

HARVARD LAW REVIEW

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ARTICLE

PRAGMATIC FAMILY LAW

Clare Huntington

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## PRAGMATIC FAMILY LAW

Clare Huntington\*

*Family law is a central battleground for a polarized America, with seemingly endless conflict over abortion, parental control of school curricula, gender-affirming health care for children, and similar flash points. This is hardly surprising for an area of law that implicates fundamental concerns about equality, bodily autonomy, sexual liberty, gender norms, parenting, and religion. Polarization poses significant risks to children and families, but centering contestation obscures another important reality. In many areas of doctrine and policy, family law has managed to avoid polarization, even for politically and socially combustible issues. Instead, states are converging on similar rules and policies, working toward consensus on once-divisive issues, and settling into a pluralism that does not line up neatly with the red-blue divide.*

*What ties together these widespread but underappreciated patterns of convergence, depolarization, and nonpartisan pluralism? This Article argues that a deep, underlying commonality is a pragmatic method of decision- and policymaking. Polarization has a long history in the United States, but so, too, does pragmatism. With roots in nineteenth-century philosophy and now deployed by advocates and scholars in multiple contexts and disciplines, the living tradition of American pragmatism rejects contestation over abstract ideals in favor of solving problems through experience-based learning, experimentation, application of empirical evidence, and contextualized decisionmaking. As this Article demonstrates, across contemporary family law, judges and policymakers are eschewing debates about political ideology and instead are focusing on whether a doctrine or policy works to enhance specific, concrete, and relatively uncontested aspects of child and family well-being. These legal actors base decisions on available evidence and center the lived experience of those enmeshed in the legal system. And they tailor each decision to its specific context.*

*Recognizing a common methodological foundation — what this Article calls pragmatic family law — has implications for scholars, legal actors, and advocates. Crystallizing the distinct approach to decision- and policymaking highlights its utility in advancing well-being and encourages legal actors and advocates to use the method more intentionally. It invites scholars to weigh the advantages of this approach against others, notably rights-based litigation and values-based debate. And it demonstrates how pragmatism can recalibrate family law doctrine to mitigate concerns about indeterminacy and provide direction for institutional reform.*

*Identifying pragmatism as a distinct approach also underscores its significant limitations, especially in addressing the root causes of racial inequity. Many instances of pragmatic*

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\* Joseph M. McLaughlin Professor of Law, Fordham Law School. For helpful suggestions and insights, I am grateful to Sania Anwar, Susan Appleton, Wendy Bach, Jessica Bulman-Pozen, Emily Buss, Naomi Cahn, June Carbone, Kristin Collins, Courtney Cox, Catherine Davidson, Nestor Davidson, Nancy Dowd, Maxine Eichner, Kris Franklin, Jennifer Gordon, Lisa Grumet, Josh Gupta-Kagan, Henry Huntington, Courtney Joslin, Ethan Leib, James Liebman, Solangel Maldonado, Linda McClain, Douglas NeJaime, Kimani Paul-Emile, David Pozen, Clare Ryan, Aaron Saiger, Carol Sanger, Elizabeth Scott, Robert Scott, Jane Spinak, Lisa Washington, Deborah Widiss, Yiran Zhang, and Benjamin Zipursky, as well as workshop participants at the Berkeley Poverty Law Conference, Columbia Law School, the Family Law Scholars and Teachers Conference, the New York Area Family Law Scholars Workshop, and the *North Carolina Law Review* 2022 Symposium on Families, Crisis, and Economic Security: Rethinking the Role of Government. For excellent research assistance, I thank Teresa Huang, Karl Kristensen, Isaac Lunt, and Anna Belle Newport, and for outstanding editing, I am grateful to the *Harvard Law Review*.

*family law equally or disproportionately benefit children and families of color, but these doctrines and policies are typically framed in race-neutral terms. When a problem is understood to affect primarily families of color, too often lawmakers do not develop pragmatic solutions. Accordingly, pragmatic family law has had limited traction in dismantling structural inequity — at least thus far. In short, pragmatic family law is no panacea.*

## INTRODUCTION

**F**amily law stands at the center of America's culture wars. Whether regulating access to abortion, debating parental rights in education, or controlling gender-affirming care for children, states are choosing starkly different, often deeply contentious, paths that track familiar political divisions.<sup>1</sup> Polarization in family law is neither new nor surprising for an area that implicates bodily autonomy, parenting, religion, and equality in numerous dimensions, including race, class, sexual orientation, and gender identity.<sup>2</sup> Some disagreement is inevitable, indeed healthy, but the hyper-politicization of family law poses serious risks to children and families, making them pawns in fights for political power, distracting attention from their concrete needs, and impeding the constructive evolution of law and policy.<sup>3</sup>

Focusing on the headlines, however, obscures an equally important phenomenon. Across the broad domain of contemporary family law,<sup>4</sup>

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<sup>1</sup> See *infra* section I.A.1, pp. 1512–16. This Article focuses on the ideological polarization of substantive family law doctrine and policy: legal actors choosing widely divergent laws and policies, such as some states banning all or most abortions and other states enacting measures to protect access to abortion. See JACOB GRUMBACH, LABORATORIES AGAINST DEMOCRACY 181 (2022) (“[P]olarization is fundamentally about the *distance between the parties*.”). As discussed below, numerous forces drive this polarization. See *infra* section I.A.2, pp. 1516–21.

<sup>2</sup> Family law's expressive function amplifies the stakes of regulation. See Clare Huntington, *Staging the Family*, 88 N.Y.U. L. REV. 589, 608–39 (2013) (describing family life as performative and explaining how family performances shape legal conceptions of the family); Carl E. Schneider, *The Channelling Function in Family Law*, 20 HOFSTRA L. REV. 495, 498 (1992) (“[T]he expressive function [of family law] . . . deploy[s] the law's power to impart ideas through words and symbols. It has two (related) aspects: Law's expressive abilities may be used, first, to provide a voice in which citizens may speak and, second, to alter the behavior of people the law addresses.”).

<sup>3</sup> See *infra* section I.A.3, pp. 1521–23.

<sup>4</sup> This Article defines family law to include both the direct and indirect regulation of families. Direct regulation creates legal categories of family and governs entry and exit from these categories, determines the rights and responsibilities that flow from family status, and regulates behavior within families, such as family violence; indirect regulation structures the larger context of family life and includes a broad range of doctrine and policy. See CLARE HUNTINGTON, *FAILURE TO FLOURISH: HOW LAW UNDERMINES FAMILY RELATIONSHIPS* 59–68 (2014). This broad definition is consistent with other family law scholarship. See Maxine Eichner, *The Family, In Context*, 128 HARV. L. REV. 1980, 1981–82 (2015) (book review) (“Fueled by the recognition that families are social institutions profoundly affected by their social and economic contexts, and that an increasing range of families are being destabilized by these contexts, the emerging scholarship of the 2010s situates families, including nontraditional families, within their surrounding world.” (footnote omitted)); Kerry Abrams, *Family History: Inside and Out*, 111 MICH. L. REV. 1001, 1003–05 (2013) (book review) (distinguishing family law, traditionally defined as marriage, divorce, and related

many doctrines and policies are *not* polarized, even when they raise the most socially and politically sensitive issues.<sup>5</sup> Instead, much of family law evinces convergence.<sup>6</sup> Despite strong and conflicting views on corporal punishment, for example, every state recognizes a parental privilege to use reasonable corporal punishment, with courts justifying the privilege with consistent reasoning: as a critical restraint on the power of the state.<sup>7</sup> Similarly, states across the country, including those not known for public investments in families, are embracing universal pre-kindergarten, with Oklahoma an early leader and states like Alabama and Mississippi investing in quality programs.<sup>8</sup>

Many instances of convergence in family law emerge after intense contestation — that is, issues become depolarized over time. In this category, states end up with similar rules and policies on once-divisive issues, and public support tends to coalesce around the new doctrine or policy. Most states, for example, have legalized gestational surrogacy and permit adoptees to access adoption records, issues that were once deeply contested.<sup>9</sup> Marriage equality — the right of two adults to marry, regardless of sex — is a paradigmatic example of consensus following division. For two decades, the issue drove political cleavages.<sup>10</sup> But by the time the Supreme Court decided *Obergefell v. Hodges*,<sup>11</sup> public support for marriage equality was strong.<sup>12</sup> This support continues to grow, although the Court’s reversal on abortion in *Dobbs v. Jackson Women’s Health Organization*<sup>13</sup> cast doubt on the lifespan of *Obergefell* as a

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issues such as parentage, from “the law of the family,” which includes “the many ways in which families are created, shaped, and constrained by law,” *id.* at 1003, including tax law, contract law, property law, welfare law, criminal law, tort law, and so on).

<sup>5</sup> Polarization in family law is well documented, *see generally* NAOMI CAHN & JUNE CARBONE, *RED FAMILIES V. BLUE FAMILIES: LEGAL POLARIZATION AND THE CREATION OF CULTURE* (2011), but most family law scholars have not addressed ways family law is *not* polarized. A few family law scholars have noted specific instances of nonpartisan pluralism, *see infra* notes 211–14, 341–46 and accompanying text (discussing the work of Professor Deborah Widiss); *infra* notes 335–40 and accompanying text (discussing the work of Professors Courtney Joslin and Douglas NeJaime); *see also* June Carbone & Naomi Cahn, *Judging Families*, 77 *UMKC L. REV.* 267, 287–90 (2008) (exploring the possibility that family courts can productively resolve issues such as same-sex parenting and custody battles), but scholars have yet to put these isolated examples in a larger context or offer a conceptual framework to link them. This Article thus returns to a theme I briefly introduced when reviewing *Red Families v. Blue Families*: after arguing that the authors’ proposed solutions to polarization of changing the subject and devolving authority to the states would be largely ineffective, I suggested that family law should “develop a pragmatic program for bridging the divide that neither avoids true differences nor retreats to balkanized localism.” Clare Huntington, *Purple Haze*, 109 *MICH. L. REV.* 903, 904 (2011) (book review).

<sup>6</sup> *See infra* section I.B.1, pp. 1524–27.

<sup>7</sup> *See infra* notes 130–33 and accompanying text.

<sup>8</sup> *See infra* notes 140–43 and accompanying text.

<sup>9</sup> *See infra* notes 156–68 and accompanying text.

<sup>10</sup> *See infra* notes 169–71 and accompanying text.

<sup>11</sup> 135 S. Ct. 2584 (2015).

<sup>12</sup> *See infra* note 173 and accompanying text.

<sup>13</sup> 142 S. Ct. 2228, 2242 (2022).

matter of constitutional doctrine, and there is ongoing resistance to marriage equality from some quarters.<sup>14</sup>

Even when state laws and policies are not uniform, pluralism on contentious issues does not necessarily reflect a red-blue divide. Conservative states, for example, might be expected to hew closely to traditional notions of parentage, granting legal rights only to adults with marital or biogenetic ties to a child. But a map of states that embrace the functional parenthood doctrine, which grants legal rights to a person who serves the psychological and functional role of a parent, looks nothing like familiar red and blue patterns.<sup>15</sup> And a list of states that have adopted some version of a pregnant workers fairness act, which requires employers to make reasonable accommodations for pregnant workers, similarly defies reductionist partisan labels.<sup>16</sup>

What — if anything — ties together these widespread but underappreciated patterns of convergence, depolarization, and nonpartisan pluralism in family law? Intuitively, they seem to share a pragmatic approach to decision- and policymaking, that is, focusing on what works to help children and families. But pragmatism is more than a colloquial shorthand for practical solutions. It is also a method with a distinct lineage in American thought and broad application in contemporary scholarship and advocacy. American pragmatism traces to late nineteenth- and early twentieth-century philosophers, most notably Charles Sanders Peirce, William James, and John Dewey, who were dissatisfied with then-dominant modes of thinking that laid claim to certainty about

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<sup>14</sup> See *infra* notes 177–82 and accompanying text.

<sup>15</sup> See Courtney Joslin & Douglas NeJaime, *How Parenthood Functions*, 123 COLUM. L. REV. (forthcoming 2023) (manuscript at 32 & fig.1), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4208364](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4208364) [<https://perma.cc/5A35-WU43>] (drawing this map, which includes recognition in states like Arkansas, Georgia, North Carolina, and South Carolina, and a lack of recognition in states like Illinois and Oregon); see also *infra* notes 199–202, 331–40 and accompanying text (discussing this example).

