

Constitutional Issues in Family Law: An Annotated Bibliography (Part 1 of 2)

by
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Family law has long been a source for interesting and important constitutional issues. The Constitution is of course the foundational document of American law, spelling out vital principles about government and the rights of people. Few things are as fundamentally important to most Americans as their families and the relationships and interests connected to them. As a result, all of the major topics in family law, such as marriage, divorce, and parenting, inevitably raise a steady stream of new and challenging constitutional questions.

This bibliography covers some of the significant constitutional issues arising in the realm of family law today, as well as other legal and policy issues spinning off of the constitutional controversies. It focuses on issues discussed in the articles in this issue of the *Journal of the American Academy of Matrimonial Lawyers*.

This bibliography begins with the issue of abortion, which is obviously a topic receiving an immense amount of attention recently because of the Supreme Court's decision to overrule *Roe v. Wade* and eliminate the federal constitutional right to choose to have an abortion.¹ The bibliography focuses on issues that are especially important in the wake of that decision, such as whether Congress can enact national legislation about abortion, whether states that prohibit abortion can prohibit their citizens from traveling to other states where abortion is still legal, and whether the availability of medication abortions will undercut abortion bans. The bibliography also covers a few other issues of

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¹ *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

particular relevance to family law, such as abortion laws affecting those who become pregnant while in foster care.

The Indian Child Welfare Act is also receiving significant attention right now, because the Supreme Court will soon be hearing and deciding a case about whether the Act exceeds Congress's authority or involves racial distinctions that violate Equal Protection rights.² This bibliography covers the literature on several key aspects of the Act, its history, and its effects, including arguments in favor of and against its constitutionality.

Other topics in this bibliography include the constitutional dimensions of fatherhood, the Second Amendment's impact on family law, the right to make medical decisions, the rights of parents versus non-parents, the privilege against self-incrimination, and the profound issues at the intersection of religious beliefs and family law.

The next issue of the *Journal* will also have a bibliography on constitutional issues.

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² *Haaland v. Brackeen*, 142 S. Ct. 1205 (2022) (granting certiorari in four consolidated cases).

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Abortion

– Effects of Allowing or Limiting Access to Abortion

Helen M. Alvaré, *Nearly 50 Years Post-Roe v. Wade and Nearing Its End: What Is the Evidence that Abortion Advances Women's Health and Equality?*, 34 REGENT U. L. REV. 165 (2021-2022) (asserting that pro-choice advocates have failed to produce persuasive evidence that abortion rights improve women's health, quality of life, or equality).

Ederlina Co, *Abortion Privilege*, 74 RUTGERS U. L. REV. 1 (2021) (discussing the implications of inequality in access to abortion and the disparities that arise along racial, economic, and geographic lines).

Emma Knight, *Statistically Speaking: Quality of Life Improves with Access to Choose: Easing Abortion Restrictions Benefits Both Mother and Child, Especially for Families of Color*, 41 CHILD. LEGAL RTS. J. 188 (2021) (arguing that courts should protect abortion rights because research has demonstrated that abortion access produces better economic and educational outcomes for women and their children, particularly for people of color and people living in poverty).

Lynne Marie Kohm, *Roe's Effects on Family Law*, 71 WASH. & LEE L. REV. 1339 (2014) (assessing the extent to which significant changes in parent-child relationships, marriages, sexuality, and family life are attributable to the Supreme Court's decision in *Roe v. Wade*, and concluding that the decision has had a profound effect on family law and produced harmful changes for men, women, and relationships between men and women).

Michelle Oberman, *What Will and Won't Happen When Abortion Is Banned*, 9 J.L. & BIOSCIENCES 1 (2022) (using empirical data and international comparisons to assess the extent to which abortion bans will deter people from having abortions, change cultural attitudes on abortion by sending a message that abortion is wrong, and be competently implemented and enforced).

Rachel Rebouché, *The Public Health Turn in Reproductive Rights*, 78 WASH. & LEE L. REV. 1355 (2021) (recommending that the debate over reproductive rights should shift away from constitutional doctrine and toward generating and evaluating

credible empirical information about the effects of abortion access and abortion restrictions).

– **Extraterritorial Restrictions on Abortion**

Susan Frelich Appleton, *Gender, Abortion, and Travel After Roe's End*, 51 ST. LOUIS U. L.J. 655 (2007) (analyzing the choice-of-law and constitutional questions presented by state laws that prohibit state residents from having abortions in other states, and arguing that such extraterritorial abortion bans improperly seek to subordinate and police women's behavior).

Anthony J. Bellia Jr., *Federalism Doctrines and Abortion Cases: A Response to Professor Fallon*, 51 ST. LOUIS U. L.J. 767 (2007) (discussing the types of standards that the Supreme Court would use to analyze difficult federalism issues arising from *Roe v. Wade* being overruled, including whether states can prohibit their citizens from going to other states to obtain abortions).

C. Steven Bradford, *What Happens if Roe Is Overruled? Extraterritorial Regulation of Abortion by the States*, 35 ARIZ. L. REV. 87 (1993) (discussing constitutional provisions and principles that might be violated by extraterritorial regulation of abortion, including the Full Faith & Credit Clause, due process, the right to a jury trial, the dormant Commerce Clause, and the right to interstate travel).

I. Glenn Cohen, *Circumvention Tourism*, 97 CORNELL L. REV. 1309 (2012) (considering whether a country that prohibits a medical procedure, such as abortion, can or should extend its prohibition to bar residents from leaving the country to circumvent the restriction).

Joseph W. Dellapenna, *Abortion Across State Lines*, 2008 B.Y.U. L. REV. 1651 (arguing that a state probably can prohibit a person who is a resident of the state from having an abortion outside the state, but not if the person establishes a legitimate place of residence in the other state before the abortion occurs).

Richard Fallon, *If Roe Were Overruled: Abortion and the Constitution in a Post-Roe World*, 51 ST. LOUIS U. L.J. 611 (2007) (discussing issues that would arise from *Roe v. Wade* being overruled, particularly whether it would be constitutional for

right-to-life states to prohibit their residents from traveling outside their borders to have abortions).

Alan Howard, *Fundamental Rights Versus Fundamental Wrongs: What Does the U.S. Constitution Say About State Regulation of Out-of-State Abortions?*, 51 ST. LOUIS U. L.J. 797 (2007) (predicting that it is unlikely any state would attempt to forbid its citizens from traveling to have an abortion in another state, and that an attempt to do so would violate the doctrine of federal citizenship rights under the Citizenship Clause of the Fourteenth Amendment or the Privileges or Immunities Clause of the Fourteenth Amendment).

Seth F. Kreimer, “*But Whoever Treasures Freedom. . .*”: *The Right to Travel and Extraterritorial Abortions*, 91 MICH. L. REV. 907 (1993) (arguing that constitutional structure, history, and traditions support the view that states should not be able to regulate their citizens’ activities while present in other states).

Seth F. Kreimer, *The Law of Choice and Choice of Law: Abortion, the Right to Travel, and Extraterritorial Regulation in American Federalism*, 67 N.Y.U. L. REV. 451 (1992) (arguing that extraterritorial abortion restrictions would run counter to strong constitutional principles limiting the extent to which states can project their moral views into other states).

Andrew J. Ries, Note, *Extraterritoriality of Restrictive State Abortion Laws: States Can Abort Plans to Abort at Home but Not Abroad*, 70 WASH. U. L.Q. 1205 (1992) (arguing that although extraterritorial application of a state’s law may be constitutional in some circumstances, a state would exceed the limits of its sovereignty if it tried to punish its citizens for having abortions outside the state).

– **Federal Authority to Enact Abortion Legislation**

Douglas A. Axel, Note, *The Constitutionality of the Freedom of Choice Act of 1993*, 45 HASTINGS L.J. 641 (1994) (predicting that a federal law protecting abortion rights would not be a valid exercise of Congress’s power to regulate interstate commerce and would be struck down as an infringement of authority reserved to the states by the Tenth Amendment).

Brannon Denning, *Gonzales v. Carhart: An Alternate Opinion*, 2007 CATO S. CT. REV. 167 (2007) (offering a hypothetical Supreme Court opinion striking down federal anti-abortion legislation on the ground that it exceeds Congress's power under the Commerce Clause).

Jordan Goldberg, Note, *The Commerce Clause and Federal Abortion Law: Why Progressives Might Be Tempted to Embrace Federalism*, 75 FORDHAM L. REV. 301 (2006) (arguing that the Commerce Clause empowers Congress to enact legislation prohibiting abortions or protecting abortion rights).

Allan Ides, *The Partial-Birth Abortion Ban Act of 2003 and the Commerce Clause*, 20 CONST. COMMENT. 441 (2003-2004) (describing serious doubts about whether Congress's power to regulate interstate commerce can support a federal law prohibiting abortions).

David B. Kopel & Glenn H. Reynolds, *Taking Federalism Seriously: Lopez and the Partial-Birth Abortion Ban Act*, 30 CONN. L. REV. 59 (1997) (calling for those who generally favor a narrow interpretation of federal authority to be consistent and recognize that a federal law prohibiting an abortion procedure exceeds Congress's power under the Commerce Clause).

Peggy S. McClard, Comment, *The Freedom of Choice Act: Will the Constitution Allow It?*, 30 HOUS. L. REV. 2041 (1994) (contending that Congress has constitutional authority to enact a federal statute protecting abortion rights because abortion restrictions will affect interstate commerce).

Thomas J. Molony, *A Costly Victory: June Medical, Federal Abortion Legislation, and Section 5 of the Fourteenth Amendment*, 74 ARK. L. REV. 33 (2021) (observing that if the Supreme Court overrules *Roe v. Wade*, Congress would have no power under Section 5 of the Fourteenth Amendment to enact abortion rights legislation).

Michael J. O'Connor, *Legitimate Defense of Civil Rights or Raw Congressional Power Grab? The Constitutionality of the Freedom of Choice Act*, 32 WHITTIER L. REV. 1 (2010) (asserting that the enactment of a federal law providing a nationwide right to abor-

tion would exceed Congress's property authority and violate the sovereignty of the states).

