

THE FUNDAMENTAL RIGHT TO LEAVE: CONSERVATIVE ATTACKS ON NO-FAULT DIVORCE ARE UNCONSTITUTIONAL AND PROMOTE A RETURN TO THE TRADITIONAL FAMILY

Abstract: In 1969, California became the first state to adopt no-fault divorce. Soon after, the rest of the United States followed and today all fifty states have no-fault divorce laws. Now, the Republican Parties in Louisiana, Texas, and Nebraska are challenging no-fault divorce, with some advocating for covenant marriages. No-fault divorce has led to significant benefits for women, including decreasing domestic violence and female suicide rates as well as promoting female autonomy by providing a means for women to unilaterally leave oppressive marriages. This Note examines how the removal of no-fault divorce is out of sync with the liberal rights developments in family law that remove gender performativity from numerous legal issues, specifically alimony, custody, and parentage. Furthermore, this Note argues that the removal of no-fault divorce is unconstitutional based on the Supreme Court's interpretation of the Equal Protection and Due Process Clauses of the Fourteenth Amendment in *Obergefell v. Hodges*.

Happy families are all alike; every unhappy family is unhappy in its own way.

—Leo Tolstoy, *Anna Karenina*¹

INTRODUCTION

Wendy Paris was at her friend's wedding in the Hamptons with her husband as they watched the happy couple say their vows to each other.² She was captivated as the groom promised to listen, share in his bride's goals, and continuously self-improve.³ Listening to them, she realized that her husband

¹ LEO TOLSTOY, *ANNA KARENINA* 1 (Constance Garnett trans., 2015).

² See Wendy Paris, *Happily Ever, After We Split*, N.Y. TIMES (June 1, 2012), <https://www.nytimes.com/2012/06/03/fashion/happily-ever-after-divorce.html> [perma.cc/G9JN-6D9Q] (recalling that watching her friend's wedding encouraged her to seek a divorce). Wendy writes that she lives in a demographic with one of the lowest divorce rates: couples who are educated, married after age thirty-five, and live in the Northeast. *Id.* The divorce rate for this demographic is approximately seven percent. *Id.*

³ See *id.* (stating that she and her husband did not say their own vows at their wedding); see also Lois Smith Brady, *Before Saying 'I Do,' Define Just What You Mean*, N.Y. TIMES (Aug. 16, 2013), <https://www.nytimes.com/2013/08/18/fashion/weddings/before-saying-i-do-define-just-what-you-mean.html#:~:text=Writing%20your%20own%20vows%2C%20Lois,to%20get%20that%20emotional%20publicly.%E2%80%9D> [perma.cc/43XJ-ZP5C] (noting that many couples write their own

would never make or keep those kinds promises to her and, after the ceremony, asked her husband why they remained married.⁴ He was not shocked by her question since they'd struggled in their relationship for years: their views differed, which led to a friction they could not overcome.⁵ They separated amicably, using no-fault divorce.⁶ Once they split, Wendy found that her frustrations evaporated, she looks to a promising future with her ex-husband in the next stages of their lives.⁷

In Spokane Washington in 2004, Shawna Hughes was denied a divorce from her abusive husband because she was pregnant.⁸ Her husband was convicted of assaulting her and was sentenced to a year in prison; during this time, another man impregnated Hughes.⁹ She feared that her husband would return to his violent behavior once he was released, so she filed for divorce.¹⁰ In rejecting her petition, the judge stated that pregnant women may not get divorced until after they give birth.¹¹ The ACLU argued that her petition was proper and

vows). A book on how to have a healthy marriage advised couples to write their own vows and think carefully about the commitments they are making in the marriage ceremony. *Id.*

⁴ See Paris, *supra* note 2 (stating that she wants someone who shares the same relationship views as her).

⁵ See *id.* (acknowledging that she and her ex-husband shared different views of marriage). Wendy explains that she wanted a soul-mate style connection, and her ex-husband wanted a more independent relationship. *Id.* She described her ex-husband as a hard-working person, dedicated to resolving social justice issues but she thought that she would be more content with a partner that is less career-driven and more interested in family life. *Id.* They thought that if they worked hard, they would be able to resolve these differences, but that was not the case. *Id.*

⁶ See Wendy Paris, *How to Finally Get Along with Your Spouse*, MEDIUM (Oct. 22, 2013), <https://medium.com/@wendyparis1/how-to-finally-get-along-with-your-spouse-f6c7d3015a10> [perma.cc/QGL7-VC5Z] (stating that no-fault divorce allows for couples to split without accusations).

⁷ See Paris, *supra* note 2 (recounting how they aspired to an optimistic divorce). She states that the negativity she felt in her divorce was largely because of her friends' reactions. *Id.* They questioned her decision and had difficulty letting go of her marriage. *Id.*; Paris, *supra* note 6 (noting that she has heard of a surprising amount of amicable divorces). She met a woman at a mommy-baby class in Manhattan who was organizing a trip with her ex and their child. *Id.* Another example is Wendy's acquaintance in Boulder, who lives directly across the street from her ex-spouse with whom she co-parents their two children. *Id.* They are friends and spend time together when their kids are not around. *Id.*

⁸ See Press Release, ACLU, ACLU and Northwest Women's Law Center Back Washington Woman's Right to Divorce (Mar. 10, 2005), <https://www.aclu.org/press-releases/aclu-and-northwest-womens-law-center-back-washington-womans-right-divorce> [perma.cc/AD6Z-QV4S] (stating the ACLU filed an amicus brief to support Hughes's right to obtain a divorce); see also *In re Marriage of Hughes*, 116 P.3d 1042, 1044 (Wash. Ct. App. 2005) (referencing the trial court's opinion stating that a marriage cannot be dissolved by the state if one party is pregnant). The three judge panel for the court of appeals held that there was no constitutional violation of Washington's Equal Rights Amendment. *Id.* at 1045. The appellate court affirmed the trial court's decision. *Id.* at 1046.

⁹ See Press Release, *supra* note 8 (noting that Hughes's husband has a pattern of abuse and that she already had two children).

¹⁰ See *id.* (reporting that her husband did not object to the divorce petition).

¹¹ See *id.* (stating that the judge also said that it is in the child's best interest not to be born out of wedlock); see also Jim Camden, *Judge Bastine Says He Will Retire*, SPOKESMAN-REVIEW (July 9, 2004), <https://www.spokesman.com/stories/2004/jul/09/judge-bastine-says-he-will-retire/> [perma.cc/

she had a right to be divorced under Washington's no-fault divorce laws.¹² On appeal, the state supreme court held that divorce could not be denied on the basis of pregnancy, highlighting the need for no-fault divorces, specifically in cases involving domestic violence.¹³

In Texas in January 2020, Eleanor was sexually assaulted by her husband.¹⁴ She struggled against him but he pinned her down, hit her with his open palm three times, and knocked her unconscious.¹⁵ Once this happened, he called law enforcement.¹⁶ When they arrived, he was charming.¹⁷ She pushed for his arrest but the cops did not believe her.¹⁸ She was denied a protective

9YDW-LHXA] (explaining that the judge in this case would retire at the end of his term in 2004, immediately after this case got resolved).

¹² See Press Release, *supra* note 8 (stating that the ACLU and Northwest Women's Law Center argued in support of Hughes's appeal as the court could not deny the petition because of no-fault laws in Washington). The groups assert that Judge Bastine's ruling reflects an out-of-date view of illegitimacy. *Id.* The law states that a child born to unmarried parents has the same rights as a child born to married parents. *Id.* The brief also includes that the Parentage Act says that a paternity test can resolve who has financial responsibility, something that is not dependent on marital status. *Id.*

¹³ See *id.* (stating the ACLU filed a friend-of-the-court brief to support Hughes's right to a divorce because she properly filed a petition in Washington, a no-fault state); Press Release, ACLU of Wash., Appeals Court Upholds Right to Divorce During Pregnancy (Nov. 20, 2009), <https://www.aclu-wa.org/news/appeals-court-upholds-right-divorce-during-pregnancy> [perma.cc/D3J6-MLQ5] (reporting that the court held a pregnant women's right to file for divorce is protected by Washington's Equal Rights Amendment).

¹⁴ See Katie Herchenroeder, *The Right's War on Divorce—and Its Costs*, MOTHER JONES (Sep. 7, 2023), <https://www.motherjones.com/politics/2023/09/no-fault-divorce-texas-republican-gop-crowder/> [perma.cc/6ETS-7KU8] (recounting anonymously the January 2020 story about a woman—Eleanor is her pseudonym—who was a victim of domestic violence). She also recounts how her husband had stopped taking his medications to treat bipolar disorder, depression, and ADHD. *Id.*

¹⁵ See *id.* (describing that, as she resisted, he said that he was going to kill her). Eleanor struck him before he hit her three times. *Id.* When she woke up after being knocked unconscious, her husband was stepping over her body and carrying on his morning routine. *Id.*

¹⁶ *Id.*

¹⁷ See *id.* (explaining that her husband was the one to call the police and, once they arrived, he was perceived as charming).

¹⁸ See *id.* (explaining that the police did not believe her because her husband had been the one who called them and he was likeable); TK LOGAN & ROBERTA VALENTE, NAT'L DOMESTIC VIOLENCE HOTLINE, WHO WILL HELP ME? DOMESTIC VIOLENCE SURVIVORS SPEAK OUT ABOUT LAW ENFORCEMENT RESPONSES 1, 2 (2015), <https://www.thehotline.org/wp-content/uploads/media/2020/09/NDVH-2015-Law-Enforcement-Survey-Report-2.pdf> [perma.cc/4475-G4JY] (reporting that in 2015, the National Domestic Violence Hotline (the Hotline) conducted a survey of survivors' experiences with law enforcement). The Hotline surveyed those who reached out and obtained data from 637 women survivors. LOGAN & VALENTE, *supra*. Both survivors who contacted the police and those who did not expressed concerns about asking the police for their help. *Id.* One quarter stated that they would not call the police again in the future, over half stated that contacting law enforcement would make things worse, and potentially more than two thirds stated they feared the police would not believe what they said or would not do anything. *Id.* Of those who contacted the police, forty-three percent believed that they experienced discrimination. *Id.* at 7.

order against him because she did not have any visible marks, but was allowed a no-fault divorce without having to relive her abuse in front of a court.¹⁹

Now, no-fault divorce is being attacked by Texas's Republican Party and, if successful, women like Eleanor will face greater hurdles to obtain divorces.²⁰ Likewise, the Republican Parties in Louisiana and Nebraska are pushing to end no-fault divorce and those in Oklahoma, South Carolina, and South Da-

¹⁹ See Herchenroeder, *supra* note 14 (stating that Eleanor stated her husband's use of an open palm was intentional so as not to leave a mark and that she was able to get a divorce without having to prove fault, which would likely have led to a longer, expensive court case). Research highlights that the most dangerous time for abused women is when they attempt to leave their relationships. *Id.* Additionally, it is traumatizing for women to leave their abusers then have to fight them in court to maintain that freedom and get their possessions. *Id.*

²⁰ See *2025 Texas Divorce Law Updates: What You Need to Know*, TERRY & ROBERTS (Aug. 26, 2025), <https://terryandrobertslaw.com/blog/texas-divorce-law-updates/> [perma.cc/UZK8-UFJ3] (stating Texas legislature considered passing HB 3401, that would cause Texas to be a fault-based state). Although the law was ultimately rejected in June 2025, legal experts believe there will continue to be a push in Texas to return to a fault-based system. *Id.*; Bryan Driscoll, *New Texas Family Laws Transform Navigating Divorce, Custody*, BEST LAWYERS (Dec. 15, 2025), <https://www.bestlawyers.com/article/new-texas-family-laws-transform-navigating-divorce-custody/7108#:~:text=On%20Sept.,toughening%20enforcement%20on%20visitation%20interference> [perma.cc/8T4F-FUPN] (highlighting that on September 1, 2025, Texas made several notable updates to its Family Code that ultimately aim to preserve the traditional family). The new laws emphasize biological ties for parenthood, limit rights of step-parents and other non-biological caregivers, increase child support caps, give courts the authority to decide the parent that is responsible for making educational decisions, and clarifying "that a parent's refusal to use a child's preferred pronouns or name does not constitute abuse under the Family Code." Driscoll, *supra*; Herchenroeder, *supra* note 14 (recounting that Eleanor was asked what it would have been like if getting divorced was more difficult and answering "[t]he notion that this could even be made any more difficult than it already is—I don't even know how it could"); Kimberly Wehle, *The Coming Attack on an Essential Element of Women's Freedom*, THE ATLANTIC (Sep. 26, 2023), <https://www.theatlantic.com/ideas/archive/2023/09/no-fault-divorce-laws-republicans-repeal/675371/> [perma.cc/BUD6-K5SD] (explaining that Texas's attacks on no-fault divorce have the potential to be successful given that the Republican party makes up a majority of the state's legislature, and the governor); *Party Control of Texas State Government*, BALLOTPEDIA, https://ballotpedia.org/Party_control_of_Texas_state_government [perma.cc/55YL-GX2C] (stating that there is a Republican trifecta and triplex in the Texas state government as of February 22, 2026). A trifecta is when a party holds a majority in the two legislature chambers and the governorship. *Party Control of Texas State Government*, *supra*. A state triplex is when a party holds the offices of the "governor, attorney general, and secretary of state." *Id.*

kota have proposed restrictions on it.²¹ These state-level attacks are significant because there are currently no constitutional protections for no-fault divorce.²²

Additionally, Vice President J.D. Vance expressed his disapproval of no-fault divorce, comparing getting divorced to being as simple as changing your underwear.²³ Alarming, he eluded that some violence in a marriage is acceptable.²⁴ Moreover, Speaker of the House Mike Johnson—who has a covenant marriage, making obtaining a divorce more difficult—shared his disapproval of no-fault divorce.²⁵ Their opposition is rooted in the belief that obtain-

²¹ See Wehle, *supra* note 20 (stating that politicians in Texas and Louisiana are pushing for no-fault divorce and there is a court case in Nebraska challenging it); Kimberlee Kruesi, *Repealing No-Fault Divorce Has So Far Stalled Across the U.S. Some Worry That'll Change Under Trump*, AP NEWS (Nov. 26, 2024), <https://apnews.com/article/divorce-nofault-repeal-republican-states-40d6c51bd26b7d8c6a2d4969b21d4b53> [perma.cc/X64F-AMWE] (noting the states that had bills proposed in their legislatures that limited no-fault divorce); see also Kristen Shearin, *The Future of No Fault Divorce Laws*, INST. FOR DIVORCE FIN. ANALYSTS (Feb. 5, 2025), [https://institutedfa.com/no-fault-divorce-future/#:~:text=As%20of%20early%202025%2C%20no,debated%20\(WWNO.org\)](https://institutedfa.com/no-fault-divorce-future/#:~:text=As%20of%20early%202025%2C%20no,debated%20(WWNO.org)) [perma.cc/YQB9-SSFV] (noting that as of the beginning of 2025, no-fault divorce remains legal across the U.S., several states including Texas, Louisiana, and Oklahoma introduced or are discussing legislation that would limit or abolish no-fault divorce).

²² See Wehle, *supra* note 20 (comparing no-fault divorce to gay marriage, something that is currently protected by the Supreme Court's 2015 decision in *Obergefell v. Hodges*, 576 U.S. 644 (2015), where the Court held that state laws need to adhere to federal rights safeguarding gay marriage).

²³ See *id.* (reporting J.D. Vance's statements from the campaign trail on no-fault divorce and adding his disdain for the sexual revolution); see also Amy Shearn, *The GOP's Next Target? No-Fault Divorce and Women's Right to Leave*, MS. MAG. (Mar. 10, 2025), <https://msmagazine.com/2025/03/10/gop-no-fault-divorce-ban-womens-rights-trump-mike-johnson/#:~:text=Although%20no%20fault%20divorce%20hasn,the%20days%20following%20the%20election> [perma.cc/Y9SC-W63B] (stating that President Trump is yet to attack no-fault divorce, but there are rumors he will). Notably, following the election no-fault divorce searches on the internet rose dramatically and on social media divorce coaches, lawyers, and influencers encouraged women to get divorces before any changes to the laws. Shearn, *supra*.

²⁴ See Wehle, *supra* note 20 (highlighting that the Vice President said “[o]ne of the great tricks that I think the sexual revolution pulled on the American populace . . . is the idea that, like, ‘Well, okay, these marriages were fundamentally, you know, they were *maybe even violent*, but certainly they were unhappy’” (emphasis added)). He then added, “[a]nd so getting rid of them and making it easier for people to shift spouses like they change their underwear, that’s going to make people happier in the long term.” *Id.*

²⁵ See Alyson Krueger, *What Is a Covenant Marriage?*, N.Y. TIMES (Nov. 3, 2023), <https://www.nytimes.com/2023/11/03/style/covenant-marriage-divorce.html> [perma.cc/NSN5-NT55] (explaining that covenant marriages are binding legal agreements between a couple that are permissible in Arizona, Arkansas, and Louisiana). Covenant marriages are largely rooted in religion and often require proof of adultery, abuse, abandonment for a specified period—usually one year—or imprisonment to obtain a divorce. *Id.*; Patt Morrison, *California Settled the No-Fault Divorce Question Decades Ago. Why Is It Back in the News?*, L.A. TIMES (May 24, 2024), <https://www.latimes.com/california/story/2024-05-24/california-settled-the-no-fault-divorce-question-decades-ago-why-is-it-back-in-the-news> [perma.cc/BM62-M4CU] (reporting that House Speaker Mike Johnson stated that no-fault divorce has led to an “amoral” society).

ing a divorce has become too easy.²⁶ Others who oppose no-fault divorce argue that it is a violation of the Fourteenth Amendment.²⁷

The potential effects of the end no-fault divorce are significant.²⁸ No-fault divorce has benefited women by decreasing domestic violence, the number women killed by their partners, and female suicide rates.²⁹ It increased female liberty by providing a way for women to unilaterally leave oppressive marriages.³⁰ Also, as states adopted no-fault divorce, they removed gender stereotypes in other areas of family law, including alimony, child custody, and parentage laws.³¹ The elimination of no-fault divorce would harm the progress made to remove gender norms from family law and signal a return to the traditional model of the family.³²

²⁶ See Kim, *Threats to No-Fault Divorce and Its Implications for Violence Against Women*, NOW (July 12, 2024), <https://now.org/blog/threats-to-no-fault-divorce-and-its-implications-for-violence-against-women/> [perma.cc/CU8G-DMTK] (noting that some religious right-wing conservatives claim that modern divorce laws deny men their due process rights and harm families).

²⁷ See *id.* (stating that the co-chair of the Coalition for Divorce Reform, Beverly Willett, asserted that unilateral no-fault divorce was a violation of the Fourteenth Amendment because it deprives defendants of their due process rights to liberty, life, and property); Wehle, *supra* note 20 (arguing against Willett's position stating that, despite some lingering aspects of coverture in U.S. law, women are not legal property, and therefore a man's due process right to property is not violated when his wife leaves their marriage).

