Constitutional Issues in Family Law: An Annotated Bibliography
(Part 2 of 2)

by
Allen Rostron*

Significant constitutional questions often arise in the family law context. This is the second of two bibliographies, in this volume of the *Journal of the American Academy of Matrimonial Lawyers*, about constitutional issues in family law. It focuses on issues discussed in the articles in this issue of the journal.

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* Associate Dean for Students and the William R. Jacques Constitutional Law Scholar and Professor of Law, University of Missouri-Kansas City School of Law.
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**Assisted Reproductive Technology**

—— **Cloning**

Francis Beckwith, *Cloning and Reproductive Technology*, 3 Nev. L.J. 61 (2002) (predicting that the Supreme Court is likely to reject arguments for a constitutional right to clone humans).

Elizabeth Price Foley, *Human Cloning and the Right to Reproduce*, 65 Alb. L. Rev. 625 (2002) (examining the circumstances under which the constitutional right to reproduce would apply to a person’s decision to produce a child using cloning technology).


would arise from development of human cloning as a reproductive option).

John A. Robertson, *Liberty, Identity, and Human Cloning*, 76 Tex. L. Rev. 1371 (1998) (discussing the development of cloning technology, as well as other technologies for genetic enhancement and alteration, and how the development of this technology would affect family and procreative liberty).


– Ectogenesis


– Genetic Selection & Modification

Andrew B. Coan, *Is There a Constitutional Right to Select the Genes of One’s Offspring?*, 63 Hastings L.J. 233 (2011) (examining whether the constitutional right to make decisions about whether to have a child should include a right to select a child’s genes and whether courts are the institution best equipped to resolve issues about assisted reproductive technologies).

reproductive screening technologies can be imposed to prevent these technologies from enabling a modern form of eugenics).


Kelly M. Plummer, Comment, *Ending Parents’ Unlimited Power to Choose: Legislation Is Necessary to Prohibit Parents’ Selection of Their Children’s Sex and Characteristics*, 47 ST. LOUIS U. L.J. 517 (2003) (arguing that it would be constitutional to enact legislation prohibiting parents from selecting their child’s gender or other traits prior to conception).


**REPRODUCTIVE RIGHTS**

Scott A. Allen, Note, *Patents Fettering Reproductive Rights*, 87 IND. L.J. 445 (2012) (considering how intellectual property law could be used by opponents of new reproductive technologies to hinder the development or use of the technologies).

Michael Boucai, *Is Assisted Reproduction an LGBT Right?*, 2016 WIS. L. REV. 1065 (critiquing the rights-based claims about equality and reproductive freedom that underlie LGBT arguments about assisted reproduction).

Kristen Bradley, Note, *Assisted Reproductive Technology After Roe v. Wade: Does Surrogacy Create Insurmountable Constitutional Conflicts?*, 2016 U. ILL. L. REV. 1871 (arguing that where a surrogate mother has no genetic relation to the child, the intended parents of the child maintain the fundamental right to privacy throughout the pregnancy and the law should favor their interests in conflicts between surrogacy and parental rights).

Mary Patricia Byrn & Jenni Vainik Ives, *Which Came First the Parent or the Child?*, 62 RUTGERS L. REV. 305 (2010) (examining the key decisions about the constitutional rights of children and
the constitutional right to raise one's child and arguing that the intended parents should be regarded as parents of a child from the moment of birth in situations involving conception through assisted reproductive technology).

Courtney Megan Cahill, *Reproduction Reconceived*, 101 Minn. L. Rev. 617 (2016) (challenging the assumption that sexual reproduction and assisted or alternative reproduction are essentially different and deserve different treatment in constitutional law).


I. Glenn Cohen, *The Constitution and the Rights Not to Procreate*, 60 Stan. L. Rev. 1135 (2008) (examining how assisted reproductive technology can raise questions about whether there is a right not to be a genetic parent, a legal parent, or a gestational parent).


Lainie M. C. Dillon, Comment, *Conundrums with Penumbras: The Right to Privacy Encompasses Non-Gamete Providers Who Create Preembryos with the Intent to Become Parents*, 78 Wash. L. Rev. 625 (2003) (arguing that the constitutional right to privacy should extend to a gamete provider’s decision to create preembryos).


& Soc. Change 273 (2011) (considering the public reaction to news about a person who gave birth to octuplets and became known as the “Octomom,” analyzing subsequent legislative proposals for regulating embryo transfers, and discussing constitutional concerns about such legislation).


Michael Higdon, *Constitutional Parenthood*, 103 Iowa L. Rev. 1483 (2016) (contending that the Supreme Court should provide more guidance on defining constitutional parenthood in order to clarify how states can approach issues like assisted reproduction).


Rachel Michael Kirkley, Comment, *Prisoners and Procreation: What Happened Between Goodwin and Gerber?*, 30 Pepper. L. Rev. 95 (2002) (examining whether the Supreme Court should find that there is a constitutional right to procreate through the use of assisted reproduction technology while in prison).

Kimberly M. Mutcherson, *Procreative Pluralism*, 30 Berkeley J. Gender L. & Just. 22 (2015) (arguing that the fundamental constitutional right to procreate includes a right to use assisted reproduction).