This Article uses the typology of red and blue states to describe familiar political divisions in the United States. The red and blue classification typically reflects voting patterns in presidential elections, see *2020 Presidential Election Results: Biden Wins*, N.Y. TIMES, <https://www.nytimes.com/interactive/2020/11/03/us/elections/results-president.html> [<https://perma.cc/4DR6-P4B8>]; *2016 Presidential Election Results*, N.Y. TIMES (Aug. 9, 2017, 9:00 AM), <https://www.nytimes.com/elections/2016/results/president> [<https://perma.cc/L3YR-4KXQ>], and the percentage of residents in each state who identify as, or lean, Republican or Democrat, see *Party Affiliation by State*, PEW RSCH. CTR., <https://www.pewresearch.org/religion/religious-landscape-study/compare/party-affiliation/by/state> [<https://perma.cc/ZLY4-BZ5D>] (reporting the results of a 2014 study). This typology, however, fails to capture many nuances in the political landscape, both within a state and between states. See Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1130–31 (2014). And, as this Article demonstrates, a state's classification as red or blue does not always predict the kinds of policies it will adopt. See *infra* section I.B, pp. 1523–35. Nonetheless, the typology is a useful shorthand for capturing the political divides that contrast with pragmatic family law.

<sup>16</sup> See *State Pregnant Workers Fairness Laws*, BETTER BALANCE (Jan. 30, 2023), <https://www.abetterbalance.org/resources/pregnant-worker-fairness-legislative-successes> <https://perma.cc/7GAV-UKJL>; see also *infra* notes 211–14, 341–46 and accompanying text (discussing this example).

the source of ideas.<sup>17</sup> The early pragmatists proposed an alternative method that focused not on first principles but instead on whether an idea was useful in clarifying or resolving a philosophical dispute.<sup>18</sup> They argued that all ideas are tentative and subject to testing and revision based on empirical evidence and experimentation.<sup>19</sup> And they were pluralist in their understanding of knowledge, looking to lived experience as well as more traditional sources of empirical evidence.<sup>20</sup> Advocates and scholars have adapted pragmatism to address social problems, from Dewey's project of reforming American public education to more recent efforts to encourage modern social movements.<sup>21</sup> In short, the living tradition of American pragmatism offers an approach to understanding and solving problems.<sup>22</sup>

<sup>17</sup> See *infra* section II.A, pp. 1537–43; Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787, 788–89 (1989) (explaining the term “American pragmatism” and its intellectual roots).

<sup>18</sup> See *infra* notes 224–28 and accompanying text.

<sup>19</sup> See *infra* notes 227–28, 231 and accompanying text.

<sup>20</sup> See *infra* notes 229–34 and accompanying text.

<sup>21</sup> See *infra* notes 245–61 and accompanying text. Family law scholars largely have not examined family law through the lens of pragmatism, although some legal scholars have written about pragmatism in the context of abortion rights. See Mark S. Kende, *Constitutional Pragmatism, The Supreme Court, and Democratic Revolution*, 89 DENV. U. L. REV. 635, 642, 659–60 (2012) (discussing how the Supreme Court has used pragmatic solutions, such as consideration of empirical elements and “common sense,” *id.* at 642, to decide abortion cases); Daniel A. Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331, 1373–74 (1988) (distinguishing *Roe v. Wade*, 410 U.S. 113 (1973), from *Lochner v. New York*, 198 U.S. 45 (1905), by pointing to the pragmatic reasoning of *Roe* — a strong consensus favoring procreative rights and an “overwhelming social consensus against the logic of the state’s position”). For the rare exception of a family law scholar using pragmatism, see David D. Meyer, *Constitutional Pragmatism for a Changing American Family*, 32 RUTGERS L.J. 711, 712 (2001) (arguing that the Supreme Court’s decision on grandparental visitation in *Troxel v. Granville*, 530 U.S. 57 (2000), reflected the principles of legal pragmatism).

<sup>22</sup> In keeping with scholarship outside of philosophy, this Article does not use pragmatism in its strict philosophical sense but instead draws on a broader living tradition. Cf. Thomas C. Grey, *Judicial Review and Legal Pragmatism*, 38 WAKE FOREST L. REV. 473, 478 (2003) (contrasting “jurisprudential high theory whose influence reaches only to those who take a specialized academic interest in jurisprudence” with “working legal thought, . . . the cluster of attitudes and approaches to law that lawyers take on during their apprenticeship, and then actually manifest in their work as practitioners, judges, teachers, and doctrinal commentators”); THOMAS MERTON, *NO MAN IS AN ISLAND* 153–54 (1955) (“Tradition is living and active, but convention is passive and dead. . . . Tradition, which is always old, is at the same time ever new because it is always reviving — born again in each new generation, to be lived and applied in a new and particular way. Convention is simply the ossification of social customs.” *Id.* at 153–54.).

Calling pragmatism a living tradition is apt both because of the nature of the method itself, which is committed to the constant revision of ideas, see JOHN DEWEY, *THE INFLUENCE OF DARWIN ON PHILOSOPHY AND OTHER ESSAYS IN CONTEMPORARY THOUGHT*, at iv (1910), reprinted in 17 JOHN DEWEY: *THE LATER WORKS*, 1925–1953, at 39, 39–40 (Jo Ann Boydston ed., 1981) (stating that it is “better to view pragmatism quite vaguely as part and parcel of a general movement of intellectual reconstruction,” because “regard[ing] it as a fixed rival system making like claim to completeness and finality,” *id.* at 40, undercuts the goal of pragmatism: to challenge systems of belief that claim universality and finality), and because the method has had so many adaptations, see *infra* notes 241–61 and accompanying text.

As this Article argues, convergence, depolarization, and non-partisan pluralism in contemporary family law evince deep, underlying commonalities that reflect the pragmatic method.<sup>23</sup> Across disparate areas, judges, legislators, administrators, and others are largely setting aside abstract ideals and political ideology and instead focusing on whether a doctrine or policy promotes core aspects of family and child well-being, such as a child's need for a consistent caregiver and a family's need for basic resources. And decisionmakers are drawing on experience-based learning, empirical evidence, and experimentation. Finally, decisionmakers are finding context-specific solutions, because what works in one setting may not work in another. This Article terms this approach to decision- and policymaking pragmatic family law.<sup>24</sup>

The doctrine of functional parenthood provides an apt illustration. Traditional parentage laws embody abstract ideals and dominant norms, grounding legal parentage in marriage and biogenetics.<sup>25</sup> But lives are complex, and adults without marital or biogenetic ties often raise children. Courts developed the functional parenthood doctrine to address this reality.<sup>26</sup> In case after case, family courts eschew broad pronouncements about acceptable and unacceptable family forms.<sup>27</sup> Instead, courts listen to families and ask a specific question: whether formalizing an arrangement with an adult who is already caring for the child will promote the well-being of *this* child.<sup>28</sup> In making this contextualized decision, courts rely on empirical evidence about the importance of stability between a child and caregiver, and courts center the experiences of affected families.<sup>29</sup> As a result, family courts often ratify nontraditional family forms.<sup>30</sup>

The example of functional parenthood also illustrates the category of nonpartisan pluralism. As noted above, the states that have embraced

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<sup>23</sup> See JOHN DEWEY, PROBLEMS OF MEN 11–12 (1946) (contending that theories should not be universal and instead should be built on observations of the world). Relatedly, Professor Martha Albertson Fineman argues that family law should use more “[m]iddle-range theory.” MARTHA ALBERTSON FINEMAN, THE ILLUSION OF EQUALITY 8 (1991). This approach was developed by sociologist Robert Merton and entails starting with observations, developing a theory, then returning to observation to adjust the developing theory. See ROBERT K. MERTON, SOCIAL THEORY AND SOCIAL STRUCTURE 39–72 (enlarged ed. 1968). Fineman describes Merton's approach as an alternative to “grand” theorizing, FINEMAN, *supra*, at 7.

<sup>24</sup> This Article does not claim that legal actors explicitly invoke the pragmatic method. Instead, the argument is that the method is implicit across much doctrine and policy.

<sup>25</sup> See Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260, 2266–67 (2017) (describing these bases for legal parenthood but also noting that unmarried fathers do not receive the same level of recognition as unmarried mothers and thus a biogenetic tie is not dispositive, at least for men).

<sup>26</sup> See *infra* notes 199–202 and accompanying text.

<sup>27</sup> See *infra* notes 331–40 and accompanying text (describing this phenomenon and an empirical study by Courtney Joslin and Douglas NeJaime making these findings).

<sup>28</sup> See *infra* notes 337–38 and accompanying text.

<sup>29</sup> See *infra* notes 339–40 and accompanying text.

<sup>30</sup> See *infra* notes 331–38 and accompanying text.

the doctrine do not fall neatly into a political category. Instead, the doctrine has taken root where courts find themselves especially in need of a tool to promote stability in a child's life. As a result of opioid overdose deaths and opioid use disorder, for example, many parents either have died or are incapacitated.<sup>31</sup> Only four percent of children nationwide live with neither parent,<sup>32</sup> but in some parts of Appalachia, more than a third of all students live with a relative or other caregiver, sometimes a teacher or neighbor.<sup>33</sup> It is unsurprising, then, that Kentucky, which has a high concentration of opioid overdose deaths,<sup>34</sup> is by far the country's leader in functional parenthood cases.<sup>35</sup>

This Article does not argue that the pragmatic method is the singular driving force behind convergence, depolarization, and nonpartisan pluralism in contemporary family law. There are many dynamics at play, and, true to pragmatism, the Article does not espouse a grand theory to

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<sup>31</sup> See *Death Rate Maps & Graphs*, CTNS. FOR DISEASE CONTROL & PREVENTION (June 2, 2022), <https://www.cdc.gov/drugoverdose/deaths/index.html> [<https://perma.cc/6VJX-TTZX>] (reporting 68,630 opioid overdose deaths in 2020); SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., U.S. DEP'T OF HEALTH & HUM. SERVS., KEY SUBSTANCE USE AND MENTAL HEALTH INDICATORS IN THE UNITED STATES: RESULTS FROM THE 2019 NATIONAL SURVEY ON DRUG USE AND HEALTH 24 (2020), [https://store.samhsa.gov/sites/default/files/SAMHSA\\_Digital\\_Download/PEP20-07-01-001-PDF.pdf](https://store.samhsa.gov/sites/default/files/SAMHSA_Digital_Download/PEP20-07-01-001-PDF.pdf) [<https://perma.cc/57FG-VHJG>] (finding approximately 10 million people misused opioids in 2019); *id.* at 40 (noting that people aged 18–25 have higher rates of opioid use disorder than other age groups). Opioid use disorder and especially overdoses are most common among people in peak childbearing and parenting years. Lawrence Scholl et al., *Drug and Opioid-Involved Overdose Deaths — United States, 2013–2017*, 67 MORBIDITY & MORTALITY WKLY. REP. 1419, 1420 tbl.1 (2019) (showing that the highest opioid overdose death rate was for men ages 25–44).

<sup>32</sup> See Paul Hemez & Chanell Washington, *Number of Children Living Only with Their Mothers Has Doubled in Past 50 Years*, U.S. CENSUS BUREAU (Apr. 12, 2021), <https://www.census.gov/library/stories/2021/04/number-of-children-living-only-with-their-mothers-has-doubled-in-past-50-years.html> [<https://perma.cc/6YVF-G6ZA>].

<sup>33</sup> See Kristina Brant, *Nonparental Primary Caregivers: A Case Study from the United States*, in *SOCIAL PARENTHOOD IN COMPARATIVE PERSPECTIVE* (Clare Huntington, Courtney G. Joslin & Christiane von Bary eds., forthcoming 2023) (manuscript at 95) (on file with the Harvard Law School Library) (describing this pattern in parts of Appalachia); Kristina Brant, *When Mamaw Becomes Mom: Social Capital and Kinship Family Formation amid the Rural Opioid Crisis*, RUSSELL SAGE FOUND. J. SOC. SCIS., May 2022, at 78, 79 (reporting findings from Appalachian Kentucky, where “local school staff in the region estimate that as many as 40 percent of students are being raised by a relative caregiver”).