²⁸ See Amy Polacko & Rosemarie Ferrante, *Take It from a Divorce Coach and Attorney: Ending No-Fault Divorce Is a Scary Suggestion*, MS. MAG. (May 24, 2023), <https://msmagazine.com/2023/05/24/no-fault-divorce-women-republicans/> [perma.cc/KW4Y-N5ZA] (describing that researchers at University of Michigan found that no-fault divorce decreased domestic violence and suicide).

²⁹ See Wehle, *supra* note 20 (describing how, in the period after states adopted no-fault divorce, rates of domestic violence decreased by a quarter, the amount of women killed by partners lessened by ten percent, and female suicide rates continuously decreased).

³⁰ Compare *id.* (describing how with no-fault divorce, women could leave a marriage and did not need permission from their husbands), with Lawrence M. Friedman, *A Dead Language: Divorce Law and Practice Before No-Fault*, 86 VA. L. REV. 1497, 1504 (2000) (noting how most fault-based divorces were collusive in that couples agreed on a divorce before beginning the proceedings). The wife usually filed and accused the husband of one of the statutory fault grounds for divorce. Friedman, *supra*, at 1504. Friedman notes how this system largely protected men. *Id.* at 1530. Given that everyone knew about collusion in divorce, it prevented men from being held accountable when they actually committed wrongdoing such as domestic violence. *Id.*

³¹ See Susan Frelich Appleton, *How Feminism Remade American Family Law (and How It Did Not)* (describing how the Supreme Court had numerous holdings that removed gender stereotypes from family law, including: holding that a law that alimony could only be paid by husbands was unconstitutional, holding that unmarried parents had to be treated the same as married parents in custody disputes, and providing rights for children not born into marriages), in RESEARCH HANDBOOK ON FEMINIST JURISPRUDENCE 426, 431 (Robin West & Cynthia G. Bowman eds., 2019).

³² See *id.* at 433–34 (noting the decrease in gender-based stereotypes in family law beginning in 1970 and culminating in the Court holding in *Obergefell*); William N. Eskridge, Jr., *Sexual and Gender Variation in American Public Law: From Malignant to Benign to Productive*, 57 UCLA L. REV. 1333, 1336 (2010) (stating that the natural law model considered each sex to have specific traits and roles). Women in the natural law model were called to be wives and mothers and were confined to the private sphere. Eskridge, *supra*, at 1336. Men were heads of households and had a public presence. *Id.* They were supposed to be in the workforce and, if they were white, had civic duties such as voting and serving on juries. *Id.* at 1336–37.

Part I of this Note provides background on no-fault divorce, including its legal history, the influence of social movements, and concurrent developments in family law.³³ Part II discusses the arguments for ending no-fault divorce and its feminist and constitutional counterarguments.³⁴ Part III argues that no-fault divorce is a constitutional right under the reasoning in 2015 in *Obergefell v. Hodges* that expanded the right to marry and that the end of no-fault divorce would be a step backward from the progressive direction of family law.³⁵

I. THE IMPLEMENTATION OF NO-FAULT DIVORCE ACROSS THE U.S.: LEGAL HISTORY AND SOCIAL MOVEMENTS

To understand the legal implications of ending no-fault divorce, one must first understand the history of marriage and divorce law in the U.S.³⁶ Section A discusses the history of divorce law, fault-based divorces, and the beginnings of no-fault divorce.³⁷ Section B describes no-fault divorce and the “constitutionalization” of family law.³⁸ Section C describes parallel movements in family law and the turn to the liberal rights model.³⁹

A. The Beginnings of No-Fault Divorce

In creating the U.S. legal system, the founders maintained English common law to regulate marriage, including the doctrine of coverture.⁴⁰ Coverture held that a husband and his wife are legally one person—that person being the husband.⁴¹ The Married Women’s Property Acts, passed in the mid-nineteenth century, modified the doctrine of coverture to permit women to maintain property that they owned before marriage; however, divorce was still largely una-

³³ See *infra* notes 36–147 and accompanying text.

³⁴ See *infra* notes 148–206 and accompanying text.

³⁵ See *infra* notes 207–278 and accompanying text.

³⁶ See *infra* notes 36–147 and accompanying text.

³⁷ See *infra* notes 40–76 and accompanying text.

³⁸ See *infra* notes 77–111 and accompanying text.

³⁹ See *infra* notes 112–147 and accompanying text.

⁴⁰ NANCY D. POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW* 12 (2009).

⁴¹ See *id.* (stating that under coverture, wives could not sign contracts, own property, possess money, or file a lawsuit). A woman’s property under this doctrine became her husband’s property when they were married. *Id.* Any of her earnings or property acquired when she was married also belonged to her husband. *Id.* The legal unity of husband and wife also did not permit for spouses to testify against each other, be guilty of conspiracy, or recover cash damages for misdeeds committed against each other. *Id.* Beyond the economic consequences, coverture deprived women of bodily autonomy. *Id.* Husbands could not be charged with raping their wives and he was entitled to his wife’s “services,” so injury to her was also injury to him and he could sue and recover for loss of consortium. *Id.* at 12–13.

available across the U.S.⁴² Unless states had adopted judicial divorce proceedings—as was the case in some northern jurisdictions—obtaining a divorce meant petitioning the legislature—as was the case in the south.⁴³

Marriage laws during this time heavily reflected natural law and gender stereotypes.⁴⁴ One scholar, William Eskridge, characterizes the law during this period as organized around understandings of gender as sex, and sexuality as

⁴² See *id.* at 13 (stating legal changes to the traditional roles of couples occurring after the Married Women's Property Acts); Friedman, *supra* note 30, at 1501. Around the time of the Married Women's Property Acts, the first women's rights convention was held in July 1848 in Seneca Falls, New York. POLIKOFF, *supra* note 40. At this convention, The Declaration of Sentiments was written, but it largely focused on women's suffrage. *Id.* Nonetheless, the document also denounced the treatment of married women. *Id.* In addition, in 1873, Myra Bradwell was denied admittance to the Illinois bar. *Id.*; see also ELIZABETH CADY STATON, THE SENECA FALLS DECLARATION OF SENTIMENTS (1848), <https://www.nps.gov/wori/learn/historyculture/declaration-of-sentiments.htm> [<https://perma.cc/S7SK-GD6C>] (stating that men created divorce laws without regard for women and their needs); *Bradwell v. Illinois*, 83 U.S. (1 Wall.) 130, 140–41 (1872) (holding that women cannot be lawyers, and that nature recognizes a distinction between men and women). The Court relied on the idea that familial composition indicated that women should be confined to the domestic sphere. *Bradwell*, 83 U.S. at 141. Furthermore, the Court considered it “repugnant” that a woman would have an independent profession. *Id.* The Court cited that the founders believed women were not supposed to have a “legal existence” outside of their husbands. *Id.*

⁴³ See Friedman, *supra* note 30, at 1501 (distinguishing northern and southern states divorce laws). By 1900, judicial divorce was permitted in all states except South Carolina. *Id.*; see Martin Schulz, *Divorce Patterns in Nineteenth-Century New England*, 15 J. FAM. HIST. 101, 104 (1990) (stating that in New England legislatures and courts, absolute divorce was available, permitting remarriage). In the Nineteenth Century, in Massachusetts there were no legislative divorces as divorce proceedings were left to the courts. Schulz, *supra*, at 105. In Connecticut and Maine there were some legislative divorces, but the courts held jurisdiction during this period. *Id.*; LOREN SCHWENINGER, *The Evolution of Divorce Laws* (stating that Tennessee was the first southern state to enact a divorce law), in *FAMILIES IN CRISIS IN THE OLD SOUTH: DIVORCE, SLAVERY, AND THE LAW* 1, 6 (2012). The law permitted a husband or wife, “by her next friend,” could file a complaint in a chancery court alleging fault by the other party. SCHWENINGER, *supra*, at 6. Yet, spouses continued to petition the legislature to divorce. *Id.*; see also S.C. CONST. of 1895, art. XVII § 3 (1895) (stating that divorces are not permissible in South Carolina); Kellen Funk, “*Let No Man Put Asunder*”: *South Carolina's Law of Divorce, 1895–1950*, 10 S.C. HIST. MAG. 134, 134 (2009) (noting that South Carolina banned divorce until 1950). There were a handful of cases tried in the antebellum era, yet, despite rare petitions for divorce, the courts followed the policy of no divorces. Funk, *supra*, at 136–37. Citizens could circumvent bans on divorce by obtaining divorces in other states, known as migratory divorce. *Id.* at 139–40. Migratory divorce was permitted pursuant to the Full Faith and Credit Clause of the U.S. Constitution. *Id.*; see U.S. CONST. art. IV, § 1 (“Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.”). Eventually lawmakers called for a national system to eliminate this issue but there was little progress. Funk, *supra*, at 140. By 1900, there was strong backlash to divorce; conservatives argued divorce should be restricted because it destroyed families, and thus the foundation of society. *Id.* at 141. Additionally, conservatives argued divorce was un-American and cited biblical bans on divorce. *Id.*

⁴⁴ See Eskridge, *supra* note 32, at 1336 (stating that in the early nineteenth century and the colonial era, American law was categorized around the male and female binary).

tied to procreation.⁴⁵ Women were meant for the domestic sphere and men were considered the head of the household and held public, economic, and civic roles.⁴⁶ Marriage laws reflected these ideals and authorized husbands to control their wives and children.⁴⁷

1. Before No-Fault

In the onset of the twentieth century, each state had its own form of divorce procedure and “grounds” for divorce, such as desertion, forms of cruelty, and adultery.⁴⁸ A few states had more stringent grounds for divorce: New York, for example, largely granted divorce only for adultery.⁴⁹ Despite restrictions, demand for divorce increased and, as a result, migratory divorce and collusion were used by those wanting to leave their marriages.⁵⁰

Migratory divorce—obtaining divorce in another state—was used to escape states with heavy restrictions.⁵¹ In 1942, in *Williams v. North Carolina*,

⁴⁵ See *id.* at 1336–37 (providing that the natural model separates sex, gender, and sexuality). Eskridge noted that this was especially prevalent in American laws before 1861. *Id.* at 1337. Marriage was a central state institution. *Id.* Once entered, the marital regulatory institution restricted men and women through criminal codes regulating sexual acts and by enacting harsh penalties for children born out of wedlock. *Id.* at 1337–38. For women, there were extra incentives to enter marriages since they were not able to enter most occupations and, under coverture, women did not have any legal existence. *Id.*

⁴⁶ See *id.* at 1336 (noting how gender roles were connected to procreation in marriage).

⁴⁷ See Appleton, *supra* note 31, at 427 (describing how marriage institutionalized natural inequality of a superior husband and a subordinate wife). Supporters of slavery used marriage as a template. *Id.* They argued that God established that some people were better than others—husbands dominated wives, therefore white people were superior to Black people. *Id.* Moreover, when suffragists pushed for the right to vote for women, they understood that it threatened the traditional notion that men made decisions for their households, including women. *Id.* at 428.

⁴⁸ See Friedman, *supra* note 30, at 1501 (demonstrating that divorce actions were adversarial lawsuits where the plaintiff asserted in court that the opposing party violated the marriage contract). Other grounds for divorce included by some states were frequent drunkenness, impotence, and narcotic addiction. *Id.*

⁴⁹ See *id.* at 1502 (noting that Maryland, North Carolina, and South Carolina also had restrictive divorce laws).

⁵⁰ See *id.* (describing how demands for divorce more than doubled in the latter part of the nineteenth century despite the continuation of restrictions). In 1870, the divorce rate was 1.5 per 1000 marriages and in 1900 it was 4 per 1000 marriages. *Id.* Although that number is small compared to modern rates, it indicated that increasing amounts of people wanted divorces. *Id.*

⁵¹ See *id.* at 1504 (exemplifying that Nevada was a target “divorce mill” because of its laws). In 1927, the residence period to obtain a divorce in Nevada was only three months. *Id.* In 1931, it reduced this period to only six weeks. *Id.* at 1504–05. As a result, in Nevada there were 38.07 divorces per 1000 residents; in contrast, Oklahoma was the next highest state, and it had 3.19 divorces per 1000 residents. *Id.* at 1505; see also Laura Oren, *No-Fault Divorce Reform in the 1950s: The Lost History of the “Greatest Project” of the National Association of Women Lawyers*, 36 LAW & HIST. REV. 847, 858–59 (2018) (stating that President Theodore Roosevelt organized a commission to address the problem of migratory divorce). The delegates represented numerous states and religious interests. Oren, *supra*, at 858. Feminists were concerned, but the delegates made little progress and were only able to agree to a modest model statute to limit migratory divorce, which was eventually withdrawn.

the Supreme Court held that if Nevada had jurisdiction, then the divorce was entitled to “full faith and credit” in other states.⁵² At retrial in 1945, the Court found that there was no domicile because the couple did not intend to reside in Nevada, thus potentially voiding migratory divorces in these cases.⁵³ In practice, however, many Nevada divorces were unquestioned.⁵⁴

In the context of divorce law, collusion is falsely asserting grounds for divorce.⁵⁵ For example, in New York, couples falsely staged adultery.⁵⁶ As a result of the fault regime, collusion was widespread, as demonstrated by high amounts of uncontested divorces—only 13.3% of divorces were contested in 1932.⁵⁷ The collusive nature of divorces negatively impacted women during

Id. The Supreme Court intervened to limit migratory divorce in 1906 in *Haddock v. Haddock*, holding that recognition of divorce in another state hinged on which spouse was at fault. 201 U.S. 562, 606 (1906), *overruled by*, *Williams v. North Carolina*, 317 U.S. 287, 287 (1942).

⁵² See *Williams*, 317 U.S. at 289–90 (recognizing the marriage of petitioners domiciled in North Carolina who divorced their spouses in Nevada, married each other, then returned to reside in North Carolina). The court overturned *Haddock* that held that a New York court did not need to give “full faith and credit” to a divorce obtained in Connecticut. *Id.* at 292–94; *Haddock*, 201 U.S. at 606. The Court instead reasoned that it had rarely found that judgments rendered in one state *could not* transfer to another, stating that this is the purpose of the “full faith and credit” clause. *Id.* at 295; Friedman, *supra* note 30, at 1506 (stating that the Supreme Court held that divorces obtained were valid across states pursuant to the “full faith and credit” clause).

⁵³ See *Williams v. North Carolina*, 325 U.S. 226, 229, 239 (1945) (holding that a judgment in one state is only valid in another if the court had the power to render the original judgment). The Court stated that North Carolina rightfully found that the petitioners went to Nevada for the sole purpose of obtaining a divorce then returned to reside in North Carolina. *Id.* at 237.

⁵⁴ See Friedman, *supra* note 30, at 1506 (noting that thousands of divorces were unquestioned and that judges, lawyers, and parties all knew there was collusion).

⁵⁵ *Id.* at 1512.

⁵⁶ See *id.* at 1512, 1517, 1519 (describing different forms of collusion in different states). In New York, couples would engage in “soft-core adultery.” *Id.* at 1512. A husband would hire a woman and a photographer, go to a hotel, and stage an adulterous affair. *Id.* In 1948, the state cracked down on these fraudulent divorces by making public arrests, but generally judges did not feel it was worthwhile to question them. *Id.* at 1513–14. In Maryland, abandonment was one of the most common grounds for divorce. *Id.* at 1517. The defendant would not appear in court or make any arguments and the plaintiff would generally testify: “he just packed up his clothes and walked out.” *Id.* at 1518. In California, plaintiffs argued extreme cruelty, meaning the marriage was incompatible or had “gone sour.” *Id.* at 1519.

⁵⁷ See *id.* at 1507 (noting that every study on divorce during the fault-regime found that collusion was typical); NELSON MANFRED BLAKE, *THE ROAD TO RENO: A HISTORY OF DIVORCE IN THE UNITED STATES* 236 (1962) (providing that judges did not want to hear divorce cases and usually had crowded dockets of uncontested divorces and in cases of true conflict, the courts did not give them significant attention). The judge hearing divorce cases was usually from a court that had general jurisdiction. BLAKE, *supra*. They often did not enjoy hearing divorce cases and there were many of them, so they reviewed them quickly. *Id.* Trials were held merely to make sure statutory requirements were met. *Id.* Moreover, judges did not carefully consider issues of children and child support; they usually just ratified the separation agreement. *Id.* This gave power to the spouse who had the most sway in constructing the agreement. *Id.* at 237.

this time period as it overshadowed real issues in marriages, including domestic violence.⁵⁸

Moreover, the fault system perpetuated stereotypes of men and women, where men were depicted as uncaring villains and women were delicate, blameless victims.⁵⁹ Fault based divorces also demonstrated the different social standards for men and women: men were held to a lower moral standard because they were assumed to be sexual, meanwhile women were not supposed to have any such desires.⁶⁰ This period of legal history falls into the natural law model that maintains male and female stereotypes, taking a different form as American leaders justified it with scientific explanations for gender norms.⁶¹ Eventually, however, there were calls across different interest groups for divorce reform.⁶²

⁵⁸ See Friedman, *supra* note 30, at 1530 (describing how the law paid little attention to actual domestic violence). Domestic violence was usually considered under the fault category of extreme cruelty. *Id.* Despite the fabrication of fault in the overwhelming number of cases, if there was actual fault, specifically domestic violence, it was not discussed in court and the law paid little attention to it as it was considered part of private life. *Id.* The wife was described as a “woman of culture and refinement.” See Garvey v. Garvey, 203 S.W.2d 912, 914 (Tenn. App. Ct. 1946) (demonstrating the stereotypes of men and women in divorce). She was described as without fault, that she loved her husband, and was doing everything she could to be a good wife. *Id.* Meanwhile, the husband was described as getting angry without reason and would frighten and abuse her. *Id.*; Friedman, *supra* note 30, at 1528 (noting how the logic of the collusive fault-based system led to stereotyping men and women).

⁵⁹ See Friedman, *supra* note 30, at 1528 (describing that because of stereotypes, women usually filed for divorce even if they were at fault).