Radhika Rao, *Equal Liberty: Assisted Reproductive Technology and Reproductive Equality*, 76 Geo. Wash. L. Rev. 1457 (2008) (arguing that there is no general right to reproductive autonomy and no absolute right to use assisted reproductive technology, but there is a right to equality that prevents the government from discriminatorily allowing the use of technology in some contexts but prohibiting it in others).
Radhika Rao, *Reconceiving Privacy: Relationships and Reproductive Technology*, 45 UCLA L. REV. 1077 (1998) (examining how the constitutional right to privacy should apply to new reproductive technologies and arguing that privacy rights should be regarded as relational rather than individual rights).

Sonia M. Suter, *Advanced Reproductive Technologies Seen Through the “Repugnance” Lens of Carhart v. Gonzales and Other Theories of Reproductive Rights*, 76 GEO. WASH. L. REV. 1514 (2008) (describing the major constitutional theories of reproductive rights and considering whether a state’s interest in the moral sensibilities of the community can justify limiting reproductive technology options).


**Federalism**

Libby S. Adler, *Federalism and Family*, 8 COLUM. J. GENDER & L. 197 (1999) (disputing the idea that family law is a subject that should be controlled exclusively by state law and challenging how each instance of federal involvement in family law is rationalized as an exceptional departure from the normal order).

Brian H. Bix, *State Interests in Marriage, Interstate Recognition, and Choice of Law*, 38 CREIGHTON L. REV. 337 (2005) (examining how federalism concerns have shaped the regulation of marriage and families and considering the impact of letting individuals choose what laws for marriage and divorce will apply to them).


allow family law cases to be adjudicated in federal courts under diversity jurisdiction reflects bias against women and families).


Kristin A. Collins, *Federalism’s Fallacy: The Early Tradition of Federal Family Law and the Invention of States’ Rights*, 26 Cardozo L. Rev. 1761 (2005) (challenging the standard assumption that there is a longstanding tradition against federal involvement in family law, exploring the federal government’s role in regulating family matters in the era before the Civil War, and questioning whether state sovereignty over domestic relations is vital for American federalism).


Ann Laquer Estin, *Family Law Federalism: Divorce and the Constitution*, 16 Wm. & Mary Bill. RTS. J. 381 (2007) (examining how the Supreme Court transformed the intersection between federalism and divorce law in the 1940s and 1950s and gave individuals the ability to choose which state’s laws would govern their marital status).


Jill Elaine Hasday, *Federalism and the Family Reconstructed*, 45 UCLA L. Rev. 1297 (1998) (finding that the historical record does not support claims that family law should be made exclusively at the state and local level without federal involvement).
Courtney G. Joslin, *Federalism and Family Status*, 90 *Ind. L.J.* 787 (2015) (showing that federal law often defines family status, rather than merely deferring to state family law, and considering the circumstances in which family law should be national rather than local).


Dana E. Prescott, *The Supreme Court in United States v. Windsor: Why the “Death” of Fungible Federalism After a Century of Convenience?*, 26 *J. Am. Acad. Matrim. Law* 51 (2013) (arguing that the Supreme Court has embraced fungible federalism, which limits federalism to economic or property interests and does not extend it to personal liberties).


**Full Faith & Credit**

Lisa S. Chen, Comment, *Second-Parent Adoptions: Are They Entitled to Full Faith and Credit?*, 46 *Santa Clara L. Rev.* 171 (2005) (analyzing an Oklahoma statute that denies recognition for adoptions issued by other states to same-sex couples, reviewing the history of the Full Faith and Credit Clause and how it has been applied by courts, and arguing that the Oklahoma statute is unconstitutional).


Anna Maria D’Ginto, Comment, *The Birth Certificate Solution: Ensuring the Interstate Recognition of Same-Sex Parentage*, 167 *U. Pa. L. Rev.* 975 (2019) (arguing that the parentage of same-sex couples reflected on a child’s birth certificate should be
treated as a record entitled to interstate recognition under the Full Faith and Credit Clause).

Joseph A. Fraioli, Note, Having Faith in Full Faith & Credit: Finstuen, Adar, and the Quest for Interstate Same-Sex Parental Recognition, 98 IOWA L. REV. 365 (2012) (arguing that full faith and credit should be given to adoption decrees even in states that do not recognize the validity of the adopting parents’ marriage).


Homeschooling

Arguments for Allowing States to Regulate and Restrict Homeschooling

Elizabeth Bartholet, Homeschooling: Parent Rights Absolutism vs. Child Rights to Education & Protection, 62 ARIZ. L. REV. 1 (2020) (describing how homeschooling activists have succeeded in lobbying for deregulation of homeschooling, discussing how homeschooling can have negative effects such as isolating children from exposure to views not embraced by their parents, and recommending that there should be a presumptive ban on homeschooling that can be overcome only if parents satisfy the burden of showing that they will provide an adequate education and do not present a risk of abuse or neglect).

Mary Anne Case, Feminist Fundamentalism on the Frontier Between Government and Family Responsibility for Children, 11 J.L. & FAM. STUD. 333 (2009) (arguing that gender equality is a fundamental constitutional commitment and therefore governments must ensure equal opportunities for boys and girls in private schools and home schooling).