<sup>34</sup> See *Drug Overdose Mortality by State*, CTNS. FOR DISEASE CONTROL & PREVENTION, [https://www.cdc.gov/nchs/pressroom/sosmap/drug\\_poisoning\\_mortality/drug\\_poisoning.htm](https://www.cdc.gov/nchs/pressroom/sosmap/drug_poisoning_mortality/drug_poisoning.htm) [<https://perma.cc/XML4-5J22>].

<sup>35</sup> Joslin & NeJaime, *supra* note 15 (manuscript at 39–40, 40 tbl.1) (noting that, as measured by electronically available judicial decisions, Kentucky has the greatest number of functional parenthood cases in the country, followed by Pennsylvania and California). After adjusting for state population, the rate of functional parenthood cases in Kentucky — as reported in court decisions — is 0.27 cases per 10,000 people, as compared with 0.08 in Pennsylvania and 0.02 in California. See *id.* (reporting 122, 108, and 82 cases in Kentucky, Pennsylvania, and California, respectively); *2020 Population and Housing State Data*, U.S. CENSUS BUREAU (Aug. 12, 2021), <https://www.census.gov/library/visualizations/interactive/2020-population-and-housing-state-data.html> [<https://perma.cc/JB88-HJ23>] (reporting populations of 4,505,836, 13,002,700, and 39,538,223 for Kentucky, Pennsylvania, and California, respectively).



explain all of family law or propose one path forward. This Article *does* argue that the patterns, at core, reflect a common method and, more importantly, that highlighting this methodological through line generates useful insights for scholars, legal actors, and advocates seeking to improve child and family well-being in an era of polarization.

Explicitly recognizing the pragmatic method in family law — that is, naming the tools that legal actors are *already* using — provides guidance about what is possible in the current political climate.<sup>36</sup> Family law is fertile ground for the pragmatic method because promoting child well-being is foundational to family law,<sup>37</sup> and pragmatism provides a tool to further this goal. As the Article demonstrates, pragmatic family law has led to substantial improvements in the well-being of children and families, contributing, for example, to the historic drop in child poverty for all racial groups over the last few decades.<sup>38</sup> Further, naming this approach invites a debate about its relative merits compared to more familiar approaches to decisionmaking, such as rights-based litigation and discourse, and values-based debates.<sup>39</sup> All three approaches have a role to play. Rights play an important role in family law, and it is critical to talk about values in many contexts. But naming pragmatism as a distinct tool encourages discussion about how these approaches can work separately and together.

Crystallizing methodological commonalities around pragmatism also has doctrinal and institutional implications. A perennial concern in family law doctrine is the ubiquity of open-ended standards, including the equitable distribution and best interests of the child standards. Scholars have long criticized the indeterminacy of these standards, arguing that they empower judges to make value-laden decisions with virtually unfettered discretion.<sup>40</sup> Pragmatism is one way of grounding these inquiries, providing methodological guidance for courts: rely on the lived

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<sup>36</sup> See *infra* sections III.A–B, pp. 1559–71.

<sup>37</sup> See Clare Huntington & Elizabeth S. Scott, *Conceptualizing Legal Childhood in the Twenty-First Century*, 118 MICH. L. REV. 1371, 1397–413 (2020) (demonstrating that the modern regulation of children is intended to promote child well-being). In that article, Professor Elizabeth Scott and I drew on our experience as reporters for the American Law Institute's *Restatement of Children and the Law*, *id.* at 1379, and identified an explanatory framework for modern regulation that centers child well-being, *see id.* at 1397–413. This Article addresses a new question: how to advance the interests of children and families in an era of intense political contestation, and the Article finds guidance in the living tradition of American pragmatism.

<sup>38</sup> See *infra* notes 390–98 and accompanying text.

<sup>39</sup> See *infra* sections III.A–B, pp. 1559–71. Rights-based litigation as an approach to decisionmaking is self-explanatory, but the terms “values-based approach” and “values-based debate” need some elaboration. This Article uses these terms to refer to a mode of decisionmaking that emphasizes broad values, such as autonomy, fairness, dignity, and equality, and centers debate around these abstract principles. As the Article makes clear, family law can and should take these and other values into account, *see infra* section III.A, pp. 1559–65, and pragmatic family law itself embraces the value of child and family well-being. For further discussion of the relationship between the three approaches to family law, see *infra* sections III.A–B, pp. 1559–71.

<sup>40</sup> See *infra* notes 266, 423–25 and accompanying text.

experience of family members, use empirical evidence, and make contextualized decisions. This echoes what advocates and scholars have long argued courts should do in family law cases, but pragmatism provides a template and set of expectations for judicial decisions.<sup>41</sup> Likewise, elevating the pragmatic method in family law highlights institutions that already — intentionally or not — deploy the approach. Identifying these institutions provides guidance for reforming the many institutions of family law that might also use the method productively but are not currently doing so.<sup>42</sup>

Finally, naming pragmatism as a distinct approach underscores its significant limitations, at least as constrained by the modern political context. Thus far, the method has not dislodged family law's system of privatized dependency; family members still bear primary responsibility for caregiving, with limited support from the state.<sup>43</sup> And pragmatism has a mixed record on addressing racial inequity. Many of the examples of pragmatic family law identified in this Article, such as the Earned Income Tax Credit, Medicaid expansion, and universal prekindergarten, have helped reduce racial gaps between families.<sup>44</sup> But this progress comes with a critical caveat: there is relatively broad public support for pragmatic doctrines and policies when they are *not* framed as redressing racial inequity and instead are cast in race-neutral terms.<sup>45</sup> Indeed, one of the starkest divides in the United States is disagreement about the government's role in addressing racial inequity.<sup>46</sup> Thus, when a problem is understood to affect primarily families of color, race has trumped pragmatism.<sup>47</sup> The functional parenthood example illustrates this phenomenon. It is part of a larger story about family law's (mostly) compassionate response to the opioid epidemic. Legal actors are using the pragmatic method to support families affected by the epidemic, including keeping families together and providing treatment for parents.<sup>48</sup> During the crack epidemic, by contrast, legal actors pathologized Black

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<sup>41</sup> See *infra* notes 423–28 and accompanying text.

<sup>42</sup> Institutional analysis is relatively new to family law. See Clare Huntington, *The Institutions of Family Law*, 102 B.U. L. REV. 393, 413–19 (2022). This Article shows the benefits of deploying this form of analysis.

<sup>43</sup> See *infra* notes 366–68 and accompanying text.

<sup>44</sup> See *infra* notes 390–97 and accompanying text.

<sup>45</sup> See *infra* notes 399–400 and accompanying text.

<sup>46</sup> See PEW RSCH. CTR., BEYOND RED VS. BLUE: THE POLITICAL TYPOLOGY 7 (2021), [https://www.pewresearch.org/politics/wp-content/uploads/sites/4/2021/11/PP\\_2021.11.09\\_political-typology\\_REPORT.pdf](https://www.pewresearch.org/politics/wp-content/uploads/sites/4/2021/11/PP_2021.11.09_political-typology_REPORT.pdf) [<https://perma.cc/D8K8-2GVE>] (“Perhaps no issue is more divisive than racial injustice in the U.S. Among the four Republican-oriented typology groups, no more than about a quarter say a lot more needs to be done to ensure equal rights for all Americans regardless of their racial or ethnic background; by comparison, no fewer than about three-quarters of any Democratic group say a lot more needs to be done to achieve this goal.”).

<sup>47</sup> See *id.*; *infra* notes 400, 407–09 and accompanying text.

<sup>48</sup> See *infra* notes 402–06 and accompanying text.

parents and made little effort to blunt the impact of the epidemic on families.<sup>49</sup>

This Article surfaces this trade-off: pragmatic family law *is* advancing the well-being of children and families of color, but it is doing so obliquely. As a matter of values, this means the United States is not reckoning with our history of racism and ongoing racial inequities. And, as an instrumental matter, it means family law is not developing policies that tackle the root causes of racial inequity. Accordingly, this Article does not argue pragmatic family law is a panacea but rather describes what pragmatic family law has — and has not — accomplished, prompting debate about the relative merits of different approaches to addressing racial inequity.

In short, this Article makes three contributions to the literature. It identifies and tracks in detail patterns in contemporary family law that defy the polarized contestation all too present in high-profile doctrines and policies. The Article then looks to American pragmatism to find a methodological link in these underappreciated patterns. Finally, by connecting the patterns with a conversation that has been unfolding for 150 years about knowledge and problem-solving, the Article draws lessons about the utility and limits of the pragmatic method in family law. Most notably, identifying the pragmatic method as a distinct approach to family law decision- and policymaking encourages scholars to debate its relative merits as compared with rights-based and values-based approaches, and it encourages legal actors and practitioners to deploy pragmatism more consciously, where and when appropriate.

The Article proceeds as follows: Part I describes polarization in family law, names some of the forces driving the phenomenon, and identifies the harms it poses to the well-being of children and families. The Article then provides granular observations about convergence, depolarization, and nonpartisan pluralism in family law. Following the pragmatic method, Part II seeks to learn from these examples to suggest a hypothesis for linking disparate strands in contemporary doctrine and policy, and it finds that commonality in the pragmatic method. Part III explores the heft of that methodological linkage, sketching lessons for scholars, legal actors, and advocates. It examines the scope, scale, and place of pragmatic family law as compared with other approaches to decisionmaking. It identifies the significant achievements of pragmatic family law in furthering child and family well-being as well as the larger social challenges that limit the utility of the approach. The Article concludes that recognizing pragmatic family law as an explicit method and understanding its place among other approaches helps scholars, advocates, and legal actors better and more purposefully deploy this tool in the law reform toolbox, guiding both doctrinal and institutional reforms.

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<sup>49</sup> See *infra* notes 407–09 and accompanying text.

## I. THE PUZZLE OF CONTEMPORARY FAMILY LAW

Polarization in family law is well known — but far from the whole reality. Notwithstanding the ingredients for conflict and partisan division, legislatures, administrative agencies, family courts, nongovernmental institutions, and advocates are devising solutions to some of the most significant challenges facing families. After describing polarization in family law, some forces driving contestation, and the harms this contestation poses to children and families, this Part describes the widespread patterns of convergence, depolarization, and nonpartisan pluralism that defy polarization.

### A. Family Law as a Locus of Contestation

1. *Sites of Division.* — Polarization in the United States runs deep,<sup>50</sup> cutting across political and social life.<sup>51</sup> Family law is a frequent and familiar battleground. In reproductive health care, for example, states and localities have long taken diametrically opposed positions, especially on access to abortion.<sup>52</sup> Sex education and, increasingly, contraception are sites of division.<sup>53</sup> Notwithstanding marriage equality, some states

<sup>50</sup> See Thomas Carothers & Andrew O'Donohue, *How Americans Were Driven to Extremes: In the United States, Polarization Runs Particularly Deep*, FOREIGN AFFS. (Sept. 25, 2019), <https://www.foreignaffairs.com/articles/united-states/2019-09-25/how-americans-were-driven-extremes> [<https://perma.cc/4MMX-EA68>].

<sup>51</sup> See PEW RSCH. CTR., IN A POLITICALLY POLARIZED ERA, SHARP DIVIDES IN BOTH PARTISAN COALITIONS app. at 111–12 (2019), [https://www.pewresearch.org/politics/wp-content/uploads/sites/4/2019/12/PP\\_2019.12.17\\_Political-Values\\_FINAL.pdf](https://www.pewresearch.org/politics/wp-content/uploads/sites/4/2019/12/PP_2019.12.17_Political-Values_FINAL.pdf) [<https://perma.cc/LJS5-NEVL>] (reporting results of polling on issues dividing Democrats and Republicans, with the seven most divisive being, in descending order, “[g]un policy,” “[r]acial attitudes,” “[c]limate & environment,” “[s]ocial safety net,” “[i]mmigration,” “[r]ole of government,” and “[g]ender & sexuality”).

