he saw fit, that time has long since passed. Today, parents’ rights are thought to derive from — and to be limited by — their children’s interests. Family law has thus moved consistently in the direction of a child-centered view of parental entitlements.”) (footnotes omitted); *id.* at 893-94 (“Today — perhaps more so than at any time in our history — courts and commentators hold that parents’ rights are secondary to children’s interests.”); Morse, *supra* note 20, at 321 (“[I]t is no longer possible to view children as objects who can be regulated without regard for their wishes and liberty.”).

⁷⁵ WEYRAUCH, *supra* note 4, at 670.

⁷⁶ D. KELLY WEISBERG & SUSAN FRELICH APPLETON, *MODERN FAMILY LAW: CASES AND MATERIALS* 951 (2d ed. 2002).

⁷⁷ *In re E.F.V.*, 461 A.2d 1263, 1268 (Pa. Super. Ct. 1983).

are a property right,”⁷⁸ that “[a] child is not a chattel” in contemporary family law.⁷⁹

In recounting the demise of common law property norms, scholars and courts rely on the law of child custody as their central source of evidence. Scholars observe that the law of child custody has moved “from father’s property to children’s rights.”⁸⁰ They declare that child custody determinations are now based on “the best-interests-of-the-child.”⁸¹ They insist that the common law of parenthood was replaced by “an entirely new standard of child placement” in “which the highest priority was the child’s interests.”⁸² Courts similarly stress that custody determinations “subordinate” a parent’s interests and allocate custody according to “a determination of the best interests of the child,”⁸³ that “the welfare of the child is the determining factor” in establishing child custody,⁸⁴ that “[w]hatever claim [parents] may make for either custody or visitation rights, is to be tested by what is in the best interest of the child.”⁸⁵

The law of parenthood has changed over time, and the emergence, since the middle of the nineteenth century, of child custody cases purporting to apply a “best interests of the child” standard is a significant development. But the canonical story of the demise of common law property norms importantly misdescribes family law and its governing principles. It overstates the changes that have occurred in family law over time. Here too, there is substantial evidence within family law to support an excluded counter-narrative: the story of the persistence of common law property norms in the law of parenthood. Parents retain substantial elements of many of their common law rights, even where those rights potentially conflict with their children’s interests. Let’s examine, for instance, parents’ custody rights, rights to inflict corporal

⁷⁸ *Raymond v. Raymond*, 345 A.2d 48, 52 (Conn. 1974).

⁷⁹ *Olinghouse v. Olinghouse*, 908 P.2d 280, 286 (Okla. Ct. App. 1995) (quoting *Commonwealth ex rel. Berg v. Catholic Bureau*, 76 A.2d 427 (Pa. Super. Ct. 1950)).

⁸⁰ MARY ANN MASON, *FROM FATHER’S PROPERTY TO CHILDREN’S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES* (1994).

⁸¹ Younger, *supra* note 74, at 497 (citation and internal quotation marks omitted).

⁸² GROSSBERG, *supra* note 73, at 234-35.

⁸³ *Raymond*, 345 A.2d at 52.

⁸⁴ *Olinghouse*, 908 P.2d at 286 (quoting *Commonwealth ex rel. Berg*, 76 A.2d at 427).

⁸⁵ *In re E.F.V.*, 461 A.2d 1263, 1268 (Pa. Super. Ct. 1983).

punishment, rights to control their children's labor, and rights to immunity from tort liability for injuring their children.

We can start with the law of custody. Courts and scholars reporting the demise of common law property norms take the law of child custody as their central illustration, yet a large portion of child custody law does not actually turn on a child's interests. These interests may help settle custody disputes between two biological parents, where a reliance on parental rights cannot decide the dispute. But today, as at common law,⁸⁶ a child's interests are not the central concern of suits in which the state seeks to take permanent custody from parents, and they do not guide most custody disputes between biological parents and third parties. The key question in these cases is *not* where the child would be best off. Instead, these cases focus on a *parent's* rights, and protect those rights unless the state or third parties can meet a very high evidentiary burden to prove parental unfitness. As the Supreme Court has explained, for example, parental termination proceedings do not consider "whether the natural parents" or some other caretakers "would provide the better home" for a child. A child can be "deeply interested in the outcome" of a parental termination proceeding, yet "the focus emphatically is not on" him.⁸⁷ Parental termination proceedings revolve around the parent's "fundamental" right to his child,⁸⁸ and uphold that right unless there is "clear and convincing evidence"⁸⁹ of "parental unfitness."⁹⁰ Many courts deciding custody disputes between parents and third parties similarly report that "[t]he issue is *not* which side would provide the better home for the child."⁹¹ These courts

⁸⁶ See Jill Elaine Hasday, *Parenthood Divided: A Legal History of the Bifurcated Law of Parental Relations*, 90 GEO. L.J. 299, 312 (2002) ("As one state supreme court summarized the premise guiding nineteenth-century custody decisions at common law, 'it would not do' to deprive a biological parent of his custodial authority simply because his children were, 'in the ordinary estimation, . . . neglected, and . . . the popular verdict would declare that they would be better off, and stand a better chance of becoming useful members of society, if they were removed from the pernicious influence of their parents.' A biological parent could only lose custody for behavior that was 'sufficiently extravagant and singular and wrong to meet the condemnation of all decent and law-abiding people.'") (footnotes omitted).

⁸⁷ *Santosky v. Kramer*, 455 U.S. 745, 759 (1982).

⁸⁸ *Id.* at 753, 759.

⁸⁹ *Id.* at 748.

⁹⁰ *Id.* at 760.

⁹¹ *In re Feemster*, 751 S.W.2d 772, 773 (Mo. Ct. App. 1988).

enforce the rights of parents and award them custody against third parties, in the absence of “clear and conclusive” “[e]vidence of unfitness.”⁹² In this way, parents continue to enjoy substantial rights to the custody of their children simply by virtue of their status as parents.

Let’s turn to the law of corporal punishment, where parents also retain essential elements of their common law rights. At common law, a parent had the right to physically chastise his child. Courts and legal commentators endorsed physical chastisement as a way of securing a child’s obedience to his parent’s authority, and never required a parent to establish that the chastisement was in the child’s best interests. The exact scope of a parent’s common law right of correction varied modestly over time, but it was always wide-ranging. By the end of the nineteenth century, a majority of common law courts held that a parent could inflict reasonable or moderate correction on his child, and rarely convicted a parent for exceeding the bounds of reasonableness or moderation.⁹³ Today, every state still recognizes a parent’s authority to impose corporal punishment on his child. At least thirty states and the District of Columbia, for instance, have codified a parent’s right to inflict “reasonable” corporal punishment.⁹⁴ At least thirteen states have codified a parent’s right to impose corporal punishment in slightly different terms.⁹⁵

⁹² *Haralson v. Haralson*, 595 P.2d 443, 445 (Okla. 1979).

⁹³ *See Hasday*, *supra* note 86, at 310-11, 314-17.

⁹⁴ *See* ALA. CODE § 13A-3-24(1) (1994); ALASKA STAT. § 11.81.430(a)(1) (Michie 2002); ARIZ. REV. STAT. ANN. § 13-403(1) (West 2001); ARK. CODE ANN. § 5-2-605(1) (Michie 1997); CAL. WELF. & INST. CODE § 300(a) (West 1998); COLO. REV. STAT. ANN. § 18-1-703(1)(a) (West 1999); CONN. GEN. STAT. ANN. § 53a-18(1) (West 2001); DEL. CODE ANN. tit. 11, § 468(1) (2001); D.C. CODE ANN. § 16-2301(23)(B)(i) (Supp. 2003); HAW. REV. STAT. § 703-309(1) (1993); IDAHO CODE § 16-2002(e) (Michie Supp. 2003); IND. CODE ANN. § 31-34-1-15(1) (West 1999); LA. REV. STAT. ANN. § 14:18(4) (West 1997); ME. REV. STAT. ANN. tit. 17-A, § 106(1) (West 1983); MD. CODE ANN., FAM. LAW § 4-501(b)(2) (Supp. 2002); MICH. COMP. LAWS ANN. § 750.136b(7) (West Supp. 2003); MINN. STAT. ANN. § 609.06(1)(6) (West 2003); MISS. CODE ANN. § 43-21-105(m) (2000); MO. ANN. STAT. § 210.110(1) (West 1996); N.H. REV. STAT. ANN. § 627:6(I) (1996); N.Y. PENAL LAW § 35.10(1) (McKinney 1998); N.D. CENT. CODE § 12.1-05-05(1) (1997); OR. REV. STAT. § 161.205(1) (2001); S.C. CODE ANN. § 20-7-490(2)(a) (Law. Co-op. Supp. 2002); S.D. CODIFIED LAWS § 22-18-5 (Michie 1998); TENN. CODE ANN. § 39-15-401(b)(1) (1997); TEX. FAM. CODE ANN. § 261.001(1)(C) (Vernon 2002); UTAH CODE ANN. § 76-2-401 (Supp. 2003); WASH. REV. CODE ANN. § 26.44.015 (West 1997); WIS. STAT. ANN. § 939.45(5) (West 1996); WYO. STAT. ANN. § 14-3-202(a)(ii) (Michie 2003).

⁹⁵ These states protect all parental corporal punishment that is “ordinary,” OKLA. STAT. ANN. tit. 21, § 844 (West 2002), or not “excessive,” 705 ILL. COMP. STAT. 405/2-3(2)(v) (2002); NEV. REV. STAT. 432B.150 (2001); OHIO REV. CODE ANN. § 2919.22(B)(3) (Anderson 2003); R.I. GEN. LAWS § 40-11-2(1)(i)-(ii) (Supp. 2002); W. VA. CODE ANN. § 49-1-3(a) (Michie 2001), or not “unnecessarily severe,” N.J. STAT. ANN. § 9:6-1 (West 2002), or not “cruel and inhuman,” KAN. STAT. ANN. § 21-3609 (1995), or does not cause a certain level of physical or mental injury, *see* FLA. STAT. ANN. § 39.01(2) (West 2003); GA. CODE ANN. § 19-15-1(3)(A) (1999); KY. REV. STAT. ANN. § 503.110(1) (Michie 1999); MASS. ANN. LAWS ch. 119, § 51A (Law. Co-op. 2002); 18 PA. CONS. STAT. ANN. §

These statutes preserve a substantial portion of the common law regime.

Parents have similarly maintained important aspects of their common law right to control their child's labor. Child labor laws have modified rather than eliminated the almost absolute authority that a parent (particularly a father) exercised over his child's labor at common law, so that parents still retain significant control over their children's work.⁹⁶ Federal law, for example, gives parents who employ their children more power than other employers, and allows parents to consent to their children's exemption from important labor protections. A child working for his parent on the parent's farm is not protected by federal law's minimum wage and maximum hour requirements,⁹⁷ by federal law's prohibition on child labor before the age of twelve,⁹⁸ or by federal law's ban on employing children under sixteen in "particularly hazardous" occupations.⁹⁹ A parent can authorize his child to work anywhere in agriculture at the age of twelve or thirteen,¹⁰⁰ and can authorize a child younger than twelve to work on many farms that the parent does not own,¹⁰¹ even though federal law generally prohibits agricultural labor until a child reaches fourteen.¹⁰² A child who works on the same farm that employs his parent is also often excluded from federal law's minimum wage and maximum hour protections.¹⁰³ A similar pattern appears in state labor laws.¹⁰⁴ Following a course begun at common law, none of these statutes

509(1) (West 1998).

⁹⁶ On the common law, see 1 BLACKSTONE, *supra* note 40, at *441.

⁹⁷ See 29 U.S.C. § 213(a)(6)(B) (2000).

⁹⁸ See *id.* § 213(c)(1)(A).

⁹⁹ *Id.* § 213(c)(2).

¹⁰⁰ See *id.* § 213(c)(1)(B).

¹⁰¹ See *id.* § 213(c)(1)(A).

¹⁰² See *id.* § 213(c)(1)(C).

¹⁰³ See *id.* § 213(a)(6)(D).

¹⁰⁴ California, for instance, exempts a parent who employs his child in "agricultural, horticultural, viticultural, or domestic labor" from otherwise applicable restrictions on child labor. CAL. LAB. CODE § 1394(a) (West Supp. 2003). Parents in South Dakota can employ their children in an "occupation dangerous to life, health, or morals," although other employers cannot do so until the child reaches sixteen. S.D. CODIFIED LAWS § 60-12-3 (Michie 1993). A parent in Arkansas can employ his child before the age of fourteen, even though the state otherwise prohibits child labor before fourteen. See ARK. CODE ANN. § 11-6-104 (Michie 2002).

requires a showing that the parent is acting in his child's interests. All accord a parent significant control over his child's labor simply because of his status as a parent.

Finally, a parent's immunity from tort liability for injuring his child represents an example where the legal rights that parents exercise over their children have actually grown over time. No state recognized parental tort immunity until 1891, when the Mississippi Supreme Court created parental tort immunity to protect a parent's authority "to care for, guide, and control" his child, and to enforce a child's "obligation to aid and comfort and obey" his parent.¹⁰⁵ Courts throughout the nation followed by adopting their own doctrines of parental tort immunity, and today at least twenty-seven states recognize some form of the immunity. Some states, for instance, exempt a parent from tort liability if he exercises legal control over his child.¹⁰⁶ Some states limit the parental conduct that can be the basis of a child's suit.¹⁰⁷ In enforcing these doctrines of parental tort immunity, courts often explain that they are acting to protect "parental

¹⁰⁵ *Hewellette v. George*, 9 So. 885, 887 (Miss. 1891).

¹⁰⁶ They hold that a child cannot bring a negligence suit against his parent unless the negligence occurred after the child reached the age of majority, *see Renko v. McLean*, 697 A.2d 468, 472-73 (Md. 1997); *Warren v. Warren*, 650 A.2d 252, 255-56 (Md. 1994), or that a child cannot bring any tort suit against his parent unless the child is emancipated or the parent does not have legal custody and control, *see LA. REV. STAT. ANN. § 9:571* (West 2000).

¹⁰⁷ They hold, for example, that a child cannot bring a tort suit against his parent "where parental control, authority, or discretion is involved." *Sears, Roebuck & Co. v. Huang*, 652 A.2d 568, 572 (Del. 1995) (citation omitted); *see also Cates v. Cates*, 619 N.E.2d 715, 728-29 (Ill. 1993); *Smith v. Smith*, 646 N.W.2d 412, 415 (Iowa 2002); *Lewis v. W. Am. Ins. Co.*, 927 S.W.2d 829, 832 (Ky. 1996); *Plumley v. Klein*, 199 N.W.2d 169, 172-73 (Mich. 1972); *Broadwell v. Holmes*, 871 S.W.2d 471, 476-77 (Tenn. 1994). They refuse to hear a child's tort suit against a parent for any injury except sexual abuse, established by "clear and convincing" evidence. *Hurst v. Capitell*, 539 So. 2d 264, 266 (Ala. 1989) (per curiam). They immunize parents from their children's tort suits for negligent supervision, *see Brunner v. Hutchinson Div., Lear-Siegler, Inc.*, 770 F. Supp. 517, 518 (D.S.D. 1991); *Crotta v. Home Depot, Inc.*, 732 A.2d 767, 770-73 (Conn. 1999); *Farmers Ins. Group v. Reed*, 712 P.2d 550, 551-52 (Idaho 1985); *Cooley v. Hosier*, 659 N.E.2d 1127, 1129, 1131 (Ind. Ct. App. 1996); *Foldi v. Jeffries*, 461 A.2d 1145, 1152 (N.J. 1983); *Holodook v. Spencer*, 324 N.E.2d 338, 340 (N.Y. 1974); *Shoemake v. Fogel, Ltd.*, 826 S.W.2d 933, 935 (Tex. 1992); *Jenkins v. Snohomish County Pub. Util. Dist. No. 1*, 713 P.2d 79, 83 (Wash. 1986) (en banc), or for any kind of negligent conduct, *see Blake v. Blake*, 508 S.E.2d 443, 444 (Ga. Ct. App. 1998), or for any kind of uninsured negligent conduct, *see Fields v. S. Farm Bureau Cas. Ins. Co.*, 87 S.W.3d 224, 228, 231 (Ark. 2002); *Herzfeld v. Herzfeld*, 781 So. 2d 1070, 1077, 1078 n.17 (Fla. 2001), or for any kind of negligent conduct that does not involve an automobile accident, *see Doe v. Holt*, 418 S.E.2d 511, 512-13 (N.C. 1992); *Courtney v. Courtney*, 413 S.E.2d 418, 427 (W. Va. 1991), *appeal after remand*, 437 S.E.2d 436 (W. Va. 1993), an insured automobile accident, *see Sorensen v. Sorensen*, 339 N.E.2d 907, 909, 916 (Mass. 1975); *Sixkiller v. Summers*, 680 P.2d 360, 360-61 (Okla. 1984), or the parent's business or employment, *see Terror Mining Co. v. Roter*, 866 P.2d 929, 933, 936-37 (Colo. 1994) (en banc); *see also Pavlick v. Pavlick*, 491 S.E.2d 602, 604 (Va. 1997) (noting that Virginia's doctrine of parental tort immunity bars a child's tort suit against his parent for negligence unless the negligence involves an automobile accident or a "business related situation").

authority,”¹⁰⁸ to maintain parental “discipline and control,”¹⁰⁹ and “[i]n the interest of preserving the unqualified right of parents to reasonably discipline their children.”¹¹⁰ With these doctrines, state courts have actually augmented the rights that a parent enjoys at common law.

The canonical story of the demise of common law property norms significantly misrepresents much of family law and its animating principles. Parents have retained (or sometimes expanded upon) important aspects of many of their common law rights, even when those rights are potentially inconsistent with their children’s interests.

As we have seen, this pattern is systemic. Each of these stories that legal authorities and legal scholars regularly invoke to describe family law and its animating principles presents a partial and even misleading picture of the field and its governing tenets. Each overstates the changes that have occurred in family law over time. Each excludes and denies the evidence documenting the persistence of inequality within family law.

B. *Understating Distinctions Between Families*

In addition to overstating the changes that have occurred in family law over time, the family law canon also understates the distinctions that family law currently draws between families. For instance, the canonical examples that legal authorities and legal scholars constantly employ to illustrate and reveal the relationship between family law and social inequality highlight—or are interpreted by legal authorities and legal scholars to highlight—the ways in which family law no longer draws distinctions between families. Family law authorities and scholars rarely discuss examples that would bring to light the continued distinctions that family law makes between families. Let’s begin by examining some of the examples within the family law canon, and then turn to some of the excluded examples.

¹⁰⁸ *Crotta*, 732 A.2d at 773 (citation and internal quotation marks omitted); *see also Terror Mining Co.*, 866 P.2d at 936 (same); *Renko*, 697 A.2d at 470 (same); *Doe*, 418 S.E.2d at 514 (same); *Shoemake*, 826 S.W.2d at 936 (same).

¹⁰⁹ *Blake*, 508 S.E.2d at 444; *see also Sorensen*, 339 N.E.2d at 916 (noting that parental tort immunity protects “parental authority and discipline”) (citation omitted); *Foldi*, 461 A.2d at 1152 (noting that parental tort immunity safeguards “parental discipline, care, and control”).

¹¹⁰ *Hurst*, 539 So. 2d at 266.

1. *The Canonical Examples*

Examples involving race and, increasingly, examples involving sexual orientation are canonical in family law. Legal authorities and legal scholars consistently cite them to explain family law's relationship to social inequality.

Consider, for instance, the role that the example of interracial marriage has assumed in the family law jurisprudence and literature. Statutes prohibiting interracial marriage (commonly known as anti-miscegenation laws)¹¹¹ swept much of the nation after the Civil War,¹¹² and were still in place in sixteen states in 1967.¹¹³ That year, the Supreme Court held in *Loving v. Virginia* that anti-miscegenation laws were unconstitutional under the Fourteenth Amendment.¹¹⁴ Legal authorities and legal scholars consistently identify *Loving* as one of the most crucial decisions in family law, illuminating family law's nature and core values. Scholars report that “[n]o respectable scholar disputes the correctness of *Loving*,”¹¹⁵ and declare that “any constitutional theory that cannot support [*Loving*'s] result is a constitutional theory that should not be supported.”¹¹⁶ Courts and judges agree, condemning and rejecting legal arguments if they

¹¹¹ On the origins of the term “miscegenation” (a pejorative), see Jill Elaine Hasday, *Federalism and the Family Reconstructed*, 45 UCLA L. REV. 1297, 1343 n.166 (1998).