⁶⁰ See *id.* (stating how the fault-based divorce system benefitted men). Even though many of the collusive divorce stories in courts were lies and this was well-known, the depictions of men in divorce proceedings was favorable. *Id.* Society held men to lower moral standards than women. *Id.* Men were able to crave sexual activity but women were perceived as uninterested in having sex. *Id.* Men were also considered physical and aggressive by nature. *Id.* It was considered “manly” and inevitable that they would react physically against women if provoked. *Id.*

⁶¹ See Eskridge, *supra* note 32, at 1339–40 (noting that the end of coverture challenged the natural model but there were still hurdles). The natural law model was given more legitimacy with the use of non-stereotypical gender and sexual norms in medical terms. *Id.* Those who did not adopt stereotypical gender norms and sexual preferences were described by medical professionals as “degenerate and inverted,” and presented as a danger to the public. *Id.* As a result, the law included criminal prohibitions on cross dressing and oral sex, among other things. *Id.* These populations were also excluded from civic life, they could not immigrate to the U.S., join the armed forces, enter professions, and be served liquor. *Id.* at 1340; Appleton, *supra* note 31, at 428 (stating that even after women won the right to vote, women in marriage were still relegated to the domestic sphere and men were breadwinners). Divorce proceedings were based on stereotypes of women as wives and mothers and did not recognize the significance of women’s contributions to marriage. Appleton, *supra* note 31, at 429. This is exemplified by simple rules for property ownership that placed no value on unpaid care, default child custody to mothers, and insufficient child support payments. *Id.*

⁶² See NANCY LEVIT & ROBERT R.M. VERCHICK, *Marriage and Family* (stating that there were numerous reasons for the change to no-fault divorce that made for strange bedfellows), in FEMINIST LEGAL THEORY: A PRIMER 171, 184 (2016). The groups that promoted a change to no-fault were those who thought fault-based divorce gave wives a financial advantage, feminists who thought no-fault would help women leave relationships that did not bring them emotional satisfaction, and those who had an interest in protecting privacy in the family. *Id.*; Friedman, *supra* note 30, at 1530 (stating

2. The Emergence of No-Fault Divorce

From the 1930s to the 1950s, the significant amount of collusive and migratory divorces demonstrated that divorce law in the books was out of sync with its application.⁶³ In 1948, to address this incompatibility, President Truman organized a National Conference on Family Life.⁶⁴ A separate commission was formed to report to the National Conference of Commissions on Uniform State Laws (NCCUSL) to update divorce and marriage laws, but it ultimately did not develop model legislation until 1970.⁶⁵ The National Association of Women Lawyers (NAWL) made an early attempt to move no-fault divorce forward, but their attempts were bypassed by NCCUSL.⁶⁶

After multiple unsuccessful efforts, California led the charge to revise its divorce laws.⁶⁷ Despite beginning in 1963, the cause did not take off until 1966 when Governor Brown formed the Commission of the Family to draft a proposal.⁶⁸ Significantly, the governor was interested in no-fault divorce because he wanted to reduce divorce rates.⁶⁹

that the case for reform rested on the image of companionate marriage, that marriage is a partnership as opposed to a sacramental union).

⁶³ Oren, *supra* note 51, at 862–63.

⁶⁴ See *id.* at 865–66 (stating that the National Association of Women Lawyers (NAWL) had a project to remove fault as the basis of divorce, and although it acted first, President Truman also acted to reform divorce law). He called together 125 experts and agencies with the goal of discovering a way to strengthen the family. *Id.*

⁶⁵ See *id.* at 869–70 (stating that the Special Committee did not produce a concrete outcome from its investigations). One committee member said that President Truman did not act because he was afraid of criticism and thus the committee was doomed from the start. *Id.* Another autonomous commission, was set up in 1950 to report to the National Conference of Commissions on Uniform State Laws (NCCUSL) but also proved to be ineffective. *Id.*; *Report of The Special Committee on Divorce and Marriage Laws and Family Courts*, 76 ANN. REP. A.B.A. 356, 357 (1951) (declaring that the Commission is enlisting leading experts to conduct scientific research to produce statutory objectives and that the committee should continue with its work).

⁶⁶ See Oren, *supra* note 51, at 847 (stating that there is a lost history of the NAWL's efforts to implement no-fault divorce across the United States). The NAWL is a group of female professionals that has worked since 1911 to pursue women's rights. *Id.*; *History*, NAT'L ASS'N OF WOMEN LAWS., <https://www.nawl.org/history> [perma.cc/U4UX-KJ47] (mentioning that in 1952, the NAWL provided a Uniform Divorce Bill and describing the project as the NAWL's most significant undertaking to date).

⁶⁷ See Oren, *supra* note 51, at 879 (providing that California enacted no-fault divorce in 1969 and the NCCUSL put forward the Uniform Marriage Divorce Act (UMDA) in 1970).

⁶⁸ See Howard A. Krom, *California's Divorce Law Reform: An Historical Analysis*, 1 PAC. L.J. 156, 163, 170, 173, 177 (1970) (describing how no-fault divorce evolved in California). In 1963, the California Assembly directed an interim committee to study and update the civil code for divorce procedures. *Id.* at 157–58. Although the committee did not make legislative proposals due in part to time constraints, its recommendations laid a foundation for California's revised law. *Id.* at 163, 170. In response to the interim committee's report, Governor Brown created the Commission of the Family. *Id.* at 163. The Commission proposed to create state-wide family courts and mandatory procedures for dissolution of marriage, such as counseling. *Id.* at 164–66. It proposed to update the standard for dissolution of marriage to "no reasonable likelihood that the marriage could be saved" and eliminating fault as a requirement for alimony and child support. *Id.* at 167–68.

⁶⁹ *Id.* at 163–64.

California became the first state to pass no-fault divorce laws when it enacted the Family Law Act of 1969 (the Act).⁷⁰ The Act removed the seven grounds for fault, instead permitting dissolution of marriage when there is adequate showing that reconciliation is not feasible.⁷¹ It stated that property will be equally divided unless there is intentional misappropriation by a party.⁷² Alimony will be awarded based on support needs, capacity to pay, the term of the marriage, and the spouse seeking support's ability to participate in employment.⁷³ In addition, the term "divorce" was removed and replaced by "dissolution of marriage."⁷⁴ Meanwhile, the NCCUSL created the Uniform Marriage Divorce Act (UMDA), passed in 1970, which included no-fault divorce.⁷⁵ The NCCUSL and ABA's support of no-fault divorce encouraged other states to adopt similar laws.⁷⁶

B. The No-Fault Divorce Revolution and the Constitutionalization of Marriage and Family Law

After California adopted no-fault divorce, other states quickly followed, starting the no-fault divorce revolution.⁷⁷ In the 1960s and 1970s, along with

⁷⁰ Oren, *supra* note 51, at 879; see Morrison, *supra* note 25 (noting that Reagan stated that no-fault divorce was "a step towards removing the acrimony and bitterness between a couple that is harmful not only to their children but also to society as a whole") President Reagan was divorced; his ex-wife Jane Wyman filed for divorce on grounds of "extreme mental cruelty." Morrison, *supra* note 25; Herchenroeder, *supra* note 14 (noting that Reagan would later say that signing no-fault divorce into law was one of his greatest regrets).

⁷¹ See Krom, *supra* note 68, at 167–68 (stating that California eliminated fault from divorce and acknowledged the legislation emerged from the 1952 landmark case *Deburgh v. Deburgh* and research initiated by the Archbishop of Canterbury); *Deburgh v. Deburgh*, 250 P.2d 598, 601 (Cal. 1952) (holding that the recrimination statute, or when both spouses are at fault, permits divorce where a trial court finds that legitimate aspects of matrimony were ruined); see also CAL. CIV. CODE § 92 (1872) (proclaiming the permissible causes for divorce are "1. Adultery; 2. Extreme cruelty; 3. Willful desertion; 4. Willful neglect; 5. Habitual intemperance; 6. Conviction of felony").

⁷² See Krom, *supra* note 68, at 157 (stating that property should be equally divided unless one party tries to exclude the other's interests).

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ See Oren, *supra* note 51, at 879 (noting that the NCCUSL amended the UMDA in 1971 and 1973); UNIF. MARRIAGE & DIVORCE ACT § 302 (NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 1973) (describing that a court can find a marriage to be "irretrievably broken" without a party proving fault).

⁷⁶ See Carl E. Schneider, *Legislatures and Legal Change: The Reform of Divorce Law*, 86 MICH. L. REV. 1121, 1124 (1988) (stating that the endorsement of no-fault divorce by the ABA and NCCUSL encouraged states to adopt it). In 1974, there were forty-five states that had laws that could be described as no-fault divorce. *Id.* In 1985, all states had no-fault divorce but many states also maintained fault grounds. *Id.* The characterization of no-fault statutes varies, pure no-fault statutes allow divorce if the marriage has broken down irretrievably but some studies classify statutes that permit divorce after separation for a specified period to be no-fault as well. *Id.*

⁷⁷ See LEVIT & VERCHICK, *supra* note 62, at 184 (stating that California was the first state to adopt no-fault divorce but soon afterwards every other state adopted no-fault reforms); see also

this revolution, the Supreme Court began to provide strong constitutional protections for the family.⁷⁸

1. The No-Fault Revolution and Accompanying Social Movements

In 1974, forty-five states had laws that incorporated no-fault divorce.⁷⁹ This occurred as both views of the family changed and anti-discrimination was extended to gender.⁸⁰ This period is what Eskridge describes as the liberal norm, where the state tolerates and affirmatively protects a broad array of sexual and gender variance.⁸¹ During this time, women entered the workforce at

Wehle, *supra* note 20 (stating that New York was the last state to abandon required evidence of fault). New York was delayed in part because of the Roman Catholic Church and a few women's rights groups that were afraid no-fault divorce would disadvantage women's ability to obtain suitable child support or alimony. Wehle, *supra* note 20; Martha Albertson Fineman, *Religious Resistance to Family Law Reform in the US*, 8 J. KOREAN L. 47, 62 (2008) (describing that the no-fault divorce revolution allowed for the dissolution of a marriage based on "irreconcilable differences" and that this was a subjective determination that only needed to be argued by one spouse).

⁷⁸ See Fineman, *supra* note 77, at 62 (noting that the no-fault divorce revolution led to changes in laws governing economic outcomes of divorce). The idea that assets accumulated during the marriage were considered separately ended and all property was considered marital property. *Id.*; David D. Meyer, *The Constitutionalization of Family Law*, 42 FAM. L.Q. 529, 531 (2008) (stating that the Court's application of the Due Process and Equal Protection Clauses allowed for increasing "constitutionalization" of family law).

⁷⁹ Schneider, *supra* note 76, at 1124.

⁸⁰ See *Frontiero v. Richardson*, 411 U.S. 677, 690–91 (1973) (holding that differential treatment of men and women for military benefits is unconstitutional). This case considered the right of a female member of the United States Air Force to claim her husband as a dependent for benefits. *Id.* at 680. Under the statute, a servicewoman could not claim her husband as a dependent unless he was dependent for more than one-half of his support. *Id.* She could not prove this. *Id.* Benefits were automatically granted for wives of male members of the armed forces. *Id.* The Court considered whether the differing treatment of men and women under this law violated the Due Process Clause of the Fifth Amendment. *Id.* at 679. The Court found that sex, like national origin or race, is a characteristic that is determined solely by birth. *Id.* at 686. Sex also has no connection to the ability to contribute to society. *Id.* Thus, the Court held classification on the basis of sex should be subject to intermediate scrutiny. *Id.* at 688. The Court found that the government's reasoning that the law provided administrative convenience because husbands are rarely dependent on wives was not sufficient to overcome intermediate scrutiny. *Id.* at 689; see *Reed v. Reed*, 404 U.S. 71, 71–72, 76 (1971) (finding that a law that prefers men as administrators of the estate is inconsistent with the Equal Protection Clause of the Fourteenth Amendment); Fineman, *supra* note 77, at 57–58, 60–61 (describing that there were three interconnected revolutions that coincided with the constitutional protections of anti-discrimination: the gender equality revolution, the sexual revolution, and the no-fault divorce revolutions). The gender equality revolution led to women's entry in the workforce. Fineman, *supra* note 77, at 58. Husbands and wives were no longer confined to traditional household roles because women were no longer limited to domestic work. *Id.* The sexual revolution reconceptualized sex and reproduction as decisions that could be made outside of a marriage, this led to an increase of non-marital mothers and acceptance of same-sex relationships. *Id.* at 60–61. Moreover, it led to less state intervention in sexual relationships. *Id.* at 61. Finally, the no-fault divorce revolution facilitated changes in rules determining the economic consequences of divorce. *Id.* at 62. For instance, there was no longer the idea of separate marital property and alimony was increasingly disfavored. *Id.*

⁸¹ See Eskridge, *supra* note 32, at 1349 (explaining that sexual and gender variation are considered benign). Feminists and the LGBTQ+ movements sought to repeal discriminatory state practices

unprecedented rates and continued to work after having children.⁸² Women were also able to find better paying jobs, which increased marital tensions while providing women with greater means to leave marriages.⁸³ Americans also became more accepting of divorce as many began to view divorce laws as too strict and binding marriage as increasingly unfavorable.⁸⁴

2. The Constitutionalization of Family Law

As societal views on marriage began to change, the Supreme Court increasingly recognized constitutional protections for the right to marry and family law in general.⁸⁵ In 1923, in *Meyer v. Nebraska*, the Court first applied the Fourteenth Amendment to protect family liberty as part of substantive due process protections of the *Lochner* era.⁸⁶ Yet, even when the Court moved away

that targeted women or sexual minorities. *Id.* They drew inspiration from the Civil Rights Movement and argued for affirmative state action preventing discrimination by employers, public accommodations, and schools. *Id.* Eskridge notes feminists were particularly successful in securing anti-discrimination laws. *Id.*

⁸² See Schneider, *supra* note 76, at 1122 (stating that during the 1970s women entered the workforce at higher rates, even when their children were young); Fineman, *supra* note 77, at 57 (noting that women in the 1960s and 1970s were increasingly part of the public sphere by entering the workforce); see also Mitra Toossi & Teresa L. Morisi, *Women in the Workforce Before, During, and After the Great Depression*, U.S. BUREAU OF LAB. STAT. (July 2017), <https://www.bls.gov/spotlight/2017/women-in-the-workforce-before-during-and-after-the-great-recession/home.htm> [perma.cc/B97F-MFN9] (reporting that women made up one third of the work force in 1950 and over 46% of the work force in 2000). Moreover, from 1964 to 1974, the female work force grew 43% compared to only approximately 17% for the male work force. Toossi & Morisi, *supra*.

⁸³ See Schneider, *supra* note 76, at 1121–22 (citing political scientist Professor Jacob in his book *Silent Revolution* who determined that economic changes that allowed women to increasingly enter the work force and find higher paying jobs also allowed them to more easily leave marriages); see also HERBERT JACOB, *SILENT REVOLUTION: THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES* 93 (1988) (stating that women were more easily able to leave marriages because they had more income and no-fault divorce was appealing because it was a faster way to dissolve a marriage with less conflict than fault-based divorces).

⁸⁴ See Schneider, *supra* note 76, at 1122 (noting that social attitudes changed to view divorce more favorably). In 1966, thirteen percent of the American population thought divorce laws were excessively strict. *Id.* By 1974, one third of the population believed divorce laws were too strict. *Id.*; Fineman, *supra* note 77, at 57–58 (stating that in the 1960s and 1970s, having a marriage that was not dissolvable was being viewed less favorably).

⁸⁵ See Meyer, *supra* note 78, at 533 (noting that, in the 1960s, the Warren Court recognized a constitutional right to privacy in marriage, which paved the way for autonomy rights connected to family law; moreover, broadening conceptions of equality led the Court to eliminate laws that discriminated on the basis of sex, race, and birth out of wedlock).

⁸⁶ See U.S. CONST. amend. XIV, § 1 (providing that the government cannot deprive anyone of liberty); Meyer v. Nebraska, 262 U.S. 390, 399–400 (1923) (determining that parents have the right to make educational decisions for their children); Pierce v. Soc’y of the Sisters of the Holy Names of Jesus & Mary, 268 U.S. 510, 531–32, 534 (1925) (holding that an act requiring children to attend public school, instead of private options, interferes with parents’ and guardians’ liberty interests in the upbringing of their children); Meyer, *supra* note 78, at 532 (stating that the Court protected parental liberty in Meyer and Pierce, which denoted the family as a realm requiring special protections); Lochner v. New York, 198 U.S. 45, 61 (1905) (holding that the state interest in preserving health and safety

from its protection of economic liberty at the end of the *Lochner* era, it reaffirmed family rights cases, stating that they have special protections under the Constitution.⁸⁷ Despite these early cases, family law was largely not “constitutionalized” until the 1960s and 1970s, where the Court based its rulings on the rights to equality and autonomy.⁸⁸

In 1967, in *Loving v. Virginia*, the Court applied the Equal Protection Clause of the Fourteenth Amendment to the family for the first time.⁸⁹ The Court suggested that the burden on the state in justifying racial classification was greater in the context of the family because it also violated substantive due process.⁹⁰ After *Loving*, the Court applied constitutional protections to protect illegitimate children from state laws discriminating against them.⁹¹ Moreover,

of the community is outweighed by concerns of limiting the rights of the individual, specifically prohibiting employers and employees from freely contracting).

⁸⁷ See *Pierce*, 268 U.S. at 531–32 (stating the Court provided constitutional protections for families under the reasoning that the family is part of the private sphere in which the state should not infringe).

⁸⁸ See *id.* at 532–33 (noting that family law between the 1920s and the 1960s was mostly considered under the Tenth Amendment). The Tenth Amendment safeguards the expansive power that states have over family law and prevents federal oversight. *Id.* State laws largely respected family privacy but had the power to define and enforce family law principles. *Id.* The Court’s recognition of the right to privacy in *Griswold v. Connecticut* led to rulings on the right to marry, have children, end pregnancies, raise children, have sexual relations, and live with extended family. *Id.* at 533. Simultaneously, the Court struck down laws relating to the family that discriminated based on illegitimacy, race, and sex. *Id.*

⁸⁹ See U.S. CONST. amend. XIV, § 1 (stating that the state cannot deny individuals equal protection under the law); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (holding that there is a fundamental right to marry protected under the Due Process Clause of the Fourteenth Amendment and that denying the Lovings the right to marry violated the Equal Protection Clause of the Fourteenth Amendment). Mildred Jeter, a Black woman, and Richard Loving, a white man, were married in the District of Columbia in June 1958. *Loving*, 388 U.S. at 2. After they married, the Lovings returned to Virginia where they were charged with violating the ban on interracial marriage in Virginia. *Id.* at 3. They were sentenced to one year in jail; however, the trial court suspended their sentence on the condition that they leave Virginia for twenty-five years. *Id.* The Lovings moved to D.C. but filed a lawsuit alleging that Virginia’s statute banning interracial marriage violated their Fourteenth Amendment rights. *Id.* The Lovings appealed the case to the U.S. Supreme Court. *Id.* at 3–4. The Court held that there is a fundamental right to marry that cannot be restricted by racial discrimination by the state. *Id.* at 12.; Meyer, *supra* note 78, at 534 (stating that *Loving* indicated that the Court would not permit racial discrimination in family law).

⁹⁰ See Meyer, *supra* note 78, at 535 (noting that *Loving* held that the state must meet a higher burden to justify classification on the basis of race in family law because it implicates the Equal Protection and Due Process Clauses).