Haley J. Conard, Note, The Constitutionality of Teacher Certification Requirements for Home-Schooling Parents: Why the Original Rachel L. Decision Was Valid, 2 DREXEL L. REV. 206 (2009) (asserting that state laws requiring homeschooling parents to be certified teachers are a legitimate regulation of education, arguing that these laws should be upheld under rational basis scrutiny, and concluding that these laws should be upheld against religious freedom challenges absent rare circumstances in which homeschooling is central to a family’s mode of life).

Martha Albertson Fineman & George Shepherd, Homeschooling: Choosing Parental Rights over Children’s Interests, 46 U. BALT. L. REV. 57 (2016) (applying vulnerability theory to homeschooling and concluding that homeschooling should be prohibited because it undermines the role of education in a democratic society and poses risks of harm to children).

Lawson B. Hamilton, Parent, Child, and State: Regulation in a New Era of Homeschooling, 51 J.L. & EDUC. 45 (2022) (suggesting that courts should balance parental rights and state rights by establishing a presumption that homeschooling is legitimate and parents are complying with state educational laws, but also increasing the accountability of parents by having mandatory reporting requirements, punishing failure to educate as a form of child neglect, and letting children petition a court for permission to attend public school).

Vivian E. Hamilton, Home, Schooling, and State: Education in, and for, a Diverse Democracy, 98 N.C. L. REV. 1347 (2020) (reviewing the trend toward deregulation of homeschooling, asserting that homeschooling should be regulated more strictly, and proposing a regulatory compromise that would protect parents’ rights while also protecting the states’ interests in ensuring that children become citizens capable of engaging effectively in democratic governance in a diverse society).

Stefan McDaniel, Note, Child’s Play: A Simple Constitutional Route to Regulation of Home Schools, 9 N.Y.U. J.L. & LIBERTY 580 (2015) (recommending that proponents of stricter regulation of homeschooling should avoid arguments based on the notion that states have an obligation to override parental decisions in some circumstances, and instead focus on arguments about how
states have compelling interests in gathering information about homeschooling, ensuring that all children attain an adequate level of education so they can read and understand American history and politics, and ensuring that all children develop the basic civic skills needed to interact with others in a diverse society).

Judith G. McMullen, *Behind Closed Doors: Should States Regulate Homeschooling?*, 54 S.C. L. REV. 75 (2002) (discussing the benefits and risks of homeschooling and proposing that states should require registration of homeschooled students, periodic testing on math and reading, and the establishment of independent agencies, unaffiliated with schools or school districts, to regulate homeschooling compliance).

Courtenay E. Moran, Note, *How to Regulate Homeschooling: Why History Supports the Theory of Parental Choice*, 2011 U. ILL. L. REV. 1061 (contending that state regulation of homeschooling should be limited to the objective of assessing the adequacy of the child’s education, but that states should not be able to infringe on parent’s interests by asserting control over the nature or methodology of the education).

Sonia M. Muscatine, *Homeschooling and the Right to Education: Are States Fulfilling Their Constitutional Obligations to Homeschooled Students?*, 49 J.L. & EDUC. 67 (2020) (reviewing the extent to which education is a right protected under federal and state law, assessing data on the impact of homeschooling, and arguing that states have an obligation to ensure that homeschool students are adequately educated but can achieve that objective without excessive regulation that might infringe parents’ rights or stifle otherwise beneficial educational approaches).

Rebecca M. Stahl, *Religious Issues in Child Welfare Cases*, FAM. ADVOC., Fall 2019, at 11 (addressing issues arising at the intersection of the constitutional right to religion and the constitutional right to parent, including situations in which parents choose homeschooling for religious reasons but the government contends that homeschooling is used as an opportunity to hide children and abuse them).

Timothy Brandon Waddell, Note, *Bringing It All Back Home: Establishing a Coherent Constitutional Framework for the Re-
Regulation of Homeschooling, 63 Vand. L. Rev. 541 (2010) (proposing that states can protect parents’ substantive due process rights and religious rights, while also safeguarding the interests of children and the public, by holding that parents have a right to homeschool and decide what subjects to teach but the state can impose requirements and obligations that do not infringe on those core decisions of parents).

Robin West, A Tale of Two Rights, 94 Boston U. L. Rev. 893 (2014) (discussing homeschooling as an example of a newly emerging conception of constitutional rights which involve the freedom to opt out of a significant public or civic project such as education).

– ARGUMENTS FOR CONSTITUTIONAL PROTECTION OF HOMESCHOOLING

Anne C. Dailey & Laura A. Rosenbury, The New Parental Rights, 71 Duke L.J. 75 (2021) (developing a new model of parental rights, which emphasizes children’s independent interests and agency and does not assume that parent’s interests match those of children), and applying this new model to issues including homeschooling).

Michael P. Donnelly, Homeschooling Response: Questioning Presumptions of the Primordial State, 50 J.L. & Educ. 66 (2021) (discussing how distaste for religious parents can affect analysis of homeschooling issues and arguing that legislatures do not violate any constitutional norms if they choose not to restrict or regulate homeschooling).