<sup>52</sup> In the wake of *Dobbs*, some states are in the process of banning or further restricting abortion, and others are increasing access, with the divergence tracking familiar political divides. *Tracking the States Where Abortion Is Now Banned*, N.Y. TIMES (Feb. 10, 2023, 5:00 PM), <https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html> [<https://perma.cc/3EN3-X3JU>]. See David S. Cohen, Greer Donley & Rachel Rebouché, *The New Abortion Battleground*, 123 COLUM. L. REV. 1, 22–52 (2023), for a description of the looming interjurisdictional battles among states and between the federal and state governments; and Kaitlin Ainsworth Caruso, *Abortion Localism and Preemption in a Post-Roe Era*, 27 LEWIS & CLARK L. REV. (forthcoming 2023) (manuscript at 25–29), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4153034](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4153034) [<https://perma.cc/8KVN-V65Y>] for a discussion of anticipated preemption battles between cities and states over local abortion laws.

<sup>53</sup> For a description of the divergence in sex education, see *The SIECUS State Profiles 2019/2020*, SIECUS, <https://siecus.org/state-profiles-2019-2020> [<https://perma.cc/ZW39-4XF3>]. On contraception, the Missouri legislature may reattempt its recently failed bill that would have prohibited taxpayer funding for intrauterine devices and emergency contraception, see Sheryl Gay Stolberg, *In Missouri, Battles over Birth Control Foreshadow a Post-Roe World*, N.Y. TIMES (June 25, 2022), <https://www.nytimes.com/2022/06/13/us/politics/birth-control-roe-v-wade.html> [<https://perma.cc/5CUG-MZKY>], whereas Oregon and California permit an individual to obtain hormonal contraceptives without a doctor's prescription, see OR. REV. STAT. ANN. § 689.689 (West 2022); CAL. BUS. & PROF. CODE § 4052.3 (West 2022); see also Lauren Holter, *The Best States for Reproductive Rights*, BUSTLE (July 20, 2015), <https://www.bustle.com/articles/98424-the>

still treat LGBTQ families differently. For example, twenty-nine states and the District of Columbia explicitly prohibit discrimination against LGBTQ adults seeking to adopt a child, but ten states permit private agencies operating with public funding to refuse to place a foster or adoptive child with an LGBTQ individual or couple if doing so conflicts with the agency's religious beliefs.<sup>54</sup> Support for low-income families is another area with high polarization and states adopting sharply divergent policies.<sup>55</sup> Under the federal Temporary Assistance for Needy Families program, which allows states to set monthly payment amounts,<sup>56</sup> a Mississippi family of three receives \$170 per month, but the same-sized family in New Hampshire receives \$1086.<sup>57</sup> And regulation of the workplace is a third familiar topic of division. Legislation requiring employers to provide paid family leave<sup>58</sup> and paid sick leave<sup>59</sup> is concentrated in blue states and cities. Reflecting even greater divergence, many paid-sick-leave laws include broad, functional definitions of family, recognizing the chosen family of many workers, but these laws are in solidly blue states.<sup>60</sup>

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4-best-states-for-reproductive-rights-are-where-we-should-all-move-stat [https://perma.cc/RC5Z-WN23] (listing California, Maryland, Oregon, and Vermont as the states most protective of reproductive rights because of policies such as over-the-counter access to birth control). Consistent with the nuanced landscape this Article describes, a few red states also permit pharmacies to sell hormonal contraceptives without a doctor's prescription. See TENN. CODE ANN. § 63-10-219 (2022); UTAH CODE ANN. § 26-64-104 (West 2022); W. VA. CODE ANN. § 16-58-3(a) (2022).

<sup>54</sup> See *Foster and Adoption Laws*, MOVEMENT ADVANCEMENT PROJECT (Feb. 11, 2023), [https://www.lgbtmap.org/equality-maps/foster\\_and\\_adoption\\_laws](https://www.lgbtmap.org/equality-maps/foster_and_adoption_laws) [https://perma.cc/D6JK-RT7C] (identifying the ten states: Arizona, Kansas, Mississippi, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, and Virginia).

<sup>55</sup> See PEW RSCH. CTR., *supra* note 51, app. at 111. For a description of divergent state policies, see David A. Super, *Laboratories of Destitution: Democratic Experimentalism and the Failure of Antipoverty Law*, 157 U. PA. L. REV. 541, 545, 567-83 (2008).

<sup>56</sup> See 42 U.S.C. § 604(a)(1).

<sup>57</sup> See ILHAM DEHRY ET AL., U.S. DEP'T OF HEALTH & HUM. SERVS., WELFARE RULES DATABOOK: STATE TANF POLICIES AS OF JULY 2020, at 116 (2022), [https://www.acf.hhs.gov/sites/default/files/documents/opre/welfare-databook-state-tanf-policies-jan-2021\\_o.pdf](https://www.acf.hhs.gov/sites/default/files/documents/opre/welfare-databook-state-tanf-policies-jan-2021_o.pdf) [https://perma.cc/K8NK-EMZ9].

<sup>58</sup> See *State Family and Medical Leave Laws*, NAT'L CONF. ST. LEGISLATURES (Sept. 9, 2022), <https://www.ncsl.org/research/labor-and-employment/state-family-and-medical-leave-laws.aspx> [https://perma.cc/39UM-D6ZD] (listing the jurisdictions with legislation requiring at least some employers to provide paid family leave: California, Colorado, Connecticut, Delaware, the District of Columbia, Maryland, Massachusetts, New Jersey, New York, Oregon, Rhode Island, and Washington). Many employers in the private sector choose to offer paid family leave, but low-wage workers often do not benefit. See U.S. BUREAU OF LAB. STAT., NATIONAL COMPENSATION SURVEY: EMPLOYEE BENEFITS IN THE UNITED STATES, MARCH 2020, at 299 tbl.31 (2020) (noting that in the private sector, 8% of workers in the bottom quartile of earnings based on average wages had access to paid family leave as compared with 33% of workers in the top quartile of earnings).

<sup>59</sup> See *State Family and Medical Leave Laws*, *supra* note 58.

<sup>60</sup> See Deborah A. Widiss, *Chosen Family, Care, and the Workplace*, 131 YALE L.J.F. 215, 230-34 (2021) (describing the laws in states like New Jersey, New Mexico, and Rhode Island, among other blue states).

The intersection of families and gender identity is an emerging site of contestation.<sup>61</sup> Hawaii and Washington State require health insurance companies to cover gender-affirming care,<sup>62</sup> and California is a “trans refuge state” for parents seeking gender-affirming care for their children.<sup>63</sup> But Alabama and Arkansas prohibit parents from seeking such care,<sup>64</sup> Texas treats gender-affirming care for minors as child abuse,<sup>65</sup> and some politicians are threatening to investigate families who take children to family-friendly drag shows.<sup>66</sup> Public education is

<sup>61</sup> See Trip Gabriel, *After Roe, Republicans Sharpen Attacks on Gay and Transgender Rights*, N.Y. TIMES (July 22, 2022), <https://www.nytimes.com/2022/07/22/us/politics/after-ro-republicans-sharpen-attacks-on-gay-and-transgender-rights.html> [<https://perma.cc/K4U3-GUL8>] (describing the sharp increase in transgender rights restrictions in conservative states in 2021 and 2022 as well as the protective legislation in progressive states).

<sup>62</sup> See HAW. REV. STAT. § 431:10A-118.3 (2022); WASH. REV. CODE § 74.09.675 (2022).

<sup>63</sup> Press Release, Scott Wiener, Sen., California State Senate, Senator Wiener’s Historic Bill to Provide Refuge for Trans Kids and Their Families Signed into Law (Sept. 30, 2022), <https://sd11.senate.ca.gov/news/20220930-senator-wiener-s-historic-bill-provide-refuge-trans-kids-and-their-families-signed-law> [<https://perma.cc/S7RB-7CNJ>] (describing the new law as making California a “trans refuge state”); see CAL. FAM. CODE § 3428 (2023); CAL. PENAL CODE § 819 (2023) (amending California state law to prohibit law enforcement from participating in the arrest, extradition, or change of custody of an individual who is helping a person, including a minor, receive gender-affirming care that is legal under California and federal law).

<sup>64</sup> ARK. CODE §§ 20-9-1501 to -1504 (2021); ALA. CODE §§ 26-26-4 to -5 (2022). Federal courts enjoined enforcement of both the Alabama and the Arkansas laws. *Brandt v. Rutledge*, 47 F.4th 661, 669, 672 (8th Cir. 2022) (stating that, under Arkansas law, “[a] minor born as a male may be prescribed testosterone . . . but a minor born as a female is not permitted to seek the same medical treatment,” *id.* at 669, and upholding the district court’s preliminary injunction because plaintiffs are likely to succeed on their sex discrimination claim, *id.* at 672); *Eknes-Tucker v. Marshall*, 603 F. Supp. 3d 1131, 1146–48, 1151 (M.D. Ala. 2022) (preliminarily enjoining the portions of the Alabama law that prohibit minors from obtaining puberty blockers and hormone therapies but not enjoining portions of the law that prohibit gender-affirming surgery for minors and prohibit school officials from keeping a child’s gender identity secret from a parent).

Other states have enacted similar laws, see Press Release, ACLU of Mississippi, Mississippi Bans Gender-Affirming Health Care for Transgender Youth (Feb. 28, 2023), <https://www.aclu.org/press-releases/mississippi-bans-gender-affirming-health-care-for-transgender-youth> [<https://perma.cc/5XY9-9U9Z>] (“Mississippi is the fifth state in the country and the third state in the past month to ban gender-affirming care for transgender youth after Utah and South Dakota passed similar bans.”), and still others are considering similar legislation, see KERITH J. CONRON ET AL., WILLIAMS INST., PROHIBITING GENDER-AFFIRMING MEDICAL CARE FOR YOUTH 2–3 (2022), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Youth-Health-Bans-Mar-2022.pdf> [<https://perma.cc/96CX-887M>] (describing enacted legislation and proposed laws in eleven conservative states, which vary in their particulars, but often seek to (1) restrict access to puberty-blocking hormones, (2) prevent health insurance companies from covering gender-affirming health care, and (3) subject parents and health care providers to criminal or civil liability for providing gender-affirming health care).

<sup>65</sup> See *infra* note 108 and accompanying text (describing this policy and the state court decision temporarily enjoining it).

<sup>66</sup> See Matt Laviertes, *DeSantis Weighs Ordering Child Protective Services to Investigate Parents Who Take Kids to Drag Shows*, NBC NEWS (June 9, 2022, 2:26 PM), <https://www.nbcnews.com/nbc-out/out-politics-and-policy/desantis-weighs-ordering-child-protective-services-parents-take-kids-drcna32757> [<https://perma.cc/7S22-DPK4>] (reporting how after circulation of a video showing children at what was advertised as a family-friendly drag show connected to Pride Month, Governor

another emerging battleground. Some states invoke parental rights to restrict how schools teach or discuss sexual orientation, gender identity, and race.<sup>67</sup> And other states are adopting antiracist curricula.<sup>68</sup>

Contestation and deep divisions in family law are not new. In the middle of the nineteenth century, state lawmakers debated whether to allow married women to retain title to property rather than forfeit the property to their husbands under the rules of coverture.<sup>69</sup> Passions ran high, with opponents contending that reforming property law would fundamentally undermine the institution of marriage, which was built on the traditional conception of marital unity — that is, the wife subsumed into the identity of the husband.<sup>70</sup> Most states ultimately enacted a married women’s property act, but it was a hotly contested issue, with

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Ron DeSantis of Florida threatened to involve Florida child protective services for any family that brings a child to a drag show; reporting similar comments from other conservative officials and commentators). The issue is spreading, with the Republican Caucus of the Arizona State Senate working on legislation prohibiting minors from attending drag shows, *see* Press Release, Arizona State Senate Republican Caucus, Senate Republicans Fight Back Against the Sexual Perversion Children Are Being Exposed To (June 14, 2022), <https://www.azsenaterepublicans.com/post/senate-republicans-fight-back-against-the-sexual-perversion-children-are-being-exposed-to> [<https://perma.cc/VW8V-CHSL>], and a candidate for governor of Arizona expressing her opposition to children at drag shows, *see* Gabriel, *supra* note 61.