⁹¹ See *Levy v. Louisiana*, 391 U.S. 68, 69, 71–72 (1968) (holding that a statute preventing illegitimate children from obtaining compensation for their mother’s wrongful death violated the Equal Protection Clause of the Fourteenth Amendment); Meyer, *supra* note 78, at 536 (explaining that decisions following *Levy* considered illegitimacy a suspect classification and children had a right to be treated as individuals regardless of their parentage). The rights of illegitimate children were further solidified by the Uniform Parentage Act (UPA), promulgated in 1973, that led to the elimination of state laws discriminating against illegitimate children. *Id.*; UNIF. PARENTAGE ACT § 2 (NAT’L CONF. OF COMM’RS ON UNIF. STATE L. 1973) (stating that the parent-child relationship is extended equally to all children and parents without regard to parents’ marital status).

the Court developed and applied intermediate scrutiny to classifications on the basis of gender that had broad impacts on family law.⁹² The expansion of the Equal Protection Clause to discrimination on the basis of sex led to the end of many family laws based on gender stereotypes, including expanding the availability of alimony to husbands and court preferences for joint custody.⁹³

The Court also began to expand autonomy through its application of the Due Process Clause.⁹⁴ In 1965, in *Griswold v. Connecticut*, the Court held that the state could not intervene in a married couple's choice to use contraceptives because it violated their rights to privacy.⁹⁵ In 1972, in *Eisenstadt v. Baird*, the Court held that the state could not intervene in unmarried individuals' decisions about contraceptives.⁹⁶ The Court emphasized that individuals, not the family unit, have a right to privacy.⁹⁷ Despite this expansion, in 1997, in *Washington v. Glucksberg*, the Court limited the right to privacy.⁹⁸ The Court held that in order to implicate a fundamental right, there must be a liberty interest

⁹² See Meyer, *supra* note 78, at 537 (noting that family laws had been based on women's subordination to men). In *Frontiero v. Richardson*, the Court analogized women's confinement to the domestic sphere to race discrimination and held that a standard of intermediate scrutiny should be applied. 411 U.S. 677, 682 (1973). The impacts of this ruling on family law were the removal of gender roles from family laws, specifically, authorizing alimony for either spouse, the end of maternal preference in custody disputes, and extending the ability to dispose community property to wives. Meyer, *supra* note 78, at 538.

⁹³ See, e.g., *Orr v. Orr*, 440 U.S. 268, 278, 283 (1979) (holding that alimony must be extended to husbands); *Commonwealth ex rel. Spriggs v. Carson*, 368 A.2d 635, 637 (Pa. 1977) (stating that courts should determine custody based on the "best interests and welfare of the child" standard and not presumptions). The Court determined that the superior court relied on "the tender years" doctrine that is based on stereotypical roles of men and women, notably the assumption that mothers must be primary caregivers. *Spriggs*, 368 A.2d at 639–40. Further, the Court found this principle offensive to sex equality. *Id.*

⁹⁴ See Meyer, *supra* note 78, at 540 (stating that in *Griswold v. Connecticut* the Court held that there is a fundamental right to marital privacy but did not cite to a specific constitutional provision); *Griswold v. Connecticut*, 381 U.S. 479, 484–85 (1965) (describing that the Bill of Rights contains penumbras that create rights to privacy and that this case is within a "zone of privacy" that involves multiple constitutional amendments).

⁹⁵ See 381 U.S. at 485–86 (holding that there is a right to privacy for married couples because of marriage's historical importance and significance to society). This case concerns a married couple who went to Planned Parenthood and received information about ways to prevent pregnancy. *Id.* at 480; Meyer, *supra* note 78, at 540 (stating that the Court in *Griswold* held that married couples have a right to use contraceptives but it was not protected under substantive due process).

⁹⁶ See 405 U.S. 438, 453 (1972) (stating it is impermissible to ban contraceptives for married and unmarried persons).

⁹⁷ See *id.* (noting that the right to privacy means that the government cannot intrude on the fundamental right of a person's decision to have a child, regardless of that person's marital status). The Court stated that the challenged law violated the Equal Protection Clause of the Fourteenth Amendment for single persons because it discriminated on the basis of relationship status. See *id.* at 443 (describing that the goal of deterring sex before marriage is not a reasonable legislative aim).

⁹⁸ See 521 U.S. 702, 733, 735 (1997) (holding there is no fundamental right to die by physician-assisted suicide). The Court elaborated that not all personal decisions are protected under the constitutional right to privacy. *Id.* at 727.

grounded in tradition and it must be defined narrowly, limiting what the Court considers fundamental rights.⁹⁹ Nevertheless, this did not halt the “constitutionalization” of family law.¹⁰⁰ In 2003, in *Lawrence v. Texas*, the Court held that a Texas law criminalizing sexual relations between same-sex couples was unconstitutional.¹⁰¹ This paved the way for even greater expansions of fundamental rights tied to family law.¹⁰²

3. The Constitutionalization of Marriage: The Expansion of the Right to Marry in *Obergefell v. Hodges*

In 2015, in *Obergefell*, the Court held that there is a fundamental right to marry for same-sex couples rooted in the Due Process and Equal Protection Clauses of the Fourteenth Amendment.¹⁰³ The Court justified its ruling by asserting four elements that explain why the right to marry should be expanded to same-sex couples: individual autonomy, intimate association, the promotion

⁹⁹ See *id.* at 720–21 (stating the two-prong test for analysis). The Court also stated it was hesitant to expand substantive due process because it limits the ability of the legislature and public to weigh in on the right. *Id.* at 720; Meyer, *supra* note 78, at 546.

¹⁰⁰ See Meyer, *supra* note 78, at 551 (stating that the Court began to recognize constitutional privacy protections for diverse families).

¹⁰¹ See 539 U.S. 558, 563, 578 (2003) (stating that the case involves two adults engaged in consensual sexual relations and the state cannot make their conduct criminal).

¹⁰² See *Obergefell v. Hodges*, 576 U.S. 644, 675 (2015) (holding that the right to marry extends to gay marriage); Meyer, *supra* note 78, at 551 (asserting that *Lawrence* precipitated constitutional protections for the family that are more inclusive and less connected to traditional family ideals).

¹⁰³ See 576 U.S. at 644, 675 (stating that the right to marry is a fundamental right rooted in liberty); U.S. CONST. amend. XIV, § 1 (providing that the state cannot infringe on ones right to liberty without due process or deny equal protection under the law). The petitioners were fourteen same-sex couples whose claims came from states that characterized marriage as between man and woman. *Obergefell*, 576 U.S. at 654, 656. They asserted that their right to marry was violated because their marriages, which were lawfully performed in another state, were not given recognition in the states they resided. *Id.* One couple was James Obergefell and John Arthur who had been together for two decades. *Id.* at 658. In 2011, Arthur was diagnosed with ALS and they got married two years later. *Id.* They went to Maryland where same-sex marriage was legal and got married in medical transport. *Id.* Three months after Arthur died, Obergefell returned to Ohio, and because Ohio did not recognize same-sex marriage, he was not listed as the surviving spouse on the death certificate. *Id.*

April Deboer and Jayne Rowse were another couple, a lesbian couple who resided in Michigan at the time of this case and had a commitment ceremony in 2007. *Id.* They welcomed three children and, as Michigan did not permit same-sex couples to adopt, each child could only have one of the women as their legal parent. *Id.* at 659. The consequences of this were that if either parent died, the other would have no legal rights to the children. *Id.* Other petitioners included Army Reserve Sergeant First Class Ijpe Dekoe and Thomas Kostura, a couple who lived in Tennessee at the time of this case. *Id.* Dekoe was deployed to Afghanistan, but before he left, the couple married in New York. *Id.* When he came back, they moved to Tennessee, where their marriage was not recognized. *Id.*

The district courts where the petitioners brought their cases ruled in their favor. *Id.* at 656. The respondents appealed to the United States Court of Appeals for the Sixth Circuit, which reversed the district court rulings. *Id.* The Supreme Court reversed in a majority opinion written by Justice Kennedy, stating that their stories demonstrated how they honor the institution of marriage and should enjoy this fundamental freedom. *Id.* at 656, 681.

of familial relations, and social structure.¹⁰⁴ The Court determined that despite the narrow construction of rights in *Glucksberg*, the right to marry has always been construed broadly under the Due Process Clause.¹⁰⁵ It also described the harmony between the Equal Protection and Due Process Clauses.¹⁰⁶ The majority referenced the 1978 decision in *Zablocki v. Redhail*, where the Court determined that strict scrutiny was necessary under the Equal Protection Clause for a law stating that fathers could not remarry if they did not pay child support because marriage is a fundamental right.¹⁰⁷ In applying strict scrutiny, the court must determine whether the law is narrowly tailored to a compelling government interest.¹⁰⁸ In *Obergefell*, the Court found that the challenged laws prohibiting gay marriage failed strict scrutiny.¹⁰⁹ Finally, the Court relied on the United States' history of change in marriage laws and that individual fundamental rights—including the right to marry—are so significant that they cannot be impeded by the democratic process.¹¹⁰ In this decision, the Court

¹⁰⁴ *Obergefell*, 576 U.S. at 665, 666, 667, 669 (explaining the four principles that demonstrate why marriage is fundamental under the Constitution).

¹⁰⁵ See *id.* at 671 (noting that although *Glucksberg* held that liberty interests should be narrowly defined, this does not align with how the Court has treated the right to marry). The Court indicates that in previous cases, the right to marry is construed generally. *Id.* For example, in *Loving*, the Court discussed the right to marry, not a “right to interracial marriage.” *Obergefell*, 576 U.S. at 671; *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (stating that fundamental rights should be rooted in tradition and proscribed narrowly).

¹⁰⁶ See *Obergefell*, 576 U.S. at 672–73 (stating there is a synergy between the Equal Protection Clause and the Due Process Clause demonstrated first in *Loving*).

¹⁰⁷ See *Obergefell*, 576 U.S. at 673 (citing *Zablocki* as an example stating that the Court applied Equal Protection Clause analysis to fathers who did not pay their child support (citing 434 U.S. 374, 383 (1978))); *Zablocki*, 434 U.S. at 382–383 (holding that because marriage is a fundamental right, restrictions by the state are subject to strict scrutiny). A Wisconsin statute stated that fathers with children not in their custody who were paying child support could not marry without a court order. *Zablocki*, 434 U.S. at 375. A court cannot grant permission unless the applicant provides evidence of compliance and that they are unlikely to miss future payments. *Id.* The appellees brought a section 1983 class action asserting violations of the Due Process and the Equal Protection Clauses of the Fourteenth Amendment. *Id.* at 376. A three-judge panel concluded strict scrutiny is the proper standard because the statute violated a fundamental right and there was a classification created. *Id.* at 379, 381. The United States Supreme Court considered whether under the Equal Protection Clause there was a “burden of justification” that the classification produced. *Id.* at 383. The Court concluded that the right is fundamental, and that the classification substantially interfered with that right. *Id.*; *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (stating laws that discriminate on the basis of race are subject to strict scrutiny), *abrogated by*, *Trump v. Hawaii*, 585 U.S. 667 (2018).

¹⁰⁸ See *Korematsu*, 323 U.S. at 216–18 (stating that, in applying strict scrutiny, the Court evaluates whether legislation is narrowly tailored to a significant government interest). The Court stated that the curfew had a close relationship to the stated government goal of stopping government espionage. *Id.* at 217; JAMES BUCHWALTER ET AL., 4 STRONG’S N.C. INDEX, § 92 (2025) (noting that to survive the strict scrutiny, the government must promote only the most important interests).

¹⁰⁹ See 576 U.S. at 675 (holding that the challenged laws prohibiting gay marriage were unconstitutional under the Equal Protection and Due Process Clauses).

¹¹⁰ See *id.* at 659, 676 (stating marriage is impacted by changes in society and democracy is typically the constitutional mechanism for change unless there is a violation of fundamental rights); see also *Schuette v. Coal. to Def. Affirmative Action, Integration & Immigrant Rts. & Fight for Equal.* By

broke with traditional gender roles in marriage, a departure that is reflected in other areas of family law.¹¹¹

C. Coinciding Movements in Family Law and the Liberal Model of Gender Variation

The no-fault divorce revolution and “constitutionalization” of family law also coincided with changes in other areas of family law.¹¹² Since the 1970s, alimony, child custody, and parentage laws removed gender stereotypes.¹¹³ These changes reflect Eskridge’s model of feminism, demonstrating the change from traditional, malignant gender norms to the liberal rights model.¹¹⁴

1. Alimony

Originally, alimony was only awarded to wives who were not at fault in the divorce.¹¹⁵ At this time (post-World War II) women lacked the ability to claim property, so their only source of economic relief was alimony.¹¹⁶ Re-

Any Means Necessary, 572 U.S. 291, 311, 313 (2014) (noting that when a law violates fundamental freedoms, the courts may be used for recourse).

¹¹¹ See Meyer, *supra* note 78, at 537–58 (stating that gender stereotypes were removed from various areas of family law in the 1970s).

¹¹² See Meyer, *supra* note 78, at 537–58 (stating the addition of intermediate scrutiny created an opportunity for state legislatures to get rid of traditional family laws); Fineman, *supra* note 77, at 63–64 (noting that the no-fault divorce, gender-equality, and sexual revolutions undermined the states’ justifications for having gendered laws).

¹¹³ See Judith G. McMullen, *Alimony: What Social Science and Popular Culture Tell Us About Women, Guilt, and Spousal Support After Divorce*, 19 DUKE J. GENDER L. & POL’Y, 41, 45 (2011) (stating that after divorce reform in the 1960s and 1970s, alimony was awarded flexibly based on need and actions without gender considerations); Linda D. Elrod & Milfred D. Dale, *Paradigm Shifts and Pendulum Swings in Child Custody: The Interests of Children in the Balance*, 42 FAM. L.Q. 381, 391 (2008) (noting that 1970s courts and laws removed maternal preference in child custody determinations because of gender equality movements); Meg Nemeth Ledebuhr, *Parentage and the Modern Family: The Only Constant Is Change*, 40 FAM. ADVOC. 12, 13 (2018) (describing that in the 1960s and 1970s, courts gave illegitimate children rights and the UPA in 1973 removed illegitimacy).

¹¹⁴ See Eskridge, *supra* note 32, at 1354 (showing shifting views of sex and gender after 1961).

¹¹⁵ See McMullen, *supra* note 113, at 44 (stating that courts granted “[d]ivorce from [b]ed and [b]oard” only in extreme cases such as desertion or infidelity). Wives needed to be innocent to get alimony. *Id.* The husbands in these cases were responsible for financially supporting their ex-wives, which was considered the first form of alimony. *Id.*; SCHWENINGER, *supra* note 43, at 2 (providing the example of Margaret Macnamarra, who filed for divorce in 1707 in the Court of Equity in Maryland). Margaret Macnamarra argued that her husband continuously threatened her life. SCHWENINGER, *supra* note 43, at 2. Her husband argued that the chancery court lacked jurisdiction in their personal lives. *Id.* The Chancellor determined nothing prevented a court from deciding this case and ruled the husband should provide her personal items including clothing and alimony in the form of fifteen pounds per year. *Id.*

¹¹⁶ See McMullen, *supra* note 113, at 44–45 n.26 (noting that after World War II, courts used distribution of property when husbands could not or would not pay alimony; however, women did not have property rights). Wives did not have claims to property purchased by nor titled to their husbands. *Id.*

formers in the 1960s and 1970s pushed for equal property divisions instead of alimony to promote better economic outcomes in divorces.¹¹⁷ They achieved this goal, but alimony awards continued because women did not have the same earning potential as men.¹¹⁸ Following these reforms, there was greater variation in property and alimony awards based on couples' circumstances.¹¹⁹

In 1979, in *Orr v. Orr*, the United States Supreme Court held that an alimony law classifying on the basis of gender was unconstitutional under the Fourteenth Amendment's Equal Protection Clause.¹²⁰ Following *Orr*, courts could order alimony in cases where a spouse needed it, regardless of gender, which precipitated the removal of gender from all states' alimony laws.¹²¹ Since *Orr*, states continued to change their alimony laws to better reflect the

¹¹⁷ See *id.* at 45 (describing how reformers believed property partitioning would be fairer in divorce because women could not count on the amount of alimony awarded or if it would be paid); CITIZEN'S ADVISORY COUNCIL ON THE STATUS OF WOMEN, REP. OF THE TASK FORCE ON THE STATUS OF WOMEN 7–8, 30 (1968) (recommending the Citizen's Advisory Council on the Status of Women bring forward its findings on the family to the attention of state authorities). The report of the Task Force on Family Law and Policy (the task force), notes an inconsistency between the law in the books and the law in practice for alimony payments. CITIZEN'S ADVISORY COUNCIL ON THE STATUS OF WOMEN, *supra*, at 7. The task force found that in practice ex-husbands, the typical payors of alimony because they made more, would combine alimony and child support payments to avoid paying taxes on the child-support. *Id.* An ex-wife is responsible for paying taxes on alimony, so this increased her taxes. *Id.* As a result, the task force recommended property divisions to reduce, or even get rid of, alimony payments and this unfair economic treatment for women. *Id.* at 8.

¹¹⁸ See McMullen, *supra* note 113, at 45 (noting that no states abolished alimony because women did not have equal salaries to men); Marsha Garrison, *Good Intentions Gone Awry: The Impact of New York's Equitable Distribution Law on Divorce Outcomes*, 57 BROOK. L. REV. 621, 630 (1991) (stating reformers wanted marriage to eliminate the need for alimony to promote the idea of marriage as an equal partnership).

¹¹⁹ See McMullen, *supra* note 113, at 45 (providing that there was more flexibility in property distribution and alimony awards by courts). Alimony was not granted in over half the cases because the rationale became more complex as the status of women changed. *Id.*

¹²⁰ See 440 U.S. 268, 278, 283 (1979) (stating Alabama's alimony statute was unconstitutional under the Fourteenth Amendment's Equal Protection Clause); U.S. CONST. amend. XIV, § 1 (providing that states cannot deny anyone equal protection under the law). In the divorce of William and Lillian Orr, the court ordered Mr. Orr to pay \$1,240 per month in alimony. *Orr*, 440 U.S. at 270. Mrs. Orr began a contempt proceeding alleging Mr. Orr had not paid her. *Id.* at 270–71. Mr. Orr's defense was that the law was unconstitutional because only husbands had to pay alimony under the law. *Id.* The United States Supreme Court agreed. *Id.* The Court supported this holding by asserting classification risks perpetuating stereotypes about women in the work force. *Id.* at 283.

¹²¹ 440 U.S. at 278, 283; see McMullen, *supra* note 113, at 46 (noting courts still usually award alimony to wives); Linda Greenhouse, *High Court Voids Alimony Laws Requiring Only Husbands to Pay*, N.Y. TIMES (Mar. 6, 1979), <https://www.nytimes.com/1979/03/06/archives/high-court-voids-alimony-laws-requiring-only-husbands-to-pay-end-to.html> [perma.cc/2XVX-99ZR] (stating that the impact of *Orr v. Orr* is that states will either have to remove sex from alimony determinations or eliminate alimony entirely). In addition to Alabama, this decision rendered ten states' alimony laws unconstitutional, these states included New York, Idaho, Mississippi, Louisiana, Nevada, Wyoming, Georgia, South Dakota, Tennessee, and South Carolina. Greenhouse, *supra*.

changing role of women in society.¹²² For example, in 2011, Massachusetts updated its alimony law to provide various options, addressing differing arrangements couples have, such as sharing work and parenting duties.¹²³

2. Child Custody

In addition to the elimination of gender from alimony considerations, state divorce laws changed to favor joint custody of minor children.¹²⁴ Before the nineteenth century, children were considered property of their fathers and fathers were appointed custodians in the rare instances of divorce.¹²⁵ During the women's rights movement in the nineteenth century, however, women advocated for equal rights to their children.¹²⁶ Following this, courts adopted a paternalistic view that mothers should have sole custody because they need to nurture and care for their children, aligning with traditional gender norms.¹²⁷

This perspective switched again in the 1970s as women sought equal rights in the workplace and fathers assumed more parenting duties.¹²⁸ As a result, courts and legislatures began to recognize custody for fathers.¹²⁹ In 1972, in

¹²² See McMullen, *supra* note 113, at 53–54 (describing that as more married women hold paid employment positions, there is an increasing expectation that they can support themselves after divorce). Wives are now more likely to be educated or make more money than their husbands. *Id.* at 54. From 1970 to 2007, the percentage of husbands with more education than their wives decreased from 28% to 19%. *Id.* Moreover, during this period, the percentage of wives with greater incomes than their husbands increased from 4% to 22%. *Id.*

¹²³ See *id.* at 51 (stating that social trends impact alimony); Laura W. Morgan, *A Nationwide Review of Alimony Legislation, 2007–2016*, 51 FAM. L. Q. 39, 46–47 (2017) (explaining the various alimony options in Massachusetts). The statute provides a “general term alimony” option that is intended for an economically dependent spouse, usually after a medium to long-term marriage. Morgan, *supra*. It ends when one party dies or the payor reaches retirement age. *Id.* Another option is “presumptive duration,” which depends on the length of the marriage. *Id.* at 47. A third option is “rehabilitative alimony” that is available to spouses who are likely to be self-supporting. *Id.* “Reimbursement alimony” is repayment for the receiving spouse’s contribution to the payor’s finances. *Id.* Finally, “transitional alimony” is given to alimony recipients to assist them in transitioning to a changed lifestyle after less than five years of marriage. *Id.*; see also MASS. GEN. L. ANN. ch. 208, §§ 48–55 (2012) (stating Massachusetts alimony laws).