Jennifer Karinen, Note, Finding a Free Speech Right to Homeschool: An Emersonian Approach, 105 Geo. L.J. 191 (2016) (arguing that a constitutional right to homeschooling should be based on freedom of speech rather than substantive due process, contending that this position draws strong support from Thomas Emerson’s influential writing on freedom of speech, and asserting that this approach will reduce the unfairness in privileging homeschooling done for religious purposes over homeschooling done for secular purposes).

Christina Sim Keddie, Note, Homeschoolers and Public School Facilities: Proposals for Providing Fairer Access, 10 N.Y.U. J.
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LEGIS. & PUB. POL’Y 603 (2006-2007) (considering whether homeschooling families have a constitutional right to participate in public school programs and access public school facilities, reviewing arguments for such a right that have been rejected by courts, and suggesting new constitutional arguments that might be more successful).


Jon S. Lerner, Comment, Protecting Home Schooling Through the Casey Undue Burden Standard, 62 U. CHI. L. REV. 363 (1995) (arguing that the undue burden standard from abortion rights cases should be applied to determine the constitutionality of homeschooling regulations).

Steven J. Macias, The Huck Finn Syndrome in History and Theory: The Origins of Family Privacy, 12 J.L. & FAM. STUD. 87 (2010) (providing a detailed analysis of the historical and theoretical origins of the constitutional interests in family privacy and parents’ rights to make decisions about the education of their children).

Louis P. Nappen, The Privacy Advantages of Homeschooling, 9 CHAPMAN L. REV. 73 (2005) (asserting that privacy is an overlooked benefit of homeschooling, because the collection and use of information about public school students and their families has expanded dramatically).

Chad Olsen, Constitutionality of Home Education: How the Supreme Court and American History Endorse Parental Choice, 2009 BYU EDUC. & L.J. 399 (arguing that Supreme Court precedent establishes a fundamental right for parents to direct the education of their children, home education has an important place in history and tradition, and home education and public education should be able to peacefully co-exist as educational options).
Billy Gage Raley, *Safe at Home: Establishing a Fundamental Right to Homeschooling*, 2017 B.Y.U. Educ. & L.J. 59 (arguing that homeschooling should be recognized as a right under substantive due process because it is a right deeply rooted in American history and tradition and it is a fundamental aspect of the right of parents to direct the education of their children).

David M. Wagner, *Homeschooling as a Constitutional Right: A Close Look at Meyer and Pierce and the Lochner-Based Assumptions They Made About State Regulatory Power*, 39 Okla. City U. L. Rev. 385 (2014) (analyzing whether there is a constitutional right to homeschooling and finding that the Supreme Court's precedents support the view that homeschooling should receive substantive due process protection).


Linda Wang, *Note, Who Knows Best? The Appropriate Level of Judicial Scrutiny on Compulsory Education Laws Regarding Home Schooling*, 25 J. Civ. Rts. & Econ. Dev. 413 (2011) (contending that intermediate scrutiny generally should apply to homeschooling regulations that infringe on parental liberty interests, while strict scrutiny should apply to hybrid claims that also involve free exercise of religion).

Daniel E. Witte, *People v. Bennett: Analytic Approaches to Recognizing a Fundamental Parental Right Under the Ninth Amendment*, 1996 BYU L. Rev. 183 (arguing that the Ninth Amendment protects a fundamental right of parents to direct the upbringing of their children and infringements on that right should receive strict scrutiny).

-- Child Abuse Investigations

ing families, including potential claims about viewpoint discrimination, family privacy, equal protection, and unreasonable searches and seizures).

– **DATA-BASED ASSESSMENT OF HOMESCHOOLING**

Tanya K. Dumas et al., *Evidence for Homeschooling: Constitutional Analysis in Light of Social Science Research*, 16 *Widener L. Rev.* 63 (2010) (arguing that homeschooling is subject to reasonable regulations, data about homeschooling should be used to assess whether homeschooling regulations actually serve government interests, and evidence does not support laws that require homeschooling parents to have teacher credentials).


– **DISABILITIES**


-- GENDER & RACE

Dick M. Carpenter II, *Mom Likes You Best: Do Homeschool Parents Discriminate Against Their Daughters?*, 70 U. ST. THOMAS J.L. & PUB. POL’Y 24 (2012) (responding to claims about discrimination against daughters in religious homeschooling, analyzing data from a national longitudinal study of students, finding there are no significant differences in educational indicators for homeschooled students based on gender, and finding some significant gender-based differences in perceptions of student performance in math).

Consuelo Valenzuela Lickstein, Note, *Race and Education at a Crossroads: How Parents Involved in Community Schools v. Seattle School District No. 1 and Wisconsin v. Yoder Shed Light on the Potential Conflict Between the Black Homeschooling Movement and K-12 Affirmative Action Programs*, 13 J. GENDER RACE & JUST. 835 (2010) (predicting that the Supreme Court would allow a school district to prohibit homeschooling if that was necessary to prevent students of color from withdrawing from the schools and making it impossible to have adequate diversity in the schools).

Najarian R. Peters, *The Right to Be and Become: Black Home-Educators as Child Privacy Protectors*, 25 MICH. J. RACE & L. 21 (2019) (discussing how an increasing number of Black parents are educating their children at home based on privacy interests in being and becoming oneself without being exposed to the harm of racial discrimination in the educational system).