<sup>67</sup> In Florida, Governor DeSantis signed into law the Parental Rights in Education bill, which restricts how public-school teachers, among other “school personnel,” discuss sexual orientation and gender identity in kindergarten through third-grade classrooms. FLA. STAT. ANN. § 1001.42(8)(c)(3) (West 2022). In Virginia, Governor Glenn Youngkin made parental rights in education a central issue in the campaign, with a clear message about not teaching about racial inequality. *See* Glenn Youngkin, *Social Warrior*, YOUTUBE (Oct. 30, 2021), <https://youtu.be/7X6rMnuviPg> [<https://perma.cc/SUQ9-JE2N>]. Other states, including Florida and Tennessee, also limit education about race and racism. *See* FLA. ADMIN. CODE ANN. R. 6A-1.094124(3)(b) (2022) (“Examples of theories that distort historical events and are inconsistent with State Board approved standards include . . . the teaching of Critical Race Theory . . .”); TENN. CODE ANN. § 49-6-1019 (2022) (establishing that a public school shall not include or promote the idea that “[t]his state or the United States is fundamentally or irredeemably racist or sexist”); *see also* Cathryn Stout & Thomas Wilburn, *CRT Map: Efforts to Restrict Teaching Racism and Bias Have Multiplied Across the U.S.*, CHALKBEAT (Feb. 1, 2022, 7:20 PM), <https://www.chalkbeat.org/22525983/map-critical-race-theory-legislation-teaching-racism> [<https://perma.cc/WJ6S-WMXU>] (“36 states have adopted or introduced laws or policies that restrict teaching about race and racism.”).

<sup>68</sup> *See, e.g.*, CONN. GEN. STAT. § 10-16b (2022) (describing the requirement, as of 2021, that public schools teach Black and Latinx history); Press Release, New York State Educ. Dep’t, New York State Board of Regents Launches an Initiative to Advance Diversity, Equity and Inclusion in New York Schools (Apr. 12, 2021), <http://www.nysed.gov/news/2021/new-york-state-board-regents-launches-initiative-advance-diversity-equity-and-inclusion> [<https://perma.cc/KD2C-42WZ>] (adopting a policy in April 2021 that encourages schools to address diversity, equity, and inclusion through numerous steps, including “acknowledging the role that racism and bigotry have played, and continue to play, in the American story”); *see also* Stout & Wilburn, *supra* note 67 (mapping the seventeen states that have expanded education on racism).

<sup>69</sup> *See* HENDRIK HARTOG, *MAN AND WIFE IN AMERICA* 110–15 (2000).

<sup>70</sup> *See id.* (noting that advocates debated the reforms “as if the imagined legislation would produce a fundamental challenge to the liberties of free men and to the virtue of a republican society,” *id.* at 111, and invoked “ideologically charged visions of marital unity,” *id.* at 114).

the economic concerns of men, not only the rights of women, playing a significant role in the passage of the laws.<sup>71</sup>

Fractional debates about parental control over education are ever-green. Today's fights are about sexual orientation, gender identity, and race, but a century ago, parents and school districts tangled over evolution.<sup>72</sup> In these arguments, curricular control often stands in for larger societal disagreements. When parents objected in the early twentieth century to the teaching of evolution, they were also objecting to Progressive Era reforms.<sup>73</sup> When today's parents oppose teaching the history of racial injustice, they are also expressing a view on contemporary responsibility for redressing racial inequity.<sup>74</sup> Opponents thus use contested theories — be it evolution or critical race theory — as a synecdoche for larger worldviews.<sup>75</sup>

2. *Driving Forces.* — Contestation and polarization in family law are unsurprising, for reasons both internal and external to the field. Beginning with the reasons specific to family law, doctrine and policy in this area of regulation implicate deeply held values, bringing the state into our most intimate and, for many people, most important relationships. A field that encompasses the regulation of abortion, contraception, and sex education necessarily addresses bodily autonomy and sexual liberty. Custody battles between parents raise questions of preferable parenting and often religion. Marriage rules reflect state judgments about which intimate relationships are valuable. Issues around trans family members raise questions about the nature and acceptability of fluidity in gender identity. And almost all of family law implicates equality and equity in numerous dimensions, including race, class, gender, sexual orientation, and gender identity.

Further, the structure of political and doctrinal decisionmaking in family law creates multiple sites for polarization. Some aspects of family law are constitutionalized at the federal level and thus are national in scope, including parental rights, access to birth control, and marriage

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<sup>71</sup> See Nancy F. Cott, *Marriage and Women's Citizenship in the United States, 1830-1934*, 103 AM. HIST. REV. 1440, 1457 (1998) (discussing scholarship finding that a significant motivating factor was shielding assets from husbands' creditors).

<sup>72</sup> See Jill Lepore, *The Parent Trap*, NEW YORKER, Mar. 21, 2022, at 16-21.

<sup>73</sup> See *id.* at 18 ("When anti-evolutionists condemned 'evolution,' they meant something as vague and confused as what people mean, today, when they condemn 'critical race theory.' Anti-evolutionists weren't simply objecting to Darwin . . . . They were objecting to the whole Progressive package . . . .").

<sup>74</sup> See *id.* at 20.

<sup>75</sup> See *id.* at 16-20. The middle of the twentieth century brought a brief convergence in many areas of regulation. To give two examples, every state liberalized divorce over a two-decade period beginning in the 1960s, see JOANNA L. GROSSMAN & LAWRENCE M. FRIEDMAN, *INSIDE THE CASTLE 176-78* (2011), and Congress funded birth control in the same period with little political heat, see CAHN & CARBONE, *supra* note 5, at 87. There were important exceptions. Antimiscegenation statutes, for example, were a significant point of midcentury difference and contention. See LINDA C. MCCLAIN, *WHO'S THE BIGOT?* 136-39 (2020).



equality,<sup>76</sup> and other areas are heavily controlled by federal statutory law, including many benefit programs.<sup>77</sup> But the core of family law has always been state law,<sup>78</sup> and even with federal statutes, states play a critical implementation role, often exercising considerable discretion and obtaining waivers from federal requirements.<sup>79</sup> This structure provides multiple opportunities for states to adopt divergent policies, as federalism can often channel deeply felt partisanship.<sup>80</sup> Additionally, as cities assert some control over family law in areas such as paid leave and even abortion, conflict around contentious issues increasingly involves fights between local governments and their states.<sup>81</sup> Often this conflict arises in progressive cities in red states, but it can also be the inverse.<sup>82</sup>

Finally, Professors Naomi Cahn and June Carbone's classic account of polarization in family law helps explain why family law provokes political, social, and cultural divisions.<sup>83</sup> As they contend, families in blue communities accept premarital sex and support access to birth control and abortion, partly because these policies help delay childbearing

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<sup>76</sup> See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015) (holding that the right to marry is a fundamental right that cannot be denied to same-sex couples); *Eisenstadt v. Baird*, 405 U.S. 438, 443 (1972) (stating that a prohibition on contraception violates the rights of single persons under the Equal Protection Clause); *Loving v. Virginia*, 388 U.S. 1, 2 (1967) (striking down Virginia's antimiscegenation statute); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (holding that the Connecticut law forbidding the provision of contraceptives to a married couple was an unconstitutional intrusion into marital privacy); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925) (holding that a statute requiring parents to send their children to public school is unconstitutional); *Meyer v. Nebraska*, 262 U.S. 390, 403 (1923) (holding a state law restricting the education of children in a foreign language to be unconstitutional).

<sup>77</sup> See JILL ELAINE HASDAY, *FAMILY LAW REIMAGINED* 45–59 (2014).

<sup>78</sup> See *United States v. Windsor*, 570 U.S. 744, 767 (2013) (“The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.” (quoting *In re Burrus*, 136 U.S. 586, 593–94 (1890))).

<sup>79</sup> This role for the states does not always result in polarization. See Jessica Bulman-Pozen & Gillian E. Metzger, *The President and the States: Patterns of Contestation and Collaboration Under Obama*, 46 *PUBLIUS* 308, 313–23 (2016) (describing the multiple ways the federal and state governments, sometimes across partisan divides, collaborate to implement federal law, including in areas related to family law, such as Medicaid expansion).

<sup>80</sup> See Bulman-Pozen, *supra* note 15, at 1081–82 (arguing that federalism “provides durable and robust scaffolding for partisan conflict,” *id.* at 1081).

<sup>81</sup> See, e.g., Caruso, *supra* note 52 (manuscript at 4–6) (describing the looming preemption battles over abortion regulation in the wake of *Dobbs*). On this phenomenon more generally, see Nestor M. Davidson, Essay, *The Dilemma of Localism in an Era of Polarization*, 128 *YALE L.J.* 954 (2019); Richard Briffault, Essay, *The Challenge of the New Preemption*, 70 *STAN. L. REV.* 1995 (2018); Erin Adele Scharff, *Hyper Preemption: A Reordering of the State-Local Relationship?*, 106 *GEO. L.J.* 1469 (2018); and Richard C. Schragger, *The Attack on American Cities*, 96 *TEX. L. REV.* 1163 (2018).

<sup>82</sup> See Summer Lin, *This Is the Latest California City Proposing an Abortion Ban*, *L.A. TIMES* (Sept. 15, 2022, 10:59 PM), <https://www.latimes.com/california/story/2022-09-15/abortion-ban-temecula-sanctuary-city> [<https://perma.cc/3599-AGFG>] (describing cities in California that plan to be “sanctuary cities” for the “unborn” by banning abortions); Oriana González, *Blue Cities in Red States Say They Won't Help Enforce Abortion Bans*, *AXIOS* (June 2, 2022), <https://www.axios.com/2022/06/02/liberal-cities-red-states-abortion-roe-bans> [<https://perma.cc/ED5H-CVL4>] (describing blue cities in red states that have declared they will not help enforce a statewide abortion ban).

<sup>83</sup> See CAHN & CARBONE, *supra* note 5, at 1–42.

until a couple is financially stable.<sup>84</sup> Families in red communities condemn premarital sex and nonmarital childbearing and resist access to birth control and abortion.<sup>85</sup> Yet blue regions of the country have low rates of nonmarital childbearing, divorce, and teen pregnancy, and red regions have high rates of nonmarital childbearing, divorce, and teen pregnancy.<sup>86</sup> Family law is divisive, Cahn and Carbone argue, because the blue-family approach of investing in education and delaying family formation is better adapted to the modern information economy.<sup>87</sup> Thus, the political battles are not only about differing values but also about the economic consequences of different family patterns and what those consequences imply about belonging and power — and voters in red states are angry that cultural elites disrespect their values.<sup>88</sup> For conservative voters, then, family law issues are not simply policy choices but instead fights over identity and a way of life.<sup>89</sup>

Turning to the broader forces driving polarization, a central factor is the ideological sorting between the two main political parties. From the middle of the twentieth century through the early 1970s, each of the two parties was ideologically diverse, but now there is limited ideological overlap between Republicans and Democrats.<sup>90</sup> Moreover, political affiliations often align with other parts of identity, especially race and

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<sup>84</sup> See *id.* at 1–2.

<sup>85</sup> See *id.* at 2–5.

<sup>86</sup> See *id.* at 1. *But see* Huntington, *supra* note 5, at 905–07 (arguing that the categorization of family forms does not account for differences in family patterns by race and class).

<sup>87</sup> See CAHN & CARBONE, *supra* note 5, at 207.

<sup>88</sup> See *id.* at 44–46, 74, 207.

<sup>89</sup> See *id.* at 73–74.