¹²⁴ See McMullen, *supra* note 113, at 55 (noting how, as a matter of public policy, states have tried to maximize placement of children with both mothers and fathers).

¹²⁵ Elrod & Dale, *supra* note 113, at 390–91.

¹²⁶ See *id.* at 391 (stating that the first mention of “best interests of the child” occurred during the nineteenth century, the industrial revolution, and the women’s rights movement).

¹²⁷ See *id.* (describing courts’ view that children needed to be with their mother during the “tender years”). This lasted through the 1960s where mothers were given sole custody unless they were considered unfit or at fault by the court. *Id.* Fathers during this time were given visitation but they rarely sought it. *Id.*; Julie E. Artis, *Judging the Best Interest of the Child: Judges’ Accounts of the Tender Years Doctrine*, 38 LAW & SOC’Y REV. 769, 770 (2004) (defining “the tender years doctrine” as the belief that mothers have biologically superior nurturing abilities and a connection to infants).

¹²⁸ See Elrod & Dale, *supra* note 113, at 391 (describing that as mothers began to seek equal treatment in the workforce, fathers began to seek equal rights to children after divorce).

¹²⁹ *Id.*

Stanley v. Illinois, the Supreme Court established that unmarried fathers had due process rights before the end of their parentage.¹³⁰ In the 1970s, states applied the “best interests of the child” standard to determine custody.¹³¹ Since then, child custody laws have continued to be gender neutral and adapted to evolving family structures.¹³² For example, states added different factors to consider when evaluating what is in the “best interests of the child” and courts shifted into a more rehabilitative role.¹³³ These changes reflect shifting family social norms.¹³⁴

3. Parentage

Along with child custody and alimony, parentage transformed as the composition of families in the United States evolved.¹³⁵ Historically, children born out of wedlock did not have a legal father.¹³⁶ Due to the harsh consequences of being illegitimate, common law presumed a child born to a married couple was legitimate.¹³⁷ From the late 1960s to the beginning of the 1970s, the Supreme Court issued decisions giving illegitimate children rights and ended *filius nullius*, a child without a legal father.¹³⁸ This led to the 1973 Uni-

¹³⁰ See 405 U.S. 645, 657–58 (1972) (stating that the Due Process and Equal Protection Clauses prevented Illinois from denying a father a hearing). Under Illinois law, children of fathers who were not married come under the legal custody of the state. *Id.* at 646. The appellee’s, wife passed away and he was never shown to be an unfit parent. *Id.* There was a dependency proceeding and the state was declared the ward of his children who were placed with court-appointed guardians. *Id.* The state acted on the assumption that unmarried fathers are not fit to raise children. *Id.* at 647. The Court held that all parents in Illinois can have a hearing on whether they are a fit parent before custody of their children is taken. *Id.* at 658.

¹³¹ See Elrod & Dale, *supra* note 113, at 392 (noting this standard is gender-neutral and judges began making decisions based on the facts of each case instead of relying on gender stereotypes).

¹³² See *id.* at 384 (stating that as family structures changed, so did custody determinations—parental rights being awarded to non-biological parents, for example).

¹³³ See *id.* at 397, 406–07 (stating that custody changes include: expanded “best interest” factors to focus judges on specific parenting competencies and behaviors, the court facilitating parenting plans, mediation gradually becoming accepted, and embracing the idea that parents—instead of the state—should determine what is in a child’s best interest).

¹³⁴ See *id.* at 397 (noting gender equality changed parenting norms by promoting joint custody).

¹³⁵ See *id.* at 384 (stating that the dynamic of American families has changed—there are more divorces, unmarried fathers gaining parental rights, and couples that choose not to marry but have children).

¹³⁶ See Ledebuhr, *supra* note 113, at 13 (explaining the doctrine of *filius nullius*: a child born illegitimately is without a legal father, a concept derived from English common law).

¹³⁷ See *id.* (noting this presumption was helpful because there was no scientific method at the time to determine paternity).

¹³⁸ See *Lehr v. Robertson*, 463 U.S. 248, 249–50, 267–68 (1983) (stating that a father who has not supported and barely interacted with his child is not entitled to a hearing before the child can be adopted); *Caban v. Mohammed*, 441 U.S. 380, 385–86, 391–92 (1979) (concluding that a New York statute allowing an unwed mother to stop the adoption of her child by withholding consent was unconstitutional because it did not give fathers the same rights). The Court elaborated that this excluded loving fathers from parenting decisions. *Caban*, 441 U.S. at 394; *Quilloin v. Walcott*, 434 U.S. 246, 255–56 (1978) (holding that a Georgia statute that allowed adoption with only a mother’s consent if the father did not legitimate the child did not violate the father’s rights under the Due Process and

form Parentage Act (UPA), which, along with further Court decisions, ended legal discrimination of nonmarital children.¹³⁹

Later, the invention of in vitro fertilization (IVF) increased options for starting a family but complicated parentage.¹⁴⁰ In the Supreme Court's majority decision in *Obergefell*, Justice Kennedy stated that same-sex couples' children would not continue to have uncertain family lives.¹⁴¹ States interpreted this decision differently for same-sex couples' parental rights, leading to the Supreme Court intervening.¹⁴² In 2017, in *Pavan v. Smith*, the Court held that same-sex couples have the same rights to appear on birth certificates as heterosexual couples.¹⁴³ After this decision, states removed gender from their parentage laws and expanded parentage.¹⁴⁴

Equal Protection Clauses); Ledebuhr, *supra* note 113, at 13 (stating that the Court relied on the Equal Protection Clause in various decisions to afford illegitimate children equal rights).

¹³⁹ See Ledebuhr, *supra* note 113, at 13 (explaining that the UPA added parentage presumptions by time of birth or conduct); Meyer, *supra* note 78, at 536 (stating the Court's holdings and the UPA led to the end of legal discrimination against illegitimate children). See UNIF. PARENTAGE ACT § 2 (NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 1973) (stating that the act provides legal equality for every child without considering the relationship between their parents).

¹⁴⁰ See Ledebuhr, *supra* note 113, at 13 (explaining that in vitro fertilization (IVF) expanded options for starting a family); *In Vitro Fertilization (IVF)*, MAYO CLINIC (Sep. 1, 2023), <https://www.mayoclinic.org/tests-procedures/in-vitro-fertilization/about/pac-20384716#:~:text=During%20in%20vitro%20fertilization%2C%20mature,which%20is%20where%20babies%20develop> [perma.cc/F6NL-3STP] (describing that IVF is a process where mature eggs are extracted from ovaries and fertilized by sperm in a lab). IVF can use eggs or sperm from donors. MAYO CLINIC, *supra*.

¹⁴¹ See 576 U.S. 644, 668 (2015) (providing, under the principle of protecting families, that the right to marry should apply to same-sex couples because, without having married parents, children have a more unpredictable family life).

¹⁴² See Ledebuhr, *supra* note 113, at 14 (discussing a case that considered whether a Kansas man who answered a Craigslist ad and provided sperm to a lesbian couple was a parent). The couple signed a contract that waived the father's parenting rights but the couple inseminated at home. Ledebuhr, *supra* note 113, at 14. The couple separated following the child's birth and one of the parents applied for state assistance because of an illness that prevented her from working. *Id.* The state tried to sue the donor for child support, arguing that a person cannot remove parenting obligations by contract. *Id.* The mother argued that she had a legal parenthood presumption and the Kansas court ruled that, because of *Obergefell*, she had parenting rights and the donor did not. *Id.*

¹⁴³ See, e.g., 582 U.S. 563, 564 (2017) (holding that an Arkansas law requiring a male spouse on a child's birth certificate infringed on same-sex couples' rights to equal marital treatment under the law that was solidified in *Obergefell*); Ledebuhr, *supra* note 113, at 14 (explaining that the case involved two lesbian couples who were married and were having children via anonymous sperm donor). The state included the biological mother on the birth certificates but not her spouse. Ledebuhr, *supra* note 136, at 14. The Arkansas Supreme Court held that they were not required to be included and the Supreme Court overruled, stating that same-sex parents had the right to be on birth certificates. *Id.*; see also *Parental Recognition Laws*, MOVEMENT ADVANCEMENT PROJECT, <https://www.lgbtmap.org/equality-maps/recognition/parenting> [perma.cc/7MNX-HJ22] (Jan. 10, 2026) (demonstrating that presently all states extend the marital presumption of parentage to children of same-sex married couples).

¹⁴⁴ See Ledebuhr, *supra* note 113, at 15 (noting that states expanded *Obergefell* by revising their statutes to include gender neutral language); *Parental Recognition Laws*, *supra* note 143 (showing that all fifty states have voluntary acknowledgement of parentage (VAP) or other routes for parental recognition). A number of states are changing their parenting laws to permit parents, regardless of

4. The Liberal Rights Model

These movements in family law demonstrate a departure from the natural model and a shift toward the liberal rights approach.¹⁴⁵ This approach is characterized by a society with laws that do not distinguish based on gender, sexual practices, or sexual orientation unless there would otherwise be harm to third parties.¹⁴⁶ As a result of this change, conservative groups have begun to attack no-fault divorce.¹⁴⁷

II. DEBATES SURROUNDING NO-FAULT DIVORCE: WHO DOES THE CONSTITUTION PROTECT AND SHOULD FAMILY LAW CONTINUE TO REMOVE THE PERFORMANCE OF GENDER?

Opponents of no-fault divorce assert that it is unconstitutional because it violates the non-divorcing party's, typically the husbands', rights, and they encourage a return to the traditional family.¹⁴⁸ In contrast, proponents of no-fault argue there is a fundamental right to divorce based on the ruling in *Obergefell*, it has substantial benefits for women, and it follows the liberal trajectory of family law.¹⁴⁹

Section A discusses the current attacks on no-fault divorce.¹⁵⁰ Section B describes constitutional arguments for and against no-fault divorce.¹⁵¹ And section C analyzes how advocates for no-fault divorce highlight that it negatively impacts women, in contrast, opponents propose a return to traditional gender roles.¹⁵²

marital status, sexual orientation, gender, or biological relationship to the child, to sign a VAP that is legally equivalent to a court decreeing parentage. *Parental Recognition Laws*, *supra* note 143.

¹⁴⁵ See Eskridge, *supra* note 32, at 1354 (demonstrating the evolution in sexual and gender variation after 1961). He provides that first, there was the malignant model that criminalized and discriminated against gender and sexual minorities. *Id.* Then the liberal norm developed, characterized by a society that has no laws that discriminate or criminalize sexual and gender variation. *Id.* Finally, the stronger liberal norm includes hate crimes, antidiscrimination laws, and marriage for sexual and gender minorities. *Id.* Eskridge acknowledges that even as society has evolved, not everyone accepts the liberal framework. *Id.* at 1353.

¹⁴⁶ See *id.* at 1344 (providing that the liberal model holds that laws should be neutral relating to gender or sexual identity). The liberal model separates sex from gender and sexuality. *Id.* This means that recognizing someone as a man does not mean you can assume his profession or his role in the family, his sexual preferences, or that he possesses stereotypical male traits such as aggression. *Id.*

¹⁴⁷ See Wehle, *supra* note 20 (reporting that no-fault divorce is being attacked by conservative leaders in Texas, Louisiana, and Nebraska).

¹⁴⁸ See *infra* notes 153–206 and accompanying text.

¹⁴⁹ See *infra* notes 153–206 and accompanying text.

¹⁵⁰ See *infra* notes 153–161 and accompanying text.

¹⁵¹ See *infra* notes 162–171 and accompanying text.

¹⁵² See *infra* notes 172–206 and accompanying text.

A. The Current Attacks on No-Fault Divorce

In Texas, Louisiana, and Nebraska, conservative politicians are pushing to remove no-fault divorce.¹⁵³ Additionally, in Oklahoma, South Carolina, and South Dakota, Republican lawmakers propose restricting no-fault divorce.¹⁵⁴ In Mississippi, attempts to strengthen no-fault divorce failed.¹⁵⁵ In Texas, there were particularly strong attacks: the 2024 Texas Republican Party Proposal called for a complete rewrite of divorce law, including removing no-fault and promoting the traditional family through covenant marriages.¹⁵⁶ The Texas legislature also proposed a new bill to end no-fault divorce.¹⁵⁷ Although a House subcommittee rejected this bill, it is likely that there will be continued efforts to end no-fault divorce in Texas.¹⁵⁸

In Nebraska, the Republican Party proposed limiting no-fault divorce to couples without children.¹⁵⁹ In Louisiana, the Republican Party considered whether to recommend the elimination of no-fault divorce.¹⁶⁰ The arguments in legislatures to repeal no-fault divorce are largely based on policy, but there are also constitutional arguments asserted for and against it.¹⁶¹

¹⁵³ See Wehle, *supra* note 20 (stating that conservative leaders are attacking no-fault divorce and are seriously considering eliminating it).

¹⁵⁴ See Kruesi, *supra* note 21 (noting that Oklahoma Republican Senator Dusty Deever put forward legislation that prevents couples from divorcing on grounds of incompatibility). Moreover, in South Carolina, two Republican legislators proposed a bill that required both parties to file for no-fault divorce, eliminating the unilateral aspect of it. *Id.* In South Dakota, each year since 2020, one Republican lawmaker has tried to eliminate irreconcilable difference grounds. *Id.*

¹⁵⁵ See Herchenroeder, *supra* note 14 (stating that no-fault divorce is facing opposition in Mississippi, Texas, Nebraska, and Louisiana).

¹⁵⁶ See PATRICK ET AL., *supra* note 20, at § 189 (proposing that the Texas Family Code be rewritten to end unilateral no-fault divorce, encourage covenant marriages, and extending the time period for when a divorce can occur after filing).

¹⁵⁷ See TERRY & ROBERTS, *supra* note 20 (stating that HB 3401 would cause Texas to be a fault-based divorce state). On February 26, 2025, Representative Brent Money filed HB 3401. *Id.* If passed, it would have required divorces filed post September 1, 2025, to have proof of fault. *Id.* It was rejected by a House Subcommittee on June 2, 2025. *Id.* Many legal experts do not think this will be the last push in Texas to return to the fault-based system. *Id.*

¹⁵⁸ See Wehle, *supra* note 20 (noting that in Texas, the Republican Party controls both chambers of the state legislature, the office of the governor, secretary of state, and attorney general).

¹⁵⁹ See Family, NEGOP, <https://ne.gop/family/> [perma.cc/TB33-AAYK] (stating that in, addition to ending no-fault divorce for families with children, the Nebraska GOP opposes laws that contribute to family dissolution).

¹⁶⁰ See Julie O'Donoghue, *Louisiana Republican Party Considers Backing Elimination of No-Fault Divorce*, WWNO (Jan. 12, 2023), <https://www.wwno.org/news/2023-01-12/louisiana-republican-party-considers-backing-elimination-of-no-fault-divorce> [perma.cc/LGB6-UU43] (noting that the lawmakers decided to send the law removing no-fault divorce back to the resolution-vetting group); Kruesi, *supra* note 21 (stating that Louisiana considered repealing no-fault divorce in early 2024).

¹⁶¹ See Kruesi, *supra* note 21 (explaining that one argument by Dusty Deever is that no-fault divorce takes away marital obligation). The U.S. Supreme Court overturning the constitutional right to an abortion has been worrisome for no-fault divorce; democratic lawmakers view abortion as an example of a longstanding right removed by a long-term effort. *Id.*; Wehle, *supra* note 20 (noting that opponents state no-fault divorce violates the Fourteenth Amendment).

B. The Constitutional Arguments For and Against No-Fault Divorce

Opponents of no-fault divorce brought challenges on grounds that it is unconstitutional under the Due Process Clause of the Fourteenth Amendment.¹⁶² For example, in 2020, in *Dycus v. Dycus*, the Nebraska Supreme Court heard that very argument.¹⁶³ The appellant, the husband, argued that the Nebraska no-fault divorce law is unconstitutional because it violated his procedural due process rights by preventing him from defending the dissolution of his marriage.¹⁶⁴ The court disagreed, holding that the decision is left to the legislature and, given that he had notice, it was within his ex-wife's rights to file for divorce.¹⁶⁵ Some legal scholars echo this argument, stating that no-fault divorce violates the procedural protections of the Fourteenth Amendment by preventing defendants, usually men, from having their "day in court."¹⁶⁶

¹⁶² See Wehle, *supra* note 20 (explaining that opponents state that unilateral no-fault divorce deprives defendants of due process); U.S. CONST. amend. XIV, § 1 (stating that a person cannot be deprived of their liberty, property, or life unless they are given due process).

¹⁶³ See 949 N.W.2d 357, 360–61 (Neb. 2020) (considering whether the elimination of fault violates procedural due process); Shannon Heckt, *Nebraska Supreme Court Hears Argument Against No-Fault Divorce*, KSNB LOC. 4 (Sep. 3, 2020), <https://www.ksnbllocal4.com/2020/09/03/nebraska-supreme-court-hears-argument-against-no-fault-divorce/> [perma.cc/4CBG-236B] (reporting on *Dycus* that the appellant argued no-fault divorce is unconstitutional).