¹¹² See *id.* at 1345; Emily Field Van Tassel, “*Only the Law Would Rule Between Us*”: *Antimiscegenation, the Moral Economy of Dependency, and the Debate over Rights After the Civil War*, 70 CHI.-KENT L. REV. 873, 903-04 (1995).

¹¹³ See *Loving v. Virginia*, 388 U.S. 1, 6 n.5 (1967).

¹¹⁴ See *id.* at 2.

¹¹⁵ WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT* 109 (1996).

¹¹⁶ RANDALL KENNEDY, *INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION* 278 (2003); see also RACHEL F. MORAN, *INTERRACIAL INTIMACY: THE REGULATION OF RACE & ROMANCE* 101 (2001) (“Today, *Loving*'s normative ideal of colorblindness in the regulation of marriage is well established.”).

suggest that *Loving* was wrongly decided.¹¹⁷ The family law jurisprudence¹¹⁸ and literature¹¹⁹

¹¹⁷ See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833, 847-48 (1992) (“It is also tempting . . . to suppose that the Due Process Clause protects only those practices, defined at the most specific level, that were protected against government interference by other rules of law when the Fourteenth Amendment was ratified. But such a view would be inconsistent with our law. It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter. We have vindicated this principle before. Marriage is mentioned nowhere in the Bill of Rights and interracial marriage was illegal in most States in the 19th century, but the Court was no doubt correct in finding it to be an aspect of liberty protected against state interference by the substantive component of the Due Process Clause in *Loving v. Virginia*.”) (citations omitted); *Bowers v. Hardwick*, 478 U.S. 186, 210 (1986) (Blackmun, J., dissenting) (“I cannot agree that either the length of time a majority has held its convictions or the passions with which it defends them can withdraw legislation from this Court’s scrutiny. See, e.g., *Roe v. Wade*; *Loving v. Virginia*; *Brown v. Board of Education*.”) (citations omitted); *id.* at 216 (Stevens, J., dissenting) (“Our prior cases make two propositions abundantly clear. First, the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack.”).

¹¹⁸ For some of the case law debating what *Loving* suggests about prohibitions on same-sex marriage, see *Standhardt v. Superior Court*, 77 P.3d 451, 458 (Ariz. Ct. App. 2003) (“[W]hile *Loving* expanded the traditional scope of the fundamental right to marry by granting interracial couples unrestricted access to the state-sanctioned marriage institution, that decision was anchored to the concept of marriage as a union involving persons of the opposite sex. In contrast, recognizing a right to marry someone of the same sex would not expand the established right to marry, but would redefine the legal meaning of ‘marriage.’ We therefore conclude that *Loving* does not mandate a conclusion that the fundamental right to choose one’s spouse necessarily includes the choice to enter a same-sex marriage.”); *Dean v. District of Columbia*, 653 A.2d 307, 359 (D.C. 1995) (Ferren, J., concurring in part and dissenting in part) (“[T]here is no convincing basis for saying . . . that marriage and homosexuality, by definition, cannot fit together. This analysis is akin to the premise of the trial court opinion the Supreme Court rejected in *Loving*: that a divine natural order forbids racial intermarriage to the point of making it conceptually unthinkable.”); *Baehr v. Lewin*, 852 P.2d 44, 67-68 (Haw. 1993) (“We understand that Judge Heen disagrees with our view . . . based on his belief that ‘[Hawaii’s prohibition on same-sex marriage] treats everyone alike and applies equally to both sexes[.]’ . . . The rationale underlying Judge Heen’s belief, however, was expressly considered and rejected in *Loving*”); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 958 (Mass. 2003) (“As both *Perez* and *Loving* make clear, the right to marry means little if it does not include the right to marry the person of one’s choice, subject to appropriate government restrictions in the interests of public health, safety, and welfare. In this case, as in *Perez* and *Loving*, a statute deprives individuals of access to an institution of fundamental legal, personal, and social significance—the institution of marriage—because of a single trait: skin color in *Perez* and *Loving*, sexual orientation here. As it did in *Perez* and *Loving*, history must yield to a more fully developed understanding of the invidious quality of the discrimination.”) (citations omitted); *Baker v. Nelson*, 191 N.W.2d 185, 187 (Minn. 1971) (“Virginia’s antimiscegenation statute, prohibiting interracial marriages, was invalidated [in *Loving*] solely on the grounds of its patent racial discrimination. . . . [I]n commonsense and in a constitutional sense, there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex.”); *Lewis v. Harris*, No. MER-L-15-03, slip op. at 52-53 (N.J. Super. Ct. Law Div. Nov. 5, 2003) (“The Supreme Court’s decision in *Loving v. Virginia* is predicated entirely on the Fourteenth Amendment’s prohibition of racial classifications. . . . No similar Constitutional provision accords heightened protection to individuals who claim that statutes discriminate on the basis of sexual orientation. . . . The comparison plaintiffs seek to draw between New Jersey’s statute limiting marriage to mixed-gender couples and Virginia’s law prohibiting interracial marriage is flawed as a matter of legal principle.”) (citation omitted); *Baker v. State*, 744 A.2d 864, 880 n.13 (Vt. 1999) (“Although the concurring and dissenting opinion invokes the United States Supreme Court decision in *Loving v. Virginia*, the reliance is misplaced. There the high court had little difficulty in looking behind the superficial neutrality of Virginia’s anti-miscegenation statute to hold that its real purpose was to maintain the pernicious doctrine of white supremacy. Our colleague argues, by analogy, that the effect, if not the purpose, of the exclusion of same-sex partners from the marriage laws is to maintain certain male and female stereotypes to the detriment of both. . . . The evidence does not demonstrate such a purpose.”) (citations omitted); *Singer v. Hara*, 522 P.2d 1187, 1192 (Wash. Ct. App. 1974) (“In *Loving* . . . , the parties were barred from entering into the marriage relationship

debate *Loving*'s implications for other disputes in family law, such as the dispute over prohibitions on same-sex marriage, on the premise that any family law rule is deeply suspect if it cannot be reconciled with the *Loving* decision.

Scholars use the example of interracial marriage to stress how family law no longer draws distinctions between families. As they note, anti-miscegenation laws “have been leveled.”¹²⁰ Family law no longer bans “color-blind romance”¹²¹ or “forbid[s] culturally integrated marriages by mandating segregationist associations.”¹²²

The debate on interracial adoption is just one place in family law where the influence of the interracial marriage example, with its focus on vanquished distinctions between families, is evident. Many states historically prohibited interracial adoption by statute or avoided it as a

because of an impermissible racial classification. There is no analogous sexual classification involved in the instant case because appellants are not being denied entry into the marriage relationship because of their sex; rather, they are being denied entry into the marriage relationship because of the recognized definition of that relationship as one which may be entered into only by two persons who are members of the opposite sex.”).

¹¹⁹ For some of the extensive literature debating *Loving*'s implications for same-sex marriage, see ESKRIDGE, *supra* note 115, at 11 (“The arguments rejected by the [*Loving*] Court are eerily similar to those advanced by traditionalist opponents of same-sex marriage.”); GERSTMANN, *supra* note 42, at 49 (“A . . . problem with the *Loving* analogy is that anti-miscegenation laws and the same-sex marriage ban are fundamentally different laws. . . . The principal purpose of the anti-miscegenation laws was to *segregate* the races. The requirement that marriage be gender neutral has the opposite purpose: it is meant to bring men and women together.”); MARK STRASSER, LEGALLY WED: SAME-SEX MARRIAGE AND THE CONSTITUTION 66 (1997) (“There are numerous reasons why the best analogue to the current state refusal to recognize intrasexual marriages is the former state refusal to recognize interracial marriages. Many of the same reasons justifying the Court’s striking down antimiscegenation statutes justify striking down laws prohibiting same-sex marriages.”); David Orgon Coolidge, *Playing the Loving Card: Same-Sex Marriage and the Politics of Analogy*, 12 BYU J. PUB. L. 201, 235 (1998) (“There is no straightforward relationship between *Loving v. Virginia* and *Baehr v. Miike*[, which considered Hawaii’s same-sex marriage prohibition].”); Josephine Ross, *Riddle for Our Times: The Continued Refusal to Apply the Miscegenation Analogy to Same-Sex Marriage*, 54 RUTGERS L. REV. 999, 1009-10 (2002) (“Same-sex marriage cases are a logical extension of the principles of *Loving v. Virginia*, for both its holdings: (1) Even though the statute affects African-Americans and whites, it still constitutes a racial classification which must be justified under a higher burden of proof; and (2) There is a fundamental right to marry.”); Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 BYU L. REV. 1, 77-78 (“The *Loving* analogy between antimiscegenation laws and laws allowing only heterosexual marriage fails as a matter of case interpretation and constitutional doctrine. . . . [T]he language of *Loving* is specifically targeted at racism, not at other categories of classification.”); James Trosino, Note, *American Wedding: Same-Sex Marriage and the Miscegenation Analogy*, 73 B.U. L. REV. 93, 120 (1993) (“[T]he reasons used for prohibiting gay couples from marrying seem strikingly similar to arguments used to prohibit interracial marriage. Hopefully, an unbiased, compassionate judiciary will learn the lessons of the past and not repeat the miscegenation mistake in the context of gay marriage.”).

¹²⁰ KENNEDY, *supra* note 116, at 35.

¹²¹ Jim Chen, *Unloving*, 80 IOWA L. REV. 145, 165 (1994).

¹²² Wardle, *supra* note 119, at 81.

matter of practice,¹²³ but some states and adoption agencies had become more favorably inclined toward interracial adoption by the early 1970s.¹²⁴ The modern debate over interracial adoption coalesced after the National Association of Black Social Workers (NABSW) issued a position paper in 1972 that denounced interracial adoption as a “form of genocide” and declared “that Black children should be placed only with Black families whether in foster care or for adoption.”¹²⁵ This position, which the NABSW reaffirmed in the 1980s and 1990s,¹²⁶ has attracted tremendous scholarly and official attention, most of it negative.¹²⁷ In explaining their

¹²³ See, e.g., JOYCE A. LADNER, *MIXED FAMILIES: ADOPTING ACROSS RACIAL BOUNDARIES* 67 (1977) (“In the late 1940s and early 1950s there were no official policies in adoption agencies that permitted whites to adopt black children.”); 1 MICHAEL SCHAPIRO, *A STUDY OF ADOPTION PRACTICE: ADOPTION AGENCIES AND THE CHILDREN THEY SERVE* 83-84 (1956) (reporting results of 1954 survey of adoption agencies in which 240 of 250 responding agencies identified “Racial background” as factor “which they considered important when selecting adoptive parents for a child”); *id.* at 85 (“Even though ten agencies reported they did not consider racial background important, we know from practice that agencies are not placing Negro children in white homes or white children in Negro homes. Some agencies use homes for children of mixed racial background where the background of the adoptive parents is not the same as the child’s. However, in most instances the characteristics of the child are primarily white, for this kind of placement occurs more frequently with children of mixed Oriental or Indian and white background, than with children in whom the non-Caucasian blood is Negro. In fact, in many of the Southern states, placement of a child of mixed Negro and white blood is prohibited by law.”).

¹²⁴ See, e.g., LADNER, *supra* note 123, at 77 (“By 1970 transracial adoptions had occurred in every state except Alabama, Arkansas, Louisiana, Mississippi, and South Carolina.”); RITA JAMES SIMON & HOWARD ALTSTEIN, *TRANSRACIAL ADOPTION*, at vii (1977) (“We started collecting information for this book in 1972. At that time, the transracial adoption of American black and Indian children and of children from South East Asia by white families had been contributing significantly to the removal of ‘hard to place children’ from public institutions into permanent family settings.”); *id.* at 4 (“When the field work for the survey began in 1971, transracial adoption was a much publicized, rather extensively used procedure for removing nonwhite children from institutions and placing them in nuclear family settings. It continued to gain momentum for a few more years.”).

¹²⁵ Position paper developed at the National Association of Black Social Workers’ Conference in Nashville, Tenn., April 4-9, 1972, *reprinted in id.* at 50, 50, 52.

¹²⁶ See *Barriers to Adoption: Hearings Before the Senate Comm. on Labor and Human Resources*, 99th Cong. 213 (1985) (statement of William T. Merritt, President, National Association of Black Social Workers) (“We have an ethnic, moral and professional obligation to oppose transracial adoption. We are, therefore, legally justified in our efforts to protect the rights of black children, black families and the black community. We view the placement of black children in white homes as a hostile act against our community. It is a blatant form of race and cultural genocide, and we are not alone in our stance regarding efforts to preserve and protect the black community from all possible forms of destruction.”); NATIONAL ASSOCIATION OF BLACK SOCIAL WORKERS, *POSITION STATEMENT: PRESERVING AFRICAN-AMERICAN FAMILIES* 5 (1994) (“NABSW believes, as do many child welfare organizations and professionals, that ‘it is in the best interest of children to place them with appropriate families of the same race, culture, and national origin.’ NABSW believes it is the right of a child to be raised in a permanent, loving home which reflects the same ethnic or racial group.”) (footnote omitted).

¹²⁷ The vast majority of scholarly opinion condemns laws and practices that prohibit or disfavor interracial adoption. See, e.g., ELIZABETH BARTHOLET, *FAMILY BONDS: ADOPTION AND THE POLITICS OF PARENTING* 112, 115 (1993) [hereinafter BARTHOLET, *FAMILY BONDS*]; KENNEDY, *supra* note 116, at 416; R. Richard Banks, *The Color of Desire: Fulfilling Adoptive Parents’ Racial Preferences Through Discriminatory State Action*, 107 *YALE L.J.* 875,

opposition to prohibitions on interracial adoption, scholars repeatedly observe that *Loving* has virtually eliminated legal distinctions between families based on racial composition, and that the remaining policies and practices disfavoring interracial adoption are last vestiges of an old issue. *Loving*, they explain, already stands for the principle that “[t]he government cannot promote racial separatism in private life.”¹²⁸

Scholars similarly use the increasingly canonical example of same-sex marriage to stress the ways in which family law no longer makes distinctions between families. This is particularly striking because the law of same-sex marriage represents an important continued distinction that family law explicitly draws between families. The District of Columbia and every state in the nation except for Massachusetts prohibit same-sex marriages.¹²⁹ Only Vermont allows a same-

943 (1998); Chen, *supra* note 121, at 168; Rita J. Simon & Howard Altstein, *The Relevance of Race in Adoption Law and Social Practice*, 11 NOTRE DAME J.L. ETHICS & PUB. POL’Y 171, 178-79, 194 (1997). Federal law, moreover, has provided since 1996 that states and organizations receiving federal funding cannot deny or delay an adoption (involving a non-Native American child) based on the race, color, or national origin of the child or the prospective adoptive parent, *see* Small Business Job Protection Act of 1996, Pub. L. No. 104-188, § 1808, 110 Stat. 1755, 1903-04 (codified at 42 U.S.C. §§ 671(a)(18), 674(d)(4), 1996b(1), 1996b(3) (2000)), although many observers believe that some states and adoption agencies continue to disfavor interracial adoption as a matter of policy or practice, *see Implementation of the Interethnic Adoption Amendments: Hearing Before the Subcomm. on Human Resources of the House Comm. on Ways and Means*, 105th Cong. 34-35 (2000) (statement of Howard Metzenbaum, former Senator); KENNEDY, *supra* note 116, at 400; Elizabeth Bartholet, Correspondence, *Private Race Preferences in Family Formation*, 107 YALE L.J. 2351, 2354 (1998).

¹²⁸ BARTHOLET, FAMILY BONDS, *supra* note 127, at 106; *see also* Chen, *supra* note 121, at 168 (“Accepting the premises underlying the racial fundamentalists’ opposition to transracial adoption dictates a rejection of *Loving*.”).

¹²⁹ For some of the case law recognizing and upholding prohibitions on same-sex marriage, see *Standhardt v. Superior Court*, 77 P.3d 451, 453 (Ariz. Ct. App. 2003) (“[W]e are asked to declare that Arizona’s prohibition of same-sex marriages . . . violates the federal and state constitutions. For the reasons that follow, we hold that Arizona’s prohibition of such state-licensed unions does not violate Petitioners’ rights under either constitution.”); *Dean v. District of Columbia*, 653 A.2d 307, 308 (D.C. 1995) (*per curiam*); *id.* at 318, 331 (Ferren, J., concurring in part and dissenting in part) (explaining the court’s conclusions “that no legislature for the District of Columbia—Congress or Council—has ever intended to sanction same-sex marriages” and “that same-sex marriage is not a ‘fundamental right’ protected by the due process clause, because that kind of relationship is not ‘deeply rooted in this Nation’s history and tradition’”) (citation omitted); *Jones v. Hallahan*, 501 S.W.2d 588, 590 (Ky. 1973) (“We find no constitutional sanction or protection of the right of marriage between persons of the same sex. . . . In substance, the relationship proposed by the appellants does not authorize the issuance of a marriage license because what they propose is not a marriage.”); *Baker v. Nelson*, 191 N.W.2d 185, 186-87 (Minn. 1971) (“We hold . . . that Minn.St. c. 517 does not authorize marriage between persons of the same sex and that such marriages are accordingly prohibited. . . . We [also] hold . . . that Minn.St. c. 517 does not offend the First, Eighth, Ninth, or Fourteenth Amendments to the United States Constitution.”); *Lewis v. Harris*, No. MER-L-15-03, slip op. at 32 (N.J. Super. Ct. Law Div. Nov. 5, 2003) (“[T]his court finds that like the federal law, in the State of New Jersey there is no statutory or constitutional basis to recognize same-sex marriage.”); *Storrs v. Holcomb*, 645 N.Y.S.2d 286, 288 (Sup. Ct. 1996) (“We conclude that New York does not recognize or authorize same sex marriage and that the City Clerk correctly refused to issue the license.”); *Singer v. Hara*, 522 P.2d 1187, 1197 (Wash. Ct. App. 1974) (“[W]e hold

sex couple to enter into a civil union that gives the parties to the civil union all of the rights and responsibilities associated with marriage under state law, except the right to identify themselves as married.¹³⁰ But as the issue of same-sex marriage has moved to the forefront of family law jurisprudence and especially family law scholarship,¹³¹ scholars have consistently identified same-sex marriage prohibitions as “vestiges” of a scheme of legal distinctions between families that family law has otherwise left almost entirely behind.¹³² On this account, “lesbians and gay

that the trial court correctly concluded that the state’s denial of a marriage license to appellants [a same-sex couple] is required by our state statutes and permitted by both the state and federal constitutions.”).

In *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003), the Massachusetts Supreme Judicial Court “declare[d] that barring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts Constitution,” *id.* at 969. The court stayed entry of its judgment “for 180 days to permit the Legislature to take such action as it may deem appropriate in light of this opinion.” *Id.* at 970. After *Goodridge* was decided, the Massachusetts Senate considered a bill that would have “‘prohibit[ed] same-sex couples from entering into marriage but allow[ed] them to form civil unions with all ‘benefits, protections, rights and responsibilities’ of marriage.’” Opinions of the Justices to the Senate, 802 N.E.2d 565, 566 (Mass. 2004) (quoting Senate order). The Massachusetts Senate asked the Massachusetts Supreme Judicial Court for an advisory opinion on the bill, *see id.*, and the court concluded that the bill would “violate[] the equal protection and due process requirements of the Constitution of the Commonwealth and the Massachusetts Declaration of Rights,” *id.* at 572.