<sup>90</sup> See ALAN I. ABRAMOWITZ, *THE GREAT ALIGNMENT* 27 (2018); *see also id.* at 5–7 (noting that people strongly dislike the other party and often dislike the other party more than they like their own). Further, there is a significant social division between the parties, with mutual distrust and dislike. See LILLIANA MASON, *UNCIVIL AGREEMENT* 3, 61–77 (2018). There is not, however, a simple divide between two parties. Instead, both parties have intraparty divisions, and some political analysts segment the population into nine categories. See PEW RSCH. CTR., *supra* note 46, at 6–7 (identifying, among Democrats, the Progressive Left, Establishment Liberals, Democratic Mainstays, and Outsider Left; among Republicans, Faith and Flag Conservatives, Committed Conservatives, Populist Right, and the Ambivalent Right; and finally, Stressed Sideliners, who are about fifteen percent of the population, have no partisan commitment, and are disengaged politically).

religiosity.<sup>91</sup> This means the divisions are especially profound, cutting across three deep axes of identity.<sup>92</sup>

Geographic clustering is another significant force driving polarization. Many states have a notably higher proportion of Republicans or Democrats,<sup>93</sup> and, within states, Republicans are more likely to live in rural and suburban areas and Democrats in urban areas.<sup>94</sup> This geographic clustering creates political economies that yield increasingly divergent policies between states and put cities and states on a collision course.<sup>95</sup> A related factor is that national politics have become local politics, with both parties bringing their policy agendas to the state level and taking advantage of the low-information, low-involvement environment of state legislatures.<sup>96</sup>

The tendency of advocates and legal actors to frame issues in the language of rights also emphasizes divisions and encourages zero-sum thinking.<sup>97</sup> When politicians and commentators invoke the Constitution, their language is more polarized than when they debate nonconstitutional issues.<sup>98</sup> And in the courts, judges treat rights as absolute rather

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<sup>91</sup> See ABRAMOWITZ, *supra* note 90, at 10–11, 14–16 (describing this alignment). The alignment between race and ethnicity and party may be shifting somewhat. See Scott Simon, *Hispanic and Minority Voters Are Increasingly Shifting to the Republican Party*, NPR (July 23, 2022, 8:03 AM), <https://www.npr.org/2022/07/23/1113166779/hispanic-and-minority-voters-are-increasingly-shifting-to-the-republican-party> [<https://perma.cc/6SF4-GDPU>] (discussing the recent trend of Latinx and other voters of color moving to the Republican Party); Gabriel R. Sanchez, *Latinos Support Democrats over Republicans 2-1 in House and Senate Elections*, BROOKINGS INST. (Nov. 11, 2022), <https://www.brookings.edu/blog/fixgov/2022/11/11/latinos-support-democrats-over-republicans-2-1-in-house-and-senate-elections> [<https://perma.cc/Q3EZ-4C92>] (“Latinos’ support for Democratic House candidates [in the 2022 midterm elections] decreased by 5% from 2020, but the movement toward the GOP was not as pronounced as pre-election surveys suggested it might be this cycle. This analysis points to a small but consistent shift among Latinos toward the Republican Party across most sub-groups of the overall Latino electorate.”).

<sup>92</sup> In other countries, polarization is typically rooted in ethnic, religious, or ideological differences, but in the United States, these overlap to a great degree, making the divisions profound and sticky. See Carothers & O’Donohue, *supra* note 50.

<sup>93</sup> See *Party Affiliation by State*, *supra* note 15 (showing that the percentage of adults who identify as Republican (or lean Republican) or Democrat (or lean Democrat) is not evenly distributed among the states; further finding that Republicans are a majority or strong plurality in states like Alabama, Arkansas, Idaho, Kansas, South Dakota, Tennessee, Utah, and Wyoming, and Democrats are a majority or strong plurality in states like California, Delaware, Hawaii, Illinois, Maryland, Massachusetts, New Jersey, and New York).

<sup>94</sup> See JONATHAN A. RODDEN, *WHY CITIES LOSE* 3–6 (2019). This clustering may have less of a partisan effect in the Trump era, as the extreme views of elected officials like President Donald Trump and Senator Ted Cruz have alienated suburban and some exurban voters, driving them toward Democratic candidates. See Thomas B. Edsall, Opinion, *Red and Blue America Will Never Be the Same*, N.Y. TIMES (July 27, 2022), <https://www.nytimes.com/2022/07/27/opinion/trump-red-blue-america.html> [<https://perma.cc/NS9J-Y5Y6>].

<sup>95</sup> See Davidson, *supra* note 81, at 996 (describing this phenomenon).

<sup>96</sup> See GRUMBACH, *supra* note 1, at 9–13, 81–84.

<sup>97</sup> See JAMAL GREENE, *HOW RIGHTS WENT WRONG*, at xvii, 89–90 (2021).

<sup>98</sup> See David E. Pozen, Eric L. Talley & Julian Nyarko, *A Computational Analysis of Constitutional Polarization*, 105 CORNELL L. REV. 1, 37–48 (2019) (reporting the results of an

than subject to reasonable limitation to accommodate multiple interests.<sup>99</sup> This approach results in winners and losers and fails to mediate real disputes and balance interests in a diverse society.<sup>100</sup>

Growing democratic deficits in our political system are a final factor worth noting in this brief overview of the forces driving polarization. These include partisan gerrymandering, restrictions on voting, and campaign finance failures. Partisan gerrymandering creates ideologically homogenous state legislative and congressional districts, heavily influencing who is elected.<sup>101</sup> Voting restrictions make it harder for some segments of the population to express their preferences.<sup>102</sup> And campaign donations tend to come from those with relatively strong views.<sup>103</sup> As a result of these and other factors, both Congress and state legislatures are highly polarized.<sup>104</sup>

It is important to underscore, however, that polarization within legislatures can overstate the extent of polarization within the electorate. There is evidence that public opinion on a range of issues has stayed roughly the same but state legislatures in many states, especially those with partisan gerrymandering, are producing more extreme

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empirical study tracking constitutional discourse in Congress and newspaper editorials, which found that remarks invoking the Constitution are more polarized than other remarks and that this constitutional polarization has increased dramatically since the late 1970s and outpaces nonconstitutional polarization).

<sup>99</sup> See GREENE, *supra* note 97, at 58–86.

<sup>100</sup> See *id.* at 167–247.

<sup>101</sup> See, e.g., Nicholas O. Stephanopoulos, *The Anti-Carolene Court*, 2019 SUP. CT. REV. 111, 123–26 (2020) (explaining partisan gerrymandering and describing its impact: the election of legislators who would not have won in a nongerrymandered district; the creation of safe districts that are more likely to elect legislators with maximal rather than moderate views; and the deterrence of political participation because voters believe their votes will be futile). Further, the process for electing state legislators in most states — winner-take-all, single-member districts — often results in a state legislature that is controlled either by the minority party or by the majority party with a margin that is unrepresentative of voter preferences. See Miriam Seifter, *Counter-majoritarian Legislatures*, 121 COLUM. L. REV. 1733, 1756, 1762–68 (2021). Partisan gerrymandering then allows this party to entrench its power. See *id.* at 1761–62. The Supreme Court is no backstop, having ruled that partisan gerrymandering is nonjusticiable. See *Rucho v. Common Cause*, 139 S. Ct. 2484, 2498–502 (2019).

<sup>102</sup> See *Voting Laws Roundup: October 2022*, BRENNAN CTR. FOR JUST. (Oct. 6, 2022), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-october-2022> [<https://perma.cc/A7K4-4SK7>].

<sup>103</sup> See Joseph Bafumi & Michael C. Herron, *Leapfrog Representation and Extremism: A Study of American Voters and Their Members in Congress*, 104 AM. POL. SCI. REV. 519, 536 (2010) (demonstrating that the distribution of campaign donations are bimodal).

<sup>104</sup> Drew DeSilver, *The Polarization in Today's Congress Has Roots that Go Back Decades*, PEW RSCH. CTR. (Mar. 10, 2022), <https://www.pewresearch.org/fact-tank/2022/03/10/the-polarization-in-todays-congress-has-roots-that-go-back-decades> [<https://perma.cc/AFZ6-U3FU>] (“Democrats and Republicans [in Congress] are farther apart ideologically today than at any time in the past 50 years.”); Boris Shor & Nolan McCarty, *The Ideological Mapping of American Legislatures*, 105 AM. POL. SCI. REV. 530, 546 (2011) (documenting legislative polarization in Congress and in state legislatures).

legislation.<sup>105</sup> Moreover, as a descriptive matter, Republican-dominated legislatures and states are more likely to push maximal policies than those controlled by Democrats.<sup>106</sup> Political scientists contend that this difference is because the Republican Party is more ideologically cohesive and governs based on ideology; by contrast, the Democratic Party reflects a diverse coalition of interest groups with different policy agendas, which tends to produce more moderate policies.<sup>107</sup> For these reasons, polarization in family law is often — although not always — asymmetrical, with the real divide between the middle and the right, rather than the left and the right.

Regardless of its exact contours and causes, polarization in family law poses significant risks to children and families, as described in the next section.

3. *Risks to Children and Families.* — The fact of polarization alone is not necessarily troubling in family law, but its impact on children and families is of great concern. There are several ways polarization risks serious harm. To begin, when family law doctrine and policy become wedge issues, children and families are pawns in fights for political power. For example, in the midst of a primary challenge, Governor Greg Abbott expressed approval of expanding the definition of child abuse to include a parent seeking gender-affirming care, and Texas immediately began investigating families.<sup>108</sup> Governor Abbott thus

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<sup>105</sup> See GRUMBACH, *supra* note 1, at 89–94 (documenting this phenomenon); *supra* note 101 (explaining that partisan gerrymandering and the process for electing state legislators means elected officials often do not reflect the views of the median voter). For a discussion of this phenomenon playing out in family law, see June Carbone, *What Does Bristol Palin Have to Do with Same-Sex Marriage?*, 45 U.S.F.L. REV. 313, 335–38 (2010).

<sup>106</sup> See MATT GROSSMANN & DAVID A. HOPKINS, ASYMMETRIC POLITICS 3–4, 11–12, 250–314 (2016).

<sup>107</sup> See *id.*

<sup>108</sup> See Letter from Greg Abbott, Governor of Texas, to Jaime Masters, Comm’r, Texas Dep’t of Fam. & Protective Servs. (Feb. 22, 2022), <https://gov.texas.gov/uploads/files/press/O-MastersJaime202202221358.pdf> [<https://perma.cc/95PF-SN9W>]; Azeen Ghorayshi, *Texas Governor Pushes to Investigate Medical Treatments for Trans Youth as “Child Abuse,”* N.Y. TIMES (Feb. 23, 2022), <https://www.nytimes.com/2022/02/23/science/texas-abbott-transgender-child-abuse.html> [<https://perma.cc/DH6D-FCFD>] (“The letter from the Texas governor comes as early voting has begun in primary elections across the state. Election Day is March 1. Mr. Abbott and [Texas Attorney General Ken] Paxton, both Republicans, face challengers who have questioned whether they have been sufficiently conservative.”); J. David Goodman & Amanda Morris, *Texas Investigates Parents over Care for Transgender Youth, Suit Says*, N.Y. TIMES (Mar. 1, 2022), <https://www.nytimes.com/2022/03/01/us/texas-child-abuse-trans-youth.html> [<https://perma.cc/5B85-W5RV>] (describing the investigations). The issue is being litigated in state court. *In re Abbott*, 645 S.W.3d 276, 280–84 (Tex. 2022) (upholding a preliminary injunction against the state agency on the ground that interpreting gender-affirming care as child abuse may infringe on parental rights and further noting that neither the Governor’s letter nor the underlying opinion from the Texas Attorney General are binding on the state agency and therefore cannot be enjoined).

politicized the health care of a population with a heightened risk of suicide<sup>109</sup> and recklessly disregarded the risk of harm from state intervention and family separation.<sup>110</sup> In this and other examples, when individuals and groups use issues such as abortion, gender identity, and parental control over curricula for political advantage, they often do so notwithstanding the adverse consequences for family well-being.

Further, when polarization focuses debates only on abstract ideals, it distracts attention from the concrete needs of children and families. This is especially true if the issue is framed in terms of rights. As developed in greater detail below,<sup>111</sup> rights play an important role in family law, protecting family integrity, for example.<sup>112</sup> But rights do not ensure that families have access to the resources and services needed for family life. Fighting for the right to terminate a pregnancy, for example, does not address broader needs around reproductive health care, especially for women of color, who have long advocated for the more capacious goal of reproductive justice.<sup>113</sup> As leaders of the reproductive justice movement argue, a right to abortion is important, but it does not ensure *access* to abortion, nor the availability of reliable, affordable birth control, adequate prenatal care, and the ability to raise a child with dignity.<sup>114</sup>

Finally, polarization can entrench stalemated or outdated values, or drive values-based debates to extremes, hindering the constructive evolution of law and policy. In many of the most contentious areas of family law, sides are dug in. In the fight over marriage equality, for example, opponents repeatedly wielded the idea of gender complementarity — that a child needs a mother and a father.<sup>115</sup> In court

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<sup>109</sup> See TREVOR PROJECT, 2022 NATIONAL SURVEY ON LGBTQ YOUTH MENTAL HEALTH 6 (2022), [https://www.thetrevorproject.org/survey-2022/assets/static/trevor01\\_2022survey\\_final.pdf](https://www.thetrevorproject.org/survey-2022/assets/static/trevor01_2022survey_final.pdf) [<https://perma.cc/93CF-KL7A>] (reporting results of national survey finding that 12% of trans girls, 22% of trans boys, and 19% of nonbinary and genderqueer youth reported that they had attempted suicide in the previous year).