¹⁶⁴ See *Dycus*, 949 N.W.2d at 363 (noting that the husband asked the court to vacate the dissolution of marriage on the grounds that it was unconstitutional). The wife, at the hearing for the dissolution of their marriage testified that the couple had seen five or six marriage counselors, pastors, and priests to address their marital issues. *Id.* at 362. The marital difficulties she was referring to were verbal abuse, elaborating that her husband had threatened her. *Id.* The Nebraska court stated the Equal Protection Clause arguments were inadequately argued and conclusory, so they did not need to be examined. *Id.* at 363. The petitioner argued that no-fault divorce laws make it so the petitioning spouse determines the result. *Id.* at 364. There were no facts presented to examine whether one spouse wanted to end the marriage as the other did not. *Id.* Furthermore, he argued that *Obergefell* recognized new marital property interests. *Id.* at 438; see *Obergefell v. Hodges*, 576 U.S. 644, 681 (2015) (holding there is a right to same-sex marriage). The court noted that he did not explain what those property interests were. *Dycus*, 949 N.W.2d at 366. His arguments relied on the liberty interest protected in *Obergefell* and the Supreme Court's statements that intimate choices define personal identity. *Id.* at 367; *Obergefell*, 576 U.S. at 651–52, 663. The petitioner argued that he identified as Debra's husband. *Dycus*, 949 N.W.2d at 367. The Nebraska Supreme Court noted that this contrasts Debra's intimate choice in defining herself as a person not married to the petitioner. *Id.*

¹⁶⁵ See *Dycus*, 949 N.W.2d at 365 (explaining that the statute provides that notice must be in the complaint and that summons must be served). Whether a marriage is irretrievably broken is determined after a hearing with both parties in attendance. *Id.* This hearing satisfies the defendant's due process rights. *Id.* The court also relied on the Pennsylvania Superior Court's decision in *Pankoe v. Pankoe*, that stated that the legislature enacted no-fault divorce based on its judgment. *Id.* at 436; 222 A.3d 443, 448–49 (Pa. Super. Ct. 2019).

¹⁶⁶ *Dycus*, 949 N.W.2d at 434; see Beverly Willett, *The Latest Scare Cards to Prop Up No-Fault Divorce*, COAL. FOR DIVORCE REFORM (May 24, 2024), <https://divorcereform.us/the-latest-scare-cards-to-prop-up-no-fault-divorce/> [perma.cc/TZK3-KENK] (describing that the ability to unilaterally file no-fault divorce allows plaintiffs, usually women, to end the marriage). She notes that the unilateral aspect of no-fault divorce forces judges to side with the plaintiff—usually women—and enter judgments for divorce with no trial where men could provide evidence. *Id.* She also argues that divorce does not make women happier because the divorce rates for second and third marriages are higher

In contrast, proponents of no-fault divorce state there is a more compelling argument to protect no-fault divorce under the Due Process Clause of the Fourteenth Amendment.¹⁶⁷ They argue that a person's liberty interest includes the ability to leave a marriage without having to prove their reasons to the government.¹⁶⁸ Significantly, some legal scholars argue that there is a constitutionally protected right to divorce.¹⁶⁹ They propose the right to marry suggests a "right to unmarry" and if the government cannot interfere with the right to marry, it also cannot interfere with your "right to unmarry."¹⁷⁰ Other legal scholars add that it is nonsensical that the government protects decisions in marriage and the decision to marry but not the decision to leave a marriage.¹⁷¹

C. Debates Surrounding the Direction of the American Family: Equality versus Tradition

Despite support, no-fault divorce has and continues to face opposition.¹⁷² Previous and current backlash to no-fault divorce largely comes from two

than for first marriages. *Id.* Moreover, she asserts female happiness has declined since the enactment of no-fault divorce in the 1970s. *Id.*; Eric Berger, *Conservative US Lawmakers Are Pushing for an End to No-Fault Divorce*, THE GUARDIAN (June 25, 2024), <https://www.theguardian.com/us-news/article/2024/jun/25/republicans-no-fault-divorce> [perma.cc/EQP3-BPMN] (stating that opponents are usually socially conservative and religious and argue that no-fault deprives men of due process and is thus unconstitutional).

¹⁶⁷ See Wehle, *supra* note 20 (explaining that since coverture ended and wives are not considered legal property of their husbands, a husband's constitutional right to his property no longer applies to divorce).

¹⁶⁸ See *id.* (stating that the due process right to liberty, based on the Court's interpretation, is not limited to "freedom from bodily restraint" but encapsulates a complete range of conduct including a person's right to end a marriage (quoting *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954))).

¹⁶⁹ See Brian L. Frye & Maybell Romero, *The Right to Unmarry: A Proposal*, 69 CLEV. ST. L. REV. 89, 102 (2020) (arguing that there is a constitutionally protected fundamental "right to unmarry"); Claire P. Donohue, *Fifty Ways to Leave Your Lover: Doing Away with Separation Requirements for Divorce*, 96 S. CAL. L. REV. 77, 115 (2022) (asserting that divorcing couples have the same rights as married couples because they are still married during proceedings).

¹⁷⁰ See Frye & Romero, *supra* note 169, at 102 (proposing that the four principles in *Obergefell* apply to divorce). For example, if the right to individual autonomy justifies marriage, it should be applied to divorce. *Id.* Frye and Romero assert that the Court's justification for gay marriage, that it is degrading for the government not to acknowledge it, also applies to divorce. *Id.* They also note the government makes marriage quick and simple but divorce slow and cumbersome. *Id.*

¹⁷¹ See Donohue, *supra* note 169, at 115 (stating that only protecting the ability to marry does not consider issues of safety, financial security, or mental health that may emerge in a marriage that may lead a spouse to divorce). In addition, Donohue argues that the principles of *Obergefell* should also apply to divorcing couples because a couple is still married during the divorce proceedings. *Id.* This is exemplified by the fact that couples cannot remarry during the proceedings. *Id.*; see also *infra* note 219 and accompanying text (describing the four principles that protect the fundamental right to marry).

¹⁷² See Fineman, *supra* note 77, at 65, 74 (stating that religious groups and those who were against making marriage more equal and flexible were part of the backlash to no-fault divorce). A legal manifestation of opposition to no-fault divorce are covenant marriage laws that allow couples to choose a more binding marriage where it is harder to obtain a divorce. *Id.* at 73. There were two serious movements to repeal no-fault divorce. *Id.* at 74. First in Michigan in 1996, then in Virginia in

sources: the value voter and the marriage movement.¹⁷³ Value voters believe that the family is in jeopardy and divorce should be discouraged and potentially prohibited to encourage reproduction within marriage.¹⁷⁴ Value-voters are primarily religious groups.¹⁷⁵ The marriage movement includes secular and religious groups, specifically child advocates, certain men's groups, and father's rights organizations.¹⁷⁶ The promarriage movement argues that reinstating fault in divorce proceedings would lead to reasserting the "natural order" where the father is the head of family.¹⁷⁷

Notably, conservative politicians align with these groups and have advocated for ending no-fault divorce.¹⁷⁸ Although President Trump has yet to speak on this topic, Vice President J.D. Vance expressed his support to end no-fault divorce even when marriages were violent.¹⁷⁹ Speaker of the House Mike Johnson has also conveyed wanting to end no-fault divorce because it makes

2007–2008. *Id.*; see also Laura Bradford, Note, *The Counterrevolution: A Critique of Recent Proposals to Reform No-Fault Divorce Laws*, 49 STAN. L. REV. 607 (1997) (explaining that in 1996, in Michigan, a state representative proposed bills to end no-fault divorce and nine other states had similar bills).

¹⁷³ Fineman, *supra* note 77, at 65.

¹⁷⁴ See *id.* 65–66 (describing that value voters views are largely rooted in religious beliefs). They believe that illicit sexuality needs to be contained and that marriage is an institution for raising children. *Id.* at 66. The state's duty is to protect marriage—divorce should be discouraged or forbidden, and sexuality should be regulated such as through criminalizing adultery or other forms of non-marital sexuality. *Id.* In addition, they believe abortion should be illegal. *Id.* Value voters believe that the traditional family is under attack by feminism because it resists traditional notions of wife and mother. *Id.* at 66–67.

¹⁷⁵ See *id.* at 67 (explaining that President Bush gathered faith groups to build a coalition of those with traditional values on sexual behavior); Kevin Eckstrom & Michele M. Melendez, 'Moral Values' Top Voters' Concerns—But What Does It Mean?, CHRISTIANITY TODAY (Nov. 1, 2004), <https://www.christianitytoday.com/2004/11/moral-values-tops-voters-concerns-but-what-does-it-mean/> [perma.cc/9HJU-2EBR] (reporting that one in five voters stated that moral values were the most important).

¹⁷⁶ See Fineman, *supra* note 77, at 69–70 (stating the marriage movement is comprised of a broad array of groups with different motivations).

¹⁷⁷ See Scott Coltrane & Michele Adams, *The Social Construction of the Divorce "Problem": Morality, Child Victims, and the Politics of Gender*, 52 FAM. RELS., 363, 364, 369–70 (2003) (describing that the promarriage movement, defined as those who promote the "traditional family," is opposed by feminists). Some argue that women should only be in the domestic sphere and men should be sole breadwinners. *Id.* A larger portion are less extreme and argue a woman's calling is to care for the family and a man's is to provide for the family. *Id.* at 370. As a result, the promarriage movement members typically promote fatherhood, the idea of fathers as natural family leaders, and the role of religion in marriage. *Id.* This movement favors both heterosexual couples and restricting divorce. *Id.* They argue that by reinstating the fault-based system, the natural order would dictate what is right and wrong. *Id.*

¹⁷⁸ See Herchenroeder, *supra* note 14 (stating that some conservative commentators and politicians oppose no-fault divorce, like William Wolfe). A former Trump deputy assistant secretary of defense stated that "no-fault divorce turned marriage from a covenant into a contract." *Id.*

¹⁷⁹ See Wehle, *supra* note 20 (presenting that J.D. Vance gave these comments during the Trump campaign, adding that no-fault divorce "mak[es] it easier for people to shift spouses like they change their underwear"); Shearn, *supra* note 23 (stating there are rumors President Trump will eliminate no-fault divorce).

society “amoral.”¹⁸⁰ He also has a covenant marriage that makes obtaining a divorce even more difficult.¹⁸¹ Moreover, Project 2025, an outline of the current administration’s governance proposals, is supported by a coalition of over one hundred conservative groups, many of which want to end no-fault divorce.¹⁸² Conservative commentators, including Matt Walsh and Steven Crowder, also argue no-fault divorce is unfair to men and bad for society because it causes more divorces.¹⁸³ Given the power and influence these groups have, no-fault divorce is in jeopardy.¹⁸⁴

Covenant marriage also presents a legal countermovement to no-fault divorce.¹⁸⁵ Louisiana, Arizona, and Arkansas adopted covenant marriage legislation, providing the option for a more binding marital contract often connected to religious or moral values.¹⁸⁶ Obtaining a divorce in a covenant marriage is

¹⁸⁰ Morrison, *supra* note 25.

¹⁸¹ See Krueger, *supra* note 25 (explaining that covenant marriages are permanent binding legal contracts between couples). Three states have these marriages: Arizona, Arkansas, and Louisiana. *Id.* They make obtaining a divorce more difficult: they must have premarital counseling and often states will have a fault requirement to file for divorce. *Id.*

¹⁸² See Justin Horowitz, *Project 2025 Partners Want to Make Divorce a Lot Harder*, MEDIA MATTERS FOR AM. (June 11, 2024), <https://www.mediamatters.org/project-2025/project-2025-partners-want-make-divorce-lot-harder> [perma.cc/7W75-Z75V] (outlining numerous organizations that expressed their support for the end of no-fault divorce). For example, the Claremont Institute’s Senior director advocated for removing the “destructive” no-fault divorce legal system. *Id.* Another example is of a senior research associate at the Heritage Foundation who wrote an article describing that no-fault divorce removed the “durability and security” of marriage. *Id.*

¹⁸³ See Berger, *supra* note 166 (stating that Matt Walsh and Steven Crowder argued that no-fault divorce is unfair to men and increases divorces); Polacko & Ferrante, *supra* note 28 (reporting that Steven Crowder vocalized his disapproval of no-fault divorce). A video of him was released in which he ordered his wife to be “disciplined.” Polacko & Ferrante, *supra* note 28. His wife filed for divorce in 2021 and he stated this was not his choice. *Id.*

¹⁸⁴ See Wehle, *supra* note 20 (explaining that conservatives in Texas have significant influence); Kruesi, *supra* note 21 (stating that some are concerned that under the new administration, no-fault divorce will be repealed); Morrison, *supra* note 25 (explaining that the current Speaker of the House also opposes no-fault divorce). Therefore, the two men who hold the next two highest positions in the government after the president support the end of no-fault. Kruesi, *supra* note 21; Morrison, *supra* note 25.

¹⁸⁵ Fineman, *supra* note 77, at 73.

¹⁸⁶ See *id.* (commenting that Louisiana was the first state to adopt covenant marriage in 1997); Krueger, *supra* note 25 (explaining that the current speaker of the house, Mike Johnson, has a covenant marriage which has brought this form of marriage back into the spotlight).

difficult and in many circumstances requires counseling and proof of fault.¹⁸⁷ Although these states added this option, it is rarely used.¹⁸⁸

Moreover, the drawbacks of no-fault divorce that conservatives point to, specifically that divorce is bad for children, are contradicted by research.¹⁸⁹ Following no-fault divorce, there was an increase in divorce rates in the U.S.¹⁹⁰ State adoption of unilateral divorces accounted for a 17.1% increase in divorce rates from 1968 to 1988 and divorce rates would have been 6.4% lower if states did not adopt no-fault divorce.¹⁹¹ Yet, studies also indicate that other factors in addition to no-fault divorce had a substantial impact on divorce rates.¹⁹² Social scientists are far from agreement on the impact of divorce on children.¹⁹³ This claim is widespread not for its accuracy but because the marriage movement is well funded and supports these studies.¹⁹⁴ Studies also demonstrate that single

¹⁸⁷ See ARIZ. REV. STAT. ANN. § 25-903 (2026) (promulgating that dissolution of marriage can only occur in a covenant marriage if there is fault or if both parties have been living apart for a specified period of time); ARK. CODE ANN. § 9-11-803 (2026) (explaining that the marriage can be dissolved only when there has been a breach of the marriage contract); LA. STAT. ANN. § 9:272 (2025) (stating that covenant marriages can only be dissolved under certain grounds); Krueger, *supra* note 25 (noting that state laws vary for covenant marriages but typically include fault, such as abandonment for longer than a year, imprisonment, and abuse).

¹⁸⁸ See Krueger, *supra* note 25 (highlighting that attorneys rarely encounter covenant marriages). Of the 119,270 total marriages in the past five years in the most populous county in Arizona, there were only 963 covenant marriages recorded. *Id.* In Arkansas there are only 242 covenant marriages. *Id.*

¹⁸⁹ See Coltrane & Adams, *supra* note 177, at 369 (explaining that despite claims that divorce is harmful to children, researchers are far from agreement on the issue). Judith Wallerstein, a clinical psychologist, started the debate about the impacts of divorce on children. *Id.* at 363. Her research indicated that divorce was negative for children and that it sets parents' interest, specifically mothers', against their children. *Id.* She suggested that parents should remain married for their children unless there is overt violence. *Id.* Her arguments were given legitimacy largely due to significant media exposure but the research was not conclusive on this issue. *Id.* at 369.

¹⁹⁰ See Leora Friedberg, *Did Unilateral Divorce Raise Divorce Rates? Evidence from Panel Data*, 88 AM. ECON. REV. 608, 608 (1998) (stating that the divorce rate rose dramatically in the 1960s and 1970s). She states that unilateral divorce is the willingness of a single spouse to divorce. *Id.* at 609. In her research, she acknowledges variance among states in unilateral divorce and notes that states that adopted laws that were more unilateral had higher divorce rates. *Id.* at 608.

¹⁹¹ See *id.* at 608, 620 (finding that, in 1960, the divorce rate was 2.2 per thousand people and rose to 5.0 by 1985). Significantly, the type of unilateral divorce used mattered to divorce rates; the state with the strictest unilateral divorce laws increased divorce rates by 0.549 per thousand people. *Id.* at 620.

¹⁹² *Id.* at 626.

¹⁹³ See Coltrane & Adams, *supra* note 177, at 369 (describing that social scientists are nowhere near consensus about children growing up in divorced families). They note that when no-fault divorce was implemented, social movements that opposed no-fault divorce turned to children as victims of divorce. *Id.* at 366.

¹⁹⁴ See *id.* at 368 (noting that the promarriage movement was well-financed and had extensive access to the media at the end of the 1990s and the beginning of the early 2000s). Media exposure allowed Wallerstein's proposals to be widely accepted. *Id.* at 369. For example, Wallerstein's PBS video, *Children of Divorce*, arguing that there is a consensus on the extreme toll of divorce on children, received \$1.3 million in funding from the conservative Olin, Bradley, and Scaife Foundation. *Id.* In addition, Wallerstein and other advocates were part of organizations such as the National Marriage

parenthood itself does not adversely affect the economic and social well-being of children, rather, being brought up in an environment with disadvantages does.¹⁹⁵

Despite opposition, research indicates that there are significant benefits of no-fault divorce, specifically for women.¹⁹⁶ From 1976 to 1985, states with no-fault divorce saw a decrease in domestic-violence instances by one quarter.¹⁹⁷ There was also a 10% decrease in women killed by “intimates.”¹⁹⁸ In states with no-fault divorce, female suicide rates fell between 8% and 16% and have continued to steadily decrease.¹⁹⁹

In addition, feminist scholars describe the benefits to women that stem from changes across family law—specifically, the removal of the gender stereotypes from laws, the sexual revolution, and no-fault divorce.²⁰⁰ No-fault divorce shifted control of entry/exit of marriage from the state to the individual and provided women with the ability to leave oppressive marriages.²⁰¹ As a result, the interest of the family no longer trumped the individual interests of its members,

Project, the National Fatherhood Initiative, and the Institute for American Values, that received millions from conservative groups such as the Heritage Foundation. *Id.*

¹⁹⁵ See Fineman, *supra* note 77, at 64 (stating that marriage is not an essential structure for child-care because statistics show that single parenthood correlates with social and economic disadvantages but that it does not negatively impact the well-being of children); see also Kevin Lang & Jay L. Zagorsky, *Does Growing Up with a Parent Absent Really Hurt?*, 36 J. HUM. RES. 253, 255, 271 (2001) (finding there is scarce evidence that parent presence impacts the economic well-being of children). Moreover, maternal and paternal presence only have modest effects on children’s cognitive outcomes. Lang & Zagorsky, *supra*, at 271–72.

¹⁹⁶ See Betsey Stevenson & Justin Wolfers, *Bargaining In the Shadow of the Law: Divorce Laws and Family Distress* 19 (Nat’l Bureau of Econ. Rsch., Working Paper No. 10175, 2003) (finding that there is a significant decline in domestic violence and female suicide rates stemming from the implementation of unilateral divorce); Wehle, *supra* note 20 (providing that no-fault divorce laws made women happier by giving them a way out of bad marriages).

¹⁹⁷ See Stevenson & Wolfers, *supra* note 196, at 3, 5, 15 (finding that domestic violence rates may have decreased because of the credible threat to leave under no-fault divorce); Wehle, *supra* note 20 (stating that domestic violence decreased from the advent of no-fault divorce).

¹⁹⁸ See Stevenson & Wolfers, *supra* note 196, at 6 fig. 4 (noting that spousal homicides generally occur in abusive relationships and that policies that diminish the barriers to exit reduce spousal abuse and homicide); Wehle, *supra* note 20 (stating that researchers believe that women gained a life-preserving advantage from the threat of divorce because husbands were more motivated to behave and thus decreased domestic violence and homicide).