A Massachusetts citizen and a group of Massachusetts legislators brought suit in federal court arguing that the remedy the Massachusetts Supreme Judicial Court adopted in *Goodridge* violated the Guarantee Clause of the United States Constitution. *See Largess v. Supreme Judicial Court for Mass.*, 373 F.3d 219, 222 (1st Cir. 2004) (*per curiam*). But the United States Court of Appeals for the First Circuit rejected this contention. *See id.* at 229 (“The resolution of the same-sex marriage issue by the judicial branch of the Massachusetts government, subject to override by the voters through the state constitutional amendment process, does not plausibly constitute a threat to a republican form of government. Absent such a threat, our federal constitutional system simply does not permit a federal court to intervene in the arrangement of state government under the guise of a federal Guarantee Clause question.”).

¹³⁰ *See* VT. STAT. ANN. tit. 15, §§ 1201-1207 (2002). Vermont’s provision for same-sex civil unions was prompted by the Vermont Supreme Court’s decision in *Baker v. State*, 744 A.2d 864 (Vt. 1999), which held that the Common Benefits Clause of the Vermont Constitution requires Vermont “to extend to same-sex couples the common benefits and protections that flow from marriage under Vermont law,” *id.* at 867. The *Baker* Court determined that the Vermont Legislature could satisfy this constitutional responsibility either by including same-sex couples “within the marriage laws themselves” or by creating “a parallel ‘domestic partnership’ system or some equivalent statutory alternative.” *Id.*

¹³¹ *See, e.g.*, 1 HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 2.8, at 142 (2d ed. 1987) (“As recently as ten years ago it would have been inconceivable to deal seriously with the question of the validity of marriages between persons of the same sex. The fact that a discussion of this subject must now be included in a legal text testifies to the rapid and drastic social changes which have occurred in that period.”).

¹³² ESKRIDGE, *supra* note 115, at 10; *see also* Maura I. Strassberg, *Distinctions of Form or Substance: Monogamy, Polygamy and Same-Sex Marriage*, 75 N.C. L. REV. 1501, 1623 (1997) (same); *Baker*, 744 A.2d at 906 (Johnson, J., concurring in part and dissenting in part) (identifying Vermont’s same-sex marriage prohibition as “a vestige”).

men are on the verge of winning . . . equal marriage rights.”¹³³ It is “an inevitable development.”¹³⁴

The use of the increasingly canonical example of same-sex marriage provides some indication of how the family law canon understates the distinctions that family law currently draws between families. Some of the examples excluded from the family law canon make this aspect of the canon’s construction even more clear.

2. *The Noncanonical Examples*

Examples involving religion and examples involving disability are rarely mentioned when legal authorities and legal scholars consider family law’s relationship to social inequality. These examples highlight the continued distinctions that family law draws between families.

Consider, for instance, the example of the suppression of Mormon polygamy. This example is hardly noticed in family law. The vast majority of the literature on the legal suppression of polygamy analyzes the polygamy prohibition from the standpoint of religious liberty.¹³⁵ In part, this reflects the important role that antipolygamy laws have played in the

¹³³ Evan Wolfson, *Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men and the Intra-Community Critique*, 21 N.Y.U. REV. L. & SOC. CHANGE 567, 571 (1994).

¹³⁴ Strassberg, *supra* note 132, at 1623.

¹³⁵ See, e.g., THOMAS G. ALEXANDER, MORMONISM IN TRANSITION: A HISTORY OF THE LATTER-DAY SAINTS, 1890-1930, at 4 (1986) (“After moving to Utah, the Latter-day Saints had built a community which conjoined church and state, politics, the economy, and society into one whole. . . . The Protestant majority in the United States responded with a series of laws, court tests, and political activities designed to break the back of the Mormon community and reshape it in the image of the remainder of the United States. These culminated in the passage of the Edmunds (1882) and Edmunds-Tucker (1887) acts, which . . . provided for imprisonment of those practicing plural marriage, and confiscated virtually all the church’s property. They insisted that the Latter-day Saints conform to the norms of Victorian America, which allowed religious influence to be exercised on moral questions but generally interdicted extensive church interference—at least by religions considered deviant—in political and economic matters.”); LEONARD J. ARRINGTON & DAVIS BITTON, THE MORMON EXPERIENCE: A HISTORY OF THE LATTER-DAY SAINTS 184 (2d ed. 1992) (“A half-century and more of heated confrontation with the U.S. government had taught Latter-day Saints the practical limits of religious life in America.”); EDWIN BROWN FIRMAGE & RICHARD COLLIN MANGRUM, ZION IN THE COURTS: A LEGAL HISTORY OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, 1830-1900, at 130 (1988) (“In the hysteria of anti-polygamy sentiment, the Supreme Court defined the scope of constitutionally protected religious activity in a narrow and distorted fashion. Thus, in deciding whether polygamy was protected by the Constitution, America defined in general terms the extent to which religious practices could stand against the claims of the state.”); RICHARD S. VAN WAGONER, MORMON POLYGAMY: A HISTORY 135 (1986) (“The framers of the Edmunds-Tucker Bill intended their legislation to destroy the Mormon theocratic system.”); Orma Linford, *The Mormons and the Law: The Polygamy Cases*, 9 UTAH L. REV. 308, 328

development of First Amendment jurisprudence on the limits of religious freedom. The Mormon Church's 1852 announcement that polygamy was an element of the Mormon faith sparked the nineteenth-century campaign against polygamy,¹³⁶ and the Supreme Court repeatedly upheld

(1964) (“Those who made the policy decisions came to accept arguments which justified anti-polygamy legislation also as justification for destroying the entire way of life of a religious group. They seemed to proceed upon the assumption that Mormons and Mormonism were synonymous with polygamists and polygamy, and once governmental power to extirpate the latter was established, it justified a full-scale attack on the former. In making this transition, Congress not only displayed faulty logic, but did violence to the principles upon which the exercise of freedom depends.”) (footnote omitted); Jeremy M. Miller, *A Critique of the Reynolds Decision*, 11 W. ST. U. L. REV. 165, 165 (1984) (“The specific purpose of this paper is to prove that the United States Supreme Court’s landmark decision in *Reynolds v. United States* was wrong. . . . The wrong decision in *Reynolds* has cast a shadow on the individual liberties for which this country has and does pride itself.”) (footnote omitted); Keith E. Sealing, *Polygamists out of the Closet: Statutory and State Constitutional Prohibitions Against Polygamy Are Unconstitutional Under the Free Exercise Clause*, 17 GA. ST. U. L. REV. 691, 695 (2001) (“[This article] argues that the Free Exercise Clause protects religiously motivated polygamy”); Rodney K. Smith, *Getting off on the Wrong Foot and Back on Again: A Reexamination of the History of the Framing of the Religion Clauses of the First Amendment and a Critique of the Reynolds and Everson Decisions*, 20 WAKE FOREST L. REV. 569, 569 (1984) (“A central thesis of this article is that the opinions in *Reynolds* and *Everson* have created seemingly interminable problems for the Court in deciding religious liberty issues under the aegis of the first amendment.”). For a history of the antipolygamy movement that devotes more attention to the polygamy prohibition as a form of marriage regulation, while still focusing on polygamy’s challenge to the limits of religious liberty, see SARAH BARRINGER GORDON, *THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH-CENTURY AMERICA* 139 (2002) (“[T]he debate over polygamy highlighted the vital ways in which the ‘private’ law of marriage had undeniably ‘public’ dimensions. *Reynolds* challenged the Court to articulate how the intersection of spiritual and secular law in marriage was fundamental to all of political life, territorial, state, and federal. In response, the Supreme Court drew together the threads that connected marriage to political life and law, holding that the Mormons’ attempt to redefine the family for Utah Territory justified the intervention of the national sovereign.”) (footnote omitted).

¹³⁶ See HUBERT HOWE BANCROFT, *HISTORY OF UTAH* 376 n.19 (San Francisco, History Co. 1890) (describing the announcement). For the federal antipolygamy legislation enacted in the wake of this announcement, see An Act to punish and prevent the Practice of Polygamy in the Territories of the United States and other Places, and disapproving and annulling certain Acts of the Legislative Assembly of the Territory of Utah (Morrill Act), ch. 126, § 1, 12 Stat. 501, 501 (1862) (“[E]very person having a husband or wife living, who shall marry any other person, whether married or single, in a Territory of the United States, or other place over which the United States have exclusive jurisdiction, shall, except in the cases specified in the proviso to this section, be adjudged guilty of bigamy, and, upon conviction thereof, shall be punished by a fine not exceeding five hundred dollars, and by imprisonment for a term not exceeding five years”); An act in relation to courts and judicial officers in the Territory of Utah (Poland Act), ch. 469, § 3, 18 Stat. 253, 254 (1874) (“A writ of error from the Supreme Court of the United States to the supreme court of the Territory shall lie in criminal cases, where the accused shall have been sentenced to capital punishment or convicted of bigamy or polygamy.”); An act to amend section fifty-three hundred and fifty-two of the Revised Statutes of the United States, in reference to bigamy, and for other purposes (Edmunds Act), ch. 47, § 1, 22 Stat. 30, 30 (1882) (“Every person who has a husband or wife living who, in a Territory or other place over which the United States have exclusive jurisdiction, hereafter marries another, whether married or single, and any man who hereafter simultaneously, or on the same day, marries more than one woman, in a Territory or other place over which the United States have exclusive jurisdiction, is guilty of polygamy, and shall be punished by a fine of not more than five hundred dollars and by imprisonment for a term of not more than five years”); An act to amend an act entitled “An act to amend section fifty-three hundred and fifty-two of the Revised Statutes of the United States, in reference to bigamy, and for other purposes,” approved March twenty-second, eighteen hundred and eighty-two (Edmunds-Tucker Act), ch. 397, § 24, 24 Stat. 635, 640 (1887) (“No person . . . who shall be a polygamist, or who shall associate or cohabit polygamously with persons of the other sex, shall be entitled to vote in

federal antipolygamy laws against Mormons' First Amendment challenges.¹³⁷

Yet the polygamy prohibition is also a form of family law, and the example of the suppression of Mormon polygamy directs attention to the continued distinctions that family law makes between families. The polygamy prohibition remains in force in every state,¹³⁸ and it is unlikely to be overturned or modified. Indeed, virtually the only time that the polygamy prohibition attracts any notice within family law at all is in the context of debates in which both sides assume that the polygamy prohibition is justified and beyond reconsideration. Courts,¹³⁹

any election in said [Utah] Territory, or be capable of jury service, or to hold any office of trust or emolument in said Territory.”); An Act To enable the people of Utah to form a constitution and State government, and to be admitted into the Union on an equal footing with the original States (Utah Enabling Act), ch. 138, § 3, 28 Stat. 107, 108 (1894) (“[Utah’s constitutional] convention shall provide, by ordinance irrevocable without the consent of the United States and the people of said State—First. That perfect toleration of religious sentiment shall be secured, and that no inhabitant of said State shall ever be molested in person or property, on account of his or her mode of religious worship: *Provided*, That polygamous or plural marriages are forever prohibited.”).

¹³⁷ See, e.g., *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 50 (1890) (“The State has a perfect right to prohibit polygamy, and all other open offences against the enlightened sentiment of mankind, notwithstanding the pretence of religious conviction by which they may be advocated and practised.”); *Davis v. Beason*, 133 U.S. 333, 342-43 (1890) (“However free the exercise of religion may be, it must be subordinate to the criminal laws of the country, passed with reference to actions regarded by general consent as properly the subjects of punitive legislation.”); *Reynolds v. United States*, 98 U.S. 145, 165-66 (1879) (“[T]here never has been a time in any State of the Union when polygamy has not been an offence against society, cognizable by the civil courts and punishable with more or less severity. In the face of all this evidence, it is impossible to believe that the constitutional guaranty of religious freedom was intended to prohibit legislation in respect to this most important feature of social life. . . . Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.”); see also *Potter v. Murray City*, 760 F.2d 1065, 1068 (10th Cir. 1985) (“In *Reynolds v. United States* the Supreme Court affirmed a criminal conviction of a Mormon for practicing polygamy and rejected the argument that Congress’ prohibition of polygamy violated the defendant’s right to the free exercise of religion. Plaintiff argues that *Reynolds* is no longer controlling because later cases have ‘in effect’ overturned the decision. We disagree.”) (citations omitted); *Founding Church of Scientology v. United States*, 409 F.2d 1146, 1154-55 (D.C. Cir. 1969) (“[I]t is clear that the First Amendment does not protect from regulation or prohibition all *bona fide* religious practices. . . . Thus the prohibition of plural marriage has been upheld, even though the practice is a religious duty to some.”).

¹³⁸ See *supra* note 27 and accompanying text.

¹³⁹ See *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 965 (Mass. 2003) (“[T]he plaintiffs [same-sex couples] seek only to be married, not to undermine the institution of civil marriage. They do not want marriage abolished. They do not attack the binary nature of marriage, the consanguinity provisions, or any of the other gate-keeping provisions of the marriage licensing law.”); *id.* at 969 n.34 (“[N]o one argues that the restrictions on incestuous or polygamous marriages are so dependent on the [same-sex] marriage restriction that they too should fall if the [same-sex] marriage restriction falls. Nothing in our opinion today should be construed as relaxing or abrogating the consanguinity or polygamy prohibitions of our marriage laws.”); *id.* at 969 (“We construe civil marriage to mean the voluntary union of two persons as spouses, to the exclusion of all others.”); *Lewis v. Harris*, No. MER-L-15-03, slip op. at 60-61 (N.J. Super. Ct. Law Div. Nov. 5, 2003) (“New Jersey statutes ban bigamous marriages, common law marriages, incestuous marriages, and marriages to persons adjudged to be mentally incompetent or with a venereal disease in a communicable stage. The governmental interests in these restrictions have been repeatedly recognized. . . . While a ban on same-sex marriage differs from those listed above, nonetheless,

judges,¹⁴⁰ lawmakers,¹⁴¹ and scholars¹⁴² defend same-sex marriage prohibitions by comparing them to prohibitions on polygamous marriage, or attack same-sex marriage prohibitions by contrasting them to prohibitions on polygamous marriage.

the interest of the State in limiting marriage to mixed-gender couples is a valid and reasonable exercise of government authority.”) (citations omitted).

¹⁴⁰ See *Lawrence v. Texas*, 539 U.S. 558, 590 (2003) (Scalia, J., dissenting) (“State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of *Bowers*’ validation of laws based on moral choices.”).

¹⁴¹ See *Federal Marriage Amendment (The Musgrave Amendment): Hearing on H.R.J. Res. 56 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 108th Cong. 39 (2004) (statement of Rep. King) (“If . . . marriage can be distorted in its meaning to include between a man and a man or a woman and a woman, then how do you draw the line between group marriage, bigamy, polygamy, and all the living arrangements there are?”); 142 CONG. REC. 16,971 (1996) (statement of Rep. Largent) (“[Homosexuals] want to say that a marriage not only is one man and one woman but it is two men or it is two women. What logical reason is there to keep us from stopping expansion of that definition to include three people or an adult and a child, or any other odd combination that we want to have?”); *id.* at 17,089 (statement of Rep. Hyde) (“It is appropriate that Congress define marriage. You may not like the definition the majority of us want, but most people do not approve of homosexual conduct. They do not approve of incest. They do not approve of polygamy, and they express their disapprobation through the law.”); see also *Baehr v. Miike*, 23 Fam. L. Rep. (BNA) 2001, 2011 (Haw. Cir. Ct. 1996) (“[The Hawaii Department of Health’s] argument that legalized prostitution, incest and polygamy will occur if same-sex marriage is allowed disregards existing statutes and established precedent and the Supreme Court’s acknowledgment of compelling reasons to prevent and prohibit marriage under circumstances such as incest.”) (citation omitted).

¹⁴² See *Defense of Marriage Act: Hearing on H.R. 3396 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 104th Cong. 88 (1996) (statement of Hadley Arkes, Edward Ney Professor of Jurisprudence and American Institutions, Amherst College) (“[I]f we detach marriage from that natural teleology of the body, on what ground of principle could the law confine marriage to couples? On what ground would the law say no to people who profess that their love is not confined to a coupling, but woven together in a larger ensemble of three or four? I think that our previous speakers have already indicated they’re not aware of any ground of principle in which the law would say no.”); ESKRIDGE, *supra* note 115, at 145 (“There is no neutral state interest supporting the state’s prohibition of same-sex marriage, but there are better arguments for the state’s regulation of child, incestuous, and polygamous marriage.”); GERSTMANN, *supra* note 42, at 104 (“[I]t is quite possible to distinguish same-sex marriage from polygamy without resorting to unsupported, stereotype-based attacks. . . . Multiple marriages raise several legitimate state concerns that same-sex marriage does not.”); David L. Chambers, *Polygamy and Same-Sex Marriage*, 26 HOFSTRA L. REV. 53, 60 (1997) (“For those of us who favor same-sex marriage, the hearings offer an opportunity to reflect upon forms of coupling of which we ourselves disapprove—polygamy perhaps, or the marriage of a father and daughter, whatever we ourselves find distasteful—and to realize that when many conservatives contemplate same-sex marriage, they have the same instinctive revulsion that we feel when we contemplate polygamy or incest.”); James M. Donovan, *Rock-Salting the Slippery Slope: Why Same-Sex Marriage Is Not a Commitment to Polygamous Marriage*, 29 N. KY. L. REV. 521, 557 (2002) (“The essential difference . . . is that marriage, same-sex or otherwise, is today predicated on romantic love. In contrast, polygamy is expressly admitted to exclude the expectation of romantic love”); Sarah Barringer Gordon, *Chapel and State: Laws Written in the 19th Century to Prevent Polygamy Are Thwarting the Efforts of Today’s Same-Sex Marriage Advocates*, LEGAL AFF., Jan./Feb. 2003, at 46, 46 (“Gays and lesbians must pair their claim that marriage is a fundamental human right with the concession that it’s also a legal category defined by the state. This is the lesson of the conflict over polygamy—a conflict that is seared into Mormon memory, but that for the rest of the country has faded into obscurity.”); Strassberg, *supra* note 132, at 1622 (“Unlike polygamy, same-sex marriage poses no threat to American ideals of separation of church and state, individual autonomy, equality of all men, and equality of men and women.”).

Similarly, legal authorities and legal scholars rarely consider examples involving disability in assessing family law's relationship to social inequality. While there is a profusion of scholarly material examining prohibitions on interracial or same-sex marriage,¹⁴³ family law scholars hardly mention laws that prohibit or restrict marriage based on disability. Although statutes and practices burdening interracial adoption have attracted tremendous scholarly and official interest,¹⁴⁴ there is virtually no discussion in family law of the legal obstacles that disabled people face in adopting children.

Excluding the treatment of the disabled from the ranks of family law's canonical examples directs attention away from the continued distinctions that family law draws between families. Let's begin with the legal regulation of disabled people's marriages. Today at least nine states impose statutory prohibitions or restrictions on marriages involving a mentally disabled or mentally ill person that go beyond a simple requirement that the person be capable of consent.¹⁴⁵ In Kentucky, for example, a marriage "[w]ith a person who has been adjudged mentally disabled by a court of competent jurisdiction" "is prohibited and void,"¹⁴⁶ and people who aid or abet such marriages are subject to criminal penalties.¹⁴⁷ In Delaware, a marriage with "[a] person of any degree of unsoundness of mind" is prohibited and voidable.¹⁴⁸ In Vermont, a marriage with "an idiot or lunatic" is voidable.¹⁴⁹ In Mississippi, it is illegal for the circuit court clerk to issue a marriage license to someone who appears to be "insane or an imbecile."¹⁵⁰ Official adoption practices and policies also seem to disfavor the disabled. Although the

¹⁴³ See *supra* text accompanying notes 111-122, 129-134.

¹⁴⁴ See *supra* text accompanying notes 123-128.