<sup>110</sup> See S. Lisa Washington, *Weaponizing Fear*, 132 YALE L.J.F. 163, 167 (2022) (arguing that Governor Abbott's directive weaponized the fear marginalized families already experience in the family regulation system).

<sup>111</sup> See *infra* sections III.A–B, pp. 1559–71.

<sup>112</sup> See Huntington & Scott, *supra* note 37, at 1413–18 (describing the importance of parental rights for protecting the stability of the parent-child relationship).

<sup>113</sup> See *Reproductive Justice*, SISTERSONG, <https://www.sistersong.net/reproductive-justice> [<https://perma.cc/6PCQ-8MP2>] (“Even when abortion is legal, many women of color cannot afford it, or cannot travel hundreds of miles to the nearest clinic. There is no choice where there is no access. . . . [W]omen of color and other marginalized women also often have difficulty accessing: contraception, comprehensive sex education, sexually transmitted infection prevention and care, alternative birth options, adequate prenatal and pregnancy care, domestic violence assistance, adequate wages to support our families, safe homes, and so much more.”); cf. LIBBY ADLER, *GAY PRIORI 2* (2018) (arguing that the LGBTQ rights movement has overlooked the needs of marginalized members and that advocacy should focus on issues such as conditions in foster care and access to housing and health care).

<sup>114</sup> See DOROTHY ROBERTS, *KILLING THE BLACK BODY*, at xi–xxi (2d ed. 2017).

<sup>115</sup> See *infra* note 303 and accompanying text.

proceedings, advocates for marriage equality eviscerated the empirical basis for this claim,<sup>116</sup> but some states resisted, continuing to limit marriage and invoking this gender norm as one of the reasons for doing so.<sup>117</sup> Marriage equality ultimately prevailed,<sup>118</sup> but legal policymaking does not always follow social science.

In short, when ideology reigns, too often impact is ignored and policies do not evolve, or, arguably worse, jurisdictions adopt policies that undermine child and family well-being. As the next section shows, however, there is more to family law than polarization.

### *B. Patterns in Family Law that Defy Polarization*

Even in areas of family law that raise politically sensitive issues and concerns, much doctrine and policy are not polarized. This section identifies three patterns in family law: convergence, depolarization, and non-partisan pluralism. This typology is not rigid but instead gives some shape to developments in family law.

Consistent with other family law scholarship,<sup>119</sup> this section uses a broad definition of family law, including doctrines and policies that directly and indirectly affect families and family life. Some of the examples have a direct impact on families, such as marriage and divorce laws. And some of the examples have an indirect — but nonetheless substantial — impact on families. Medicaid expansion under the Patient Protection and Affordable Care Act<sup>120</sup> (ACA) is an example of the latter type of law.<sup>121</sup> Although most children already had health insurance before the ACA,<sup>122</sup> the expansion benefitted children and promoted their well-being by supporting parents. Research demonstrates that Medicaid expansion has improved parental access to substance abuse treatment and mental health services,<sup>123</sup> two conditions linked to child abuse and neglect as well as poor family functioning more generally.<sup>124</sup> Further, Medicaid expansion has improved the finances of low-income families,

<sup>116</sup> See *infra* notes 294–314 and accompanying text.

<sup>117</sup> See *infra* notes 302–04 and accompanying text.

<sup>118</sup> See *infra* notes 312–14 and accompanying text.

<sup>119</sup> See *supra* note 4 (describing the norm in family law scholarship to define the field broadly).

<sup>120</sup> Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of the U.S. Code).

<sup>121</sup> See *infra* notes 191–98 and accompanying text.

<sup>122</sup> See *Health Insurance Coverage of Children 0–18*, KAISER FAM. FOUND., <https://www.kff.org/other/state-indicator/children-0-18/?currentTimeframe=11> [<https://perma.cc/G2YB-VPF4>]. Undocumented children are the main population of uninsured children. *Health Coverage and Care of Immigrants*, KAISER FAM. FOUND. (Dec. 20, 2022), <https://www.kff.org/racial-equity-and-health-policy/fact-sheet/health-coverage-of-immigrants> [<https://perma.cc/YL88-B4LX>].

<sup>123</sup> For an example of the benefits to families, see OHIO DEP'T OF MEDICAID, 2018 OHIO MEDICAID GROUP VIII ASSESSMENT: A FOLLOW-UP TO THE 2016 OHIO MEDICAID GROUP VIII ASSESSMENT 4–8 (2018).

<sup>124</sup> See *Risk and Protective Factors*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/violenceprevention/childabuseandneglect/riskprotectivefactors.html> [<https://perma.cc/TQY3-6DMP>].

increased employment rates, and promoted housing stability,<sup>125</sup> all of which benefit children. The following description includes this and similar examples of laws that have a substantial impact on families.

*I. Convergence.* — On an array of potentially divisive issues, family law evinces a high level of convergence in doctrine and policy. In divorce, for example, notwithstanding the fraught interplay between gender norms and legal regulation, a consensus has developed around emphasizing a continued relationship between both parents and the child.<sup>126</sup> For property division, there used to be significant differences between community property and common law states.<sup>127</sup> But with the introduction of equitable distribution in the 1970s, which sought to protect the economic interests of homemaker spouses, differences between the two regimes are now negligible, notwithstanding ongoing debates about gender norms in marriage.<sup>128</sup>

In doctrines governing children in families, in schools, in the juvenile justice system, and as emerging adults, the American Law Institute's *Restatement of Children and the Law* has unearthed considerable consistency across states.<sup>129</sup> The *Restatement* shows, for example, that every state recognizes a parental privilege to use reasonable corporal punishment — a privilege that applies in both criminal and civil proceedings.<sup>130</sup> The regulation of corporal punishment could well be polarizing because the use of this form of discipline correlates with

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<sup>125</sup> See Emily A. Gallagher et al., *The Effect of Health Insurance on Home Payment Delinquency: Evidence from ACA Marketplace Subsidies*, 172 J. PUB. ECON. 67, 82 (2019) (“Our results confirm that health insurance through the ACA’s Marketplaces helps protect low-income households from falling behind on rent or mortgage payments.”); OHIO DEP’T OF MEDICAID, *supra* note 123, at 8–9; Kara Gavin, *Medicaid Expansion Helped Enrollees Do Better at Work or in Job Searches*, MICH. MED. (June 27, 2017, 10:20 AM), <https://www.michiganmedicine.org/health-lab/medicaid-expansion-helped-enrollees-do-better-work-or-job-searches> [<https://perma.cc/2WUE-4Z5R>].

<sup>126</sup> See JUNE CARBONE, FROM PARTNERS TO PARENTS 180–94 (2000) (describing the evolution of custody rules toward an “increasing coherence,” including “the insistence that the law recognize the continuing ties of parents and children without a corresponding insistence that parents stay together,” *id.* at 191).

<sup>127</sup> See GROSSMAN & FRIEDMAN, *supra* note 75, at 193–96 (describing community property and common law regimes).

<sup>128</sup> See *id.* at 196–200; Naomi R. Cahn, *Models of Family Privacy*, 67 GEO. WASH. L. REV. 1225, 1229 (1999).

<sup>129</sup> For sections that have been approved by the ALI membership, see *Restatement of the Law, Children and the Law*, AM. L. INST., <https://www.ali.org/publications/show/children-and-law> [<https://perma.cc/G7XW-BEHY>]. There are some differences among states reflected in the *Restatement*. See, e.g., RESTATEMENT OF CHILD. & THE L. § 1.80 cmt. a (AM. L. INST., Tentative Draft No. 2, 2019) (child’s contact with a third party).

<sup>130</sup> RESTATEMENT OF CHILD. & THE L. § 3.24 (AM. L. INST., Tentative Draft No. 1, 2018) (defenses: parental privilege to use reasonable corporal punishment). Delaware severely limits the scope of the privilege by defining physical injury broadly. See DEL. CODE ANN. tit. 11, § 1100 (2022) (“Physical injury’ to a child shall mean any impairment of physical condition or pain.”).



geography, race, and parental education,<sup>131</sup> and people have strongly held, divergent views on the issue.<sup>132</sup> Despite these differences, and regardless of the political orientation of the state, courts across the country recognize a similar privilege and justify the privilege with the same basic reasoning: parents need some latitude given the stress of caring for children, and even if corporal punishment is undesirable, the privilege protects families from coercive state intervention, which presents its own risk of harm to the child.<sup>133</sup>

Beyond divorce and the *Restatement's* particular areas of focus on children, many other areas of family law evince doctrinal convergence. Consider parentage laws, which are ripe for polarization because they implicate changing family patterns and serve to reinforce or deemphasize the nuclear family. Historically, parentage rules allowed children to have only two legal parents, a doctrine that underscored the importance of the nuclear family.<sup>134</sup> But states are increasingly recognizing a third adult as a parent, even when the child has two legal parents.<sup>135</sup> At first glance, these rules appear to follow familiar political divides: California, Connecticut, Delaware, Maine, Vermont, and Washington have enacted laws that authorize recognition of more than two

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<sup>131</sup> David Finkelhor et al., *Corporal Punishment: Current Rates from a National Survey*, 28 J. CHILD & FAM. STUD. 1991, 1994 tbl.1 (2019) (reporting survey results showing that parents in the South and Midwest are most likely to use corporal punishment, and corporal punishment is more common in families of color and least common in families with a parent who has earned a graduate degree).

<sup>132</sup> The American Academy of Pediatrics adopted a policy against corporal punishment, see Robert D. Sege et al., *Effective Discipline to Raise Healthy Children*, PEDIATRICS, Dec. 2018, at 1, 5, and some advocates argue against its use, see generally STACEY PATTON, SPARE THE KIDS (2017), but other groups, including some religious groups, believe a parent should be allowed to use corporal punishment, see, e.g., *Should Parents Spank?*, AOP (Jan. 1, 2008), <https://www.aop.com/blog/should-parents-spank> [<https://perma.cc/9XJ6-CH9Q>]. Support for corporal punishment is declining, but a 2013 poll suggested that a strong majority of Americans still supported the practice, at least in some circumstances. See Regina A. Corso, *Four in Five Americans Believe Parents Spanking Their Children Is Sometimes Appropriate*, CISION (Sept. 26, 2013, 5:00 AM), <https://www.prnewswire.com/news-releases/four-in-five-americans-believe-parents-spanking-their-children-is-sometimes-appropriate-225314281.html> [<https://perma.cc/R676-RTQ5>].

<sup>133</sup> See, e.g., *Commonwealth v. Dorvil*, 32 N.E.3d 861, 868 (Mass. 2015) (“[T]he parental privilege defense must strike a balance between protecting children from punishment that is excessive in nature, while at the same time permitting parents to use limited physical force in disciplining their children without incurring criminal sanction.”); *Paida v. Leach*, 917 P.2d 1342, 1349 (Kan. 1996) (“[I]t would be undesirable to have each judge freely imposing his or her own morality, own concept of what is acceptable, own notions of child rearing . . . on the circumstances of the litigants.”); *In re J.A.J.*, 225 S.W.3d 621, 630 (Tex. App. 2006) (noting that the court should not hold parents to an ideal standard, and instead should focus on the child’s welfare); RESTATEMENT OF CHILD. & THE L. § 3.24 cmt. c (AM. L. INST., Tentative Draft No. 1, 2018) (describing this justification).

<sup>134</sup> See NeJaime, *supra* note 25, at 2266–67.