¹⁹⁹ See Stevenson & Wolfers, *supra* note 196 fig. 1 (showing the decrease in female suicide rates as a result of unilateral divorce); Wehle, *supra* note 20 (providing that female suicide rates fell immediately after the enactment of no-fault divorce laws); Kim, *supra* note 26 (discussing a paper by Betsey Stevenson and Justin Wolfers that found a decrease in female suicide rates, intimate partner violence, and women murdered by their partners after no-fault divorce laws were enacted).

²⁰⁰ Fineman, *supra* note 77, at 63–64. For example, antidiscrimination and gender equity laws benefitted women by providing them access to the workforce, politics, and schooling. *Id.*; see Appleton, *supra* note 31, at 430 (stating that a resurgence in feminism shifted family law reforms that paved the way for same-sex marriage to become a constitutional right).

²⁰¹ See Fineman, *supra* note 77, at 63 (noting that the no-fault divorce revolution reflected changing societal views that the family as a unit no longer eclipsed individual interests); Appleton, *supra* note 31, at 431–32 (stating that no-fault divorce provided women a means to exit bad marriages without collusion or travel that were ubiquitous in the fault regime).

specifically wives.²⁰² Accompanying the no-fault divorce revolution, women's economic position improved.²⁰³ Marriage is no longer considered economically essential—gender equity and antidiscrimination laws freed women from their economic dependency on men.²⁰⁴ This equality now applies to divorce law as gendered considerations for alimony, child custody, and parentage were removed.²⁰⁵ These changes helped free women from gendered familial responsibilities as couples began to share breadwinning and household responsibilities.²⁰⁶

III. WHERE IS FAMILY LAW HEADED? AN ANALYSIS THAT THE ELIMINATION OF NO-FAULT DIVORCE IS UNCONSTITUTIONAL AND OUT OF STEP WITH THE PROGRESSIVE DIRECTION OF FAMILY LAW

The Supreme Court's reasoning in *Obergefell* regarding the expansion of the right to marry—notably, the four principles outlined by the Court—can be extended to no-fault divorce.²⁰⁷ Based on the Court's interpretation of the Equal Protection and the Due Process Clauses, no-fault divorce can be constitutionally protected under the right to marry.²⁰⁸ Finally, the Court described a history of changing traditions and that democracy should not infringe on fundamental rights.²⁰⁹ This Note argues that these justifications logically map onto no-fault divorce.²¹⁰ Moreover, the removal of no-fault divorce does not align with the progressive direction of family law and lived realities of American families.²¹¹ State legislatures have already removed the performance of gender

²⁰² See Fineman, *supra* note 77, at 63 (explaining that the no-fault divorce revolution was part of a movement that bolstered individual interests).

²⁰³ See *id.* (noting that marriage after the three revolutions was no longer economically vital because women could support themselves).

²⁰⁴ See *id.* (explaining that the end of the idea of natural dependency of women on men diminished one of the state's reasons for controlling divorce); Eskridge, *supra* note 32, at 1340–41 (demonstrating that a substantial number of people diverged from the natural law norm and advocated for the rejection of traditional gender roles in marriage).

²⁰⁵ See Fineman, *supra* note 77, at 63 (explaining that with the no-fault divorce revolution, there were the gender equality and sexual revolutions); McMullen, *supra* note 113, at 45 (stating that following reforms, alimony was no longer considered an obligation of the husband and a right for the wife); Elrod & Dale, *supra* note 113, at 392 (explaining that, in the 1970s, fathers began to assume more parenting duties and the child custody law shifted to the “best-interests-of-the-child” standard); Ledebuhr, *supra* note 113, at 13 (noting that after divorce reforms, illegitimate children were given rights and non-marital presumptions of parentage were added to state laws).

²⁰⁶ See Appleton, *supra* note 31, at 431 (describing that the Supreme Court removed alimony as an obligation for divorced husbands, supported parental equality in child custody and parentage, and these developments permitted men and women to diverge from traditional gender roles).

²⁰⁷ See *Obergefell v. Hodges*, 576 U.S. 644, 672, 681 (2015) (holding that same-sex couples right to marry is protected under the Fourteenth Amendment's liberty interest); *infra* notes 219–234 and accompanying text.

²⁰⁸ See *infra* notes 235–244 and accompanying text.

²⁰⁹ See *infra* notes 245–258 and accompanying text.

²¹⁰ See *infra* notes 259–269 and accompanying text.

²¹¹ See *infra* notes 259–269 and accompanying text.

from alimony, child custody, and parentage laws.²¹² The Court also ruled on these areas of family law and held that gender cannot be a distinguishing factor.²¹³ Overall, the removal of no-fault divorce would be a step backward for society, particularly harmful for women.²¹⁴

Section A discusses how *Obergefell*'s ruling can extend to no-fault divorce because it expanded the fundamental right to marry.²¹⁵ Section B describes how the removal of no-fault divorce negatively impacts women and is a reversion to the natural law model of society.²¹⁶

A. A Proposal: Based on the Ruling in Obergefell v. Hodges That Expanded the Fundamental Right to Marry, the Elimination of No-Fault Divorce Is Unconstitutional

In *Obergefell*, the Supreme Court overruled the Sixth Circuit and held that the fundamental right to marry under the Due Process and Equal Protection Clauses of the Fourteenth Amendment applies to same-sex marriages.²¹⁷ This section argues that, based on that ruling, no-fault divorce is protected under the right to marry.²¹⁸

1. Applying the Four Principles Outlined by the Court in *Obergefell* to No-Fault Divorce

The *Obergefell* Court outlined four principles that explained the right to marry is fundamental and must be expanded to same-sex couples: individual autonomy, intimate association, the promotion of familial relations, and social order.²¹⁹ These four principles can also be applied to no-fault divorce.²²⁰

The Court stated that individual autonomy includes the right to decide who you marry.²²¹ Additionally, the Court noted that the Constitution protects

²¹² See *infra* notes 259–269 and accompanying text.

²¹³ See *infra* notes 259–269 and accompanying text.

²¹⁴ See *infra* notes 259–278 and accompanying text.

²¹⁵ See *infra* notes 217–258 and accompanying text.

²¹⁶ See *infra* notes 259–278 and accompanying text.

²¹⁷ See U.S. CONST. amend. XIV, § 1 (noting that the state cannot deprive anyone of their liberty under the due process clause and must afford equal protection under the law); *Obergefell v. Hodges*, 576 U.S. 644, 672, 681 (2015) (holding same-sex couples have a constitutional right to marry).

²¹⁸ See *infra* notes 219–278 and accompanying text.

²¹⁹ See 576 U.S. at 665 (describing four premises that show marriage is fundamental under the Constitution and also applies to same-sex couples); Donohue, *supra* note 169, at 114–15 (presenting the four *Obergefell* principles as justifying the “right to unmarried”); Frye & Romero, *supra* note 169, at 97, 99 (arguing that the four principles apply to a fundamental right to divorce).

²²⁰ See *Obergefell*, 576 U.S. at 665–66 (stating how the four principles are rooted in tradition and are used to argue when the right to marry extends to same-sex couples); Frye & Romero, *supra* note 169, at 102 (arguing that individual autonomy can be applied to a fundamental right to divorce).

²²¹ See *Obergefell*, 576 U.S. at 666 (noting that decisions about marriage are the most personal).

procreation and family relationships.²²² The Court explained it would be paradoxical to recognize the right to privacy in these spheres of family life but not the decision to be in the relationship, emphasizing that deciding to marry or not marry is an individual freedom the state cannot impede on.²²³ If individual autonomy includes the decision of who you marry, then this can be extended to include the choice to no longer be married.²²⁴ The return to fault-based divorce is inconsistent with individual autonomy because it restricts individual choice.²²⁵ Further, the Court reasoned that decisions in marriage are protected under the right to privacy.²²⁶ Because the decision not to be married occurs within the marriage, it should be protected under the same grounds.²²⁷

The premise of intimate association also logically extends to no-fault divorce because it encompasses the freedom to engage or not engage in relationships.²²⁸ The Court stated that the right to intimate association is not limited to the holding in *Lawrence*.²²⁹ Based on the Court's expansive view of intimate

²²² See *id.* (stating the Court has previously protected choices concerning the family like childrearing, contraception, procreation, and family relationships (citing *Lawrence v. Texas*, 539 U.S. 558, 574 (2003))); see also *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965) (ruling that there is a right to use contraceptives).

²²³ See *Obergefell*, 576 U.S. at 666 (stating that same-sex couples who want to marry have autonomy to make this choice) (citing *Loving v. Virginia*, 388 U.S. 1, 12 (1967))).

²²⁴ See *id.* (referencing the Supreme Judicial Court of Massachusetts that if and who you marry is a way to define oneself); Frye & Romero, *supra* note 169, at 102 (asserting that the right to marry prevents the government from dictating who people love). If individual autonomy produces a right to marry, then it also must logically lead to “a right to unmarry” (dissolving a marriage). Frye & Romero, *supra* note 169, at 102.

²²⁵ See *Obergefell*, 576 U.S. at 666 (stating that marriage is an intimate choice and the state should not intrude on decisions regarding marriage); see also Krom, *supra* note 68, at 156–57 (1970) (stating there were seven grounds for divorce in California before no-fault divorce); CAL. CIV. CODE § 92 (1872) (describing the grounds for divorce are “1. Adultery; 2. Extreme cruelty; 3. Willful desertion; 4. Willful neglect; 5. Habitual intemperance; 6. Conviction of felony”).

²²⁶ *Obergefell*, 576 U.S. at 666.

²²⁷ See *id.* (stating that it is not logical to acknowledge the right to privacy in certain areas of family life but not in marriage which, is foundational to the family) (citing *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978))); Donohue, *supra* note 169, at 115 (demonstrating that parties that are divorcing should have a constitutionally protected right to privacy). Couples who are getting divorced are still married until their divorce is finalized. Donohue, *supra* note 169, at 115; see also *Zablocki*, 434 U.S. at 375, 387 (holding that a Wisconsin statute that states that residents that have minor children they pay child support for but are not in their custody cannot marry clearly interferes with the right to marry).

²²⁸ See *Obergefell*, 576 U.S. at 666 (noting that the right to marry is fundamental because it is significant to individuals' commitments to each other); Frye & Romero, *supra* note 169, at 102 (interpreting *Obergefell* to hold that the right to marry is fundamental because it reflects a couple's mutual desire to be married).

²²⁹ See *Obergefell*, 576 U.S. at 667 (stating that, in *Lawrence v. Texas*, the Court held there could not be criminal liability attached to the right of intimate association but that the freedom does not come to an end there); see also *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003) (holding that the state cannot criminalize same-sex intimate relationships). The Houston police, in response to a weapons disturbance report, entered John Geddes Lawrence's home and witnessed him engaging in a sexual act with another man, Tyron Garner. *Lawrence*, 539 U.S. at 562–63. Texas had a statute prohibiting

association, it would include the ability not to associate through no-fault divorce.²³⁰

The Court also cited the premises of encouraging familial relationships and maintaining social order.²³¹ The inclusion of no-fault divorce under the right to marry encourages familial relationships that both parties want to be in and incorporates a modern view of the family beyond the traditional nuclear family model.²³² In addition, the majority's statement that marriage is in the child's best interest is unsupported by research.²³³ The majority further argues that marriage is a keystone of our social order but that it has evolved; this evolution of marriage in the social order today should include no-fault divorce to reflect present views of marriage.²³⁴

2. The Removal of No-Fault Divorce is Unconstitutional under the Fourteenth Amendment's Due Process and Equal Protection Clauses

In *Obergefell*, the Supreme Court held that same-sex marriage is constitutional under the liberty guaranteed by the Fourteenth Amendment's Due Process and Equal Protection Clauses.²³⁵ It referenced the determination in *Washington v. Glucksberg* that the Due Process Clause must be applied narrowly but asserts that the right to marry has always been applied expansively by the Court.²³⁶ In

certain same-sex sexual conduct. *Id.* In its ruling, the Court held that this statute violated the Fourteenth and Fifth Amendments' Due Process Clauses. *Id.* at 578–79.

²³⁰ See *Obergefell*, 576 U.S. at 667 (stating that intimate association does not end with relationships no longer being illegal); Frye & Romero, *supra* note 169, at 102 (stating that the government should not be able to force people to remain married against their wishes). They argue that there is a constitutional right to a prompt divorce. Frye & Romero, *supra* note 169, at 103.

²³¹ See *Obergefell*, 576 U.S. at 666–67 (stating that the right to marry protects families and that marriage is a cornerstone of the social order).

²³² See *id.* at 668 (noting that the right to marry encourages couples to build a home and raise children). Yet, the Court takes a more modern approach to marriage by acknowledging that the right to marry is not less relevant to those who do not want or can't have children. *Id.* at 669. The Court states that raising children is only one aspect of marriage. *Id.*

²³³ See *id.* at 668 (asserting that marriage gives stability that is significant to the child's best interest); Coltrane & Adams, *supra* note 177, at 369 (noting that the research on the impacts of marriage on children is far from conclusive).

²³⁴ See *Obergefell*, 576 U.S. at 669 (stating that marriage has evolved in considerable ways over time). The Court references that rules based on gender, race, and parental approval have all been removed from marriage, but it has remained a staple of the community. *Id.*; Frye & Romero, *supra* note 169, at 103 (noting that the social benefits marriage confers on society can't undermine the rights of individuals); Kim Parker & Rachel Minkin, *Views of Divorce and Open Marriages*, PEW RSCH. CTR. (Sep. 14, 2023), <https://www.pewresearch.org/social-trends/2023/09/14/views-of-divorce-and-open-marriages/> [perma.cc/7NLW-AR9G] (reporting that 55% of Americans say that unhappy couples stay married for too long).

²³⁵ See 576 U.S. at 672 (stating that The Due Process and Equal Protection Clauses are linked despite describing different principles).

²³⁶ See *id.* at 671 (noting that *Washington v. Glucksberg* proposed that liberty must be interpreted narrowly (citing 521 U.S. 702, 721 (1997))). The Court proposed that this is different from the way the Court has discussed marriage. *Id.* The Court cited numerous precedents, stating they interpreted a

addition, the Court applied precedent, looking to history and tradition to construe rights but noted that they should not be limiting.²³⁷ Rights should not be defined solely based on who historically had access to them; instead, history should be looked to for examples of how the Constitution defines liberty.²³⁸

The Court discussed the synergy between the Equal Protection and the Due Process Clauses that guard the right to marry.²³⁹ The Due Process Clause guarantees certain rights.²⁴⁰ The Equal Protection Clause prohibits the State from creating discriminatory laws that violate fundamental rights; laws that infringe on those rights are subject to the highest level of scrutiny.²⁴¹ Given the

broad right to marry. *Id.* For example, it cited *Loving*, stating that this case did not consider whether there was a right to interracial marriage, *Turner v. Safley* noting that it did not inquire about the right for inmates to marry, and *Zablocki* explaining that it did not ask about a right for fathers who did not pay child support to marry—all these cases inquired about the right to marry. *Id.*; *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Turner v. Safley*, 482 U.S. 78, 97 (1987); *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978); see also *Glucksberg*, 521 U.S. at 733 (holding that there is no right to physician-assisted suicide). The Court instructs that, to determine whether a right is fundamental, courts should first look to whether the right is embedded in the traditions and history of the United States. *Glucksberg*, 521 U.S. at 721. Next, the Court looked to whether the right should provide a limited description of the liberty interest. *Id.*

²³⁷ See *Obergefell*, 576 U.S. at 671–72 (stating that rights should not be defined by who previously exercised them).

²³⁸ See *id.* (asserting if rights were only defined based on who previously had them, then new groups could not gain rights wrongly denied in the past).

²³⁹ See *id.* at 673 (stating that each of the Due Process and Equal Protection Clauses can illuminate the meaning of the other). The Court again cited *Loving*, noting that it held a prohibition on interracial marriage was unconstitutional under the Equal Protection and the Due Process Clauses. *Id.* at 672 (citing 388 U.S. at 12). In *Loving*, the Court stated that the ban on interracial marriage was unenforceable because of its disparate treatment of interracial couples. 388 U.S. at 12. Then, it applied a fundamental rights framework asserting that marriage, as a fundamental right, could not be denied to interracial unions. *Id.* Another example the Court cited was *Zablocki*, where the Court applied the Equal Protection Clause to hold that a law prohibiting fathers who missed child-support payments to marry was unconstitutional. *Obergefell*, 576 U.S. at 673; *Zablocki*, 434 U.S. at 383. In its analysis, the Court relied on the fundamental right to marry being violated. *Zablocki*, 434 U.S. at 383. The Court in *Obergefell* concluded that both cases show that the Equal Protection Clause can assist in identifying and remedying the inequalities of marriage and protect the Constitutional principles of equality and liberty. *Obergefell*, 576 U.S. at 674.

²⁴⁰ See *Obergefell*, 576 U.S. at 671 (stating that the fundamental right to marry should be construed broadly); *Frye & Romero*, *supra* note 169, at 103 (arguing that the Due Process Clause stipulates that rights should be available to everyone and that it must protect the “right to unmarried”). *Frye* and *Romero* argue that there is a “right to unmarried” implied in *Obergefell*’s holding that the government cannot burden the right to marry. *Frye & Romero*, *supra* note 169, at 102; see *Obergefell*, 576 U.S. at 675–76 (stating that same-sex couples cannot be excluded from the right to marry).

²⁴¹ U.S. CONST. amend. XIV, § 1; see *Obergefell*, 576 U.S. at 673–74 (stating that the Equal Protection Clause revealed inequality in the most important institutions). The Court provided the example of how a brief in *Reed v. Reed* shed light on marriage and how women were treated unequally to men. *Obergefell*, 576 U.S. at 674; Brief for Appellant at 69–88, *Reed v. Reed*, 404 U.S. 71 (1971) (No. 70-4); see also *Reed*, 404 U.S. at 76 (holding that states cannot enforce legislation that discriminates on the basis of sex). The brief demonstrates that the Court held that a Georgia law stating that the husband is the head of the family and his wife’s legal existence is joined with his is unconstitutional. *Obergefell*, 576 U.S. at 674.

majority's reasoning that the right to marry is expansive and not limited by history, it can be interpreted that no-fault divorce is included under that right.²⁴² Therefore, it is subject to strict scrutiny under the Equal Protection Clause, something that is extremely difficult to overcome.²⁴³ Alternatively, since women initiate approximately seventy percent of divorce filings, these laws could be considered discrimination on the basis of sex, discrimination that the Court has invalidated numerous times.²⁴⁴

3. The Termination of No-Fault Divorce does not align with Constitutional views of Democracy and History

In the Court's reading of the Constitution, it finds that democracy is the process that should be used to change laws, however, the courts may intervene if a law diminishes a fundamental right.²⁴⁵ This applies to laws preventing same-sex marriage.²⁴⁶ Given *Obergefell*'s expansive interpretation of the right to marry that can be extended to protect no-fault divorce as described in the subsections above, the Court should intervene when laws interfere with this right.²⁴⁷ The proposals to remove no-fault divorce in Louisiana, Texas, and Nebraska would unduly burden the ability to access this right.²⁴⁸

²⁴² See *Obergefell*, 576 U.S. at 673 (stating that the Equal Protection Clause prevents inequalities in key institutions like marriage); Frye & Romero, *supra* note 169, at 103 (noting that marriage is finalized when a license is received and the ceremony occurs but divorce takes much longer). Frye and Romero argue that divorce should be available immediately and that other considerations, including child custody and property, can be resolved later. Frye & Romero, *supra* note 169, at 103.