¹⁴⁵ See CONN. GEN. STAT. ANN. § 46b-29 (West 2004); DEL. CODE ANN. tit. 13, § 101(b)(1) (1999); KY. REV. STAT. ANN. §§ 402.020(1)(a), 402.990(2) (Michie 1999); MINN. STAT. ANN. § 517.03(2) (West Supp. 2004); MISS. CODE ANN. § 93-1-5(f) (1994); N.J. STAT. ANN. § 37:1-9 (West 2002); R.I. GEN. LAWS § 15-1-5 (2000); S.C. CODE ANN. § 20-1-10(A) (Law. Co-op. Supp. 2003); VT. STAT. ANN. tit. 15, § 512 (2002).

¹⁴⁶ KY. REV. STAT. ANN. § 402.020(1)(a).

¹⁴⁷ See *id.* § 402.990(2).

¹⁴⁸ DEL. CODE ANN. tit. 13, § 101(b)(1).

¹⁴⁹ VT. STAT. ANN. tit. 15, § 512.

¹⁵⁰ MISS. CODE ANN. § 93-1-5(f).

literature on adoption virtually ignores the subject, it appears to be the case that many state adoption agencies consider disabled people to be categorically undesirable adoptive parents, making it exceedingly difficult, if not impossible, for a disabled person to adopt a child through the agencies.¹⁵¹

These laws and legal practices represent important instances in which family law continues to draw distinctions between families, adding to the legal and social disadvantages associated with being disabled. Yet, at this point, it should not be surprising to learn that examples involving disability are not canonical in family law. The family law canon locates almost every inequality in family law in the past rather than the present.

The remainder of this part considers some of the consequences of the canonical understanding of the relationship between family law and social inequality, and explores how challenging the construction of the family law canon can be the first step to changing the canon and restructuring family law debates.

C. *The Consequences of the Canon and the Possibilities for Change: The Debate over Divorce Law*

The family law canon presents a distorted picture of family law that suggests that the inequalities that may have once characterized family law are vanquished, and no cause for present concern. This construction of the family law canon has enabled legal authorities enacting and defending family law policies that might harm historically subordinated groups to contend that family law no longer supports social inequality and need no longer be concerned about the status and position of historically subordinated people.

Yet, as we have seen, there are aspects of family law that continue to sustain social inequality. Contesting the way that the family law canon presents the relationship between family law and social inequality is a first step toward changing the canon and altering the terms

¹⁵¹ For a brief suggestion along these lines, see BARTHOLET, FAMILY BONDS, *supra* note 127, at 70-71 (“Screening for parental fitness is a basic part of the agency adoption process. . . . The system ranks prospective parents from top to bottom in terms of relative desirability, which is assessed primarily on the basis of easily determined objective factors. . . . Single and older adoptive applicants — those in their late thirties and forties — are placed lower on the ladder, along with people with disabilities. Gays, lesbians, and the seriously disabled are generally excluded altogether.”).

on which many family law debates take place. It makes clear that it is not a convincing argument in a family law debate to assert that family law already upholds social equality securely. Equality concerns cannot be assumed away like that. Instead, a relevant question in any family law debate is whether the specific family law policy at issue is consistent with equality or not.

Consider the debate over divorce law, one of the most prominent recent debates to reflect the influence of the canonical understanding of the relationship between family law and social inequality. Starting with California's Family Law Act of 1969,¹⁵² state legislatures and state courts across the nation have instituted a number of changes in divorce law. In making and defending these changes, legislatures and courts have relied heavily on the canonical story of coverture's demise to argue that the law no longer needs to be concerned about women's status at divorce because family law now supports and upholds women's equality.

California's Family Law Act, for instance, replaced a divorce regime that granted divorce only upon proof of marital fault and that favored the faultless spouse, who was usually the wife, in dividing community property at divorce.¹⁵³ Under the divorce law that the Family Law Act established, none of the grounds for securing a divorce turn on marital fault,¹⁵⁴ and community property is divided equally upon divorce, regardless of each party's fault or future earning capacity.¹⁵⁵ Before the Family Law Act became law, the Judiciary Committee of the California Assembly issued a report stating the legislative intent behind the act's financial provisions.¹⁵⁶ This report explained that divorce law no longer needed to be concerned about women's status upon divorce because of women's "approaching equality" with men under the law and in the

¹⁵² Family Law Act, ch. 1608, 1969 Cal. Stat. 3314.

¹⁵³ *See, e.g.*, Assembly Committee Report on Assembly Bill No. 530 and Senate Bill No. 252 (The Family Law Act), Committee on Judiciary (Aug. 8, 1969), in 4 JOURNAL OF THE ASSEMBLY: LEGISLATURE OF THE STATE OF CALIFORNIA 8053, 8056-57, 8061 (1969); REPORT OF THE GOVERNOR'S COMMISSION ON THE FAMILY 1, 26, 44 (1966).

¹⁵⁴ *See* Family Law Act §§ 4506-4510.

¹⁵⁵ *See id.* § 4800. The Family Law Act permits courts to deviate from an equal division of community property only where: the couple agrees to a different division, *see id.* §§ 4802, 4811, one party has deliberately misappropriated assets, *see id.* § 4800(2), or "economic circumstances warrant . . . awarding any asset to one party on such conditions as the court deems proper to effect a substantially equal division of the property," *id.* § 4800(1).

¹⁵⁶ *See* Assembly Committee Report on Assembly Bill No. 530 and Senate Bill No. 252 (The Family Law Act), Committee on Judiciary, *supra* note 153, at 8053, 8062-63.

market. As the report elaborated:

When our divorce law was originally drawn, woman's role in society was almost totally that of mother and homemaker. She could not even vote. Today, increasing numbers of married women are employed, even in the professions. In addition, they have long been accorded full civil rights. Their approaching equality with the male should be reflected in the law governing marriage dissolution and in the decisions of courts with respect to matters incident to dissolution.¹⁵⁷

The New Jersey legislature embraced a similar line of reasoning in 1971 in creating a no-fault ground for divorce and providing for the equitable division of marital property upon divorce.¹⁵⁸ As a member of the New Jersey Divorce Law Study Commission later explained,¹⁵⁹ the changes in New Jersey's divorce law were grounded on the premise that family law no longer made wives "the economic dependents of husbands" and therefore no longer needed to be concerned about a woman's position after divorce. Instead, New Jersey's new divorce law "assum[es] that marital partners are equal in all matters, including matters of family economics" so that "[w]hen the marriage ends in divorce, such wealth as either of them has acquired during the marriage is, with but a few exceptions, treated as an equitably divisible partnership asset."¹⁶⁰

Courts have also relied on the premise that women's legal subordination under coverture has been excised from family law in concluding that divorce law no longer needs to be worried about divorced women's status. They explain, for instance, "that the former complete protective role of the court regarding alimony is no longer necessary" because "[t]he law formerly attaching . . . subjection to the legal status of a married woman has been abolished either by legislation or by the continuous pressure of judicial interpretation."¹⁶¹ They insist that divorce law no longer

¹⁵⁷ *Id.* at 8062. James A. Hayes, the chairman of the California Assembly's Judiciary Committee, wrote the committee's report. *See id.* at 8053. He later quoted this passage of the report in a brief that he filed as part of a petition seeking to terminate his obligation to support his former wife and his children. *See* RIANE TENNENHAUS EISLER, *DISSOLUTION: NO-FAULT DIVORCE, MARRIAGE, AND THE FUTURE OF WOMEN* 25-29 (1977).

¹⁵⁸ *See* An Act concerning actions for divorce and nullity of marriage, alimony, maintenance and custody of children, ch. 212, §§ 2, 8, 1971 N.J. Laws 1022, 1023, 1026.

¹⁵⁹ *See* STATE OF N.J. DIVORCE LAW STUDY COMM'N, *FINAL REPORT TO THE GOVERNOR AND THE LEGISLATURE*, at ii (1970); Annamay T. Sheppard, *Women, Families & Equality: Was Divorce Reform a Mistake?*, 12 *WOMEN'S RTS. L. REP.* 143, 143 (1990).

¹⁶⁰ Sheppard, *supra* note 159, at 145-46.

¹⁶¹ *Parniawski v. Parniawski*, 359 A.2d 719, 721 (Conn. Super. Ct. 1976).

needs to be concerned about limiting women’s economic vulnerability at divorce because it is a “day of women’s emancipation,”¹⁶² in which women’s legal status is no longer “second class,”¹⁶³ and married women now have “coequal status” with their husbands¹⁶⁴ and a position “of complete equality as partners sharing equal rights and obligations in the marriage relationship.”¹⁶⁵ They report that “the law has advanced to recognize the equal status of men and women in our society,” and reason that divorce law should accordingly discard its former interest in “protecting women” in favor of an assumption that spouses have equal status and equal bargaining power.¹⁶⁶ They declare that women “now occupy a position of equal partners in the family relationship resulting from marriage,” and conclude that divorce law should therefore no longer treat wives “with compassion, tenderness and mercy.”¹⁶⁷

In sum, the debate over the law of divorce helps reveal some consequences of the family law canon’s construction. The family law canon suggests that any historical inequalities in family law have been excised from the law and left behind in the past. This account has allowed legislatures and courts enacting and defending changes in family law that might injure historically subordinated groups, like women, to argue that the law can pursue such changes without worrying about the status of historically subordinated people.

The debate over divorce also suggests how challenging the canonical understanding of the relationship between family law and social inequality can be a first step toward changing the family law canon and restructuring family law debates, altering what counts as a good reason and

¹⁶² *Hinson v. Hinson*, 461 P.2d 560, 563 (Wash. Ct. App. 1969); *see also Neal v. Neal*, 570 P.2d 758, 761 (Ariz. 1977) (in banc) (“We are living in an era of feminine equality”) (citation omitted).

¹⁶³ *Edwardson v. Edwardson*, 798 S.W.2d 941, 944 (Ky. 1990).

¹⁶⁴ *Kover v. Kover*, 278 N.E.2d 886, 888 (N.Y. 1972).

¹⁶⁵ *Thigpen v. Thigpen*, 277 So. 2d 583, 585 (Fla. Dist. Ct. App. 1973).

¹⁶⁶ *Simeone v. Simeone*, 581 A.2d 162, 165 (Pa. 1990). *But see id.* at 168 (Papadakos, J., concurring) (“I cannot join the opinion authored by Mr. Justice Flaherty, because, it must be clear to all readers, it contains a number of unnecessary and unwarranted declarations regarding the ‘equality’ of women. Mr. Justice Flaherty believes that, with the hard-fought victory of the Equal Rights Amendment in Pennsylvania, all vestiges of inequality between the sexes have been erased and women are now treated equally under the law. I fear my colleague does not live in the real world. If I did not know him better I would think that his statements smack of male chauvinism, an attitude that ‘you women asked for it, now live with it.’”).

¹⁶⁷ *Beard v. Beard*, 262 So. 2d 269, 271-72 (Fla. Dist. Ct. App. 1972) (per curiam).

reforming how decisions are made. It helps make clear that a central argument on which legislatures and courts have relied to explain and defend changes in the law of divorce, that family law has already established women's equality so no longer needs to be concerned about women's status and position, is inadequate and unconvincing. As we have seen, substantial evidence within family law documents the persistence of principles and rules from common law coverture.¹⁶⁸ No state, for example, will enforce an interspousal contract for domestic labor, which might allow a woman to accumulate separate economic assets during marriage that could help support her after divorce.¹⁶⁹ At least thirty-three states retain some form of the doctrine of necessaries, which deprives a wife of a direct claim on her husband's assets based on the wife's right to support during marriage.¹⁷⁰

Indeed, these family law rules may help explain why the recent changes in divorce law appear to have contributed to the downward economic mobility or absolute impoverishment of many divorced women and their children.¹⁷¹ The prohibition on interspousal contracts for domestic labor and the doctrine of necessaries help ensure that many married women acquire few

¹⁶⁸ See *supra* Part I.A.2.

¹⁶⁹ See *supra* text accompanying notes 38-39, 62-65.

¹⁷⁰ See *supra* text accompanying notes 34-37, 66-72.

¹⁷¹ Lenore Weitzman has published the best-known work on the economic consequences of the new divorce laws for women and children. Her study of no-fault divorce in California found that "divorced men experience[d] an average 42 percent rise in their standard of living in the first year after the divorce, while divorced women (and their children) experience[d] a 73 percent decline." LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* 323 (1985). Several scholars have challenged Weitzman's methodology and her specific findings. See, e.g., Saul D. Hoffman & Greg J. Duncan, *What Are the Economic Consequences of Divorce?*, 25 *DEMOGRAPHY* 641, 641 (1988); Richard R. Peterson, *A Re-Evaluation of the Economic Consequences of Divorce*, 61 *AM. SOC. REV.* 528, 529-35 (1996). But a number of studies confirm that divorce under the new divorce laws has been economically devastating for many women and children. See, e.g., Rosalyn B. Bell, *Alimony and the Financially Dependent Spouse in Montgomery County, Maryland*, 22 *FAM. L.Q.* 225, 284 chart 6 (1988) (finding that in contested divorce adjudications where the women were awarded alimony the mean per capita income of the women fell 37% after divorce, the income of their children fell 61%, and the income of their former husbands increased 55%); Greg J. Duncan & Saul D. Hoffman, *A Reconsideration of the Economic Consequences of Marital Dissolution*, 22 *DEMOGRAPHY* 485, 488 (1985) (reporting that in the first year after divorce or separation "the family income of women who do not remarry is 70 percent of its previous figure; five years after a divorce or separation, the ratio for those still unmarried is 71 percent"); Barbara R. Rowe & Jean M. Lown, *The Economics of Divorce and Remarriage for Rural Utah Families*, 16 *J. CONTEMP. L.* 301, 324-25 (1990) (reporting that "the divorced men in this study experienced a 73 percent increase in their standard of living while divorced women experienced a 32 percent decrease"); Heather Ruth Wishik, *Economics of Divorce: An Exploratory Study*, 20 *FAM. L.Q.* 79, 98 tbl.15 (1986) (reporting that, even assuming that all support orders were paid, women's mean per capita income after divorce declined by 33%, children's declined by 25%, and men's rose by 120%).

separate assets during marriage, while performing labor that diminishes their future earning potential in the market. In light of this legal and economic background, divorce laws that assume that spouses have equal bargaining power in marriage and equal earning power at divorce may frequently be insufficient to keep many divorced women and their children out of poverty.

Contesting the family law canon's construction helps reveal, in other words, that the inequalities in family law are not necessarily in the past. The changes that have occurred in divorce law since 1969 may or may not be consistent with a commitment to women's equality. But legislatures and courts debating and instituting these changes cannot simply assume that question away, by asserting that family law has already fully and finally established women's equal status. Social equality is an important goal for family law, yet announcing its achievement is premature. Instead, a crucial question in any family law debate has to be whether the particular proposal at issue is consistent with equality or not.

Let's turn to the canonical understanding of the relationship between family law and federalism.

II. THE RELATIONSHIP BETWEEN FAMILY LAW AND FEDERALISM

The family law canon insists that family law is exclusively local. This construction of the family law canon suggests that a key issue in family law is whether the federal government can or should begin to intervene in family law at all. The exclusion of federal law from the family law canon has allowed legal authorities and legal scholars to oppose particular examples of federal family law on the ground that any form of federal family law is unprecedented and inappropriate, even where the authorities and scholars admit that the specific federal family law at issue would otherwise promote admirable aims and purposes. Yet challenging the construction of the family law canon uncovers the existence and extent of federal family law. It makes clear that the relevant question in a family law debate is not whether the federal government can or should make family law. It is whether any particular piece of federal family law is desirable on its own terms, in light of its substantive merits and the potential (state or federal) alternatives.

This part explores the canonical understanding of the relationship between family law and federalism, and examines the canon's distortions. It then turns to the recent debates over the

Violence Against Women Act¹⁷² and the Defense of Marriage Act,¹⁷³ federal statutes that legal authorities and legal scholars have opposed on the ground that they constitute federal family law and are categorically inappropriate for that reason alone. These debates reveal some of the consequences of the canonical understanding of the relationship between family law and federalism. They also indicate how contesting the construction of the family law canon can be a first step to changing the canon and restructuring the terms on which family law debates take place. Challenging the exclusion of federal law from the family law canon helps to undermine one of the most prominent arguments that legal authorities and legal scholars now use against federal family law measures, pushing the opponents of these measures to explain their opposition in new terms, if at all.

A. *The Exclusion of Federal Law from the Family Law Canon*

One of the best ways to uncover the canonical understanding of the relationship between family law and federalism is to consider which official legal sources, like statutes and judicial decisions, are excluded from the family law canon and not recognized as family law. Making this question intelligible requires a working definition of family law. After all, it would hardly be noteworthy for the family law canon to exclude a statute or judicial decision that has nothing to do with family law. There may be many possible definitions of family law. A serviceable one, however, is that family law regulates the creation and dissolution of legally recognized family relationships, and/or determines the legal rights and responsibilities of family members. To observe that a statute or judicial decision meets this definition of family law is not to assert that the statute or decision can be defined only as family law. Indeed, one of the problems with the family law canon is that it treats family law as a wholly separate enclave, so that a law is either entirely a matter of family law or entirely part of another legal category.¹⁷⁴ The doctrinal

¹⁷² Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1902.

¹⁷³ Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996).

¹⁷⁴ Writing in a somewhat different context, Judith Resnik has usefully identified a mode of reasoning that she terms “categorical federalism.” One of the features of categorical federalism that Resnik highlights is its assumption

boundaries around family law remain almost impermeable, while those between other legal subjects, like torts, contracts, and property, are arguably weakening.¹⁷⁵ However, law that falls within my working definition of family law is operating as family law, even if it is also falls within another body of law at the same time. Yet federal statutes and constitutional decisions that meet a serviceable definition of family law are systematically excluded from the family law canon and not recognized as family law.

It is commonplace for courts and judges to assert that family law is, and always has been, entirely a matter of state government.¹⁷⁶ The Supreme Court's recent decisions in *United States v. Lopez* (1995)¹⁷⁷ and *United States v. Morrison* (2000),¹⁷⁸ for instance, both use the notion that

that a particular rule of law regulates a single aspect of human action: Laws are described as about "the family," "crime," or "civil rights" as if laws were univocal and human interaction similarly one-dimensional. . . . [C]ategorical federalism relies on such identification to locate authority in state or national governments and then uses the identification as if to explain *why* power to regulate resides within one or another governmental structure.

Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 YALE L.J. 619, 620 (2001). Similar forms of analysis are also much in evidence in the family law canon.

¹⁷⁵ See, e.g., GRANT GILMORE, *THE DEATH OF CONTRACT* 87 (1974) ("Speaking descriptively, we might say that what is happening is that 'contract' is being reabsorbed into the mainstream of 'tort.' Until the general theory of contract was hurriedly run up late in the nineteenth century, tort had always been our residual category of civil liability. As the contract rules dissolve, it is becoming so again.") (footnote omitted); Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1089 (1972) ("Recent writings by lawyers concerned with economics and by economists concerned with law suggest . . . that an attempt at integrating the various legal relationships treated by [property and torts] would be useful both for the beginning student and the sophisticated scholar. By articulating a concept of 'entitlements' which are protected by property, liability, or inalienability rules, we present one framework for such an approach.") (footnote omitted); Robert Cooter, *Unity in Tort, Contract, and Property: The Model of Precaution*, 73 CAL. L. REV. 1, 2 (1985) ("[T]his Article shows that the model of precaution is similar in structure for torts, contracts, and property. Thus the theme of the Article is the unity of the common law at the simplest level of economic analysis."); Peter Linzer, *Uncontracts: Context, Contorts and the Relational Approach*, 1988 ANN. SURV. AM. L. 139, 139 ("The lines among not only tort and contract, but property as well have become increasingly blurred."). But see Carol M. Rose, *The Shadow of The Cathedral*, 106 YALE L.J. 2175, 2177 (1997) ("[B]y inattentiveness to the examples they used, [Calabresi and Melamed] not only claimed too much but also blurred what may be the distinctive characteristics of the various parts of our common law regimes. I will suggest that a closer attention to examples could lead to a deeper understanding of the common law—one in which the conventional categories of tort, contract, and property reveal quite different dominating concerns.").