Robert J. Pushaw, Jr., *Does Congress Have the Constitutional Power to Prohibit Partial-Birth Abortion?*, 42 HARV. J. ON LEGIS. 319 (2005) (recommending a politically neutral approach that would uphold Congress's power to enact legislation that would expand abortion rights or restrict them).

Alissa Schecter, Note, *Choosing Balance: Congressional Powers and the Partial-Birth Abortion Ban Act of 2003*, 73 FORDHAM L. REV. 1987 (2005) (arguing that abortion is primarily a state issue rather than a federal issue and Congress's power to regulate interstate commerce does not give it the power to pass national legislation about abortion).

– Foster Children

Tara Grigg Garlinghouse, Comment, *Fostering Motherhood: Remediating Violations of Minor Parents' Right to Family Integrity*, 15 U. PA. J. CONST. L. 1221 (2013) (discussing the due process and equal protection rights of pregnant or parenting youth in foster care, including rights concerning decisions about abortion).

Katherine Moore, *Pregnant in Foster Care: Prenatal Care, Abortion, and the Consequences for Foster Families*, 23 COLUM. J. GENDER & L. 29 (2012) (arguing that the legal framework governing foster care does not provide adequate prenatal care and access to and funding for abortion, and recommending ways in which agencies, courts, and legislatures can better support pregnant young women in foster care).

Amy T. Pedagno, Note, *Who Are the Parents? In Loco Parentis, Parens Patriae, and Abortion Decision-Making for Pregnant Girls in Foster Care*, 10 AVE MARIA L. REV. 171 (2011) (criticizing the lack of consistency and clear policies concerning decisions about pregnancy and abortion for minor girls in foster care, and suggesting reforms that would provide strong maternal examples for girls in foster care).

Kara Sheli Wallis, Note, *No Access, No Choice: Foster Care Youth, Abortion, and State Removal of Children*, 18 CUNY L. REV. 119 (2014) (describing the obstacles faced by pregnant

youth and parenting youth in foster care, including lack of resources and access to reproductive health services, and recommending ways to improve how the foster system approaches child welfare, teen sexuality, and reproductive health).

– **Infant Safe Haven Laws**

Tanya Amber Gee, Comment, *South Carolina's Safe Haven for Abandoned Infants Act: A "Band-Aid" Remedy for the Baby-Dumping "Epidemic,"* 53 S.C. L. REV. 151 (2001) (discussing state laws that give confidentiality and immunity to parents who leave infants at designated safe haven locations, questioning the effectiveness of these laws, and suggesting alternative approaches that would be more effective).

Carol Sanger, *Infant Safe Haven Laws: Legislating in the Culture of Life*, 106 COLUM. L. REV. 753 (2006) (analyzing the impact of infant safe haven laws and arguing that these laws subtly promote the political goal of eliminating abortion rights).

– **Medication Abortions**

Greer Donley, *Medication Abortion Exceptionalism*, 107 CORNELL L. REV. 627 (2022) (examining federal regulations that limit distribution of drugs used to terminate pregnancies, and suggesting ways in which the Food & Drug Administration can remove unnecessary barriers to medication abortion).

Katherine Fang & Rachel Perler, Comment, *Abortion in the Time of COVID-19: Telemedicine Restrictions and the Undue Burden Test*, 32 YALE J.L. & FEMINISM 134 (2021) (arguing that state law restrictions on the provision of medication abortions via telemedicine are an undue burden on a practice that can decrease costs and improve reproductive health care, especially during the COVID-19 pandemic).

Yvonne Lindgren, *The Doctor Requirement: Griswold, Privacy, and At-Home Reproductive Care*, 32 CONST. COMMENT. 341 (2017) (contending that state laws restricting at-home use of medication abortion violate privacy rights).

Yvonne Lindgren, *When Patients Are Their Own Doctors: Roe v. Wade in an Era of Self-Managed Care*, 107 CORNELL L. REV. 151 (2021) (describing how reproductive freedom has been treated in

the past as a right to make an abortion decision in consultation with a doctor, but should be re-framed as a right that includes direct consumer access to abortion care including self-managed medication abortion).

Hina Mohiuddin, Note, *The Use of Telemedicine During a Pandemic to Provide Access to Medication Abortion*, 21 HOUS. J. HEALTH L. & POL'Y 483 (2022) (arguing that laws requiring an in-person visit with a doctor for medication abortion impose undue burdens on women seeking abortions).

Moriah Murray, *Proposal to Expand the Accessibility and Effectiveness of Medical Abortions in the United States*, 40 J. LEGAL MED. 27 (2020) (asserting that safety concerns do not justify the federal policy preventing at-home medication abortions and that policy should be changed).

Kerri Pinchuk, *California Policy Recommendations for Realizing the Promise of Medication Abortion: How the COVID-19 Public Health Emergency Offers a Unique Lens for Catalyzing Change*, 18 HASTINGS RACE & POVERTY L.J. 265 (2021) (discussing legislative steps that California can take to expand access to abortion care, including access to medication abortion via telehealth).

Nicole Ratelle, Note, *A Positive Right to Abortion: Rethinking Roe v. Wade in the Context of Medication Abortion*, 20 GEO. J. GENDER & L. 195 (2018) (proposing a new vision of the right to abortion as a positive right to access abortion care, including medication abortion).

Reproductive Rights—Medication Abortion—FDA Lifts In-Person Dispensing Requirement for Mifepristone Abortion Pill—Update to FDA Risk Evaluation and Mitigation Strategy for Mifepristone on Dec. 16, 2021, Eliminating In-Person Dispensing Requirement, 135 HARV. L. REV. 2235 (2022) (discussing the Food & Drug Administration's elimination of in-person dispensing requirements for medication abortion).

Patty Skuster, *How Laws Fail the Promise of Medical Abortion: A Global Look*, 18 GEO. J. GENDER & L. 379 (2017) (explaining how access to medication abortion would reduce risks to women's health and lives from unsafe abortion methods, but laws in

many countries create obstacles to medication abortion by requiring doctors to perform, supervise, or authorize abortions).

– **Minors**

Maya Manian, *Minors, Parents, and Minor Parents*, 81 MO. L. REV. 127 (2016) (contending that state laws generally limit adolescents' access to abortion and rights and resources as parents, and thereby enforce the traditional notion that giving birth and giving up the child for adoption is the best outcome).

Alexandra Rex, Note, *Protecting the One Percent: Relevant Women, Undue Burdens, and Unworkable Judicial Bypasses*, 114 COLUM. L. REV. 85 (2014) (reviewing empirical evidence on the detrimental impact of laws requiring pregnant minors to obtain parental or judicial approval for abortions).

– **Providing Information About Circumventing Abortion Bans**

Abigail Burman, Note, *Abortion Sanctuary Cities: A Local Response to the Criminalization of Self-Managed Abortion*, 108 CALIF. L. REV. 2007 (2020) (recommending that cities adopt a harm reduction approach and provide the information needed for people to safely self-manage unlawful abortions).

Joanna N. Erdman, *Access to Information on Safe Abortion: A Harm Reduction and Human Rights Approach*, 34 HARV. J.L. & GENDER 413 (2011) (examining Uruguay's harm reduction initiative, under which doctors can provide information about clandestine methods of pregnancy termination to women ineligible for a lawful abortion).

Fatherhood

– **Conceptualizing Fatherhood**

Courtney Megan Cahill, *The New Maternity*, 133 HARV. L. REV. 2221 (2020) (arguing that constitutional law improperly treats maternity as certain and obvious, while treating paternity as uncertain and nonobvious, and that these assumptions should be reconsidered and uprooted in light of new developments such as alternative reproduction).

Nancy E. Dowd, *Fathers and the Supreme Court: Founding Fathers and Nurturing Fathers*, 54 EMORY L.J. 1271 (2005) (critiquing the Supreme Court's negative, stereotypic views of fatherhood in constitutional cases, especially unmarried fatherhood, and suggesting that the Court should reshape its definition of fatherhood around the concept of nurturing).

Melanie B. Jacobs, *My Two Dads: Disaggregating Biological and Social Paternity*, 38 ARIZ. ST. L.J. 809 (2006) (arguing that constitutional law and family law have taken an improperly rigid approach to the definition of fatherhood and proposing that a more flexible approach would permit the recognition of social paternity as well as biological paternity).

Serena Mayeri, *Foundling Fathers: (Non-)Marriage and Parental Rights in the Age of Equality*, 125 YALE L.J. 2292 (2016) (discussing why unwed fathers never achieved constitutional parity with mothers or with married and divorced fathers).

Dara E. Purvis, *The Origin of Parental Rights: Labor, Intent, and Fathers*, 41 FLA. ST. U. L. REV. 645 (2014) (arguing that the current constitutional understanding of fatherhood, which mirrors theories of acquiring property, is inconsistent and gendered, and proposing that it be replaced with a theory of fatherhood created through labor performed in caring for the child).

– **Father's Rights**

Deborah Dinner, *The Divorce Bargain: The Fathers' Rights Movement and Family Inequalities*, 102 VA. L. REV. 79 (2016) (providing the first legal history of the fathers' rights movement, and arguing that the movement advocated for formal equality in divorce and child custody laws but never abandoned traditional conceptions of marriage as a bargain based on gender differentiation and hierarchy).

Jennifer S. Hendricks, *Fathers and Feminism: The Case Against Genetic Entitlement*, 91 TUL. L. REV. 473 (2017) (contending that progressive proposals to give more parental rights and opportunities to men reflect a principle of genetic entitlement that is an undesirable basis for laws about reproduction and parentage).

Linda Kelly, *The Alienation of Fathers*, 6 MICH. J. RACE & L. 181 (2000) (explaining how maternal preference is an unconstitu-

tional vehicle for gender bias but that it persists in legal areas such as immigration and custody).

Heather Kolinsky, *The Ties That Bind: Reevaluating the Role of Legal Presumptions of Paternity*, 48 LOY. L.A. L. REV. 223 (2014) (arguing that the constitutional right to parent has been improperly conferred on marriages, rather than individuals, particularly with respect to unwed biological fathers).