Madalyn Doucet Vicry, Note, *That Kind of Girl: Effects of Homeschooling on the Sexual Health of Women and Girls*, 18 GEO. J. GENDER & L. 103 (2017) (contending that the sexual health of homeschooled women and girls can be jeopardized by the home school movement’s focus on censorship, purity, and patriarchy and the lack of exposure to competing ideas about sex and relationships).
Kimberly A. Yuracko, *Education off the Grid: Constitutional Constraints on Homeschooling*, 96 Calif. L. Rev. 123 (2008) (arguing that state constitution clauses about education require states to regulate homeschooling in ways that guarantee children receive a basic minimum level of education, while the federal Constitution’s Equal Protection Clause imposes limits on the extent to which states can permit homeschooling parents to engage in sex discrimination by providing far more extensive education for boys than for girls).

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**INTERNATIONAL PERSPECTIVES**


Alicia Kreh, Note, *Where Do We Belong?: A Call for Consistency in Homeschooling Regulation*, 36 U. La Verne L. Rev. 237

Aaron T. Martin, Note, *Homeschooling in Germany and the United States*, 27 Ariz. J. Int’l & Comp. L. 225 (discussing recent controversies over homeschooling in Germany, comparing Germany’s approach to that of the United States, and arguing that undue restrictions on homeschooling infringe parental rights and undermine the goals of a liberal democracy).


Jonathan Tavares, Note, *Why Homeschooling Shouldn’t Be Banned: The Resurgence of Home Education in the 21st Century*, 56 New Eng. L. Rev. F. 11 (2022) (arguing that parents have a fundamental right to direct the education of their children and comparing how other countries have approached the issue of homeschooling).
Erin Welch, Casenote, *Disguised Persecution in Germany: The Romeike Asylum Case*, 83 U. CIN. L. REV. 1029 (2015) (discussing a Sixth Circuit decision rejecting asylum claims by a Christian homeschooling family who claimed they were subject to persecution in Germany for violating laws requiring children to attend school).

– **Judicial Bypass Mechanisms for Children Objecting to Homeschooling**

Carmen Green, Note, *Educational Empowerment: A Child’s Right to Attend Public School*, 103 GEO. L.J. 1089 (2015) (describing how the federal constitutional right of parents to direct the education of their children can clash with the state constitutional right of children to receive an adequate education, when parents want to do homeschooling but a child objects to that, and proposing that states should create a judicial bypass mechanism enabling a court to decide that it is in a child’s best interests to attend public school).

Desiree Walden, *The Homeschooled Child’s Right to Attend Public School: Is Judicial Bypass a Solution?*, 49 URB. LAW. 175 (2017) (examining the lack of oversight of homeschooling in Missouri, describing the conflict between parental rights and public policy interests in education, and proposing the establishment of a judicial bypass mechanism, like that used for decisionmaking about abortion, for situations where a child objects to being homeschooled).

**Military**

– **Military Families**


Jeffrey P. Sexton, *Home Schooling Away from Home: Improving Military Policy Toward Home Education*, 182 MIL. L. REV. 50 (2004) (arguing that the U.S. military’s policies on homeschooling should be revised to better protect the rights of military parents, clarify the role of the military’s family advocacy programs with respect to child neglect and homeschooling issues, and im-
prove the relationship between the military and state or local child protection agencies).

**Parental**

--- **Parental Disagreement About Homeschooling**

Anthony Brone Kolenc, *Homeschooling and the Perils of Shared Parental Responsibility*, FLA. B. J., Nov. 2016, at 44 (providing advice for attorneys handling situations where the continuation of home education is threatened by the separation or divorce of parents).


J. Bart McMahon, Note, *An Examination of the Non-Custodial Parent’s Right to Influence and Direct the Child’s Education: What Happens When the Custodial Parent Wants to Home Educate the Child*, 33 U. LOUISVILLE J. FAM. L. 723 (1995) (surveying the standards that courts use in ruling on disputes between parents about homeschooling and arguing that courts should allow homeschooling if the child will receive an education comparable to that provided by public schools).


Catherine J. Ross, *Fundamentalist Challenges to Core Democratic Values: Exit and Homeschooling*, 18 WM. & MARY BILL RTS. J. 991 (2010) (arguing that homeschooling creates a risk that children are not exposed to significant constitutional values such as tolerance that are necessary for life in a pluralistic democracy, asserting that homeschooling should be regulated more closely,
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and proposing that there should be a presumption against homeschooling in situations where parents have separated or divorced and do not agree about whether the children should be homeschooled).

Jasmine D. Smith, *Clear Agreements as the Best Prevention*, S.C. LAW., July 2022, at 40 (advising attorneys about the importance of being clear and precise in drafting separation agreements and anticipating future issues such as whether a child will be homeschooled).

**Participation**

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**Participation in Sports, Classes, and Other Public School Activities**


Kathryn Gardner, *Legal Precedents and Strategies Shaping Homeschooled Students’ Participation in Public School Sports*, 11 J. LEGAL ASPECTS SPORT 25 (2001) (discussing litigation over homeschooled students’ participation in public schools’ extracurricular activities and arguing that this litigation is stressful and wasteful for families and school administrators).