¹⁷⁶ For a critique of the historical claim that family law has always been under exclusively local jurisdiction, see Hasday, *supra* note 111, at 1298 ("This Article challenges both the existence of an exclusively local tradition in family law and the uncritical use of historical claims in federalism discourse.").

¹⁷⁷ 514 U.S. 549 (1995).

¹⁷⁸ 529 U.S. 598 (2000).

family law is exclusively for the states to buttress their relatively narrow interpretations of Congress's power to regulate interstate commerce, contending that any broader theory of Congress's commerce power must be rejected if it would grant the federal government (supposedly unprecedented) authority to regulate family law. *Morrison* makes this point twice,¹⁷⁹ and *Lopez* insists on the exclusive localism of family law no less than four times.¹⁸⁰ Similarly, the major reason the Court cited in *Ankenbrandt v. Richards* (1992)¹⁸¹ for affirming the existence of a "domestic relations exception" to federal diversity jurisdiction, which excludes "cases involving the issuance of a divorce, alimony, or child custody decree" from federal court,¹⁸² was the proposition that family law is, and has long been, exclusively a matter for the states.¹⁸³

¹⁷⁹ See *id.* at 612-13 ("[*Lopez*] rejected these 'costs of crime' and 'national productivity' arguments because they would permit Congress to 'regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce.' We noted that, under this but-for reasoning: 'Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example.'") (citations omitted); *id.* at 615-16 ("Petitioners' reasoning, moreover, will not limit Congress to regulating violence but may, as we suggested in *Lopez*, be applied equally as well to family law and other areas of traditional state regulation since the aggregate effect of marriage, divorce, and childrearing on the national economy is undoubtedly significant.").

¹⁸⁰ See *Lopez*, 514 U.S. at 564 ("[U]nder the Government's 'national productivity' reasoning, Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example."); *id.* at 564-65 ("JUSTICE BREYER posits that there might be some limitations on Congress' commerce power, such as family law or certain aspects of education. These suggested limitations, when viewed in light of the dissent's expansive analysis, are devoid of substance.") (citation omitted); *id.* at 565 ("JUSTICE BREYER focuses, for the most part, on the threat that firearm possession in and near schools poses to the educational process and the potential economic consequences flowing from that threat. . . . This analysis would be equally applicable, if not more so, to subjects such as family law and direct regulation of education."); *id.* ("Under the dissent's rationale, Congress could just as easily look at child rearing as 'fall[ing] on the commercial side of the line' because it provides a 'valuable service—namely, to equip [children] with the skills they need to survive in life and, more specifically, in the workplace.'") (citation omitted); see also *id.* at 585 (Thomas, J., concurring) ("[I]t seems to me that the power to regulate 'commerce' can by no means encompass authority over mere gun possession, any more than it empowers the Federal Government to regulate marriage, littering, or cruelty to animals, throughout the 50 States."); *id.* at 624 (Breyer, J., dissenting) ("To hold this statute constitutional is not to 'obliterate' the 'distinction between what is national and what is local,'; nor is it to hold that the Commerce Clause permits the Federal Government to 'regulate any activity that it found was related to the economic productivity of individual citizens,' to regulate 'marriage, divorce, and child custody,' or to regulate any and all aspects of education.") (citations omitted).

¹⁸¹ 504 U.S. 689 (1992).

¹⁸² *Id.* at 704.

¹⁸³ See *id.* at 694-95 ("[W]e are unwilling to cast aside an understood rule that has been recognized for nearly a century and a half . . ."); see also *id.* at 715 (Blackmun, J., concurring in the judgment) ("[T]he unbroken and unchallenged practice of the federal courts since before the War Between the States of declining to hear certain domestic relations cases provides the very rare justification for continuing to do so.").

Such assertions of family law’s exclusive localism are typical. The Supreme Court has repeatedly declared that “the laws of marriage and domestic relations are concerns traditionally reserved to the states,”¹⁸⁴ that “domestic relations [is] an area that has long been regarded as a virtually exclusive province of the States,”¹⁸⁵ that—even more emphatically—“[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.”¹⁸⁶ William Rehnquist, the Chief Justice of the United States, has explained in his capacity as head administrator of the federal courts that family law “ha[s] traditionally been reserved to state courts.”¹⁸⁷ The Conference of Chief Justices, the organization for the chief justices of the state courts, has insisted that family law “is not federal in nature.”¹⁸⁸ Family law treatises and family law casebooks likewise report that “the institution

¹⁸⁴ *Trammel v. United States*, 445 U.S. 40, 50 (1980); *see also* *Thompson v. Thompson*, 484 U.S. 174, 186 (1988) (“Instructing the federal courts to play Solomon where two state courts have issued conflicting custody orders would entangle them in traditional state-law questions that they have little expertise to resolve.”); *Santosky v. Kramer*, 455 U.S. 745, 770 (1982) (Rehnquist, J., dissenting) (“If ever there were an area in which federal courts should heed the admonition of Justice Holmes that ‘a page of history is worth a volume of logic,’ it is in the area of domestic relations. This area has been left to the States from time immemorial, and not without good reason.”) (footnote omitted); *De la Rama v. De la Rama*, 201 U.S. 303, 307 (1906) (“It has been a long established rule that the courts of the United States have no jurisdiction upon the subject of divorce, or for the allowance of alimony, either as an original proceeding in chancery, or an incident of a divorce or separation”); *Barber v. Barber*, 62 U.S. (21 How.) 582, 584 (1859) (“We disclaim altogether any jurisdiction in the courts of the United States upon the subject of divorce, or for the allowance of alimony, either as an original proceeding in chancery or as an incident to divorce *a vinculo*, or to one from bed and board.”).

¹⁸⁵ *Sosna v. Iowa*, 419 U.S. 393, 404 (1975); *see also* *Zablocki v. Redhail*, 434 U.S. 374, 398 (1978) (Powell, J., concurring in the judgment) (“In my view, analysis must start from the recognition of domestic relations as ‘an area that has long been regarded as a virtually exclusive province of the States.’” (quoting *Sosna*, 419 U.S. at 404)).

¹⁸⁶ *Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 2301, 2309 (2004) (quoting *In re Burrus*, 136 U.S. 586, 593-94 (1890)); *see also* *Boggs v. Boggs*, 520 U.S. 833, 848 (1997) (same); *Rose v. Rose*, 481 U.S. 619, 625 (1987) (same); *McCarty v. McCarty*, 453 U.S. 210, 220 (1981) (same); *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979) (same); *Ohio ex rel. Popovici v. Agler*, 280 U.S. 379, 383 (1930) (same); *Simms v. Simms*, 175 U.S. 162, 167 (1899) (same); *In re Burrus*, 136 U.S. 586, 593-94 (1890) (same).

¹⁸⁷ William H. Rehnquist, *Chief Justice’s 1991 Year-End Report on the Federal Judiciary*, THIRD BRANCH (Office of Legislative & Pub. Affairs, Admin. Office of the U.S. Courts, Washington, D.C.), Jan. 1992, at 1, 3 [hereinafter Rehnquist, *Year-End Report*]; *see also* Remarks of Chief Justice Rehnquist, *reprinted in* 138 CONG. REC. 6186, 6186 (1992) (same); Report of the Judicial Conference Ad Hoc Committee on Gender-Based Violence 7 (Sept. 1991) (unpublished manuscript, on file with author) (contending that “domestic relations disputes” “have traditionally been within the province of the state courts”).

¹⁸⁸ *Violence Against Women: Victims of the System: Hearing on S. 15 Before the Senate Comm. on the Judiciary*, 102d Cong. 317 (1992) (statement of Conference of Chief Justices); *Crimes of Violence Motivated By Gender: Hearing Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 103d Cong. 82 (1994) (statement of Conference of Chief Justices) (same).

of marriage is regulated by the states.”¹⁸⁹

This exclusion of federal law from the family law canon covers many federal statutes that regulate the creation and dissolution of legally recognized family relationships and/or determine the rights and responsibilities of family members. Whatever else they do and whatever other legal subjects they implicate, federal social security law, employee benefit law, immigration law, tax law, Indian law, military law, same-sex marriage law, child support law, adoption law, and family violence and abuse law are also forms of family law.

Consider federal social security law first. Although most known for entitling qualified workers to old-age insurance benefits based on their histories of paid employment,¹⁹⁰ the social security program also distributes significant benefits to family members because of their family status. Most notably, the social security program provides spousal insurance benefits to the spouses, divorced spouses, and surviving spouses of qualified workers,¹⁹¹ and provides child’s insurance benefits to the dependent minor children of qualified workers.¹⁹² These benefits turn solely on the recipient’s family status, rather than the recipient’s work history. In fact, the social security program requires people receiving spousal benefits to forgo any social security benefits based on their own record of employment.¹⁹³ While social security benefits based on work

¹⁸⁹ SAMUEL GREEN & JOHN V. LONG, MARRIAGE AND FAMILY LAW AGREEMENTS § 1.10, at 13 (1984); *see also* HARRY D. KRAUSE ET AL., FAMILY LAW: CASES, COMMENTS AND QUESTIONS 19 (5th ed. 2003) (“Unlike taxation and interstate commerce, family matters are not among the enumerated powers of the federal government. As a result, . . . in the United States, state legislatures have traditionally defined the family and enacted the laws that regulate marriage, parentage, divorce, family support obligations, and family property rights. While federal courts might, theoretically, exercise diversity jurisdiction over family matters, as a result of the so-called ‘domestic relations exception’ to diversity jurisdiction and various abstention doctrines, federal courts have seldom entertained family law matters. Indeed, the United States Supreme Court has often repeated that ‘[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the State, and not the laws of the United States.’”) (citation omitted); WARDLE & NOLAN, *supra* note 42, at 29 (“The regulation of domestic relations historically has been, and today remains, primarily a matter of state law. Indeed, the Supreme Court of the United States has observed, not infrequently, that the ‘[r]egulation of domestic relations [is] an area that has long been regarded as a virtually exclusive province of the states.’”) (citation omitted); *id.* at 839 (noting “the strong tradition of deference to state expertise in matters of domestic relations”).

¹⁹⁰ *See* 42 U.S.C. § 402(a) (2000).

¹⁹¹ *See id.* § 402(b) (wife’s and divorced wife’s insurance benefits), 402(c) (husband’s and divorced husband’s insurance benefits), 402(e) (widow’s insurance benefits), 402(f) (widower’s insurance benefits). For the origin of these benefits, *see* Social Security Act Amendments of 1939, ch. 666, § 201, 53 Stat. 1360, 1362-67.

¹⁹² *See* 42 U.S.C. § 402(d) (child’s insurance benefits).

¹⁹³ *See id.* § 402(b)(1)(D), 402(c)(1)(D), 402(e)(1)(D), 402(f)(1)(D).

history are calculated according to wages earned and amount of time employed,¹⁹⁴ spousal benefits are calculated based on the benefits to which the “primary” spouse is entitled.¹⁹⁵

Spousal and child’s benefits under the social security program represent an important right associated with family status. Indeed, only 39.0% of the women aged 62 or older who received social security benefits in 2002 collected based on their own work histories. The rest collected spousal benefits, either because their own work histories did not qualify them for social security benefits (33.0%), or because the benefits they would have received based on their work histories would have been smaller than the spousal benefits they could receive (28.0%).¹⁹⁶

In part because the social security program creates such important rights tied to family status, the program is also concerned with regulating the creation and dissolution of the family relationships that will be legally recognized for its purposes. The social security program defines who counts as a child, a spouse, a divorced spouse, or a surviving spouse in ways that build on,¹⁹⁷ but significantly depart from, state definitions. For example, the social security program recognizes the relationship between a qualified worker and his dependent minor child only if the child is unmarried.¹⁹⁸ Similarly, the social security program recognizes the spouse of a qualified worker only if (with a few exceptions) the spouse has been married to the qualified worker for at least one year or has a child with the qualified worker.¹⁹⁹ The social security program recognizes

¹⁹⁴ *See id.* § 415.

¹⁹⁵ A spouse or divorced spouse can receive a spousal benefit that is up to 50% as large as the benefit the primary spouse receives, *see id.* § 402(b)(2), 402(c)(3), and a surviving spouse can receive a spousal benefit that is up to 100% as large as the benefit that the primary spouse would have received, *see id.* § 402(e)(2)(A), 402(f)(3)(A). Similarly, children whose qualifying parent is alive can receive a child’s insurance benefit that is 50% as large as the benefit the qualifying parent receives, and children whose qualifying parent is dead can receive a child’s insurance benefit that is 75% as large as the benefit that the qualifying parent would have received. *See id.* § 402(d)(2).

¹⁹⁶ *See* OFFICE OF POLICY, OFFICE OF RESEARCH, EVALUATION, & STATISTICS, SOC. SEC. ADMIN., ANNUAL STATISTICAL SUPPLEMENT TO THE SOCIAL SECURITY BULLETIN, 2003, at 5.25 tbl.5.A14, G.8-G.9 (2004).

¹⁹⁷ *See, e.g.*, 42 U.S.C. § 416(h)(1)(A)(i) (“An applicant is the wife, husband, widow, or widower of a fully or currently insured individual for purposes of this subchapter if the courts of the State in which such insured individual is domiciled at the time such applicant files an[] application, or, if such insured individual is dead, the courts of the State in which he was domiciled at the time of death, or, if such insured individual is or was not so domiciled in any State, the courts of the District of Columbia, would find that such applicant and such insured individual were validly married at the time such applicant files such application or, if such insured individual is dead, at the time he died.”).

¹⁹⁸ *See id.* § 402(d)(1)(B).

¹⁹⁹ *See id.* § 416(b), 416(f).

a divorced spouse only if she was married to the qualified worker for at least ten years,²⁰⁰ and (with a few exceptions) has not remarried.²⁰¹ The social security program recognizes a surviving spouse only if (with a few exceptions) she was married to the qualified worker for at least nine months or had a child with the qualified worker,²⁰² and she has not remarried before the age of 60.²⁰³ The Supreme Court has also indicated in an analogous case on the federal Railroad Retirement Act that the social security program deviates from state divorce law in providing that social security benefits are not community property to be distributed at divorce.²⁰⁴

The federal Employee Retirement Income Security Act (ERISA),²⁰⁵ which regulates private employee benefit plans with a combined worth of trillions of dollars,²⁰⁶ similarly determines important rights that family members receive because of their family status. Since 1984, for instance, Congress has provided that surviving and divorced spouses have specific, but limited rights to the private employee pension benefits of their former spouses.²⁰⁷ As the Supreme Court has repeatedly found, this federal provision preempts state family law on the designation of beneficiaries at death or divorce.²⁰⁸

²⁰⁰ *See id.* §§ 402(b)(1)(G), 402(c)(1)(G), 416(d)(1), 416(d)(4).

²⁰¹ *See id.* § 402(b)(1)(C), 402(b)(3), 402(c)(1)(C), 402(c)(4). If the primary spouse dies, the divorced spouse is subject to the same remarriage rules applied to surviving spouses. *See id.* §§ 402(e)(1)(A), 402(e)(3), 402(f)(1)(A), 402(f)(4), 416(d)(2), 416(d)(5).

²⁰² *See id.* § 416(c), 416(g).

²⁰³ *See id.* § 402(e)(1)(A), 402(e)(3), 402(f)(1)(A), 402(f)(4).

²⁰⁴ *See Hisquierdo v. Hisquierdo*, 439 U.S. 572, 573-77, 579, 582-83, 585-87 (1979).

²⁰⁵ Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829.

²⁰⁶ *See Boggs v. Boggs*, 520 U.S. 833, 840 (1997) (noting that “[t]he nine community property States” alone “have some 80 million residents, with perhaps \$1 trillion in retirement plans”).

²⁰⁷ *See Retirement Equity Act of 1984*, Pub. L. No. 98-397, 98 Stat. 1426.

²⁰⁸ *See Egelhoff v. Egelhoff*, 532 U.S. 141, 143 (2001) (“A Washington statute provides that the designation of a spouse as the beneficiary of a nonprobate asset is revoked automatically upon divorce. We are asked to decide whether the Employee Retirement Income Security Act of 1974 (ERISA) pre-empts that statute to the extent it applies to ERISA plans. We hold that it does.”) (citation omitted); *id.* at 151 (“[W]e have not hesitated to find state family law pre-empted when it conflicts with ERISA or relates to ERISA plans.”); *Boggs*, 520 U.S. at 835-36 (“We consider whether the Employee Retirement Income Security Act of 1974 (ERISA) pre-empts a state law allowing a nonparticipant spouse to transfer by testamentary instrument an interest in undistributed pension plan benefits. . . . We hold that ERISA pre-empts the state law.”) (citation omitted).

Federal immigration law also creates valuable rights tied to family status, and determines who will count as a family member for its purposes. Most notably, the immigration law exempts the “‘immediate relatives’” of United States citizens from numerical limitations on immigration.²⁰⁹ The family law category of “‘immediate relatives’” is a creation of federal immigration law, which defines “‘immediate relatives’” as children, spouses, some surviving spouses who were married to the citizen for at least two years, and parents when the citizen is at least twenty-one years-old.²¹⁰ Federal immigration law further specifies who counts as a child or a spouse. It provides, for instance, that the relationship between a father and his illegitimate biological child will not be recognized unless “‘the father has or had a bona fide parent-child relationship with the [child].’”²¹¹ Similarly, federal immigration law does not recognize marriages entered into “‘for the purpose of evading the immigration laws,’”²¹² or marriages between two people of the same sex.²¹³ Such rules play a pivotal role in immigration law because the immigration preferences accorded to the immediate relatives of United States citizens are so powerful that these relatives accounted for 47.2% of all legal immigration in 2003, the largest single category.²¹⁴ The beneficiaries of other family-based immigration preferences accounted

²⁰⁹ 8 U.S.C. § 1151(b)(2)(A)(i) (2000); *see also* OFFICE OF IMMIGRATION STATISTICS, U.S. DEP’T OF HOMELAND SEC., 2003 YEARBOOK OF IMMIGRATION STATISTICS 5 (2004).

²¹⁰ 8 U.S.C. § 1151(b)(2)(A)(i).

²¹¹ *Id.* § 1101(b)(1)(D); *see also* *Nguyen v. INS*, 533 U.S. 53, 56-59 (2001) (upholding the constitutionality of 8 U.S.C. § 1409, which “governs the acquisition of United States citizenship by persons born to one United States citizen parent and one noncitizen parent when the parents are unmarried and the child is born outside of the United States or its possessions” and “imposes different requirements for the child’s acquisition of citizenship depending upon whether the citizen parent is the mother or the father”); THE EFFECTS OF GENDER IN THE FEDERAL COURTS: THE FINAL REPORT OF THE NINTH CIRCUIT GENDER BIAS TASK FORCE 114 (1993) (“An overt gender distinction is made in the definition of the term ‘illegitimate’ child under the immigration and nationality laws An ‘illegitimate’ child may seek immigration benefits through, or on behalf of, his or her *mother*. He or she may seek immigration benefits through, or on behalf of, his or her *father*, however, only by establishing that a ‘bona fide’ parent-child relationship exists or existed.”).

²¹² 8 U.S.C. § 1154(c)(2).

²¹³ *See Adams v. Howerton*, 673 F.2d 1036, 1038-43 (9th Cir. 1982) (holding that a party to a same-sex marriage does not count as a spouse under federal immigration law, even if state law recognizes the same-sex marriage).