Yvonne Lindgren, *Antiabortion Civil Remedies and Unwed Fatherhood as Genetic Entitlement*, 99 WASH. U. L. REV. 2015 (2022) (arguing that constitutional “biology plus” norms about fatherhood, which require unwed fathers to establish a relationship with their child or the gestating parent, are violated by the recent enactment of laws allowing putative fathers to sue abortion providers for wrongful death regardless of their relationship to the gestating parent).

Jeffrey A. Parness, *Systematically Screwing Dads: Out of Control Paternity Schemes*, 54 WAYNE L. REV. 641 (2008) (criticizing how laws systematically deny genetic fathers’ paternity opportunity interests and proposing reforms that would respect fathers’ rights without unduly burdening maternal interests).

Jeffrey A. Parness & Zachary Townsend, *Legal Paternity (and Other Parenthood) after Lehr and Michael H.*, 43 U. TOL. L. REV. 225 (2012) (reviewing the treatment of fatherhood with respect to issues like safe haven laws, custody, visitation, child support, torts, and inheritance, and asserting that natural fathers are often denied their constitutional opportunity interests in rearing children).

Dara E. Purvis, *The Constitutionalization of Fatherhood*, 69 CASE W. RES. L. REV. 541 (2019) (describing the treatment of unwed biological fathers in constitutional law and arguing that the differential treatment of fathers and mothers violates Equal Protection rights).

Malinda L. Seymore, *Grasping Fatherhood in Abortion and Adoption*, 68 HASTINGS L.J. 817 (2017) (examining the distinctions drawn between biological mothers and biological fathers in decisions about abortion and adoption placement, and arguing that while the exclusion of fathers from abortion decisionmaking

is inevitable, fathers should be afforded greater rights with respect to adoption).

– **Terminating Parental Rights for Pregnancies Resulting from Rape**

Jennifer S. Hendricks, *The Wages of Genetic Entitlement: The Good, the Bad, and the Ugly in the Rape Survivor Child Custody Act*, 112 NW. U. L. REV. ONLINE 75 (2017) (evaluating the federal law encouraging states to enact laws allowing mothers to terminate the parental rights of rapists, and explaining how it reflects or departs from constitutional principles about acquisition of paternal parental rights).

Natalie Hoch, Note, *The Real American Horror Story: Overcoming the Hurdles to Terminate a Rapist's Parental Rights*, 51 VAL. U. L. REV. 783 (2017) (proposing legislation to protect victims from rapists asserting parental rights).

Margo E.H. Stevens, Note, *Rape-Related Pregnancies: The Need to Create Stronger Protections for the Victim-Mother and Child*, 65 HASTINGS L.J. 865 (2014) (arguing that states do not violate constitutional rights by allowing termination of parental rights for rape-related pregnancies, without requiring a criminal conviction and leaving the option for child-support obligations to be imposed).

Katherine E. Wendt, Comment, *How States Reward Rape: An Agenda to Protect the Rape-Conceived Child Through the Termination of Parental Rights*, 2013 MICH. ST. L. REV. 1763 (recommending the enactment of legislation providing for termination of rapists' parental rights and discussing how such statutes can satisfy constitutional requirements about fair procedures for termination of parental rights).

Guns

– **Domestic Violence**

Joseph Blocher, *Domestic Violence and the Home-Centric Second Amendment*, 27 DUKE J. GENDER L. & POL'Y 45 (2019-2020) (examining how the danger of domestic violence in the home complicates arguments about how the right to keep and bear arms should be strongest inside the home).

Sayoko Blodgett-Ford, Note, *Do Battered Women Have a Right to Bear Arms?*, 11 YALE L. & POL'Y REV. 509 (1993) (arguing that battered women have a constitutional right to bear arms for protection and that gun laws that may generally be valid, such as lengthy waiting periods or permit requirements, may be unconstitutional as applied to battered women).

Aaron Edward Brown, *This Time I'll Be Bulletproof: Using Ex Parte Firearm Prohibitions to Combat Intimate-Partner Violence*, 50 COLUM. HUM. RTS. L. REV. 159 (2019) (supporting the constitutionality and effectiveness of laws enabling victims of intimate-partner violence to obtain an ex parte order for protection that prohibits possession of firearms by the subject of the order).

Elizabeth Coppolecchia et al., Note, *United States v. White: Disarming Domestic Violence Misdemeanants Post-Heller*, 64 U. MIAMI L. REV. 1505 (2010) (suggesting that the federal laws banning possession of guns by those convicted for domestic violence misdemeanors may violate the right to keep and bear arms).

Monette M. Davis, *The Repugnant Effect of Reckless Conduct and Domestic Violence: Voisine v. United States and the Restriction of Firearms*, 45 S.U. L. REV. 331 (2018) (arguing that Second Amendment rights are not violated by prohibiting possession of guns by those convicted for domestic violence misdemeanors based on reckless conduct).

Kellie Desrochers, Note, *Municipalities Are Not Kingdoms: Regulating Gun Ownership in Cases Involving Domestic Violence in Light of the Pauley Decision*, 29 B.U. PUB. INT. L.J. 277 (2020) (arguing that courts should uphold the constitutionality of laws that prohibit possession of guns by those convicted of domestic violence misdemeanors, including those convicted under municipal ordinances).

Julia Hatheway, Note, *Disarming Abusers and Triggering the Sixth Amendment: Are Domestic Violence Misdemeanants Guaranteed the Right to a Jury Trial?*, 90 FORDHAM L. REV. 179 (2021) (examining whether defendants charged with domestic violence misdemeanors have a Sixth Amendment right to a jury trial because conviction would result in being prohibited from possessing a firearm).

Monica Maio, Note, *Stalkers and Firearms: A Dangerous Mix, Utah's Civil Stalking Injunction Statute*, 7 J.L. & FAM. STUD. 263 (2005) (pointing out a loophole in Utah's statutes that allows some dangerous stalkers to lawfully possess firearms even while subject to anti-stalking protective orders).

Cassie Maneen, Note, *No Right to Bear Arms and Blows: Disarming Domestic Violence Misdemeanants and the Durability of Voisine v. United States*, 57 HOUS. L. REV. 1199 (2020) (considering whether the Supreme Court's shift toward stronger protection of gun rights will result in overturning precedent allowing domestic violence misdemeanants to be prohibited from having guns).

Sarah Martin, Note, *Evidence-Based, Constitutionally-Sound Approaches to Reducing Gun Fatalities in Violent Relationships*, 6 BELMONT L. REV. 245 (2018) (endorsing measures that would be constitutional and improve efforts to keep guns away from domestic abusers, including expanding the definition of "intimate partner" to include casual dating partners and implementing protocols to ensure that abusers prohibited from having guns actually surrender them to law enforcement).

Lisa D. May, *The Backfiring of the Domestic Violence Firearm Bans*, 14 COLUM. J. GENDER & L. 1 (2005) (examining the risk that some judges may deny valid requests for protective orders because they do not want to disqualify the defendant from being able to possess a gun for purposes such as hunting or a law enforcement job).

Claire McNamara, *Finally, Actually Saying "No": A Call for Reform of Gun Rights Legislation and Policies to Protect Domestic Violence Survivors*, 13 SEATTLE J. FOR SOC. JUST. 649 (2014) (proposing that Washington should enhance its enforcement of laws prohibiting possession of guns by domestic violence offenders, and assessing the constitutionality of measures requiring surrender of firearms by such offenders).

Cynthia M. Menta, Comment, *The Misapplication of the Lautenberg Amendment in Voisine v. United States and the Resulting Loss of Second Amendment Protection*, 51 AKRON L. REV. 189 (2017) (arguing that it would violate the right to keep and bear arms to impose a lifetime ban on possession of firearms

for those convicted of domestic violence misdemeanors where the crime was committed recklessly rather than knowingly or intentionally).

Patrick D. Murphree, “*Beat Your Wife, and Lose Your Gun*”: *Defending Louisiana’s Attempts to Disarm Domestic Abusers*, 61 LOY. L. REV. 753 (2015) (describing how Louisiana courts could apply strict scrutiny but still uphold the constitutionality of the state’s laws prohibiting possession of guns by those with domestic violence misdemeanor convictions or subject to domestic violence restraining orders).

Natalie Nanasi, *Disarming Domestic Abusers*, 14 HARV. L. & POL’Y REV. 559 (2020) (proposing strategies for meaningful enforcement of laws prohibiting perpetrators of intimate partner violence from possessing firearms).

Stacie J. Osborn, Comment, *Preventing Intimate Partner Homicide: A Call for Cooperative Federalism for Common Sense Gun Safety Policies*, 66 LOY. L. REV. 235 (2020) (proposing that Congress and states can cooperate to pass legislation that would close loopholes and improvement enforcement of laws prohibiting domestic violence offenders from having firearms).

Carolyn B. Ramsey, *Firearms in the Family*, 78 OHIO ST. L.J. 1257 (2017) (arguing that current laws prohibiting domestic violence misdemeanants from possessing firearms are both under-broad and over-broad and that legislatures should revise such laws in order to give greater protection to victims who resist their batterers, provide exceptions for convicted offenders with jobs that require carrying firearms on-duty, and provide means for restoring gun rights to those who show the capacity to avoid reoffending).

Matthew Robins, *State of Fear: Domestic Violence in South Carolina*, 68 S.C. L. REV. 629 (2017) (proposing gun control measures that would reduce the risks of domestic violence while respecting Second Amendment rights, such as automatically suspending gun rights when an order of protection is issued but allowing the defendant a fast track appeal to challenge the suspension).

Emily J. Sack, *Confronting the Issue of Gun Seizures in Domestic Violence Cases*, 6 J. CTR. FOR FAMILIES, CHILD. & CTS. 3 (2005)

(discussing constitutional challenges and other issues raised by laws that prohibit possession of guns by domestic violence offenders).

Tracy Sauro, Note, *Don't Leave Me Now!—A Domestic Violence Victim's Right to Be Armed Because Their Abusers Are Dangerous*, 40 *WOMEN'S RTS. L. REP.* 171 (2019) (contending that legislatures should ensure that the gun rights of domestic violence victims are adequately protected, including the right to carry a concealed handgun in public).