²⁴³ See *Obergefell*, 576 U.S. at 675 (determining that the right to marry is a fundamental right that must be afforded to same-sex couples under the Equal Protection and Due Process clauses); *supra* note 107 and accompanying text (noting that in *Zablocki* the court held that because the right to marry is fundamental, it is subject to strict scrutiny).

²⁴⁴ See *Obergefell*, 576 U.S. at 673–74 (stating that there are various precedents that demonstrate how the Equal Protection Clause remedies inequalities in marriage laws). For example, the Court cites *Frontiero v. Richardson*, which overturned a law that prevented a female member of the armed forces from claiming her husband as a dependent. 411 U.S. 677, 688–89 (1973); *supra* note 80 and accompanying text (describing further the holding in *Frontiero*); see also *Women More Likely Than Men to Initiate Divorces, but Not Non-Marital Breakups*, AM. SOCIO. ASS'N, <https://www.asanet.org/women-more-likely-men-initiate-divorces-not-non-marital-breakups/> [perma.cc/76TU-ARBG] (Sep. 28, 2022) (reporting that an associate professor of sociology at Stanford University found that from 2009–2015, 69% of women initiated divorces but men only initiated 31%).

²⁴⁵ See *Obergefell*, 576 U.S. at 676–77 (providing that liberty is usually maintained through democracy but the courts must address when fundamental rights are violated by the government).

²⁴⁶ See *id.* at 677, 680 (stating that, through the courts, individuals can invoke constitutional protections and the Constitution does not allow states to prevent same-sex marriage).

²⁴⁷ See *supra* notes 217–244 and accompanying text (explaining that given the four principles of marriage outlined in *Obergefell*, and the Court's previous holdings that synchronize the Due Process and Equal Protection clauses, no-fault divorce should be protected under the fundamental right to marry).

²⁴⁸ See *Obergefell*, 576 U.S. at 676–77 (stating that the legislature cannot implement laws that violate fundamental rights); Wehle, *supra* note 20 (demonstrating that conservative politicians are trying to remove no-fault divorce).

It would also lead to the same impermissible disparity in laws cautioned in *Obergefell*.²⁴⁹ The majority highlights that the recognition of marriage in one state but not in another is a complication of domestic relations law, harming same-sex couples.²⁵⁰ This same scenario would likely occur with the removal of no-fault divorce in some states: couples legally divorced under no-fault grounds may not have their divorces recognized when they enter states that removed no-fault divorce.²⁵¹ This lack of recognition would not only lead to confusion among states but also cause significant pain to the divorcing couple.²⁵²

Finally, the Court in *Obergefell* referred to history and the democratic process to support its conclusion that the right to marry should extend to same-sex couples; the Court's rationale can also apply to protecting no-fault divorce.²⁵³ Notably, the Court stated that the history of marriage is a history of consistency but also evolution.²⁵⁴ For example, the Court referenced how the doctrine of coverture ended as women gained rights.²⁵⁵ State legislatures removed patronizing gender stereotypes from various components of divorce and marriage laws,

²⁴⁹ See 576 U.S. at 678–79 (noting that variance in decisions by the courts of appeals caused state variation in gay marriage laws). Moreover, if the Court reviewed these on a case-by-case basis, it would be slow and deny same-sex couples rights that are connected to marriage. *Id.*

²⁵⁰ See *id.* at 680 (describing how being legally married in one state but not another causes uncertainty). It can cause hardship if a spouse is hospitalized in a state that does not allow same-sex marriage. *Id.*

²⁵¹ See *id.* (stating that if all states are constitutionally required to issue same-sex couples marriage licenses then they cannot refuse to recognize marriages in other states). The Court held that there is no legal basis that one state can deny a same-sex marriage from another state. *Id.*

²⁵² See *supra* note 250 and accompanying text (explaining that variance in state laws about gay marriage can cause couples emotional harm).

²⁵³ See *Obergefell*, 576 U.S. at 659 (stating that, although the institution of marriage is ancient, it has evolved with society). The Court provides examples like the end of arranged marriage and coverture. *Id.* at 659–60. The Court also demonstrated that democracy is the proper avenue for change, but only if it does not infringe on fundamental rights. *Id.* at 676. The Court cited to *Schuette v. BAMN*, arguing that fundamental freedoms cannot be violated by the government, leading to courts stepping in. 572 U.S. 291, 311, 313 (2014). Furthermore, the Court justified its positions by stating that the Constitution allows individuals to bring cases asserting a violation of a fundamental right without waiting for legislatures. *Obergefell*, 576 U.S. at 677.

²⁵⁴ See *Obergefell*, 576 U.S. at 659–60 (stating that the changes in marriage laws have strengthened it; new elements of freedom are realized by new generations).

²⁵⁵ See *id.* at 660 (describing that coverture treated married couples as the same legal entity that was dominated by the husband). But as women's roles changed and they gained rights, society viewed women as more equal and abandoned coverture. *Id.*; Woody Holton, *Equality as Unintended Consequence: The Contracts Clause and the Married Women's Property Acts*, 81 J.S. HIST. 313, 330–31 (2015) (providing several reasons for the Married Women's Property Acts but that, in Mississippi, it was a work-around for husbands to avoid their debts by having women own property). There are many reasons why states began to permit property ownership by wives. Holton, *supra*, at 330. First, many state legislators believed that a wife should not have to suffer because of her husband's bad business decisions. *Id.* Second, state legislators wanted a distinct legal system from the English—so there was an increasing preference for black-letter code over common law. *Id.*

and the Court protected their removal under the Constitution.²⁵⁶ Expanding the right to marry to include no-fault divorce is in line with cultural shifts reflected in family law because it would remove gender stereotypes that were ubiquitous under the fault regime, such as the notion of female victims that require protection and male perpetrators.²⁵⁷ Given the prevalence and more favorable view of divorce and that marriage law is intended to reflect society's perceptions of marriage, the inclusion of constitutional protections for no-fault is a logical step.²⁵⁸

B. The End of No-Fault Divorce Would Mean the Return to the Traditional Model of the Family

The divorce revolution that led to no-fault divorce occurred alongside the removal of gender from alimony, child custody, and parentage.²⁵⁹ The fault-based divorce system relied on formalist conceptions of victims and perpetrators.²⁶⁰ If a litigant could prove the right to exit, the gendered notion of roles in marriage flowed into decisions about how to organize the family in divorce.²⁶¹ For example, gendered presumptions prevailed in property ownership—courts

²⁵⁶ See *supra* notes 112–144 and accompanying text (explaining changes in family law that coincided with state adoption of no-fault divorce including alimony, parentage, and child custody laws).

²⁵⁷ See *Obergefell*, 576 U.S. at 659 (stating that the institution of marriage evolved over time); Friedman, *supra* note 30, at 1528 (arguing that women were characterized as innocent and men as perpetrators). Friedman presents that this model was a false sense of protection for women and these stereotypes actually protected men as men were held to a lesser moral standard than women. Friedman, *supra* note 30, at 1528; see *supra* note 113 and accompanying text (describing the elimination of gender stereotypes from alimony, parentage, and child custody laws).

²⁵⁸ See *Obergefell*, 576 U.S. at 659–60 (noting there were crucial transformations in marriage over time that reflected societal values and this strengthened the institution of marriage); Appleton, *supra* note 31, at 430–31 (stating in the 1970s that the U.S. Supreme Court removed the performance of gender from family laws, allowing men and women to challenge the traditional breadwinner-housewife model); Parker & Minkin, *supra* note 234 (explaining that the majority of the population believes unhappy couples remain married for too long).

²⁵⁹ See Appleton, *supra* note 31, at 430–31 (stating that, in the 1970s, the Supreme Court removed the performance of gender from family laws like parentage, alimony, and custody).

²⁶⁰ See *id.* at 429 (describing the formalist fault-based divorce system that hinged on the notions of guilty and innocent parties); Friedman, *supra* note 30, at 1528 (noting that the fault system encourages wives to describe themselves as innocent victims and to depict their husbands as adulterous or cruel villains).

²⁶¹ See Appleton, *supra* note 31, at 429 (providing that in court the plaintiffs had the burden of proving fault); Friedman, *supra* note 30, at 1517–18 (describing that Maryland had strict laws for divorce and that there were largely only two grounds that were recognized: abandonment and adultery). One had to prove their spouse was gone for more than three years and usually they brought in corroborating witnesses. Friedman, *supra* note 30, at 1517–18. Abandonment was the most popular ground for divorce in 1929, with 1,188 such cases being brought compared to the 382 cases based on adultery. *Id.* at 1517. Collusion was obvious in these cases; the defendant would not appear or make arguments. *Id.* In most instances, the wife would say he just left one day and a corroborating witness would say the words included in the statute. *Id.* at 1518; *supra* note 56 and accompanying text. For adultery, somebody would claim to witness an adulterous relationship, even going so far as to say they saw the defendant engaged in intercourse. Friedman, *supra* note 30, at 1518.

usually did not award women property, courts did not acknowledge the importance of care work in the home and this increased female impoverishment following divorce, courts automatically placed children with their mothers, and court-ordered child support reinforced mother's role as a selfless caregiver and economic subordinate.²⁶²

In the 1960s and 1970s, there was a strong feminist push for equality and litigants pursued antidiscrimination statutes.²⁶³ This is exemplified by the family law equality project that called for the removal of traditional gender roles in the home and workplace and disputed the idea of separate spheres for men and women.²⁶⁴ Meanwhile, no-fault divorce characterized marriage as a personal commitment, promoting individual agency and equality.²⁶⁵ The liberal rights model reached its peak in 2015, in *Obergefell*, where the Supreme Court held that a fundamental right to marry existed regardless of gender or sexuality.²⁶⁶ The cases that followed *Obergefell* continued to advance the removal of gender-based stereotypes from laws and relied on no-fault divorce's individualistic portrayal of marriage.²⁶⁷ The Court's holdings focused on agency and personal expression, destabilizing gender as central to what marriage looked like and, therefore, what divorce would look like.²⁶⁸ A continued focus on the notion of

²⁶² See Appleton, *supra* note 31, at 429 (describing that the rules that governed economic divisions in the divorce proceedings generally undervalued women's contributions to the marriage); McMullen, *supra* note 113, at 45 (stating that, before the 1960s, despite courts using property to divide assets in divorce, wives were frequently not seen as having claims to property that her husband purchased or was under his title).

²⁶³ See Appleton, *supra* note 31, at 430–31 (describing that litigants used the Equal Protection Clause and antidiscrimination to invalidate assumptions based on gender in family law).

²⁶⁴ See *id.* at 430–31, 434 n.63 (providing that part of this movement was widespread state adoption of no-fault divorce and constitutional challenges to alimony, custody, and parentage, applying the Equal Protection Clause and the Due Process Clause).

²⁶⁵ See *id.* at 435 (stating that no-fault divorce paved the way for the idea of marriage as a personal commitment as opposed to a societal construction centered around procreation).

²⁶⁶ See *Obergefell v. Hodges*, 576 U.S. 644, 681 (2015) (holding that it is unlawful for a state not to recognize a same-sex marriage); Appleton, *supra* note 31, at 434 (noting that feminist changes in family law led to *Obergefell*).

²⁶⁷ See *Pavan v. Smith*, 582 U.S. 563, 564, 567 (2017) (stating the Court held that Arkansas's gendered practice of denying lesbian spouses to be named on a birth certificate was unconstitutional). The Court added that its holding is consistent with *Obergefell* because married same-sex parents must be afforded the same marital rights as heterosexual parents. *Pavan*, 582 U.S. at 566. Riano and Eskridge remark that marriage equality is a result of more than fifty years of shifts in constitutional and family law, yet they recognize there are still steps needed for equality for the LGBTQ+ community. Christopher R. Riano & William N. Eskridge, Jr., *The Unfinished Business of LGBTQ+ Equality: Five Years After Obergefell v. Hodges*, N.Y. STATE BAR ASS'N (June 3, 2020), <https://nysba.org/the-unfinished-business-of-lgbtq-equality-five-years-after-obergefell-v-hodges/?srsltid=AfmBOoORTf9hs0HbbGvViK02-hRyFCNElZF008OTwyIdkha94bVPt54V#endnote-002> [perma.cc/3VSQ-3UH2].

²⁶⁸ See Appleton, *supra* note 31, at 435, 442 (describing that marriage equality removed gender stereotypes and that no-fault divorce led to centering agency and personal identity within marriage); Courtney G. Joslin, Response, *Marriage Equality and Its Relationship to Family Law*, 129 HARV. L. REV. F. 197, 209 (2016), <https://harvardlawreview.org/forum/vol-129/marriage-equality-and-its-relationship-to-family->

personal commitment, agency, and equality would usher in progress on laws that reflect appreciation of different family compositions.²⁶⁹

Instead of moving beyond the liberal rights model of equality, the removal of no-fault divorce would move us backwards.²⁷⁰ No-fault divorce correlates with decreased domestic violence, declines in femicide, and continuously declining female suicide rates.²⁷¹ No-fault divorce's enactment also coincided with anti-discrimination in the workplace and the removal of gender norms from alimony, child custody, and parentage.²⁷² These movements freed women from oppressive gender roles.²⁷³ They allowed women to leave marriages that made them unhappy without proving fault, promoting female economic independence by legally viewing women as economically productive, and creating a system in which caregiving is not the sole responsibility of the mother through gender-neutral custody and parentage laws.²⁷⁴ Although certain divorce and marriage laws are gender-neutral and this is constitutionally protected, divorce itself is not.²⁷⁵ Conservative attacks advocate for a return to the fault-based system that is based on natural law assumptions of gender.²⁷⁶ The

law/ [perma.cc/L2EC-Y4PZ] (stating that *Obergefell* considered evolving families to recognize constitutional violations for same-sex couples).

²⁶⁹ See Appleton, *supra* note 31, at 435 (describing that no-fault divorce centers around agency and individual identity); Joslin, *supra* note 268, at 211 (noting that *Obergefell* demonstrates that changing experiences need to be considered in the development of legal changes). She explains that the laws that provide advantages to marital relationships but not nonmarital ones are likely to be a violation of liberty. Joslin, *supra* note 268, at 211.

²⁷⁰ See Wehle, *supra* note 20 (explaining that conservative states are considering ending no-fault divorce); Fineman, *supra* note 77, at 63 (describing the no-fault divorce revolution's connection to the gender equality and sexual revolutions). The end of no-fault divorce would reintroduce the unhelpful and increasingly less relevant gender norms and it would adversely affect women. See Fineman, *supra* note 77, at 63–64 (promoting the idea that the three revolutions—no-fault divorce, sexual equality, and gender equality—resulted in changes in family laws, including increased individual choice in marriages and the elimination of gender stereotypes).

²⁷¹ See Wehle, *supra* note 20 (describing that there are numerous benefits to no-fault divorce that gave women the power to leave marriages without the permission of their husbands). It made women happier because it allowed them to leave bad marriages. *Id.* Through no-fault divorce, women benefited from courts dividing assets; without this, they would be left destitute. *Id.*

²⁷² See Appleton, *supra* note 31, at 430–31 (noting that feminist movements led to litigation to strike down laws that encouraged gender stereotypes in family law).

²⁷³ See *id.* at 431 (stating that the increased gender equality in family law gave men and women greater opportunities to deviate from the traditional familial norms).

²⁷⁴ See *id.* at 431–32 (demonstrating that family law adopted a partnership theory of marriage that is demonstrated in no-fault divorce). This included increased valuing of women's contributions in domestic labor to increase equity in division of assets in divorce. *Id.* Increasingly gender-neutral laws also allowed for divisions of caregiving not based on traditional roles. *Id.* at 431.

²⁷⁵ See *id.* at 430–31 (describing constitutional protections for removing gender from various other elements of family law including alimony, custody, and parentage).

²⁷⁶ See Wehle, *supra* note 20 (stating that conservative commentators and politicians oppose no-fault divorce and claim that it is unfair to men and makes it too easy for women to leave marriages). Eskridge, *supra* note 32, at 1336 (proposing that the natural law model is based on the idea that women should be wives and mothers and that their role is to take care of the household; on the other hand,

removal of no-fault divorce is an attack on female autonomy and promotes the idea of women as confined to the private sphere; it detracts from the progress made in family law to strip gender-based presumptions.²⁷⁷ Instead of moving forward, we are now working to prevent family law from going backward.²⁷⁸

CONCLUSION

Although the liberal rights model is not perfect, in family law it has pushed the needle toward gender equality by eliminating gender stereotypes from the legal system. The return to a fault-based system would be a step backwards, it is a regression to the natural model of the family that would place women back in the private sphere. Due to the “constitutionalization” of family law that uncoupled gender in family law rights, the conservative proposals to remove no-fault divorce are unconstitutional under the framework of *Obergefell*, potentially expanding to protect a fundamental right to no-fault divorce.

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men control the households and are meant to have public, civic, and economic roles); POLIKOFF, *supra* note 40, at 22 (describing that the idea behind fault was that one party was innocent and this largely determined the results of divorce). For example, if a mother was at fault, she lost custody of her children and was unable to obtain alimony. POLIKOFF, *supra* note 40, at 22. Moreover, women under the fault regime also could not access property because, even if she bought the property in her name with her money, the court presumed it was her husband’s property. *Id.*

²⁷⁷ See Wehle, *supra* note 20 (arguing that the liberty interest that opponents of no-fault divorce point to more convincingly can be used to argue that no-fault divorce should continue); Friedman, *supra* note 30, at 1528 (stating that the fault system encourages gender-based stereotypes of men and women). Women were depicted as helpless and dependent in these proceedings. Friedman, *supra* note 30, at 1528.

²⁷⁸ See Eskridge, *supra* note 32, at 1355, 1358 (stating that we are supposed to be in the post-liberal model where the liberal model is challenged and variation in sexual and gender norms are considered critically productive). This hinges on the idea that sexual and gender minorities improve mainstream society. *Id.* at 1358. For example, post-liberals argue that the women, gay, and transgender presence in the workplace disrupt traditional attitudes about society. *Id.* at 1359. They challenge the notion that only men with wives and children are good employees. *Id.* The focus is on reconstructing traditional institutions to promote inclusivity. *Id.*; see also Jane Biondi, Note, *Who Pays for Guilt?: Recent Fault-Based Divorce Reform Proposals, Cultural Stereotypes and Economic Consequences*, 40 B.C. L. REV. 611, 617–18 (1998) (discussing the transition to no-fault divorce, noting that the liberal model does not fully address the needs of women). Although the author rejects calls to return to fault-based divorce, the author cites Martha Fineman, explaining that the lack of success of equitable property divorce distribution is because of the lack of acknowledgement of women’s contributions as it presumed equality in the workplace and in marriage. Biondi, *supra*, at 611, 617–18. It does not acknowledge that women who work are still also primary caregivers. *Id.* at 617–18. In this scenario, the appreciation of differences between men and women and their contributions would be impactful as part of the post-liberal model. *Id.*; see Eskridge, *supra* note 32, at 1358 (describing the post-liberal model).