²¹⁴ *See* OFFICE OF IMMIGRATION STATISTICS, *supra* note 209, at 7 tbl.A.

for an additional 22.5% of legal immigration.²¹⁵

Federal tax law, in turn, ubiquitously distributes rights and burdens based on family status, and regulates which family relationships are legally recognized for its purposes. The extent of federal tax liability, for instance, can turn significantly on whether the taxpayer is married,²¹⁶ and the tax law's definition of marriage builds on, but differs from, state law. The federal tax code considers a person unmarried if his spouse is a nonresident alien and considers a person married if his spouse died during the taxable year.²¹⁷ Federal tax law also grants important benefits based on specifically recognized family relationships. It determines, for example, which relatives count as dependents for purposes of entitling a taxpayer to a tax deduction.²¹⁸

Federal Indian law similarly governs the legal creation and dissolution of family relationships. The Indian Child Welfare Act,²¹⁹ for instance, structures the termination of parental rights over Native American children and the adoption of Native American children. The Act provides that a parent voluntarily terminating his rights to a Native American child must consent to the termination in writing and before a judge who certifies that the parent understands the consequences of his consent.²²⁰ The parent can withdraw his consent to the termination within two years if the consent was obtained through fraud or duress.²²¹ More strikingly, the Act provides that “[i]n any adoptive placement of an Indian child under State law, a preference shall

²¹⁵ *See id.*

²¹⁶ *See, e.g.,* *Druker v. Comm’r*, 697 F.2d 46, 51 (2d Cir. 1982) (upholding “marriage penalty” in federal income tax code, whereby some married couples owe significantly higher taxes than they would owe if they were unmarried); *Mapes v. United States*, 576 F.2d 896, 897 (Ct. Cl. 1978) (same); *see also id.* at 897-98 (“[N]ot all married couples are penalized taxwise by reason of their status. To the contrary, many, if not most, married couples achieve considerable tax savings through income-splitting on a joint return. . . . It is when both spouses generate somewhat comparable incomes that the benefits of income-splitting cease to exist. As a general rule, two-income couples would benefit from filing separately and using the tax rates applicable to single persons. They are not, however, eligible to use these schedules, but are restricted to filing jointly . . .”).

²¹⁷ *See* 26 U.S.C. § 2(b)(2)(C)-(D) (2000).

²¹⁸ *See id.* §§ 151, 152(a)-(b).

²¹⁹ Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3069.

²²⁰ *See* 25 U.S.C. § 1913(a) (2000).

²²¹ *See id.* § 1913(d).

be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families."²²²

The federal law governing the United States military also creates rights and responsibilities that family members have because of their family status, and determines which family relationships the military will legally recognize. Federal law, for example, gives the dependents of service members the right to receive medical and dental care based on their family status,²²³ and defines which family members count as dependents for purposes of receiving those benefits.²²⁴ The federal Survivor Benefit Plan gives the spouses, former spouses, and dependent children of service members a right to pension benefits.²²⁵ These benefits also turn solely on family status.²²⁶ Like the federal law providing health care to the relatives of service members, the Survivor Benefit Plan includes detailed specifications about which family relationships it recognizes.²²⁷

There are also a number of federal statutes that are even more manifest examples of

²²² *Id.* § 1915(a).

²²³ *See* 10 U.S.C. §§ 1076-1078 (2000).

²²⁴ *See id.* § 1072(2).

²²⁵ *See id.* §§ 1447-1455.

²²⁶ Dependent children and spouses or former spouses who are younger than 62 when they become entitled to the annuity receive a pension benefit that is 55% as large as the service member's benefit. *See id.* § 1451(a)(1)(A). Spouses or former spouses who are 62 or older when they become entitled to the annuity generally receive a benefit that is 35% as large as the service member's benefit. *See id.* § 1451(a)(1)(B).

²²⁷ A surviving spouse, for instance, can receive benefits under the Survivor Benefit Plan only if she has not remarried before the age of 55, *see id.* § 1450(b)(2), and was married to the service member for at least one year, or was married to the service member at the time of his retirement, or had a child with the service member, *see id.* § 1447(7)-(9). The Survivor Benefit Plan recognizes the relationship between a service member and his dependent child only if the child is unmarried. *See id.* § 1447(11)(A)(I).

Paired with these federal statutes granting the relatives of military personnel significant benefits tied to their family status, other federal laws governing the military regulate the responsibilities associated with family status. Federal law provides, for instance, that a service member's marriage does not exempt him from criminal prosecution for raping his wife, *see id.* § 920(a), although marriage is a defense to prosecution for "carnal knowledge," a crime based on having sex with someone younger than sixteen "under circumstances not amounting to rape," *id.* § 920(b). In addition, federal law indicates that a service member's marriage or his parenthood does not give him the right to commit violence against his spouse or child. For example, members of the military are prohibited from possessing firearms if they have been convicted of a domestic violence misdemeanor, *see* 18 U.S.C. §§ 922(d)(9), 922(g)(9), 922(s)(3)(B)(i), 925(a)(1) (2000), a crime defined to include violence committed against a spouse, former spouse, or child, *see id.* § 921(a)(33).

family law. Consider the Defense of Marriage Act,²²⁸ which defines “‘marriage’” for purposes of all federal statutory and administrative law as “a legal union between one man and one woman as husband and wife” and defines a “‘spouse’” as “a person of the opposite sex who is a husband or a wife.”²²⁹ This statute is emphatically unwilling to defer to state definitions of marriage. It applies, moreover, across the full spectrum of federal law. As the House Judiciary Committee that reported favorably on the act estimated, “[t]he word ‘marriage’ appears in more than 800 sections of federal statutes and regulations, and the word ‘spouse’ appears more than 3,100 times.”²³⁰

In addition, Congress has enacted many statutes structuring and strengthening a child’s right to parental support.²³¹ These statutes, for instance, use financial and other incentives to require states to petition for the inclusion of medical care in child support orders.²³² They specify detailed procedures that states must adopt to facilitate the determination of paternity.²³³ They also make it a federal crime for a parent to willfully fail to pay child support for a child who lives in another state, if the unpaid support has been due for more than a year or is for more than \$5,000.²³⁴

Similarly, there are a number of federal statutes that structure the termination of parental rights and the adoption of children.²³⁵ We have already discussed the Indian Child Welfare Act,

²²⁸ Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996).

²²⁹ 1 U.S.C. § 7 (2000).

²³⁰ H.R. REP. NO. 104-664, at 10 (1996).

²³¹ *See* Social Services Amendments of 1974, Pub. L. No. 93-647, 88 Stat. 2337 (1975); Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, 98 Stat. 1305; Family Support Act of 1988, Pub. L. No. 100-485, 102 Stat. 2343; Child Support Recovery Act of 1992, Pub. L. No. 102-521, 106 Stat. 3403; Ted Weiss Child Support Enforcement Act of 1992, Pub. L. No. 102-537, 106 Stat. 3531; Full Faith and Credit for Child Support Orders Act, Pub. L. No. 103-383, 108 Stat. 4063 (1994); Child Support Performance and Incentive Act of 1998, Pub. L. No. 105-200, 112 Stat. 645.

²³² *See* 42 U.S.C. § 652(f) (2000).

²³³ *See id.* § 666(a)(5).

²³⁴ *See* 18 U.S.C. § 228(a)(1) (2000).

²³⁵ *See* Child Abuse Prevention and Treatment and Adoption Reform Act of 1978, Pub. L. No. 95-266, 92 Stat. 205; Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500; Howard M. Metzenbaum Multiethnic Placement Act of 1994, Pub. L. No. 103-382, 108 Stat. 4056; Small Business Job Protection Act of 1996, Pub. L. No. 104-188, §§ 1807-1808, 110 Stat. 1755, 1899-1904; Adoption and Safe

which regulates termination and adoption proceedings involving Native American children.²³⁶ A provision of the Small Business Job Protection Act, which applies to adoptions that the Indian Child Welfare Act does not cover,²³⁷ prohibits states and organizations that receive federal funding from denying or delaying an adoption based on the race, color, or national origin of the child or the prospective adoptive parent.²³⁸ Other federal statutes use federal funding to require states to adopt specific rules for determining when existing parent-child relationships should be protected, when parental termination proceedings should be initiated, and when adoption should be pursued.²³⁹

Still more federal laws structure the rights that a family member has to be protected from violence or other abuse by another family member.²⁴⁰ The Child Protection and Obscenity Enforcement Act, for instance, makes it a federal crime for a parent to sell his child in interstate commerce to someone who the parent knows will use the child in the production of pornography.²⁴¹ The Victims of Child Abuse Act requires various professionals to report child

Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115.

²³⁶ See *supra* text accompanying notes 219-222.

²³⁷ See 42 U.S.C. §§ 674(d)(4), 1996b(3) (2000).

²³⁸ See *id.* §§ 671(a)(18), 1996b(1).

²³⁹ See 42 U.S.C. §§ 671, 675(5) (2000).

²⁴⁰ See Child Abuse Prevention and Treatment Act, Pub. L. No. 93-247, 88 Stat. 4 (1974); Child Abuse Prevention and Treatment and Adoption Reform Act of 1978, Pub. L. No. 95-266, 92 Stat. 205; Parental Kidnaping Prevention Act of 1980, Pub. L. No. 96-611, 94 Stat. 3568; Child Protection Act of 1984, Pub. L. No. 98-292, 98 Stat. 204; Child Abuse Amendments of 1984, Pub. L. No. 98-457, 98 Stat. 1749; Child Abuse Prevention, Adoption, and Family Services Act of 1988, Pub. L. No. 100-294, 102 Stat. 102; Child Protection and Obscenity Enforcement Act of 1988, Pub. L. No. 100-690, 102 Stat. 4485; Child Abuse Prevention Challenge Grants Reauthorization Act of 1989, Pub. L. No. 101-126, 103 Stat. 764; Victims of Child Abuse Act of 1990, Pub. L. No. 101-647, 104 Stat. 4792; Child Abuse, Domestic Violence, Adoption and Family Services Act of 1992, Pub. L. No. 102-295, 106 Stat. 187; Battered Women's Testimony Act of 1992, Pub. L. No. 102-527, 106 Stat. 3459; An Act To amend the State Justice Institute Act of 1984 to carry out research, and develop judicial training curricula, relating to child custody litigation, Pub. L. No. 102-528, 106 Stat. 3461 (1992); International Parental Kidnapping Crime Act of 1993, Pub. L. No. 103-173, 107 Stat. 1998; Safe Homes for Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1925; Child Abuse Prevention and Treatment Act Amendments of 1996, Pub. L. No. 104-235, 110 Stat. 3063; Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub. L. No. 108-21, 117 Stat 650.

²⁴¹ See 18 U.S.C. § 2251A (2000).

abuse,²⁴² while specifically indicating that “discipline administered by a parent or legal guardian to his or her child” does not constitute child abuse so long as “it is reasonable in manner and moderate in degree and otherwise does not constitute cruelty.”²⁴³

The oft-repeated insistence that family law is exclusively subject to local jurisdiction and control similarly excludes federal judicial decisions interpreting the United States Constitution from the family law canon. Yet the same Supreme Court that has frequently declared the exclusive localism of family law has also, through its decisions interpreting and enforcing the federal Constitution, often structured how legally recognized family relationships are made and dissolved, and determined the rights and responsibilities that family members have because of their family status. Like the federal statutes already discussed, many of these federal constitutional decisions fall into other legal categories as well. They are part of the jurisprudence on substantive due process, for example, or equal protection. But these decisions are also forms of family law. A few examples, taken just from the Supreme Court, should be sufficient to provide a sense of the important family law contained in federal constitutional decisions and excluded from the family law canon.

Consider first the many federal constitutional decisions structuring how legally recognized relationships between parents and children are created and dissolved. These decisions provide, for instance, that an illegitimate child must have more than one year in which to establish a legal relationship with his biological father.²⁴⁴ They hold that a biological father has no right to create a legally recognized relationship with his child if the child is born to another man’s wife.²⁴⁵ They determine that parental rights can be involuntarily terminated only if the parent is proven unfit by at least clear and convincing evidence,²⁴⁶ and that indigent parents in termination proceedings do not always have a right to appointed legal counsel.²⁴⁷

²⁴² See 42 U.S.C. § 13031(a)-(b) (2000).

²⁴³ *Id.* § 13031(c)(8).

²⁴⁴ See *Mills v. Habluetzel*, 456 U.S. 91, 99-102 (1982).

²⁴⁵ See *Michael H. v. Gerald D.*, 491 U.S. 110, 113, 124, 129-30 (1989) (plurality opinion).

²⁴⁶ See *Santosky v. Kramer*, 455 U.S. 745, 747-48 (1982).

²⁴⁷ See *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 31-32 (1981).

Other federal constitutional decisions regulate the rights and responsibilities that parents and children have when their relationship is legally recognized. They establish, for example, that a parent can place his child in private rather than public school,²⁴⁸ or remove his child from school entirely in some circumstances.²⁴⁹ They give parents substantial control over the access that third parties, including grandparents, have to a child.²⁵⁰ They provide that a parent's right to the custody of his child is not diminished by the parent's interracial marriage.²⁵¹ They structure a parent's authority to participate in his child's decision to have an abortion, determining that parental consent can be required as long as the child has the option of seeking judicial authorization instead.²⁵² They hold that a child can be subjected to child labor restrictions against his parent's wishes.²⁵³

Federal constitutional decisions similarly regulate the legal creation and dissolution of marriage. They prohibit states from banning interracial marriage,²⁵⁴ for instance, or from requiring people subject to child support orders to obtain judicial approval before they can marry.²⁵⁵ They establish that laws governing the provision of alimony at divorce must apply equally to husbands and wives,²⁵⁶ and that laws governing the provision of child support cannot set different ages of majority for male and female children.²⁵⁷

Federal constitutional decisions also determine some of the rights that are, and are not, associated with marriage. They provide that a husband has no right to notice of his wife's

²⁴⁸ See *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925).

²⁴⁹ See *Wisconsin v. Yoder*, 406 U.S. 205, 207-09 (1972) (permitting Amish parents to remove their children from school after eighth grade for religious reasons).

²⁵⁰ See *Troxel v. Granville*, 530 U.S. 57, 60, 63, 65-73 (2000) (plurality opinion).

²⁵¹ See *Palmore v. Sidoti*, 466 U.S. 429, 430, 433-34 (1984).

²⁵² See *Planned Parenthood v. Casey*, 505 U.S. 833, 899 (1992) (plurality opinion).

²⁵³ See *Prince v. Massachusetts*, 321 U.S. 158, 159-60, 166-67, 170 (1944).

²⁵⁴ See *Loving v. Virginia*, 388 U.S. 1, 2, 11-12 (1967).

²⁵⁵ See *Zablocki v. Redhail*, 434 U.S. 374, 375-77 (1978).

²⁵⁶ See *Orr v. Orr*, 440 U.S. 268, 270-71, 283 (1979).

²⁵⁷ See *Stanton v. Stanton*, 421 U.S. 7, 8, 14-15 (1975).

decision to have an abortion, much less the right to override that decision.²⁵⁸ They establish that a married couple has the right to use contraception without being subject to criminal prosecution.²⁵⁹

Along the same lines, federal constitutional decisions structure the rights associated with family relationships beyond marriage and parenthood. They hold, for instance, that a housing ordinance cannot deny an extended family the right to live together.²⁶⁰

As should be clear by this point, all of these statutes and judicial decisions are examples of family law. They regulate the creation and termination of legally recognized family relationships, and/or determine the rights and responsibilities that family members have because of their family status. The courts and judges who authoritatively declare that family law is entirely local unreasonably exclude these statutes and decisions from the family law canon.

Let's explore some of the consequences of this construction of the family law canon, and consider how challenging the family law canon's construction can be a first step to changing the canon and altering the terms on which family law debates take place.

B. *The Consequences of the Canon and the Possibilities for Change: The Debates over the Violence Against Women Act and the Defense of Marriage Act*

The exclusion of federal law from the family law canon suggests that a crucial and undecided question in family law is whether the federal government can or should make family law. This exclusion has permitted legal authorities and legal scholars to oppose specific examples of federal family law on the ground that any instance of federal family law is unprecedented and inappropriate by definition, even where the authorities and scholars concede that the particular federal family law in question otherwise advances worthy goals and purposes.

Yet as we have seen, federal statutory and constitutional law already regulates family relationships, rights, and responsibilities. Indeed, federal constitutional requirements make federal family law inevitable. The relevant question is not whether the federal government can or

²⁵⁸ See *Planned Parenthood v. Casey*, 505 U.S. 833, 887-88, 892-98 (1992).

²⁵⁹ See *Griswold v. Connecticut*, 381 U.S. 479, 480, 485-86 (1965).

²⁶⁰ See *Moore v. City of East Cleveland*, 431 U.S. 494, 495-96, 503-06 (1977) (plurality opinion).

should make family law. It is whether any specific example of actual or proposed federal family law is desirable on its own terms, in view of its substantive merits and the possible state or federal alternatives. Challenging the exclusion of federal law from the family law canon helps to reveal that one of the leading arguments that legal authorities and legal scholars now employ against federal family law measures is logically unconvincing, pushing opponents of these measures to defend their opposition on new grounds, if at all.

Consider, for example, the two most prominent recent debates to reflect the influence of the exclusion of federal law from the family law canon. The first involves the civil rights remedy in the Violence Against Women Act of 1994 (VAWA),²⁶¹ which the Supreme Court found unconstitutional in *United States v. Morrison* (2000).²⁶² This remedy created a federal civil right to be free from gender-motivated violence and entitled the victims of such violence to seek money damages from their assailants in federal court.²⁶³ There were many reasons to conclude that the remedy was not a form of family law at all, as it did not structure the legal creation or dissolution of family relationships, or subject people to different rights and responsibilities based on their family status. But VAWA's civil rights remedy did seek to combat domestic violence and marital rape, along with other forms of gender-motivated violence.²⁶⁴ Perhaps for this reason, opponents of the civil rights remedy identified the provision as a form of family law. Having done so, they attacked the remedy on the ground that federal intervention in family law was unprecedented and categorically inappropriate. This argument was extraordinarily successful.

Even before VAWA's enactment, a wide variety of judges and judicial organizations used claims about the inherently local nature of family law to secure limitations on VAWA's civil

²⁶¹ 42 U.S.C. § 13981 (2000) (found unconstitutional 2000).

²⁶² 529 U.S. 598, 601-02 (2000).

²⁶³ *See* 42 U.S.C. § 13981.

²⁶⁴ For instance, victims of gender-motivated violence could bring suit under VAWA's civil rights remedy regardless of whether the violence at issue would be treated more leniently under state law because of the relationship between victim and perpetrator. *See id.* § 13981(d)(2)(B).

rights remedy. The Conference of Chief Justices,²⁶⁵ the Judicial Conference of the United States,²⁶⁶ and Chief Justice Rehnquist²⁶⁷ never challenged VAWA’s substantive goal of combating violence against women. But the Conference of Chief Justices, the organization of state chief justices, voted on January 31, 1991 to oppose VAWA’s civil rights remedy on the ground that the remedy was a form of federal family law and family law “is not federal in nature.”²⁶⁸ The Judicial Conference of the United States, the organization for federal judges, followed suit in September 1991,²⁶⁹ after the Conference’s Ad Hoc Committee on Gender-Based Violence warned that VAWA’s civil rights remedy would involve the federal courts in “domestic relations disputes” “that have traditionally been within the province of the state courts.”²⁷⁰ Chief Justice Rehnquist, acting in his capacity as chief administrator of the federal courts, similarly opposed VAWA’s civil rights remedy because it “could involve the federal courts in a whole host of domestic relations disputes,” an area of “law that ha[s] traditionally been reserved to state courts.”²⁷¹

²⁶⁵ See *Violence Against Women: Victims of the System: Hearing on S. 15 Before the Senate Comm. on the Judiciary*, *supra* note 188, at 317 (statement of Conference of Chief Justices) (“Obviously, there is a need to protect women.”); *Crimes of Violence Motivated By Gender: Hearing Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, *supra* note 188, at 82 (statement of Conference of Chief Justices) (same); *id.* at 84 (statement of Conference of Chief Justices) (“[T]he Conference of Chief Justices commends Congress for addressing the critical problems of sexual and spousal violence and supports the intended objectives of S. 15 . . .”).

²⁶⁶ See Report of the Proceedings of the Judicial Conference of the United States (Sept. 23-24, 1991), *reprinted in Crimes of Violence Motivated By Gender: Hearing Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, *supra* note 188, at 74, 75 (“The Judicial Conference of the United States . . . support[s] the objectives of the Violence Against Women Act . . .”).