Peter Slocum, Comment, *Biting the D.V. Bullet: Are Domestic-Violence Restraining Orders Trampling on Second Amendment Rights?*, 40 *SETON HALL L. REV.* 639 (2010) (suggesting that New Jersey's law prohibiting possession of guns by those subject to domestic violence restraining orders may violate the right to keep and bear arms, and proposing ways to narrow the statute to make it more likely to be upheld).

Jennifer L. Vainik, Note, *Kiss, Kiss, Bang, Bang: How Current Approaches to Guns and Domestic Violence Fail to Save Women's Lives*, 91 *MINN. L. REV.* 1113 (2007) (discussing ways in which the federal government can constitutionally use its powers to incentivize states to address domestic violence involving guns, including funding the creation of local law enforcement units focused on identifying and disarming domestic violence offenders).

Liz Washam, Comment, *Diffusing Deadly Situations: How Missouri Could Effectively Remove Firearms from the Hands of Domestic Abusers*, 59 *ST. LOUIS U. L.J.* 1221 (2015) (contending that Missouri should amend its laws to require law enforcement to take firearms away from those legally prohibited from having them while subject to domestic violence restraining orders, and arguing that this would not violate Second Amendment rights).

– **Foster Homes**

Joseph G. DuChane, *In Defense of Hearth and [Foster] Home: Determining the Constitutionality of State Regulation of Firearm Storage in Foster Homes*, 75 *WASH. & LEE L. REV.* 1639 (2018) (arguing that the Second Amendment rights of foster parents are violated by regulations requiring them to store firearms in their homes in locked safes or cabinets).

Sean Murphy, Note, *Fostering Second Amendment Rights: An Evaluation of Foster Parents' Right to Bear Arms*, 96 U. DET. MERCY L. REV. 397 (2019) (contending that foster care safe-storage laws burden foster parents' right to possess firearms in their homes for self-defense and may ultimately harm the well-being of foster children).

– **Heightened Risks for the Elderly and People with Dementia or Other Mental Problems**

Michael Bell, Comment, *Bridging the Gap Between Mental Illness and Firearms in Probate Courts*, 10 EST. PLAN. & COMMUNITY PROP. L.J. 125 (2017) (examining whether Second Amendment rights would be violated if Texas adopted a statute prohibiting a mentally ill person from inheriting a firearm).

Sarah Lynn Blodgett, *Dementia, Guns, and Red Flag Laws: Can Indiana's Statute Balance Elders' Constitutional Rights and Public Safety*, 16 NAELA J. 103 (2020) (discussing how Indiana's "red flag" law, which provides for guns to be taken from people who pose a danger to themselves or others because of mental problems, applies to elders with dementia-related illnesses and how the law can be implemented in a way that balances safety interests with elders' personal autonomy and constitutional right to own firearms).

Abigail Forrester Jorandby, *Armed and Dangerous at 80: The Second Amendment, the Elderly, and a Nation of Aging Firearm Owners*, 29 J. AM. ACAD. MATRIM. LAW. 85 (2016) (evaluating the effectiveness and constitutionality of potential laws regulating firearm ownership by elderly people diagnosed with dementia or cognitive disorders).

Lauren Paglini, Comment, *How Far Will the Strictest State Push the Limits: The Constitutionality of California's Proposed Gun Law Under the Second Amendment*, 23 AM. U. J. GENDER SOC. POL'Y & L. 459 (2015) (defending the constitutionality of a proposed California law that creates a procedure for family members to obtain a restraining order and firearm seizure warrant against an individual who poses a significant risk to themselves or others by possessing a firearm).

Angela Selvaggio & Fredrick E. Vars, “*Bind Me More Tightly Still*”: *Voluntary Restraint Against Gun Suicide*, 53 *HARV. J. ON LEGIS.* 671 (2016) (proposing systems that would enable those with elevated risks for suicide to voluntarily choose to legally disqualify themselves from purchasing firearms).

Caroline Shen, Note, *A Triggered Nation: An Argument for Extreme Risk Protection Orders*, 46 *HASTINGS CONST. L.Q.* 683 (2019) (arguing that laws allowing courts to issue protective orders prohibiting dangerous individuals from having guns are constitutional and beneficial).

Tara Sklar, *Elderly Gun Ownership and the Wave of State Red Flag Laws: An Unintended Consequence That Could Help Many*, 27 *ELDER L.J.* 35 (2019) (analyzing the key provisions of “red flag” laws that some states have recently enacted, the ways in which the requirements and procedures created by these laws vary, and the implications that these laws have for elderly gun owners and their families).

Fredrick E. Vars, *Not Young Guns Anymore: Dementia and the Second Amendment*, 25 *ELDER L.J.* 51 (2017) (evaluating the constitutionality of laws prohibiting possession of guns after a dementia diagnosis and proposing the adoption of measures that would enable people with dementia to voluntarily relinquish their firearms and disqualify themselves from being able to purchase firearms).

– **International Comparisons**

Daniel Burley, Note, *The Ban Down Under: United States Should Adopt Australian-Style Gun Regulations to Curb Rising Rate of Elderly Suicides*, 26 *ELDER L.J.* 149 (2018) (assessing Australia’s policies designed to reduce the number of suicides committed by elderly people and whether they would be struck down as violating Second Amendment rights in the United States).

Shay Raoofi, *Around the World: A Comparison of Approaches to Gun Homicides in the United States and Japan*, 34 *CHILD. LEGAL RTS. J.* 344 (2014) (comparing the American and Japanese experiences with youth gun violence, and exploring how the Second Amendment and other aspects of law, policy, and culture affect the problem).

Indian Child Welfare Act

– Constitutional Challenges

Katie L. Bojevic, Note, *Benefit or Burden?: Brackeen v. Zinke and the Constitutionality of the Indian Child Welfare Act*, 68 BUFF. L. REV. 247 (2020) (describing the consequences that will occur if the Indian Child Welfare Act is struck down as unconstitutional, and explaining how the effects of such a decision would extend beyond adoption cases by paving the way for the invalidation of other laws that involve classifications based on Native American descent).

Christina Cook, *In the Courts: Interpreting the ICWA in Light of Adoptive Couple*, 35 CHILD. LEGAL RTS. J. 87 (2015) (discussing California court decisions rejecting constitutional challenges to the Indian Child Welfare Act).

Cassandra Crandall, Note & Comment, *Moving Forward from the Scoop Era: Providing Active Efforts Under the Indian Child Welfare Act in Illinois*, 40 N. ILL. U. L. REV. 100 (2019) (discussing the Indian Child Welfare Act's requirement that active efforts must be made to prevent the breakup of Indian families, and how the Act has been criticized and challenged on constitutional grounds).

Allison E. Davis, Note, *Roadway to Reform: Assessing the 2015 Guidelines and New Federal Rule to the Indian Child Welfare Act's Application to State Courts*, 22 SUFFOLK J. TRIAL & APP. ADVOC. 91 (2016-2017) (assessing the impact of constitutional challenges to the Indian Child Welfare Act and regulatory guidance from the Bureau of Indian Affairs).

Mariam Hashmi, Note, *Recent Challenges to the Indian Child Welfare Act Suggest It Is Time for the United States to Act: Indian Survival Depends on It*, 21 RUTGERS RACE & L. REV. 149 (2020) (examining the reasons why the Supreme Court needs to address the constitutional uncertainties surrounding the Indian Child Welfare Act and forecasting how conservative members of the Court such as Brett Kavanaugh and Clarence Thomas are likely to approach the issues).

Emily Hudson, Student Comment, *The Constitutionality of the Indian Child Welfare Act*, 47 OHIO N.U. L. REV. 359 (2021) (re-

viewing the constitutional challenges to the Indian Child Welfare Act, including the Equal Protection, Commerce Clause, anti-commandeering, and non-delegation doctrine arguments, and describing the potential consequences of the statute being struck down).

Christine Metteer, *The Existing Indian Family Exception: An Impediment to the Trust Responsibility to Preserve Tribal Existence and Culture as Manifested in the Indian Child Welfare Act*, 30 *LOY. L.A. L. REV.* 647 (1997) (criticizing courts for applying the Indian Child Welfare Act only in situations where a child would be taken away from an existing Indian family, and analyzing the constitutional issues that arise if the Act applies regardless of a whether an Indian child or the child's parents have social, cultural, or political ties to a tribe).

Matthew Newman & Kathryn Fort, *Legal Challenges to ICWA: An Analysis of Current Case Law*, 36 *CHILD L. PRAC.* 13 (2017) (discussing several waves of litigation concerning the Indian Child Welfare Act, including lawsuits challenging the Act's constitutionality).

Alexander Tallchief Skibine, *The Supreme Court's Last 30 Years of Federal Indian Law: Looking for Equilibrium or Supremacy?*, 8 *COLUM. J. RACE & L.* 277 (2018) (analyzing Supreme Court decisions on Indian law issues, including the Indian Child Welfare Act, and arguing that the Court seeks to maintain a proper equilibrium between tribal interests and other interests at stake in these cases).

Kelsey Vujnich, Comment, *A Brief Overview of the Indian Child Welfare Act, State Court Responses, and Actions Taken in the Past Decade to Improve Implementation Outcomes*, 26 *J. AM. ACAD. MATRIM. LAW.* 183 (2013) (reviewing legal developments surrounding the Indian Child Welfare Act and how Supreme Court decisions clarified some aspects of the statute but left significant questions unresolved).

– Criticisms of the Act

Barbara Ann Atwood, *Flashpoints Under the Indian Child Welfare Act: Toward a New Understanding of State Court Resistance*, 51 *EMORY L.J.* 587 (2002) (exploring why state courts became

hostile to the Indian Child Welfare Act and suggesting that two key aspects of the resistance to the statute are judges' frustration with the statute's approach to defining Indian identity and judges' assumptions about how disruption of custodial arrangements will be harmful to the child).