William Grob, *Note, Access Denied: Prohibiting Homeschooled Students from Participating in Public-School Athletics and Activities*, 16 GA. ST. U. L. REV. 823 (2000) (analyzing whether homeschooled students have a constitutional or statutory right, at the federal or state level, to participate in athletics and other extracurricular activities offered at public schools).
Lisa M. Lukasik, Comment, The Latest Home Education Challenge: The Relationship Between Home Schools and Public Schools, 74 N.C. L. Rev. 1913 (1996) (assessing the rights and interests at stake in situations where parents seek to have homeschooled children attend a public school part-time in order to take a course that the parents are not equipped to teach at home).

John T. Plecnik, Equal Access to Public Education: An Examination of the State Constitutional & Statutory Rights of Nonpublic Students to Participate in Public School Programs on a Part-Time Basis in North Carolina & Across the Nation, 13 Tex. J. C.L. & C.R. 1 (2007) (arguing that private school and homeschool students in North Carolina have a state constitutional and statutory right to participate in public school programs).

Joshua Roberts, Dispelling the Rational Basis for Homeschooler Exclusion from High School Interscholastic Athletics, 38 J.L. & Educ. 195 (2009) (arguing that homeschooled students have a constitutional right to participate in high school sports because there is no financial, administrative, or other reason that would be a legitimate rational basis for excluding them).


— RELIGION

Laura J. Bach, Note, For God or Grades? States Imposing Fewer Requirements on Religious Home Schoolers and the Religion Clauses of the First Amendment, 38 Val. U. L. Rev. 1337 (2004) (describing how state laws on homeschooling may violate the Establishment Clause because they are not neutral toward religion and proposing a model statute that would avoid these First Amendment problems).

elementary school principal who was reassigned to a teaching position after indicating that he planned to homeschool his children).


James G. Dwyer, *Religious Schooling and Homeschooling Before and After Hobby Lobby*, 2016 U. Ill. L. Rev. 1393 (arguing that while parents have interests in deregulating religious schools or home schools, children have interests in being protected against educational deprivation and states should not empower parents or private school operators to infringe on the religious liberty of children).

Louis A. Greenfield, Note, *Religious Home-Schools: That’s Not a Monkey on Your Back, It’s a Compelling State Interest*, 9 Rutgers J.L. & Religion 4 (2007) (proposing that states create monitoring programs for homeschooling, including religious-based homeschooling, which would require children to pass annual standardized achievement tests, require homeschooling teachers to be certified and tested like substitute teachers, and require families to submit portfolios of work done by homeschooled students).

Robert Kunzman, *Homeschooling and Religious Fundamentalism*, 3 Int’l Elec. J. Elem. Educ. 17 (2010) (examining how homeschooling provides a setting that supports fundamentalist religious principles such as resistance to contemporary culture, skepticism of institutions and expertise, and parental control of the family).

-- State Specific Analysis

Noah Aleshire, *Defining the New “Species”: Recommendations for California Homeschool Legislation After Jonathan L. v. Superior Court*, 246 EDUC. LAW REP. 607 (2009) (analyzing California court decisions about whether there is a constitutional or statutory right to homeschooling and proposing a model statute that would impose requirements for homeschool teachers, create a means of assessing the learning of home schooled students, and prevent homeschooling in abusive circumstances).

Jessica Archer, *Leandro’s Limit: Do North Carolina’s Homeschoolers Have a Right to a Sound Basic Education Protected by the State?*, 36 CAMPBELL L. REV. 253 (2014) (contending that North Carolina’s homeschooling laws have failed to ensure that homeschooled children receive the sound basic education guaranteed by the state’s constitution).

Tyler Barnett, Comment, *Pulling Back the Curtains: Undetected Child Abuse and the Need for Increased Regulation of Home Schools in Missouri*, 2013 B.Y.U. EDUC. & L.J. 341 (urging Missouri legislators not to cut back on regulation of homeschooling and instead pass laws that will further protect children from abusive situations while respecting the Due Process and Free Exercise Clause rights of parents).


Gerald B. Lotzer, Comment, *Texas Homeschooling: An Unresolved Conflict Between Parents and Educators*, 39 BAYLOR L. REV. 469 (1987) (examining the debate over homeschooling and parents’ rights and discussing possible legislative changes that would clarify the regulatory approach to homeschooling in Texas).

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**Marriage Equality’s Impact on Family Law**

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**Adult Adoptions**

Robert Keefe, Note, *Sweet Child O’Mine: Adult Adoption & Same-Sex Marriage in the Post-Obergefell Era*, 69 FLA. L. REV. 1477 (2017) (proposing the enactment of “conversion statutes” that would enable same-sex couples to dissolve adult adoptions that were done as a way to create legal relationships and ensure inheritance and property rights in the era before same-sex marriages were permitted).

Sarah A. Quarles, Note, *Vacating Adopt Adoptions Post-Obergefell*, 106 KY. L.J. 837 (2017-2018) (describing how some same-sex couples used adult adoptions to establish legally recognized relationships in the era before same-sex marriage was permitted, discussing the problems they now face if unable to marry because they have a parent/child relationship through adoption,
and urging states to allow these adult adoptions to be vacated in order to avoid infringing the couples’ right to marry).