²⁶⁷ See Rehnquist, *Year-End Report*, *supra* note 187, at 3 (“The Judicial Conference . . . support[s] the underlying objective of S. 15 [the Violence Against Women Act]—to deter violence against women . . .”); *see also* Remarks of Chief Justice Rehnquist, *reprinted in* 138 CONG. REC. 6186, 6186 (1992) (similar).

²⁶⁸ *Violence Against Women: Victims of the System: Hearing on S. 15 Before the Senate Comm. on the Judiciary*, *supra* note 188, at 315, 317 (statement of Conference of Chief Justices); *Crimes of Violence Motivated By Gender: Hearing Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, *supra* note 188, at 82-84 (statement of Conference of Chief Justices) (same).

²⁶⁹ See Report of the Proceedings of the Judicial Conference of the United States (Sept. 23-24, 1991), *supra* note 266, at 75.

²⁷⁰ Report of the Judicial Conference Ad Hoc Committee on Gender-Based Violence, *supra* note 187, at 7.

²⁷¹ Rehnquist, *Year-End Report*, *supra* note 187, at 3; *see also* Remarks of Chief Justice Rehnquist, *reprinted in* 138 CONG. REC. 6186, 6186 (1992) (same). Judith Resnik has argued that federal judges seek “to confirm their prestige” by limiting their docket to nationally important issues and have attempted to keep family law

This line of argument about the exclusively local nature of family law carried enough weight that VAWA’s supporters were forced to reduce the scope of the bill’s civil rights remedy significantly. The initial versions of the remedy, for instance, covered all violent crimes “committed because of gender or on the basis of gender,”²⁷² and presumed that every rape fell into that category.²⁷³ But in 1993, the Senate Judiciary Committee felt compelled to restrict the civil rights remedy to those crimes that would constitute a felony involving the risk of physical injury,²⁷⁴ and that were “committed because of gender or on the basis of gender; *and* due, at least in part, to an animus based on the victim’s gender.”²⁷⁵ The revised bill did not define its new “animus” requirement,²⁷⁶ but the requirement was clearly meant as a limitation. The legislative

cases out of federal courts because they do not understand “[w]omen and the families they sometimes inhabit” to be nationally important. Judith Resnik, *Naturally” Without Gender: Women, Jurisdiction, and the Federal Courts*, 66 N.Y.U. L. REV. 1682, 1749 (1991); *see also id.* at 1766 (“Women’s unexamined presence in the law and jurisprudence of the federal courts bespeaks hostility to seeing women as legitimate participants in the national world—in this context represented by the federal courts.”). This may be an accurate assessment of the federal judiciary’s perceived self-interest. For my purposes, however, I am less interested in how the arguments that judges and judicial organizations made against VAWA’s civil rights remedy reflected their perceived self-interest, and more interested in how the preexisting construction of the family law canon meant that it would count as a convincing argument against VAWA’s civil rights remedy to contend that the remedy was unprecedented and inappropriate because it was a form of federal family law. As we will see, when judges and judicial organizations advanced this argument—whether from self-interest, sincere belief, or most likely a combination of the two—it resonated powerfully with both Congress and the courts. *See infra* text accompanying notes 272-285.

²⁷² *E.g.*, Violence Against Women Act of 1991, S. 15, 102d Cong. § 301(d)(1).

²⁷³ *See, e.g.*, Violence Against Women Act of 1993, H.R. 1133, 103d Cong. § 301(e)(1) (defining a “crime of violence motivated by the victim’s gender” to include, *inter alia*, “a crime of violence that is rape (excluding conduct that is characterized as rape solely by virtue of the ages of the participants), sexual assault, sexual abuse, or abusive sexual contact”).

²⁷⁴ *See* Violence Against Women Act of 1993, S. 11, 103d Cong. § 302(d)(2)(A) (as amended by Judiciary Committee), *reprinted in* S. REP. NO. 103-138, at 2, 30 (1993). For the final codification of this provision, see 42 U.S.C. § 13981(d)(2) (2000) (“[T]he term ‘crime of violence’ means—(A) an act or series of acts that would constitute a felony against the person or that would constitute a felony against property if the conduct presents a serious risk of physical injury to another, and that would come within the meaning of State or Federal offenses described in section 16 of title 18, whether or not those acts have actually resulted in criminal charges, prosecution, or conviction and whether or not those acts were committed in the special maritime, territorial, or prison jurisdiction of the United States”) (footnote omitted).

²⁷⁵ S. 11 § 302(d)(1), *reprinted in* S. REP. NO. 103-138, at 30 (emphasis added). For the final codification, see 42 U.S.C. § 13981(d)(1) (“[T]he term ‘crime of violence motivated by gender’ means a crime of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim’s gender”).

²⁷⁶ For the sole discussion of “animus” in the 1993 Senate Judiciary Committee report, see S. REP. NO. 103-138, at 64 (“This new language elucidates the committee’s intent that a victim alleging a violation under this section must have been targeted on the basis of his or her gender. The defendant must have had a specific intent or purpose,

history indicated, for example, that the Senate Judiciary Committee no longer presumed that the civil rights remedy would cover all rapes.²⁷⁷ In addition, the revised bill also clarified that VAWA's civil rights remedy did not give federal courts "jurisdiction over any State law claim seeking the establishment of a divorce, alimony, equitable distribution of marital property, or child custody decree."²⁷⁸

Even these limitations, however, did not quell the argument that VAWA's civil rights remedy was a form of federal family law, and unprecedented and inappropriate for that reason alone. After the modified bill became law in September 1994,²⁷⁹ the constitutionality of VAWA's civil rights remedy was soon challenged in court. These challenges relied heavily on the premise that family law had always been and should always remain a matter of exclusively local jurisdiction, and stressed the Supreme Court's 1995 decision in *Lopez*, which repeatedly identified family law as uniquely beyond the reach of Congress's constitutional authority to regulate interstate commerce.²⁸⁰ The challenges enjoyed significant success in the lower courts.²⁸¹ The Fourth Circuit, for example, held that VAWA's civil rights remedy was

based on the victim's gender, to injure the victim.").

²⁷⁷ See *id.* at 51 (reporting that the revised version of VAWA's civil rights remedy "does not create a general Federal law for all assaults or rapes against women").

²⁷⁸ S. 11 § 302(e)(4), reprinted in *id.* at 30. For the final codification, see 42 U.S.C. § 13981(e)(4) ("Neither section 1367 of title 28 nor subsection (c) of this section shall be construed, by reason of a claim arising under such subsection, to confer on the courts of the United States jurisdiction over any State law claim seeking the establishment of a divorce, alimony, equitable distribution of marital property, or child custody decree.").

²⁷⁹ See Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1902.

²⁸⁰ See *Bergeron v. Bergeron*, 48 F. Supp. 2d 628, 631 (M.D. La. 1999) ("[D]efendant contends that § 13981 violates principles of federalism by reaching private domestic disputes, invading an area that has . . . traditionally been a matter of state law."); *Doe v. Doe*, 929 F. Supp. 608, 615-16 (D. Conn. 1996) ("Defendant . . . argues that enactment of the VAWA encroaches on traditional police powers of the state and impermissibly 'federalizes' criminal, family law, and state tort law."); *supra* note 180 and accompanying text.

²⁸¹ See *Bergeron*, 48 F. Supp. 2d at 635-36 ("[A]cceptance of such arguments [in favor of VAWA's constitutionality] would effectively 'remove all limits on federal authority'. It would additionally constitute a 'sweeping intrusion' into areas of traditional state concern, particularly as the statute applies to domestic violence . . .") (citation omitted); *Seaton v. Seaton*, 971 F. Supp. 1188, 1190-91 (E.D. Tenn. 1997) ("[T]he court must note its extreme discomfort with the sweeping nature of VAWA. While there is no doubt that violence against women is a serious matter in our society, this particular remedy created by Congress, because of its extreme overbreadth, opens the doors of the federal courts to parties seeking leverage in settlements rather than true justice. The framers of the Constitution did not intend for the federal courts to play host to domestic disputes and invade the well-established authority of the sovereign states."); *id.* at 1194 ("While VAWA ostensibly seeks to protect the rights of women who are victims of gender-based violence, this court must again express its deep concern that the Act will effectively

unconstitutional in an en banc opinion that identified the remedy as a form of family law,²⁸² and insisted at least seven times that the federal government could not and had never intervened in family law.²⁸³

allow domestic relations litigation to permeate the federal courts. Issues related to domestic relations are better suited for the state courts, which have a closer relation to the concerns of their citizenry and are capable of applying state laws better suited for the needs of a particular area.”); *Brzonkala v. Va. Polytechnic & State Univ.*, 935 F. Supp. 779, 793 (W.D. Va. 1996) (“Family law issues and most criminal issues affect the national economy substantially and in turn have some effect on interstate commerce. These too have interstate travel implications. However, to extend Congress’s power to these issues would unreasonably tip the balance away from the states. . . . In essence, if VAWA is a permissible use of the commerce power because of the regulated activity’s effect on the national economy, which in turn affects interstate commerce, then it would be inconsistent to deny the commerce power’s extension into family law, most criminal laws, and even insomnia.”), *aff’d sub nom. Brzonkala v. Va. Polytechnic Inst. & State Univ.*, 169 F.3d 820 (4th Cir. 1999) (en banc).

²⁸² See *Brzonkala*, 169 F.3d at 826, 843.

²⁸³ See *id.* at 838 (“[U]nder the Government’s ‘national productivity’ reasoning, Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example.” (quoting *United States v. Lopez*, 514 U.S. 549, 564 (1995))); *id.* at 842 (“In the words of the Chief Justice of the United States, section 13981 creates a ‘new private right of action so sweeping, that the legislation could involve the federal courts in a whole host of domestic relations disputes.’”) (citation omitted); *id.* at 843 (“By entering into this most traditional area of state concern, Congress has . . . substantially reduced the States’ ability to calibrate the extent of judicial supervision of intrafamily violence”); *id.* (“As this case illustrates, to adopt such an understanding of Congress’ power to regulate interstate commerce would be to extend federal control to a vast range of problems falling within even the most traditional areas of state concern—problems such as violent crime generally, educational shortcomings, and even divorce, all of which are significant and as a result unquestionably affect the economy and ultimately interstate commerce.”); *id.* at 854 (“[T]he very findings on which appellants rely in this case would, themselves, justify not only section 13981, but . . . federal regulation, and even occupation, of the entire field of family law, including divorce, alimony, child custody, and the equitable division of property.”); *id.* at 859 (“[T]he essence of appellants’ contention is that Congress can regulate any problem solely by finding that it affects the economy and has not been fully remedied by the States. . . . [I]f Congress has found that the States have failed to eradicate gender bias, a problem that is not limited to violent crime but permeates the law generally, and family law in particular, then Congress need not proscribe federal jurisdiction over the core areas of family law, but can extend supplemental jurisdiction over these areas, or even regulate them directly and perhaps exclusively, because issues of divorce, alimony, the equitable division of property, and child custody, like violent crime, indisputably have ultimate economic effects.”); *id.* at 888 (“If the congressional findings cited here suffice to render section 13981 a legitimate enforcement of the Fourteenth Amendment, then in effect the federal government could constitutionally regulate every aspect of society, even including those areas traditionally thought to be reserved exclusively to the several States, such as general criminal and domestic relations law.”); see also *id.* at 896 (Wilkinson, C.J., concurring) (“VAWA’s civil suit provision falters for the most basic of reasons. Section 13981 scales the last redoubt of state government—the regulation of domestic relations.”); *id.* at 899 (Niemeyer, J., concurring) (“At oral argument, the government was pressed at some length to articulate its position on how to define the line between a national interest subject to regulation under the Commerce Clause and a local interest which is beyond the scope of Congress’ legislative power. It continually refused to accept the challenge, leaving me with the clear impression that if the political pressure were sufficiently great, the government would feel justified in maintaining the position that Congress could constitutionally regulate local matters, such as divorces and, indeed, even child custody proceedings.”); *id.* at 930 (Motz, J., dissenting) (“Nor, contrary to the majority’s contentions, does Subtitle C directly supersede or impermissibly infringe on the states’ authority to regulate family law matters. Domestic matters may be addressed in some cases brought under Subtitle C, but no state or official regulation is superseded as a result. Instead, Congress expressly limited the reach of Subtitle C in deference to traditional areas of state expertise on family law matters.”).

The Supreme Court also relied on the claim that family law is inherently and exclusively local in striking down VAWA's civil rights remedy.²⁸⁴ The Court's opinion in *United States v. Morrison* never directly identified VAWA's civil rights remedy as a form of federal family law, presumably because of the difficulties involved in such an identification. But in holding that the civil rights remedy exceeded Congress's authority under the Commerce Clause, the *Morrison* Court stressed twice that it had rejected more generous interpretations of Congress's commerce power because they would give Congress the (purportedly unprecedented) authority to regulate "family law and other areas of traditional state regulation," and any interpretation of Congress's commerce power had to be rejected if it would do that.²⁸⁵ The argument that federal family law is unprecedented and inappropriate, which drew much of its strength from the exclusion of federal law from the family law canon, played a key role both in securing limitations on VAWA's civil rights remedy and in shaping the decision that found even the modified remedy unconstitutional.

The second prominent recent debate to reflect the influence of the exclusion of federal law from the family law canon involves section three of the Defense of Marriage Act of 1996 (DOMA).²⁸⁶ This provision defines "marriage" for purposes of all federal statutory and administrative law as "a legal union between one man and one woman as husband and wife" and defines a "spouse" as "a person of the opposite sex who is a husband or a wife."²⁸⁷ Unlike

²⁸⁴ Judith Resnik has written insightfully about the potential problems that arise when judges advocate against the enactment of a statutory provision and then rule on the same provision's constitutionality. She takes as a central example Chief Justice Rehnquist, who both lobbied against VAWA's civil rights remedy and later wrote the Supreme Court's majority opinion finding the remedy unconstitutional. See Judith Resnik, *The Programmatic Judiciary: Lobbying, Judging, and Invalidating the Violence Against Women Act*, 74 S. CAL. L. REV. 269, 269-78 (2000).

²⁸⁵ *United States v. Morrison*, 529 U.S. 598, 615-16 (2000) ("Petitioners' reasoning, moreover, will not limit Congress to regulating violence but may, as we suggested in *Lopez*, be applied equally as well to family law and other areas of traditional state regulation since the aggregate effect of marriage, divorce, and childrearing on the national economy is undoubtedly significant."); see also *id.* at 612-13 ("[*Lopez*] rejected these 'costs of crime' and 'national productivity' arguments because they would permit Congress to 'regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce.' We noted that, under this but-for reasoning: 'Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example.'") (citations omitted).

²⁸⁶ 1 U.S.C. § 7 (2000).

²⁸⁷ *Id.*

VAWA's civil rights remedy, DOMA's section three is clearly an example of federal family law. The section structures the creation and dissolution of legally recognized family relationships, and determines the rights and responsibilities that family members have because of their family status. At this point, it should not be surprising to learn that the section has been attacked for this reason alone.

Section three's critics assume and assert that family law is inherently and exclusively a matter of local jurisdiction, so that the section can be condemned simply because it is a form of federal family law. This argument may be particularly bizarre in the context of DOMA's third section. After all, that section has such practical importance only because, as we have seen, so many federal rights and responsibilities already turn on whether a couple is recognized as married for purposes of federal law. Federal law, moreover, has a long record of defining legally recognized marriages in ways that differ from state definitions.²⁸⁸ But legal authorities and legal scholars have pursued the critique of DOMA as federal family law nonetheless, reflecting the continuing power of federal law's exclusion from the family law canon.

Before DOMA's passage, section three's critics in Congress contended "that the Federal government has always relied on the states' definition of marriage for Federal purposes, and that it is unwarranted and an intrusion on states rights to change that practice now."²⁸⁹ They warned that federal intervention into the law of marriage would set a new and "dangerous precedent," so that "tomorrow it may be divorce, the third day it may be custody."²⁹⁰

Since DOMA's enactment, many legal scholars have continued and expanded on this line of argument. They criticize section three on the ground that it is an "unprecedented federal intrusion into the law of marriage" because, "[w]ithout exception, domestic relations law has been a matter of state, not federal, concern and control since the founding of the Republic."²⁹¹ They explain "that our federalist system entrusts domestic relations, including marriage, to the

²⁸⁸ See *supra* Part II.A.

²⁸⁹ H.R. REP. NO. 104-664, at 43 (1996) (dissenting views on DOMA).

²⁹⁰ 142 CONG. REC. 22,467 (1996) (statement of Sen. Kennedy).

²⁹¹ Evan Wolfson & Michael F. Melcher, *Constitutional and Legal Defects in the "Defense of Marriage" Act*, 16 QLR 221, 221, 227 (1996).

states rather than to the federal government.”²⁹² They report that DOMA’s third section is “where the federal government defined marriage for the first time in U.S. history.”²⁹³ They insist that section three represents “the first time in our history that Congress has interfered in an area where any regulation is quintessentially a matter of state, not federal, concern -- namely, family law and domestic relations.”²⁹⁴ This line of argument has yet to produce legislative action repealing section three, or a constitutional decision striking the provision down. But lawmakers and legal scholars take it to have significant force, and to be capable of convincing even people opposed to same-sex marriage.²⁹⁵

Both the debate over VAWA’s civil rights remedy and the debate over DOMA’s section three, then, reveal some additional consequences of the family law canon’s construction. The exclusion of federal law from the family law canon has distorted and obscured what is at stake in each of these family law debates. This exclusion suggests that federal family law is unprecedented, and that a core issue to be resolved when a piece of federal family law is proposed is whether the federal government can or should intervene in family law at all. The exclusion permits legal authorities and legal scholars to argue, with considerable success, that federal family law is categorically inappropriate, so that any form of federal family law should be rejected for that reason alone.

The debates over VAWA and DOMA also suggest how contesting the way in which the

²⁹² Ruthann Robson, *Assimilation, Marriage, and Lesbian Liberation*, 75 TEMP. L. REV. 709, 794-95 (2002).

²⁹³ Barbara J. Cox, *But Why Not Marriage: An Essay on Vermont’s Civil Unions Law, Same-Sex Marriage, and Separate but (Un)Equal*, 25 VT. L. REV. 113, 136 (2000).

²⁹⁴ Nadine Strossen, *The Current Assault on Constitutional Rights and Civil Liberties: Origins and Approaches*, 99 W. VA. L. REV. 769, 772 (1997).

²⁹⁵ The argument that family law is inherently local has also emerged in the debate over a proposed amendment to the United States Constitution. This amendment would provide that:

Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution or the constitution of any State, nor state or federal law, shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups.

H.R.J. Res. 56, 108th Cong. (2003). Phyllis Bossin, chair of the American Bar Association’s Family Law Section, has already opposed the amendment in testimony before the Senate Judiciary Committee on the ground that the amendment would “usurp the historic responsibility of the states” in family law. *Proposed Constitutional Amendment to Preserve Traditional Marriage: Hearing on H.R.J. Res. 56 Before the Senate Comm. on the Judiciary*, 108th Cong. (2004) (statement of Phyllis Bossin, Chair, Family Law Section, American Bar Association).

family law canon is constructed can be a first step to changing the family law canon and restructuring family law debates, altering what counts as a convincing reason and how decisions are made. Uncovering the existence and extent of federal family law, which is now excluded from the family law canon, helps make clear that the legitimacy of VAWA, or DOMA, or other federal statutes cannot be logically undermined simply by identifying the statutes as forms of family law. Even if these statutes are instances of federal family law, federal laws and constitutional decisions have long regulated family relationships, rights, and responsibilities.

This does not establish that either VAWA's civil rights remedy or DOMA's third section is well-advised, or that all of family law should be made federal. The substantive merits of any example of federal family law, and the wisdom of establishing a national standard or facilitating state variation in any specific instance, will vary in each case. But challenging the way that the family law canon is constructed does reveal that the relevant question is the advisability of the particular federal family law measure at issue. It makes clear, in other words, that arguments for or against federal statutes like VAWA or DOMA need to address their particular merits or disadvantages, and cannot simply rely on the premise that all of family law is and must be exclusively local.

Let's turn to the canonical understanding of the relationship between family law and welfare law.