Christine D. Bakeis, *The Indian Child Welfare Act of 1978: Violating Personal Rights for the Sake of the Tribe*, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 543 (1996) (arguing that the Indian Child Welfare Act violates the constitutional rights of abused and neglected Indian children, as well as the rights of parents of Indian children, and proposing that the Act be amended so that it applies only to children who are part of an existing Indian family).

Teri Dobbins Baxter, *Respecting Parents' Fundamental Rights in the Adoption Process: Parents Choosing Parents for Their Children*, 67 RUTGERS L. REV. 905 (2015) (discussing how some state adoption laws and federal laws, such as the Indian Child Welfare Act, fail to give appropriate deference to parents' choices about who adopts their child).

Jennifer Nutt Carleton, *The Indian Child Welfare Act: A Study in the Codification of the Ethnic Best Interests of the Child*, 81 MARQ. L. REV. 21 (1997) (describing how the Indian Child Welfare Act represents an attempt to make a child's ethnic heritage a factor in analysis of the child's best interests, observing how the Act has often failed to preserve Indian families, and suggesting that the Act may inform discussions about the broader issue of ethnicity preferencing and transracial adoptions).

Christopher Deluzio, *Tribes and Race: The Court's Missed Opportunity in Adoptive Couple v. Baby Girl*, 34 PACE L. REV. 509 (2014) (characterizing the Indian Child Welfare Act as a radical departure from the colorblind approach to custody and adoption placement issues and discussing the constitutional issues created by the Act's racial preferences).

Philip (Jay) McCarthy, Jr., *The Oncoming Storm: State Indian Child Welfare Act Laws and the Clash of Tribal, Parental, and Child Rights*, 2013 UTAH L. REV. 1027 (suggesting that Indian gaming revenues have funded increases in lobbying efforts for passage of state laws supplementing the Indian Child Welfare

Act, asserting that tribal rights should not override parental rights, and arguing that the state laws infringe on constitutional rights because the laws mandate that notice be provided to Indian tribes in voluntary adoptions that do not involve state agencies and the laws take away discretion that judges would have under the federal Act).

Shawn L. Murphy, Comment, *The Supreme Court's Revitalization of the Dying "Existing Indian Family" Exception*, 46 *MC-GEORGE L. REV.* 629 (2014) (contending that the Indian Child Welfare Act is unconstitutional but that the constitutional problems can be reduced by application of the "existing Indian family" doctrine, which prevents the Act from applying where the Indian child's family has not maintained significant social, cultural, or political relationships with a tribe).

Timothy Sandefur, *Recent Developments in Indian Child Welfare Act Litigation: Moving Toward Equal Protection?*, 23 *TEX. REV. L. & POL.* 425 (2019) (criticizing the existing literature on the Indian Child Welfare Act, claiming that defenders of the Act approach the issue in abstract terms rather than examining actual cases, and observing that the Supreme Court may be headed toward striking down the Act on Equal Protection grounds).

Amanda Tucker, *The Indian Child Welfare Act's Unconstitutional Impact on the Welfare of the Indian Child*, 9 *WHITTIER J. CHILD. & FAM. ADVOC.* 87 (2009) (arguing that the Indian Child Welfare Act adversely affects Native American children eligible for adoption and unconstitutionally denies them the same opportunities for placement as children of other races and ethnicities).

– Defense of the Act

Bethany R. Berger, *In the Name of the Child: Race, Gender, and Economics in Adoptive Couple v. Baby Girl*, 67 *FLA. L. REV.* 295 (2015) (exploring how the Supreme Court's distortion of facts and law in an Indian Child Welfare Act case reflects biases and assumptions about race, gender, and class).

Bethany R. Berger, *Savage Equalities*, 94 *WASH. L. REV.* 583 (2019) (arguing that when laws like the Indian Child Welfare Act are attacked as infringements of individual equality, they should

be defended as measures that protect the equality of Indian tribes as governments).

Lucy Dempsey, Note, *Equity over Equality: Equal Protection and the Indian Child Welfare Act*, 77 WASH. & LEE L. REV. ONLINE 411 (2021) (arguing that the Indian Child Welfare Act does not violate equal protection rights because being Indian should be regarded as a political classification rather than a suspect racial distinction, and because the Act is narrowly tailored to serve compelling purposes so it is valid even if strict scrutiny applies).

Michael Doran, *The Equal-Protection Challenge to Federal Indian Law*, 6 U. PA. J.L. & PUB. AFF. 1 (2020) (arguing that Congress's plenary power over Indians and their tribes provides a basis for Congress to make classifications under laws affecting Indians, such as the Indian Child Welfare Act, that are subject only to rational basis review).

John Hayden Dossett, *Tribal Nations and Congress's Power to Define Offences Against the Law of Nations*, 80 MONT. L. REV. 41 (2019) (arguing that the constitutional provision empowering Congress to define offenses against the law of nations is a valid source of authority for federal laws, such as the Indian Child Welfare Act, that address child custody in the context of foreign affairs or tribal citizenship).

Allison Elder, Note & Comment, "*Indian*" as a Political Classification: Reading the Tribe Back into the Indian Child Welfare Act, 13 NW. J.L. & SOC. POL'Y 410 (2018) (arguing that strict constitutional scrutiny should not apply to the Indian Child Welfare Act because "Indian" should be treated as a political classification rather than a racial one).

Carol Goldberg, *Descent into Race*, 49 UCLA L. REV. 1373 (2002) (discussing how courts evaluating the constitutionality of laws like the Indian Child Welfare Act treat Indian identity as a racial characteristic, but the Constitution and political theory justify treating Indian classifications as being based on special trust obligations that the federal government owes to tribes and therefore being outside the conventional framework of analysis for racial classifications).

Cheyaña L. Jaffke, *The “Existing Indian Family” Exception to the Indian Child Welfare Act: The States’ Attempt to Slaughter Tribal Interests in Indian Children*, 66 *LA. L. REV.* 733 (2006) (criticizing the judicial development of the “existing Indian family” exception to the Indian Child Welfare Act, which gives judges the discretion to decide that a child or the child’s parents have not maintained a significant relationship to a tribe, and arguing that this exception is not supported by the Act’s language, it does not serve the Act’s purposes, and it is not a necessary means of strengthening the Act’s constitutionality).

B.J. Jones, *The Indian Child Welfare Act: In Search of a Federal Forum to Vindicate the Rights of Indian Tribes and Children Against the Vagaries of State Courts*, 73 *N.D. L. REV.* 395 (1997) (arguing that the objectives of the Indian Child Welfare Act have been undercut by state court decisions that disregard the Act’s terms and render its provisions ineffective, and that federal courts need to step in and be more aggressive about correcting erroneous state court decisions).

Elizabeth MacLachlan, Comment, *Tensions Underlying the Indian Child Welfare Act: Tribal Jurisdiction over Traditional State Court Family Law Matters*, 2018 *B.Y.U. L. REV.* 455 (contending that state courts have improperly resisted the Indian Child Welfare Act because the Act runs counter to the general historical tradition of state courts having nearly total jurisdiction over family law disputes, and suggesting that updated guidelines from the Bureau of Indian Affairs may help overcome state court resistance to the Act).

Jose Monsivais, *A Glimmer of Hope: A Proposal to Keep the Indian Child Welfare Act of 1978 Intact*, 22 *AM. INDIAN L. REV.* 1 (1997) (describing how the Indian Child Welfare Act was undermined by constitutional challenges and judicially-created exceptions, but it could be reinvigorated and strengthened if more state court judges understood how the Act protects Native American culture and heritage).

Addie C. Rolnick, *Indigenous Subjects*, 131 *YALE L.J.* 2652 (2022) (considering how constitutional law concerning racial classifications, particularly the claim that ancestry is equivalent to

race, has become a significant threat to the rights of indigenous people).

Addie Rolnick & Kim Pearson, *Racial Anxieties in Adoption: Reflections on Adoptive Couple, White Parenthood, and Constitutional Challenges to the ICWA*, 2017 MICH. ST. L. REV. 727 (arguing that although the Indian Child Welfare Act is not a race-based statute, the Supreme Court's skepticism of the statute reflects race-based anxieties about a law that strongly protects minority families' communities).

Nicole Russo, Note, *Back to Basics: The Supreme Court's Return to Fundamental Principles of Federal Indian Law in McGirt v. Oklahoma Ahead of Equal Protection Challenge to the Indian Child Welfare Act of 1978*, 55 SUFFOLK U. L. REV. 123 (2022) (arguing that the Supreme Court can return to fundamental principles of federal Indian law, which recognize the special trust relationship between the federal government and Indian tribes, by rejecting the equal protection challenges being brought against the Indian Child Welfare Act).

Timothy Sandefur, *Escaping the ICWA Penalty Box: In Defense of Equal Protection for Indian Children*, 37 CHILD. LEGAL RTS. J. 1 (2017) (arguing that the Indian Child Welfare Act unconstitutionally discriminates on the basis of race by reducing legal protections for Indian children, excluding them from the reach of state protective services, and subordinating their interests to those of tribal governments).

Timothy Sandefur, *The Unconstitutionality of the Indian Child Welfare Act*, 26 TEX. REV. L. & POLITICS 55 (2021) (asserting that although Congress had good intentions in enacting the Indian Child Welfare Act, the statute unconstitutionally imposes special rules on American citizens of Native ancestry and winds up hurting the children it was supposed to help).

Marcia Zug, *ICWA's Irony*, 45 AM. INDIAN L. REV. 1 (2021) (arguing that although the Indian Child Welfare Act is relentlessly criticized for providing special treatment for Native American children, the statute actually ensures that Indian families receive the same protections as other families, and the invalidation of the Act will prevent that equalization and bring about harmful differential treatment of Indian children).

– **Establishing Paternity**

Taylor Dow, Comment, *ICWA and the Unwed Father: A Constitutional Corrective*, 167 U. PA. L. REV. 1513 (2019) (describing the various approaches that state courts have taken on how an unwed father can acknowledge or establish paternity for purposes of the Indian Child Welfare Act, and proposing that courts can follow the Court’s “biology plus” jurisprudence when considering whether a putative father has developed a constitutionally protectable relationship with the child).