– CHILDREN AND PARENTAGE

June Carbone & Naomi Cahn, *Marriage and the Marital Presumption Post-Obergefell*, 84 UMKC L. Rev. 663 (2016) (assessing how the marital presumption will be applied to same-sex couples and arguing that it should at least establish a presumption that both spouses will have joint responsibility for any child born in the marriage).


Meg Nemeth Ledebuhr, *Parentage and the Modern Family*, Fam. Advoc., Spring 2018, at 12 (considering whether the Supreme Court’s recognition of same-sex marriage rights will have the limited effect of requiring states to allow same-sex marriages or lead to broader changes on topics like parentage, assisted reproductive technology, and gender neutrality in family law).

Charmaine Mech, Note, *Same-Sex Marriage and the Baby Carriage: A Post-Obergefell Analysis of ART Funding for Same-Sex Couples in the United States*, 45 Ga. J. Int’l & Comp. L. 343 (2017) (examining the United Kingdom’s experience, predicting that the right to same-sex marriage in the United States will bring about an expansion of same-sex couples’ need for infertility treatments and assisted reproductive technology, and proposing that states should revise their statutes on insurance coverage to ensure the laws are clear and non-discriminatory).

Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 Harv. L. Rev. 1185 (2016) (analyzing the role that marriage played in early litigation about LGBT parenting, as well as the impact that the establishment of marriage equality may have on issues concerning nonbiological parents and nonmarital families).

availability of same-sex marriage and the presumption of parentage that comes with marriage will reduce the importance of equitable remedies such as de facto parenthood, psychological parents, and co-parenting agreements).

Catherine Sakimura, *The Impact of Marriage Equality on LGBT Parents*, *Fam. Advoc.*, Spring 2016, at 24 (analyzing family law issues generated by the right to same-sex marriage, including issues about parentage, assisted reproduction, and adoption).


Eric I. Wrubel & Linda Genero Sklaren, *The “Parent” Paradox in a Post-Obergefell World*, *Fam. Advoc.*, Spring 2016, at 32 (arguing that issues about what constitutes a family and who can be a parent should be resolved in ways that reflect modern values, serve the best interests of children, and advance the intent of the Supreme Court’s decision on marriage equality).

– DIVERSITY AND CULTURAL COMPETENCE

Elvia Rosales Arriola, *Queer, Undocumented, and Sitting in an Immigration Detention Center: A Post-Obergefell Reflection*, 84 *UMKC L. Rev.* 617 (2016) (offering thoughts, based on personal experiences and narratives from undocumented gay migrants, about how the protection of constitutional interests in dignity and freedom will be difficult for some people because of their race, class, and citizenship status).

Takeia R. Johnson, *Cultural Competence to Represent LGBTQ Clients Post-Obergefell*, *GPSolo*, Jan./Feb. 2017, at 44 (arguing that the recognition of same-sex marriage rights increases the need for training attorneys to be culturally competent in representing clients).

– DOMESTIC PARTNERSHIPS

vided for the creation of domestic partnerships not only for the sake of same-sex couples who would not legally marry, but also for the benefit of elderly people in opposite-sex relationships who faced a risk of losing benefits such as alimony or Social Security spousal benefits if they remarried, and arguing that legislators should consider whether continuing to recognize domestic partnerships for opposite-sex couples merely creates opportunities for gamesmanship by wealthy individuals who have expert assistance navigating the legal complexities of using domestic partnerships to gain the benefits of a new marriage without fear of losing the benefits of a previous marriage).

Jessica R. Feinberg, *The Survival of Nonmarital Relationship Statuses in the Same-Sex Marriage Era: A Proposal*, 87 Temple L. Rev. 47 (2014) (arguing that the recognition of a right to same-sex marriage may leave unmarried couples without a way to have their nonmarital relationships legally recognized and proposing the creation of a nonmarital relationship status as an alternative to marriage).

**FAMILY LAW**

David D. Meyer, *Family Law Equality at a Crossroads*, 2013 Mich. St. L. Rev. 1231 (reviewing the significant progress toward equality in family law in recent decades and predicting that future battles over equality will involve reconciling competing interests and carefully determining the specific facts of individual situations, rather than the establishment of sweeping new principles).


Deborah H. Wald, *Practicing LGBT Family Law in a Post-Obergefell World*, Fam. Advoc., Spring 2016, at 19 (discussing practical issues facing family attorneys in the aftermath of the Supreme Court’s decision establishing a constitutional right to same-sex marriage, including questions that can arise about
whether a couple had a common-law marriage before same-sex marriage became officially allowed in their state, situations where a couple was married but unable to obtain a dissolution of the marriage because courts in their home state would not recognize the existence of the marriage, and struggles over the application of the Full Faith and Credit Clause to adoptions by same-sex couples).

Lynn D. Wardle, *Reflections on Equality in Family Law*, 2013 MICH. ST. L. REV. 1385 (reflecting on the complex role of equality in family law, considering the impact the movement toward constitutional protection of marriage equality will have for family law, and arguing that equality is important but not enough to ensure that family law protects the well-being of families, adults, and children).