III. THE RELATIONSHIP BETWEEN FAMILY LAW AND WELFARE LAW

The family law governing the poor is also excluded from the family law canon. In part, this exclusion reflects the insistence on family law's localism that we have already examined, as many of the statutes and constitutional decisions that govern family rights and responsibilities in poor families are federal. But there is also a larger phenomenon at work, involving both federal and state law. When legal authorities identify a statute or situation as part of welfare law, they presume for that reason that the rules governing family law do not apply, that a statute or situation that falls within welfare law cannot simultaneously be part of family law.

The exclusion of welfare law from the family law canon has allowed legal authorities to avoid explaining why the law applies very different rules to regulate poor families. Challenging

the canon's construction, however, reveals that many of the federal and state legislative programs and judicial decisions now classified exclusively within the realm of welfare law are also forms of family law, structuring the rights and responsibilities that family members have because of their family status.²⁹⁶ It makes clear that the law is applying a different family law to govern the poor and that the difference needs to be explained or eliminated.

This part explores the canonical understanding of the relationship between family law and welfare law, and examines its inaccuracy. It then turns to the recent debate over the Personal Responsibility and Work Opportunity Reconciliation Act.²⁹⁷ The Personal Responsibility Act regulates the familial rights and responsibilities of the poor in many ways that are directly opposed to the law's regulation of more affluent families. But the Congress that enacted the law, and the courts that have upheld its most interventionist provisions, have never felt the need to acknowledge that the act applies a different family law to the poor, much less to justify the difference. The treatment of the Personal Responsibility Act illustrates some of the consequences of the exclusion of welfare law from the family law canon, and indicates how challenging the canon's construction can be a first step to changing the canon and altering the terms on which family law debates take place.

A. *The Exclusion of Welfare Law from the Family Law Canon*

The evidence that welfare law is excluded from the family law canon is abundant. Family law casebooks, for instance, routinely include no discussion of welfare law as a form of family law. Consider, moreover, the Supreme Court's jurisprudence. *Dandridge v. Williams*²⁹⁸ offers a

²⁹⁶ For an account of the historical development of the family law governing the poor, see Hasday, *supra* note 86, at 300 ("The American law of parent and child is conventionally understood to be extremely deferential to parental prerogatives and highly reluctant to intervene. But this picture, endorsed by legal authorities and popular commentators from the nineteenth century to the present day, reflects only one tradition in the law's regulation of parenthood. Since the last quarter of the nineteenth century, there has also been massive legal intervention into the parental relation. This second legal tradition, moreover, has been guided by norms wholly different from those conventionally associated with family law, often evincing a radical suspicion of parental autonomy and an eager willingness to reshape family relations.") (footnote omitted).

²⁹⁷ Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105.

²⁹⁸ 397 U.S. 471 (1970).

good introduction.

The Supreme Court decided *Dandridge* in 1970, just a few years after cases involving welfare law (long hampered by the poor’s systematic lack of access to counsel)²⁹⁹ began to reach the Court.³⁰⁰ The Maryland regulation at issue in *Dandridge* established a ceiling on the welfare benefits that any single family could receive, no matter how large the family.³⁰¹ This meant that family members’ rights turned on their family status and that impoverished parents with large families had a powerful incentive to send some of their children to live in other families.³⁰² Under the Maryland regulation, a child in a large family received no additional aid because he was part of a large family already receiving the maximum benefit (\$250 a month).³⁰³ If the child left his original family and joined another, he could receive aid. The *Dandridge* Court, however, identified the Maryland regulation as part of welfare law, and assumed for that reason that family law was not implicated. “[H]ere we deal with state regulation in the social and economic field,” the Court explained.³⁰⁴ The most relevant precedents, the Court concluded, “involved state regulation of business or industry.”³⁰⁵

The Court confirmed *Dandridge*’s understanding of the exclusion of welfare law from the family law canon in *Lyng v. Castillo* (1986).³⁰⁶ The federal statute at issue in *Castillo* established

²⁹⁹ In the mid-1960s, the federal government began funding programs that provided legal counsel to the poor. This funding made it practically possible for many more challenges to welfare law to be brought into court. See FRANCES FOX PIVEN & RICHARD A. CLOWARD, *REGULATING THE POOR: THE FUNCTIONS OF PUBLIC WELFARE* 248-50, 288-93, 306-14 (1971).

³⁰⁰ The Court, for instance, did not review any aspect of the Aid to Families with Dependent Children program until 1968, see *King v. Smith*, 392 U.S. 309 (1968), although this major welfare program had been in place since 1935, see Social Security Act, ch. 531, §§ 401-406, 49 Stat. 620, 627-29 (1935) (repealed 1996).

³⁰¹ See *Dandridge*, 397 U.S. at 473.

³⁰² See *id.* at 501 (Douglas, J., dissenting) (“As the District Court noted, . . . ‘the maximum grant regulation provides a powerful economic incentive to break up large families by placing ‘dependent children’ in excess of those whose subsistence needs, when added to the subsistence needs of other members of the family, exceed the maximum grant, in the homes of persons included in the class of eligible relatives.’ By this device, payments for the ‘excess’ children can be obtained.”) (citation omitted).

³⁰³ See *id.* at 474.

³⁰⁴ *Id.* at 484.

³⁰⁵ *Id.* at 485.

³⁰⁶ 477 U.S. 635 (1986).

that the food stamp program, which provides food vouchers to poor families, would conclusively assume in setting benefit levels that parents, children, and siblings who lived together constituted a single household, and purchased and prepared their food together. More distant relatives or unrelated people who lived together were not considered a single household unless they actually did purchase and prepare food together.³⁰⁷ On its face, the statute determined benefits and burdens associated with family status. It denied close family members, because of their family status, the right to establish a legally recognized separate household without relocating. It gave close family members, because of their family status, a tremendous incentive to restructure their living arrangements so that they purchased and prepared food together because their food stamp benefits would reflect that cost-saving assumption. By the time the Court decided *Castillo*, moreover, it had already indicated that statutes “‘directly and substantially’” interfering with family living arrangements burdened a fundamental right and triggered heightened judicial scrutiny.³⁰⁸ But the Court identified the food stamp statute at issue in *Castillo* as a form of welfare law. With that classification in place, the Court quickly dismissed the suggestion that family law precedents might apply to the case, simply asserting that the food stamp statute did not “interfere with family living arrangements” because it did “not order or prevent any group of persons from dining together.”³⁰⁹ *Castillo* upheld the food stamp statute on the ground that it was rationally designed, as welfare law, to further Congress’s interest in conserving funds.³¹⁰

After *Castillo*, the Court insisted on welfare law’s exclusion from family law again in *Bowen v. Gilliard* (1987)³¹¹ and *Lyng v. International Union* (1988).³¹² *Bowen* considered a federal statute establishing that the Aid to Families with Dependent Children (AFDC) program, which provided means-tested welfare benefits to poor children and their caretaker relatives, would conclusively assume in determining eligibility that all parents, brothers, and sisters living

³⁰⁷ *See id.* at 636.

³⁰⁸ *Id.* at 638 (quoting *Zablocki v. Redhail*, 434 U.S. 374, 386-87 & n.12 (1978)).

³⁰⁹ *Id.*

³¹⁰ *See id.* at 639-43.

³¹¹ 483 U.S. 587 (1987).

³¹² 485 U.S. 360 (1988).

in the same home shared all of their income.³¹³ The statute undoubtedly regulated the rights associated with family status. It denied close family members, because of their family status, the right to keep their income separate in a way that would be legally recognized. It gave close family members, because of their family status, a strong incentive to send a family member with a separate source of income (like a child receiving child support from a noncustodial parent) to live in another family.³¹⁴ But the *Bowen* Court analyzed the statute exclusively as welfare law designed to “decreas[e] federal expenditures,”³¹⁵ and immediately rejected the argument that the judicial review directed at statutes that “intrud[e] on choices concerning family living arrangements” might be appropriate.³¹⁶

The Court drew a similarly impermeable line between welfare law and family law in *International Union*. That case considered a federal statute providing that a household could not become eligible for food stamps while a household member was on strike and could not augment the amount of food stamps it received if the household’s need increased because of a decline in a striker’s income.³¹⁷ This statute, like those in *Dandridge*, *Castillo*, and *Bowen*, determined the benefits and burdens of family membership. It prevented family members from receiving food stamps based on their family relationship with a striker, and it established that family members could receive food stamps by excluding the striker from their legally recognized family. Nonetheless, the *International Union* Court analyzed the statute solely as an example of welfare law. Relying on *Castillo*, it dismissed the claim that the statute might interfere with family living arrangements.³¹⁸

In sum, the Supreme Court has long treated family law and welfare law as completely separate categories. Although welfare law often structures the rights and responsibilities that

³¹³ See *Bowen*, 483 U.S. at 589-90 & n.1.

³¹⁴ See *id.* at 601 n.16 (“For example, the District Court had before it an affidavit from one mother who stated that she had sent a child to live with the child’s father in order to avoid the requirement of including that child, and the support received from the child’s father, in the AFDC unit.”).

³¹⁵ *Id.* at 599.

³¹⁶ *Id.* at 601-02 (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977) (plurality opinion)).

³¹⁷ See *International Union*, 485 U.S. at 362.

³¹⁸ See *id.* at 364-66.

family members have because of their family status, this family law of the poor is excluded from the family law canon.

B. *The Consequences of the Canon and the Possibilities for Change: The Debate over the Personal Responsibility Act*

The recent debate over the Personal Responsibility and Work Opportunity Reconciliation Act of 1996³¹⁹ reflects the influence of the canonical understanding of the relationship between family law and welfare law. It reveals how placing welfare law in a wholly separate category from family law has obscured the disparities between the family law governing the poor and the family law governing wealthier families, permitting legal authorities to avoid offering an explanation for these disparities. Contesting the family law canon's construction, and uncovering how welfare law can also be a form of family law, makes the different family law regulating the poor manifest and the need to explain, or eliminate, this difference clear.

The Personal Responsibility Act ended the AFDC program and replaced it with Temporary Assistance for Needy Families (TANF), another federal-state program for providing means-tested benefits to poor children and their caretaker relatives.³²⁰ Like AFDC before it, TANF importantly structures familial rights and responsibilities in poor families, often in ways diametrically opposed to the law's regulation of familial rights and responsibilities in more affluent families. For instance, the Personal Responsibility Act permits states participating in the TANF program to enact "family cap" provisions.³²¹ These provisions, which twenty-three states have adopted,³²² establish that a family will not receive additional benefits under TANF to cover the needs of any child born while the family is already in the TANF program. Family cap provisions are clear forms of family law, determining the rights of family members based on their family status: Under a family cap provision, a child born into a family receiving TANF is not

³¹⁹ 42 U.S.C. §§ 601-619 (2000).

³²⁰ *See id.*

³²¹ *See id.* § 602(a)(7)(A)(iii).

³²² *See* U.S. GEN. ACCOUNTING OFFICE, PUB. NO. GAO-01-924, WELFARE REFORM: MORE RESEARCH NEEDED ON TANF FAMILY CAPS AND OTHER POLICIES FOR REDUCING OUT-OF-WEDLOCK BIRTHS 2 (2001).

entitled to aid because he is related to that family.

As we have seen, family law is frequently reluctant to intervene into decisions about whether to have a child or how to structure family living arrangements.³²³ Yet the congressional supporters of the Personal Responsibility Act never felt the need to explain why it was appropriate for the act to deviate so sharply from the rules and norms otherwise thought suitable for family law. Indeed, they never mentioned family law precedents or principles as relevant to the Personal Responsibility Act at all. Instead, they simply defended the Personal Responsibility Act as part of a welfare system designed to promote “self-sufficiency”³²⁴ and “self-reliance,”³²⁵ and to end “dependence” “on government benefits.”³²⁶

Similarly, all of the courts that have reviewed the family cap provisions have classified them exclusively as welfare law, and refused to acknowledge their family law aspects, to apply family law precedents, or to explain why different family law rules are appropriate for poor families. The New Jersey Supreme Court, for instance, upheld New Jersey’s family cap on the ground that it was designed to promote “self-sufficiency and decreased dependency on welfare,”³²⁷ and simply did not address the legal questions raised by a program that distinguishes between children based on their parents’ conduct.³²⁸ The United States District Court for the District of New Jersey, affirmed by the United States Court of Appeals for the Third Circuit, also upheld New Jersey’s family cap provision, relying on *Dandridge* to deflect the argument that the

³²³ See *supra* text accompanying notes 248-252, 259-260, 308, 316, 318.

³²⁴ H.R. REP. NO. 104-725, at 262 (1996); see also H.R. REP. NO. 104-651, at 4 (1996) (same); S. REP. NO. 104-96, at 6 (1995) (same).

³²⁵ H.R. REP. NO. 104-725, at 261, 263.

³²⁶ 42 U.S.C. § 601(a)(2); see also H.R. REP. NO. 104-725, at 264 (“end dependence on government benefits”); S. REP. NO. 104-96, at 5 (end “welfare dependency”); CONTRACT WITH AMERICA: THE BOLD PLAN BY REP. NEWT GINGRICH, REP. DICK ARMEY AND THE HOUSE REPUBLICANS TO CHANGE THE NATION 66 (Ed Gillespie & Bob Schellhas eds., 1994) (“reduce government dependency”).

³²⁷ *Sojourner A. v. N.J. Dep’t of Human Servs.*, 828 A.2d 306, 316 (N.J. 2003).

³²⁸ The court did “presum[e]” that all children in families that have experienced the imposition of a family cap share in the capped TANF benefits that the family receives, but it never explored the basis for that presumption or whether it was legally required. More notably, the court never compared the situation of children in families that have experienced the imposition of a family cap because a child was born while the family was receiving TANF to the situation of children in families that have not experienced the imposition of a family cap because no children have been born while the family was receiving TANF. *Id.* at 317.

family cap should be evaluated as a law that affects family rights.³²⁹ The Indiana Court of Appeals reviewed an Indiana family cap provision that permits a family to avoid the effect of the family cap by sending additional children born while the family is receiving TANF to live elsewhere.³³⁰ This provision not only determines a child's rights based on the family to which he is related, it allows a parent to increase a child's rights by transferring the child to another family. The Indiana court, however, analyzed the law solely as an example of welfare legislation designed to promote "self-sufficiency."³³¹ It dismissed the family cap's impact on family structure as "incidental" at best and refused to employ the heightened judicial scrutiny generally applied to laws that affect family structure.³³²

The debate over the Personal Responsibility Act, and its authorization of family caps, reveals some more consequences of the family law canon's construction. This construction, by placing welfare law and family law in entirely distinct legal categories, has helped legal authorities avoid explaining why different rules should govern familial rights and responsibilities in poor families. Challenging the family law canon's construction, and establishing that welfare law can also be family law, helps reveal the differences in family law's treatment of poor families and make clear the need to explain these differences, or eliminate them.

CONCLUSION

As we have seen, the family law canon importantly determines what is classified as family law, what counts as a good reason or a convincing argument in a family law debate, what explanations must be offered, and what need not be explained. Yet the family law canon misdescribes both the content of family law and its animating tenets, distorting how legal authorities and legal scholars understand family law in a way that can distort their judgments about particular family law debates. Indeed, the family law canon highlights an aspect of canons

³²⁹ See *C.K. v. Shalala*, 883 F. Supp. 991, 1012-14 (D.N.J. 1995), *aff'd sub nom. C.K. v. N.J. Dep't of Health & Human Servs.*, 92 F.3d 171 (3d Cir. 1996).

³³⁰ See *N.B. v. Sybinski*, 724 N.E.2d 1103, 1106 (Ind. Ct. App. 2000).

³³¹ *Id.* at 1110.

³³² *Id.* at 1108.

that has received too little attention in the scholarship on the literary and constitutional law canons: the practical effects that a canon can have in the real world. Challenging the family law canon's construction—subjecting to scrutiny and doubt what currently functions at the level of common sense—is the first step toward changing the family law canon and restructuring the terms on which family law debates take place.

The next steps lie ahead of us. By definition, the family law canon cannot be changed immediately by individual fiat or lone scholarly argument. Inherent in the concept of the family law canon is that it consists of ways of thinking about family law that are widely shared by legal scholars and especially by legal authorities. Legal authorities and legal scholars create the family law canon, and the family law canon in turn shapes how these authorities and scholars understand family law. The canonical ways of thinking about family law are often so taken for granted that legal authorities and legal scholars accept them as beyond criticism or reappraisal. If I have convinced you that much in the family law canon should be altered, we must now consider how changing the family law canon might be accomplished as a practical matter.

In thinking about concrete mechanisms for changing the family law canon, it is useful to distinguish between the various actors who create and maintain the family law canon, and the various contexts in which the family law canon is constructed and enforced. For example, legal authorities like legislators and judges have the most control over the family law canon. Their statutes and judicial opinions have inherent and independent legal force, whether or not legal scholars or legal practitioners agree with them. For this reason, however, it may be difficult for scholars, practitioners, or members of the general public to change how legal authorities understand the family law canon. Given the specific institutional difficulties associated with altering what legal authorities think and do about the family law canon, an effort to reshape the family law canon may be most effective if it begins with family law scholars and the process by which we transmit the family law canon to our students and successors.

Legal scholars can work to change the family law canon by helping to guide the next generation to understand family law in different ways, which should ultimately lead this generation to make different judgments about family law disputes. The academic community's scholarship, for instance, helps to create, shape, and perpetuate the family law canon. One step that family law scholars can take to change the family law canon is to join the project that this

Article has begun and to generate more scholarship that subjects the family law canon to examination and appraisal, question and scrutiny.

Perhaps more importantly, family law scholars can also work to reshape the family law canon through our teaching. How family law is taught—what texts and perspectives are included and excluded, what stories and examples are employed—helps to determine how the next generation of lawyers, including some future judges, legislators, and legal scholars, will understand family law and its governing tenets. For example, family law courses, and the family law casebooks that shape the content and focus of many family law courses, can be constructed to assume and affirm the canonical understanding of the relationships between family law and social inequality, family law and federalism, and family law and welfare law. In fact, the family law casebooks that are currently available generally endorse and reinforce the existing family law canon with little, if any, explicit deliberation. They note, for instance, that common law coverture principles no longer govern the law of marriage,³³³ that common law property norms no longer govern the law of parenthood,³³⁴ and that family law is inherently local.³³⁵ They include no discussion of welfare law as a form of family law.³³⁶ Such support for the family law canon is hardly surprising. After all, the family law canon consists of ways of thinking about family law that are widely held. In addition, much of the power of the family law canon lies in its ability to operate at the level of common sense, so that it seems to require no explanation or reexamination.

But our family law courses, and our construction of the family law casebooks that guide large numbers of family law courses, provide an invaluable opportunity to subject the family law canon to question and to advance the process of altering it. Family law courses and casebooks can be restructured to reveal, scrutinize, and challenge the family law canon. These courses and casebooks can critique the canonical understanding of the relationship between family law and social inequality, for example, and uncover the persistence of inequality in family law. They can

³³³ See *supra* note 42 and accompanying text.

³³⁴ See *supra* text accompanying notes 75-76.

³³⁵ See *supra* note 189 and accompanying text.

³³⁶ See *supra* text accompanying note 298.

explore how the construction of the family law canon has permitted legal authorities debating and enacting family law policies that might injure historically subordinated groups to argue that family law no longer supports social inequality and need no longer be concerned about the status of historically subordinated people. Family law courses and casebooks can also examine the existence and extent of federal family law, and discuss how the exclusion of federal law from the family law canon has rendered every example of federal family law, whatever its particular merits, vulnerable to attack. Family law courses and casebooks can similarly study welfare law as a form of family law, and draw attention to the ways in which the exclusion of welfare law from the family law canon has allowed legal authorities to avoid explaining why different rules govern the familial rights and responsibilities of the poor.

Changing the family law canon by intervening in the process of the canon's intergenerational transmission will be a lengthy and demanding task. But the effort is well worthwhile because the potential benefits are enormous. We can begin with our own scholarship and our own teaching.

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