Shreya A. Fadia, Note, *Adopting “Biology Plus” in Federal Indian Law: Adoptive Couple v. Baby Girl’s Refashioning of ICWA’s Framework*, 114 COLUM. L. REV. 2007 (2014) (comparing the Supreme Court’s approach in Indian Child Welfare Act cases to the “biology plus” approach used to establish the existence of a father-child relationship for unwed fathers in the context of immigration law).

– **Extension Beyond American Indians**

Vinita Andrapalliyal, *The CPS Took My Baby Away: Threats to Immigrant Parental Rights and a Proposed Federal Solution*, 7 HARV. L. & POL’Y REV. 173 (2013) (proposing that the Indian Child Welfare Act should serve as a model for enactment of legislation protecting immigrant families and their children and that such legislation would be a valid exercise of Congress’s authority over immigration).

J. Bohl, “*Those Privileges Long Recognized*”—*Termination of Parental Rights Law, the Family Right to Integrity and the Private Culture of the Family*, 1 CARDOZO WOMEN’S L.J. 323 (1994) (arguing that parental unfitness, rather than best interests of the child, is the only constitutionally acceptable criterion for removing children from their families, and proposing a more constitutionally sound approach to child welfare legislation based on the general principles embodied in the Indian Child Welfare Act).

Marcia Zug, *ICWA International: The Benefits and Dangers of Enacting ICWA-Type Legislation in Non-U.S. Jurisdictions*, 97 DEN. L. REV. 205 (2019) (exploring the benefits and difficulties of implementing indigenous child protection legislation like the Indian Child Welfare Act in other countries, and finding that

such legislation could work well in other countries, although it would need some modifications in countries that do not recognize tribal sovereignty).

– **Federalism Issues**

Leanne Gale & Kelly McClure, Note, *Commandeering Confrontation: A Novel Threat to the Indian Child Welfare Act and Tribal Sovereignty*, 39 YALE L. & POL'Y REV. 292 (2020) (arguing that the Indian Child Welfare Act does not unconstitutionally commandeer state officials or authority and the anti-commandeering challenges to the statute contradict settled anti-commandeering principles and misconstrue how child custody proceedings actually work).

Jessie Shaw, Note, *Commandeering the Indian Child Welfare Act: Native American Rights Exception to Tenth Amendment Challenges*, 42 CARDOZO L. REV. 2007 (2021) (arguing that the Indian Child Welfare Act does not unconstitutionally commandeer state officials or authority because it is a law, like the Voting Rights Act or Age Discrimination in Employment Act, created to remedy states' historically discriminatory practices against Native American families).

– **Originalist and Other Historical Arguments**

George Ablavsky, "With the Indian Tribes": *Race, Citizenship, and Original Constitutional Meanings*, 70 STAN. L. REV. 1025 (2018) (exploring the meaning of "Indian" and "Indian tribes" at the time of the Constitution's creation and finding support for arguments that federal laws based on membership in a recognized tribe, like the Indian Child Welfare Act, involve political rather than racial classifications).

Abi Fain & Mary Kathryn Nagle, *Close to Zero: The Reliance on Minimum Blood Quantum Requirements to Eliminate Tribal Citizenship in the Allotment Acts and the Post-Adoptive Couple Challenges to the Constitutionality of ICWA*, 43 MITCHELL HAMLINE L. REV. 801 (2017) (exploring the historical origins of the idea that a minimum amount of blood quantum should be required to qualify as "Indian" under federal laws such as the Indian Child Welfare Act).

Matthew L.M. Fletcher, *Politics, Indian Law, and the Constitution*, 108 CALIF. L. REV. 495 (2020) (asserting that the Constitution's Indian Commerce Clause and Indians Not Taxed Clause expressly authorize Congress to create legal classifications based on race and ancestry, and that the Indian Child Welfare Act is a valid exercise of congressional authority on that basis).

Sarah Krakoff, *They Were Here First: American Indian Tribes, Race, and the Constitutional Minimum*, 69 STAN. L. REV. 491 (2017) (criticizing attempts to characterize Indian tribes as groups defined primarily by race and explaining how this effort to enshrine colorblind understandings of the Equal Protection Clause overlooks the original and legitimate constitutional basis for the sovereign status of the tribes and their political relationship with the federal government).

– **Personal Accounts**

Janice Beller, *Defending the Gold Standard: American Indian Tribes Fight to Save the Indian Child Welfare Act*, ADVOC. (Idaho), Feb. 2022, at 16 (explaining the history behind the Indian Child Welfare Act and why tribal communities are concerned that it may be struck down as unconstitutional, and providing personal reflections on the issue from a Tribal Social Services Manager who sees tribal connections being severed in child protective cases).

Matthew L.M. Fletcher, *On Indian Children and the Fifth Amendment*, 80 MONT. L. REV. 99 (2019) (using a personal account of the impact of the Indian Child Welfare Act to argue for interpreting the Fifth Amendment in Indian affairs cases in a way that focuses on the political origins of the Amendment rather than the modern individual rights perspective on it).

– **Proposed Reforms**

Onalee R. Chappeau, Note, *Trusting the Tribe: Understanding the Tensions of the Indian Child Welfare Act*, 64 ST. LOUIS U. L.J. 241 (2020) (suggesting four ways the Indian Child Welfare Act could be modified to overcome constitutional concerns while recognizing the value of tribes and promoting the best interests of Indian children).

Kate Shearer, Comment, *Mutual Misunderstanding: How Better Communication Will Improve the Administration of the Indian Child Welfare Act in Texas*, 15 TEX. TECH. ADMIN. L.J. 423 (2014) (examining the implementation of the Indian Child Welfare Act in Texas and suggesting ways in which its administration can be improved so that it properly balances the constitutional interests in the parent/child relationship and the emotional and physical best interests of children).

Katerina Silcox, Note, *Thompson v. Fairfax County Department of Family Services: Determining the Best Interests of the Indian Child*, 10 LIBERTY U. L. REV. 141 (2015) (discussing the constitutional controversies concerning the Indian Child Welfare Act and proposals to revise the statute to avoid constitutional problems and improve its effectiveness).

Caroline M. Turner, Note, *Implementing and Defending the Indian Child Welfare Act Through Revised State Requirements*, 49 COLUM. J.L. & SOC. PROBS. 501 (2016) (urging states to adopt regulations for implementing the Indian Child Welfare Act that are based on U.S. Department of Interior Guidelines, that will clarify and improve the implementation of the Act, and that will strengthen the Act against constitutional challenges).

Medical Decision Making

– Assisted Suicide

Rebecca Critser, *Assisted Suicide: Is the Cruzan “Unqualified State Interest in the Preservation of Human Life” a Legitimate State Interest?*, 13 NAELA J. 71 (2017) (discussing the constitutionality of laws prohibiting physician assisted suicide and arguing that a state’s desire to preserve human life is not a legitimate government interest when a competent adult person with a painful and debilitating terminal illness will be forced to continue life).

Sarah M. Gentry, Comment, *The Right to Die with Dignity: Death, Your Body, and Privacy*, 28 GEO. MASON U. CIV. RTS. L.J. 203 (2018) (arguing that physician-assisted suicide and euthanasia should be analyzed under a framework similar to that used for abortion rights under *Roe v. Wade*).

Yale Kamisar, *Are the Distinctions Drawn in the Debate About End-of-Life Decision Making “Principled”? If Not, How Much Does It Matter?*, 40 J.L. MED. & ETHICS 66 (2012) (exploring the constitutional and moral dimensions of the distinction between “killing” and “letting die”).

Browne Lewis, *A Deliberate Departure: Making Physician-Assisted Suicide Comfortable for Vulnerable Patients*, 70 ARK. L. REV. 1 (2017) (discussing how safeguards can ensure that the availability of physician-assisted suicide does not adversely affect those who are vulnerable because of their race, age, disability, or economic status).

Stephanie M. Richards, *Death with Dignity: The Right, Choice, and Power of Death by Physician-Assisted Suicide*, 11 CHARLESTON L. REV. 471 (2017) (observing that physician-assisted suicide should not be a fundamental right and instead each state should be given discretion to determine what laws it will have on the subject).

Edward Rubin, *Assisted Suicide, Morality, and Law: Why Prohibiting Assisted Suicide Violates the Establishment Clause*, 63 VAND. L. REV. 763 (2010) (asserting that laws prohibiting physician-assisted suicide represent the coercive imposition of traditional religious-based moral systems and thus violate the First Amendment’s prohibition of establishments of religion).

Carita Skinner, *Doctrine of Dignity: Making a Case for the Right to Die with Dignity in Florida Post-Obergefell*, 14 FLA. A & M U. L. REV. 241 (2020) (arguing that the Supreme Court’s decision in favor of marriage equality recognized the constitutional right to make private decisions that affect one’s dignity and therefore should support the recognition of a constitutional right to physician-assisted suicide).

– **Medical Decisions for Minors**

Doriane Lambelet Coleman & Philip M. Rosoff, *Adolescent Medical Decisionmaking Rights: Reconciling Medicine and Law*, 47 AM. J.L. & MED. 386 (2022) (examining the legal literature and the medical and bioethics literature to generate recommendations for a new model of adolescent medical decisionmaking

that gives adolescents both medical decisionmaking rights and protections consistent with their evolving capacities).

Anne C. Dailey & Laura A. Rosenbury, *The New Parental Rights*, 71 DUKE L.J. 75 (2021) (providing a new model of parent rights that reduces parental control, addresses race and class biases, and highlights children's independent interests and agency, and applying this model to issues including transgender youth medical decisionmaking).

F. Lee Francis, *Who Decides: What the Constitution Says About Parental Authority and the Rights of Minor Children to Seek Gender Transition Treatment*, 46 S. ILL. U. L.J. 535 (2022) (asserting that the Constitution and common law do not provide rights to children, but parental rights should not be absolute and states should be able to override them when the state's interest is sufficiently strong).

Clare Huntington & Elizabeth S. Scott, *Conceptualizing Legal Childhood in the Twenty-First Century*, 118 MICH. L. REV. 1371 (2020) (describing a conceptual framework for promoting the wellbeing of children, driven by research and promoting social welfare, and how it applies to issues such as decisions about medical care).