– FINANCIAL ISSUES

Kaitlin E.L. Gates, Comment, *Catching the Gold at the End of the Rainbow: The Impacts of Retroactive Recognition of Same-Sex Marriage on Community Property Division*, 9 EST. PLAN. & COMMUNITY PROP. L.J. 263 (2017) (considering how Texas law on community property should resolve issues involving same-sex marriage, such as when would the accumulation of community property be deemed to begin if a same-sex couple living in Texas was legally married in another state before same-sex marriage became legal in Texas, and when would the accumulation of community property be deemed to begin if a same-sex couple in Texas met the requirements for a valid common-law marriage prior to the time when same-sex marriages became legal in Texas).

Paula A. Monopoli, *Inheritance Law and the Marital Presumption After Obergefell*, 8 EST. PLAN. & COMMUNITY PROP. L.J. 437 (2016) (examining how a constitutional right to same-sex marriage will affect inheritance law, discussing the marital presumption doctrine which provides that a child born during a marriage is presumed to be the child of the husband, and arguing that a conclusive presumption of parentage should be extended to all non-birth, non-genetic spouses for purposes of inheritance law).
Marriage

Kerry Abrams, The Rights of Marriage: Obergefell, Din, and the Future of Constitutional Family Law, 103 Cornell L. Rev. 501 (2018) (arguing that the rights of unmarried couples will be expanded to some extent by the Supreme Court’s decisions on same-sex marriage and considering whether courts will recognize a constitutional right to marital unification in the context of immigration).

Curtis Cook, Note, Same-Sex Common Law Marriage: An Examination of the Constitutionality of State Processes in Determining a Valid Common Law Marriage Post Obergefell v. Hodges, 55 Creighton L. Rev. 561 (2022) (examining the challenges that same-sex couples may have in satisfying the required elements for recognition of a common law marriage and proposing the adoption of a factor-based test to better protect same-sex couples’ constitutional interests).

Courtney G. Joslin, Discrimination in and out of Marriage, 98 B.U. L. Rev. 1 (2018) (examining the history of marital status advocacy and considering whether the Supreme Court’s decisions in favor of same-sex marriage will derail efforts to eliminate legal privileges for marriage over nonmarriage).

Courtney G. Joslin, Marriage Equality and Its Relationship to Family Law, 129 Harv. L. Rev. F. 197 (2016) (arguing that the constitutional principle of marriage equality might move family law closer to equalizing the treatment of marital and non-marital adult relationships).

Suzanne A. Kim, Skeptical Marriage Equality, 34 Harv. J.L. & Gender 37 (2011) (examining how one might support same-sex marriage while having serious criticisms and doubts about the institution of marriage in general, and arguing that victories for marriage equality ultimately may help pave the way for a less hierarchical and more pluralistic approach to state recognition of family connections).

Melissa Murray, Obergefell v. Hodges and Nonmarriage Inequality, 104 Calif. L. Rev. 1207 (2016) (contending that the Supreme Court has prioritized marriage and demeaned nonmarriage).

Michelle Piscopo, *FAQs Regarding Same-Sex Relationships*, Fam. Advoc., Summer 2019, at 37 (answering questions about marriages, civil unions, and parentage raised by the Supreme Court’s decision on same-sex marriage rights).

Richard A. Roane, *No More “Same-Sex Marriage,” Marriage Is Period*, Fam. Advoc., Spring 2016, at 12 (listing many changes to federal and state laws likely to occur after the Supreme Court’s decision on marriage equality, such as giving same-sex married couples the same tax treatment as opposite-sex married couples and allowing same-sex marriages to be dissolved through divorce, but also listing questions that may not have clear and definite answers, such as how the duration of marriages will be determined for relationships that predated the Supreme Court’s decision but were not legally recognized until that decision).

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Thomas J. Walsh, *Religion and Marriage*, Fam. Advoc., Fall 2019, at 6 (noting how the debate over same-sex marriage brought new attention to the institution of marriage, examining the historical relationship between marriage and religious values, and arguing that states should establish basic principles about marriages that apply across different legal contexts).

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REV. 1445 (critiquing proposals to avoid controversies over marriage by reducing or eliminating government involvement with marriage, arguing that these proposals would sacrifice vital benefits of legal recognition of marriages, and suggesting that disputes over marriage can be adequately resolved through reasonable accommodation of those with religious objections to same-sex marriage).

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Tle Rock L. Rev. 543 (2015) (arguing that equal access to justice requires recognition of a right to counsel in civil cases).

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Amie K. Wilcox, Civil Right to Counsel for Indigent Parents in Contested Adoptions: An Argument for Due Process and Equal Protection When Parental Rights Are Terminated in Private Civil Actions, Ark. Law., Summer 2021, at 22 (arguing that Arkansas should establish a constitutional right to counsel for indigent persons whose parental rights are subject to termination in a private adoption).
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**Unwed Parents**

- **Abortion**


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- **Nonmarital Families**

  June Carbone & Naomi Cahn, *Nonmarriage*, 76 MD. L. REV. 55 (2016) (proposing a framework that would provide a coherent legal approach to nonmarriage and reconcile the differences in how state laws treat financial obligations versus custodial issues for unmarried partners).


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— **NONMARITAL FATHERS**


to end disparate treatment of unmarried fathers in child custody cases).

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– REPRODUCTION

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