Stephanie S. O'Loughlin, *Lessons from My Sister's Keeper: A Minor's Right to Refuse Lifesaving Treatment*, 52 FAM. L.Q. 203 (2018) (arguing that the constitutional right to bodily integrity should give a minor the right to refuse lifesaving medical treatment if they can show that the refusal is an informed decision that is in the minor's best interest because the minor has a terminal and incurable illness that causes great suffering).

Clare Ryan, *The Law of Emerging Adults*, 97 WASH. U. L. REV. 1131 (2020) (contending that emerging adulthood should be recognized as a distinct legal category that falls between childhood and adulthood, and laws affecting emerging adults should take into account the distinctive characteristics of this crucial transitional life stage).

Katharine Silbaugh, *The Legal Design for Parenting Concussion Risk*, 53 U.C. DAVIS L. REV. 197 (2019) (considering the extent

to which parents should have authority to make decisions about exposing their children to concussion risks in youth sports).

Federica Vergani, Comment, *Why Transgender Children Should Have the Right to Block Their Own Puberty with Court Authorization*, 13 *FIU L. REV.* 903 (2019) (arguing that children have a right to privacy and autonomy that supports the establishment of judicial bypass procedures allowing them to obtain hormone suppression treatments without parental consent).

Lynn D. Wardle, *Controversial Medical Treatments for Children: The Roles of Parents and of the State*, 49 *FAM. L.Q.* 509 (2015) (discussing disputes over controversial medical treatments for children, such as therapy to eliminate same-sex attractions, and suggesting ways in which courts can balance the constitutional rights of parents to make decisions about medical treatment for their children and the states' interest in protecting children's interests).

Lois A. Weithorn & Dorit Rubinstein Reiss, *Providing Adolescents with Independent and Confidential Access to Childhood Vaccines: A Proposal to Lower the Age of Consent*, 52 *CONN. L. REV.* 771 (2020) (recommending that older minors be allowed to give legally binding consent for childhood vaccinations).

Parents and Non-Parents

– Constitutional Concerns

Barbara A. Atwood, *Third-Party Custody, Parental Liberty, and Children's Interests*, *FAM. ADVOC.*, Spring 2021, at 48 (observing that the Supreme Court has left lower courts with an incomplete constitutional framework for dealing with non-parent interests in children, the law on this is still in flux, and parents continue to enjoy a robust constitutional presumption in their favor while non-parents must satisfy strict standing requirements and demanding standards of proof).

Brian Bix, *Philosophy, Morality, and Parental Priority*, 40 *FAM. L.Q.* 7 (2006) (exploring bases in moral philosophy for distinguishing between parents and non-parents when considering the distribution of rights and obligations relating to children, and suggesting areas in need of further thought such as how to treat

“near-parents” who do not technically qualify as parents but come close enough to raise difficult moral and policy questions).

Michael J. Higdon, *The Quasi-Parent Conundrum*, 90 U. COL. L. REV. 941 (2019) (discussing attempts to balance parent’s constitutional interests and children’s interests in relationships with people who are not legally parents but function as one, and arguing that in struggling with these issues courts have largely treated the traditional nuclear family model as the norm and so the law of quasi-parenthood is not achieving the benefits it was meant to provide).

Pamela Laufer-Ukeles, *The Relational Rights of Children*, 48 CONN. L. REV. 741 (2016) (arguing for recognition of children’s rights to support from care relationships with people other than their parents).

Jeffrey A. Parness, *The Constitutional Limits on Custodial and Support Parentage by Consent*, 56 IDAHO L. REV. 421 (2020) (contending that new means of acquiring parental rights based on presumed or implied consent of the child’s existing legal parents pose a threat to due process interests of parents).

Jeffrey A. Parness, *Unconstitutional Parenthood*, 104 MARQ. L. REV. 183 (2020) (examining the constitutional issues arising from new forms of parentage, such as de facto parentage or voluntary acknowledgement parentage, that do not depend on biological ties or formal adoptions).

Jeffrey A. Parness & Matthew Timko, *De Facto Parent and Nonparent Child Support Orders*, 67 AM. U. L. REV. 769 (2018) (discussing constitutional limits on child support obligations being imposed on non-parents).

Rebecca L. Scharf, *Psychological Parentage, Troxel, and the Best Interests of the Child*, 13 GEO. J. GENDER & L. 615 (2012) (contending that principles of constitutional law do not adequately resolve the difficult dilemma of how to balance parents’ constitutional interests in controlling the upbringing of their children and the competing interest in protecting children from the harm of losing contact with someone who effectively acted as a parent in the child’s life).

– **State Laws**

David W. Lannetti, *A Nonparent's Ability to Infringe on the Fundamental Right of Parenting: Reconciling Virginia's Nonparental Child Custody and Visitation Standards*, 30 REGENT U. L. REV. 203 (2017-2018) (arguing that Virginia laws concerning nonparental custody do not adequately protect parents' rights to raise their children and preclude government interference with that right).

P. Mars Scott, *Not the Cleavers Anymore: Third-Party Parental Interests in Minor Children and the Evolving American Family*, 73 MONT. L. REV. 97 (2012) (considering how Montana laws seek to protect parents' constitutional rights while also respecting children's constitutional rights to maintain a non-parent relationship).

Tobie Tranchina, *Nonparent Visitation Rights: A National Issue as Addressed in Louisiana*, 18 LOY. J. PUB. INT. L. 32 (2017) (assessing the constitutionality of Louisiana's statutes allowing family members other than parents to seek visitation rights).

– **Uniform Acts**

Jeff Atkinson & Barbara Atwood, *Moving Beyond Troxel: The Uniform Nonparent Custody and Visitation Act*, 52 FAM. L.Q. 479 (2018) (describing how the Uniform Nonparent Custody and Visitation Act seeks to balance, within constitutional limits, the interests of children, parents, and nonparents with whom children have close relationships).

Alexandra Dylan Lowe, *Parents and Strangers: The Uniform Adoption Act Revisits the Parental Rights Doctrine*, 30 FAM. L.Q. 379 (1996) (criticizing the parental rights doctrine, which presumptively favors biological parents over others who have loved and cared for a child, and examining how the Uniform Adoption Act seeks to give more protection to non-parents who have had strong relationships with a child).

Privilege Against Self-Incrimination

– Risk of Criminal Prosecution

Barbara Kaban & Ann E. Tobey, *When Police Question Children*, 1 J. CTR. FOR CHILD. & CTS. 151 (1999) (examining the legal protections, including the Fifth Amendment privilege against self-incrimination, available for children interrogated by police, and suggesting ways in which police interview procedures should be modified to account for the suggestibility of children's memories).

Meghan Scahill, *Prosecuting Attorneys in Dependency Proceedings in Juvenile Court*, 1 J. CTR. FOR CHILD. & CTS. 73 (1999) (assessing the issues and effects of having criminal prosecutors involved in child abuse and neglect cases, including the dilemma for parents who may face the choice of preserving their constitutional right against self-incrimination but risk losing custody or contact with their children).

Jane K. Stoeber, *Mirandizing Family Justice*, 39 HARV. J.L. & GENDER 189 (2016) (discussing how the presence of mandatory reporters at Family Justice Centers, where government and community services are provided in one location for domestic violence victims, can create a risk of self-incriminating statements being used against victims).

– Strategic Considerations for Attorneys in Family Law Cases

Brian J. Blitz & Patrick Emerson, *Should Your Client Remain Silent?*, FAM. ADVOC., Spring 2011, at 28 (explaining the Fifth Amendment privilege against self-incrimination and providing advice about its significance in litigation of family law matters, particularly the assertion of the privilege in response to questions about adultery or illegal drug use).

James H. Feldman, *Between Priest and Penitent, Doctor and Patient, Lawyer and Client. . . Which Confidences Are Protected?*, FAM. ADVOC., Fall 1991, at 20 (describing the testimonial privileges that may be relevant in matrimonial cases, including the Fifth Amendment privilege against self-incrimination).

James H. Feldman & Carolyn Sievers Reed, *Silences in the Storm: Testimonial Privileges in Matrimonial Disputes*, 21 FAM. L.Q. 189 (1987) (discussing the use of testimonial privileges, including the assertion of the Fifth Amendment privilege against self-incrimination in response to questions about sexual conduct or requests for disclosure of tax returns or other financial information).

Matthew Fraidin, *First Steps in Representing a Parent Accused of Abuse or Neglect*, 35 CHILD L. PRAC. 81 (2016) (describing risks and benefits of advising a client to invoke the constitutional privilege against self-incrimination in a civil child protection case).

Daniel H. Glasser, *Tax Issues When Cross-Examining the Owner of a Cash Business*, 18 EQUITABLE DISTRIBUTION J. 109 (2001) (discussing the privilege against self-incrimination, the provisions in tax laws that may allow an innocent spouse to avoid penalties for underpayment of taxes, and the dilemmas faced by attorneys in support cases who seek to show that a client's spouse had significant amounts of unreported income).

Mitchell K. Karpf, *Evidentiary Privileges*, FAM. ADVOC., Spring 2022, at 10 (providing an overview of evidentiary privileges that can be relevant in family cases, including the Fifth Amendment privilege against self-incrimination).

Carlton R. Marcyan, *Discovering Unreported Income*, FAM. ADVOC., Spring 2011, at 12 (discussing the ethical and practical issues, including possible use of the Fifth Amendment privilege against self-incrimination, in family cases involving accusations about a spouse having unreported income or hidden benefits from a business).

Samuel V. Schoonmaker, IV, *Criminal Law or Family Law: The Overlapping Issues*, 44 FAM. L.Q. 155 (2010) (describing constitutional complexities that arise at the intersection of criminal law and family law, such as when individuals involved in family cases must make difficult decisions about whether to preserve the privilege against self-incrimination).

Religion

– Arbitration or Adjudication by Religious Authorities

Barbara Atwood, *Religious Arbitration of Family Disputes*, FAM. ADVOC., Fall 2019, at 24 (discussing First Amendment concerns about the enforcement of agreements to resolve family disputes through religious arbitration).

Julia Halloran McLaughlin, *Taking Religion Out of Civil Divorce*, 65 RUTGERS L. REV. 395 (2013) (examining the constitutional issues that arise when a party seeks to have a court enforce the decision of a religious tribunal).

– Children

Jennifer Ann Drobac, Note, *For the Sake of the Children: Court Consideration of Religion in Child Custody Cases*, 50 STAN. L. REV. 1609 (1998) (observing that courts routinely consider religious beliefs in custody cases, asserting that this violates constitutional rights, and proposing a bifurcated procedural mechanism in order to minimize the risks of religious bias when judges consider religion in custody determinations).

Susan Higginbotham, “*Mom, Do I Have to Go to Church?*”: *The Noncustodial Parent’s Obligation to Carry Out the Custodial Parent’s Religious Plans*, 31 FAM. L.Q. 585 (1997) (discussing the First Amendment concerns and other issues raised by situations where a custodial parent seeks to bar a noncustodial parent’s access to the child because of the noncustodial parent’s failure to respect the custodial parent’s religious wishes).

Cynthia R. Mabry, *Blending Cultures and Religions: Effects that the Changing Makeup of Families in Our Nation Have on Child Custody Determinations*, 26 J. AM. ACAD. MATRIM. LAW. 31 (2013) (providing advice for attorneys and judges about the extent to which the culture and religion of parents can be considered in making decisions about child placements and parenting plans, including an explanation of constitutionally permissible and impermissible ways to consider religion).

Elizabeth Newland, *Extreme Religion, Extreme Beliefs: Comparing the Role of Children’s Rights in Extremist Religions Versus Extremist Cults (QAnon)*, 42 CHILD. LEGAL RTS. J. 121 (2022)

(discussing how the Constitution gives parents the right to determine the role that religion will have in the upbringing of their children, even if the religion has views that some consider extreme and harmful to the mental or emotional wellbeing of children, and comparing this to the issue of parents who embrace cult-like beliefs that are social or political but not religious in nature).

Laura J. Schwartz, *Religious Matching for Adoption: Unraveling the Interests Behind the “Best Interests” Standard*, 25 *FAM. L.Q.* 171 (1991) (analyzing whether religious matching, which means placing a child with an adoptive family that shares the religious identity of the biological parents, is a constitutional and justifiable practice).

Jeffrey Shulman, *Spiritual Custody: Relationship Rights and Constitutional Commitments*, 7 *J. L. & FAM. STUD.* 317 (2005) (arguing that the Free Exercise Clause and the Establishment Clause should not bar courts from considering the religious beliefs and practices of custodial candidates in making decisions about custody and a child’s best interests).

Sejal Singh, *Does Teaching Yoga to Children in Public Schools Violate the Establishment Clause of the First Amendment?*, 41 *CHILD. LEGAL RTS. J.* 27 (2021) (arguing that yoga and similar mindfulness or meditation programs in public schools do not violate the Establishment Clause if the programs separate the physical and mental health aspects of yoga from its roots in the Hindu religion).

Rebecca M. Stahl, *Religious Issues in Child Welfare Cases*, *FAM. ADVOC.*, Fall 2019, at 11 (providing advice for attorneys dealing with religious issues relating to child welfare, such as whether a parent can reject life-saving medical treatment for a child, whether private adoption agencies can deny adoptions for same-sex couples, and whether children in foster care can be required to attend religious services).

Cassandra Terhune, Comment, *Cultural and Religious Defenses to Child Abuse and Neglect*, 14 *J. AM. ACAD. MATRIM. LAW.* 152 (1997) (discussing practices, such as female genital mutilation and faith healing, that create a clash between religious liberty interests and the need to protect children).

Carolyn R. Wah, *Religion in Child Custody and Visitation Cases: Presenting the Advantage of Religious Participation*, 28 FAM. L.Q. 269 (1994) (discussing how constitutional interests in religious freedom can be respected, and the benefits of religious participation for children can be acknowledged, when adjudicating issues about the best interests of children).

Joanne Ross Wilder, *Religion and Best Interests in Custody Cases*, 18 J. AM. ACAD. MATRIM. LAW. 211 (2002) (analyzing issues involving religion that can arise in custody cases, including the consideration of religion as a factor in custody determinations, the enforceability of agreements to raise a child in a particular religious faith, the relevance of a child's expression of preferences about religion, and the significance of expert testimony from a psychologist or other professional).

Joanne Ross Wilder, *Resolving Religious Disputes in Custody Cases: It's Really Not About Best Interests*, 22 J. AM. ACAD. MATRIM. LAW. 411 (2009) (arguing that unconstitutional infringement of religious rights will frequently occur if courts try to use a "best interests of the child" standard to resolve religious issues in custody cases, and therefore courts should defer to parental choices about religion and override them only when necessary to protect a child from substantial harm).

– Marriage and Divorce

Ann Laquer Estin, *Toward a Multicultural Family Law*, 38 FAM. L.Q. 501 (2004) (noting the First Amendment issues that can arise because of the religious considerations surrounding marriage and divorce).

Cheryl I. Foster, *When a Prenup & Religious Principles Collide*, FAM. ADVOC., Winter 2011, at 34 (discussing the constitutional considerations that can arise because of different principles in Catholicism, Judaism, and Islam concerning prenuptial agreements).

Allison Gerli, Comment, *Living Happily Ever After in a Land of Separate Church and State: Treatment of Islamic Marital Contracts*, 26 J. AM. ACAD. MATRIM. LAW. 113 (2013) (describing the inconsistency and confusion in court decisions about marriage contracts entered by Muslim couples).

Michael Howald, *Blending Religious Practices*, FAM. ADVOC., Summer 2013, at 30 (providing a rabbi's advice about how parents with different religious backgrounds and beliefs can achieve a harmonious integration of their religious practices, both during a marriage or after a divorce).

Gerald L. Nissenbaum & Wendy O. Hickey, *Religious Law Cannot Be Enforced by Any Civil Court in the United States*, 30 J. AM. ACAD. MATRIM. LAW. 83 (2017) (examining the constitutional concerns and other issues arising when courts are asked to enforce religious marriage contracts).

Kimberly Scheuerman, Comment, *Enforceability of Agreements to Obtain a Religious Divorce*, 23 J. AM. ACAD. MATRIM. LAW. 425 (2010) (noting that courts are split on whether the Establishment Clause or the Free Exercise Clause prevents courts from ordering a spouse to grant a religious divorce).

Lynn D. Wardle, *Marriage and Religious Liberty: Comparative Law Problems and Conflict of Laws Solutions*, 12 J.L. & FAM. STUD. 315 (2010) (reviewing the conflicts that can arise between religious communities and governments over religious liberty and the regulation of marriage and arguing that conflict of laws principles provide a valuable means of resolving church-state disputes concerning marriage).

– **Religious Beliefs**

Ann Laquer Estin, *Foreign and Religious Family Law: Comity, Contract, and the Constitution*, 41 PEPP. L. REV. 1029 (2014) (discussing how courts have handled the difficult task of managing cases that involve constitutional issues, such as First Amendment or Equal Protection concerns, relating to enforcement of religious family law principles).

Amos N. Guiora, *Protecting the Unprotected: Religious Extremism and Child Endangerment*, 12 J.L. & FAM. STUD. 391 (2010) (arguing that the immunity from outside interference afforded to religious beliefs or practices that endanger children should be eliminated, just as the immunity that once was afforded to the family, with respect to domestic violence and abuse, has been eliminated).

Hugo Kamya, *Engaging Spirituality in Family Conflict: Witnessing to Hope and Dialogue*, 26 J. AM. ACAD. MATRIM. LAW. 15 (2013) (recommending ways in which attorneys can account for the importance of religious faith and spirituality in helping families handle conflicts).

David D. Meyer, *Self-Definition in the Constitution of Faith and Family*, 86 MINN. L. REV. 791 (2002) (contrasting the broad approach to defining religion, and the narrow approach to defining family, for constitutional purposes).

Raymond C. O'Brien, *Family Law's Challenge to Religious Liberty*, 35 U. ARK. LITTLE ROCK L. REV. 3 (2012) (discussing the conflict between traditional worldviews based on religious beliefs and the trend toward family law structures being shaped by individual private-ordering decisions, with respect to subjects including divorce, marriage, adoption, and parentage).

Benjamin Shmueli, *Civil Actions for Acts That Are Valid According to Religious Family Law but Harm Women's Rights: Legal Pluralism in Cases of Collision Between Two Sets of Laws*, 46 VAND. J. TRANSNAT'L L. 823 (2013) (discussing the collisions among tort law, family law, and constitutional law that may occur when religious principles permit acts that harm human rights).

Robin Fretwell Wilson et al., *When Faith Defines, and Divides, Family*, FAM. ADVOC., Winter 2022, at 21 (discussing the significant constitutional interest in the religious autonomy of families and recommending ways for judges to avoid bias when deciding disputes involving religious beliefs or practices).

– Religious Exemptions

Stephane P. Fabus, *Religious Refusal: Endangering Pregnant Women and Professional Standards*, 13 MARQ. ELDER'S ADVISOR 219 (2012) (arguing that Catholic hospitals should be treated as quasi-public actors who violate patients' constitutional rights if they refuse to provide emergency abortion services for pregnant women with conditions such as ectopic pregnancy, severe pulmonary hypertension, and miscarriage, when there is a serious risk to the health and life of the mother and no chance of successful continuation of fetal life).

Kharis Lund, *Wolves in Sheep's Clothing: How Religious Exemption Laws for Discriminatory Private Agencies Violate the Constitution and Harm LGBTQ+ Families*, 54 *FAM. L.Q.* 67 (2020) (arguing that the Equal Protection Clause and the Establishment Clause can be violated when states allow faith-based child placement agencies to discriminate against prospective parents on the basis of sexual orientation or gender identity).

Louise Melling, *Religious Exemptions and the Family*, 131 *YALE L.J. FORUM* 275 (2021) (discussing how antidiscrimination laws that protect diverse family arrangements are threatened by allowing religious exemptions to the laws' requirements).