<sup>135</sup> For a discussion of multiparent families and the changing legal landscape, see Courtney G. Joslin & Douglas NeJaime, *Multi-parent Families, Real and Imagined*, 90 FORDHAM L. REV. 2561, 2561 (2022); and Jessica Feinberg, *The Boundaries of Multi-parentage*, 75 SMU L. REV. 307, 309 (2022).

parents.<sup>136</sup> Massachusetts is considering a similar bill.<sup>137</sup> But a closer examination reveals that courts in red states, such as West Virginia, acknowledge that a third person acting as a parent should be granted rights to a relationship with the child.<sup>138</sup> These adults are often step-parents or relatives taking care of children while parents are unavailable.<sup>139</sup> Thus, although red states do not recognize three-parent families in codified law, they do in practice.

One final example — although hardly exhausting the landscape — is in the realm of government support for low-income families. Despite polarizing views in this area, there is broad political support for expanding access to prekindergarten. States across the political spectrum are investing in programs, with Oklahoma an early and strong leader.<sup>140</sup> Some states, especially more conservative states, spend less per pupil than more progressive states,<sup>141</sup> but many states are investing in the quality of prekindergarten, with Alabama, Hawaii, Michigan, Mississippi, Missouri, and Rhode Island meeting all of the National Institute for Early Education Research’s quality benchmarks in 2020, and Delaware, Louisiana, Maine, New Mexico, Oklahoma, Tennessee, and West Virginia each meeting all but one of the benchmarks.<sup>142</sup> These investments in quality are especially important in light of research

<sup>136</sup> See CAL. FAM. CODE § 7601(c) (West 2022); CONN. GEN. STAT. ANN. § 46b-475(c) (West 2022); DEL. CODE ANN. tit. 13, § 8-201(c) (2022); ME. REV. STAT. ANN. tit. 19-A, § 1891 (2022); VT. STAT. ANN. tit. 15C, § 206(b) (2022); WASH. REV. CODE ANN. § 26.26A.460 (West 2022). The 2017 Uniform Parentage Act also contains a multiparent provision. See UNIF. PARENTAGE ACT § 609 cmt. (UNIF. L. COMM’N 2017).

<sup>137</sup> See S. 1133, § 201, 192d Gen. Ct. (Mass. 2021).

<sup>138</sup> See Joslin & NeJaime, *supra* note 135, at 2575–82 (showing how West Virginia’s courts have recognized families with more than two parents); Joslin & NeJaime, *supra* note 15 (manuscript at 108–09) (“Functional parent doctrines . . . often readily facilitate multi-parent arrangements — allowing the functional parent to assume parental rights and responsibilities without disestablishing an existing parent.” *Id.* at 109.); Feinberg, *supra* note 135, at 334–35 (describing court decisions in Florida and Alaska recognizing three parents); Naomi Cahn & June Carbone, *Custody and Visitation in Families with Three (or More) Parents*, 56 FAM. CT. REV. 399, 401 (2018) (same for Louisiana). Louisiana was the first state to recognize a child could have three parents when, in a wrongful death suit, the state supreme court acknowledged a child could have two legally cognizable fathers: one biological and one legal, established through the marital presumption. See *Warren v. Richard*, 296 So. 2d 813, 815 (La. 1974).

<sup>139</sup> See Joslin & NeJaime, *supra* note 135, at 2578–82.

<sup>140</sup> See ALLISON H. FRIEDMAN-KRAUSS ET AL., NAT’L INST. FOR EARLY EDUC. RSCH., THE STATE OF PRESCHOOL 2020, at 30 tbl.4 (2021) (providing enrollment figures). For an in-depth discussion, see Clare Huntington, *Early Childhood Development and the Replication of Poverty*, in HOLES IN THE SAFETY NET 130, 144–46 (Ezra Rosser ed., 2019). For more details about Oklahoma, see DAVID L. KIRP, THE SANDBOX INVESTMENT 180–86 (2007).

<sup>141</sup> See FRIEDMAN-KRAUSS ET AL., *supra* note 140, at 32 tbl.6 (noting spending variations, which closely reflect the traditional red-blue divide with some exceptions, such as West Virginia).

<sup>142</sup> See *id.* at 31 tbl.5.

finding that high-quality programs are far more effective in boosting student outcomes than lower-quality programs.<sup>143</sup>

2. *Depolarization.* — A subset of convergence in family law involves consensus following intense contestation. In this category, an issue begins as a point of sharp division but, over time, public support coalesces around a more uniform doctrine or policy. Married women's property acts, described above,<sup>144</sup> are a good historical example of high conflict and division followed by resolution both in the law and by the public.<sup>145</sup> Similarly, before the 1970s, children born to unmarried parents were considered "illegitimate," with significant legal and social consequences.<sup>146</sup> In the middle of the twentieth century, regulation of legitimacy was a point of significant controversy, with some states using illegitimacy statutes to discriminate against Black families and resist the civil rights movement.<sup>147</sup> In a series of cases, the Supreme Court recognized illegitimacy as a quasi-suspect classification and struck down many state laws.<sup>148</sup> Now called nonmarital children, these children and their families still face stigma and disadvantage,<sup>149</sup> and like some of the earlier illegitimacy statutes, this stigma is based on racial stereotypes about Black families.<sup>150</sup> But the legal system no longer punishes

<sup>143</sup> See Timothy J. Bartik & Brad Hershbein, *Pre-K in the Public Schools: Evidence from Within U.S. States* 9–10, 31–32, 34–35, 37 (Upjohn Inst., Working Paper No. 18-285, 2018) (reporting results of large-scale prekindergarten programs).

<sup>144</sup> See *supra* notes 69–71 and accompanying text.

<sup>145</sup> There are numerous historical examples. See, e.g., Ann Laquer Estin, *Family Law Federalism: Divorce and the Constitution*, 16 WM. & MARY BILL RTS. J. 381, 390–406 (2007) (describing the history of divorce regulation in the United States and noting that it was a point of contention and division for a century but ended with the rapid acceptance of no-fault divorce in the 1960s and 1970s, largely because of the slow shifting of views and practices throughout the twentieth century).

<sup>146</sup> See Serena Mayeri, Essay, *Marital Supremacy and the Constitution of the Nonmarital Family*, 103 CALIF. L. REV. 1277, 1284–86 (2015) (describing this history).

<sup>147</sup> See *id.*

<sup>148</sup> For a description of the twenty cases decided by the Supreme Court between 1968 and 1980, see Martha T. Zingo, *Equal Protection for Illegitimate Children: The Supreme Court's Standard for Discrimination*, 3 ANTIOCH L.J. 59, 60–83 (1985). The Supreme Court did not, however, grapple with the anti-Black impetus behind these laws, nor did it address the intersection of race, class, and gender in the regulation of legitimacy. See Mayeri, *supra* note 146, at 1310–40.

<sup>149</sup> See Clare Huntington, *Postmarital Family Law: A Legal Structure for Nonmarital Families*, 67 STAN. L. REV. 167, 202–12 (2015).

<sup>150</sup> See Melissa Murray, *What's So New About the New Illegitimacy?*, 20 AM. U. J. GENDER, SOC. POL'Y & L. 387, 414–16 (2012) (noting that the "paradigmatic image of single mothers is the young, African American woman receiving public assistance," *id.* at 414); Solangel Maldonado, *Illegitimate Harm: Law, Stigma, and Discrimination Against Nonmarital Children*, 63 FLA. L. REV. 345, 367–69 (2011) (discussing how late twentieth-century policymakers equated nonmarital children with single, Black women, even though "[m]ore than 50% of all nonmarital children today are born to cohabiting couples," *id.* at 369). For a discussion of the ongoing stereotyping of young, Black single mothers, typified in the racial stereotype of the "welfare queen," see Catherine Powell & Camille Gear Rich, *The "Welfare Queen" Goes to the Polls: Race-Based Fractures in Gender Politics and Opportunities for Intersectional Coalitions*, 108 GEO. L.J. 105, 108–15 (2020).

nonmarital children, and popular discourse generally does not focus on the “legitimacy” of such children.<sup>151</sup>

The law’s response to intimate partner violence reflects similar dynamics. Ostensibly prohibited in the nineteenth century, the male prerogative to beat a wife continued largely uncontested for another century, at least for white men of means; courts justified nonintervention on grounds of family privacy and the need to shield the marital family from state intrusion.<sup>152</sup> Beginning in the late 1960s, however, feminists challenged the policy of nonintervention.<sup>153</sup> At first, this advocacy faced considerable resistance, but reformers ultimately prevailed, and now every state makes it a crime to engage in intimate partner violence and related conduct, such as stalking.<sup>154</sup> The sustained consensus against intimate partner violence is reflected in Congress partially closing the “boyfriend loophole” in gun regulation. Gun control measures are notoriously conflict-ridden, but in the summer of 2022, there was sufficient bipartisan political support to extend to dating partners the prohibition on gun purchases by people convicted of domestic violence.<sup>155</sup>

Gestational surrogacy is another example of controversy to consensus.<sup>156</sup> Initially, religious groups and many women’s rights groups teamed up to oppose any form of surrogacy, and they had some success

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<sup>151</sup> Some advocates and scholars still emphasize the importance of marriage and marital childbearing. See, e.g., W. Bradford Wilcox, *Concluding Reflections: What Does Less Marriage Have to Do with More Family Inequality?*, in *UNEQUAL FAMILY LIVES: CAUSES AND CONSEQUENCES IN EUROPE AND THE AMERICAS* 261, 261–64 (Naomi R. Cahn et al. eds., 2018).

<sup>152</sup> Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 *YALE L.J.* 2117, 2120, 2139 (1996) (describing this regime and demonstrating that arguments about family privacy protected white men of means and that lower-income men, especially Black and immigrant men, were prosecuted for intimate partner violence).

<sup>153</sup> ELIZABETH M. SCHNEIDER, *BATTERED WOMEN AND FEMINIST LAWMAKING* 13–22 (2000) (describing the roots of the family privacy argument and the role of feminists in the late 1960s and 1970s in combating these arguments).

<sup>154</sup> LEIGH GOODMARK, *A TROUBLED MARRIAGE: DOMESTIC VIOLENCE AND THE LEGAL SYSTEM* 9, 18–25 (2012) (describing this history and these laws). There is considerable debate about whether criminalization serves the interests of survivors and families, especially given the disproportionate impact on families of color, see, e.g., LEIGH GOODMARK, *DECRIMINALIZING DOMESTIC VIOLENCE: A BALANCED POLICY APPROACH TO INTIMATE PARTNER VIOLENCE* 142–50 (2018), but there is no serious argument that intimate partner violence should be lawful.

<sup>155</sup> See 18 U.S.C. § 921(a)(33); Abigail Higgins, *The Gun Deal Could Close the “Boyfriend Loophole.” Here’s What It Is.*, *WASH. POST* (June 14, 2022, 12:37 PM), <https://www.washingtonpost.com/nation/2022/06/14/boyfriend-loophole-bipartisan-gun-deal> [<https://perma.cc/NXS5-WAL3>] (describing the politics). The amendment does not fully close the loophole because it covers only partners convicted of intimate partner violence, not partners subject to a protection order, as is true for spouses, cohabitants, and coparents. See *Domestic Violence & Firearms*, GIFFORDS L. CTR., <https://giffords.org/lawcenter/gun-laws/policy-areas/who-can-have-a-gun/domestic-violence-firearms> [<https://perma.cc/LVD3-FHTM>] (describing how “intimate partner” is defined narrowly under federal law).

<sup>156</sup> See Courtney G. Joslin, (*Not*) *Just Surrogacy*, 109 *CALIF. L. REV.* 401, 432–55 (2021) (describing the basic consensus on gestational surrogacy, with most states permitting it in some form, but arguing that states vary on many aspects of surrogacy, such as the autonomy of the surrogate).

at the legislative level.<sup>157</sup> But public opinion soon turned, especially as the issue was framed around sympathetic stories of infertile couples.<sup>158</sup> The nearly ubiquitous use of gestational surrogacy rather than traditional surrogacy increased support for surrogacy,<sup>159</sup> and since the early 1990s, every state to consider the issue has legalized gestational surrogacy.<sup>160</sup> After a successful campaign emphasizing equality for LGBTQ families,<sup>161</sup> even New York State, long a holdout on legalizing surrogacy, enacted a law in 2021 permitting the practice.<sup>162</sup> In short, despite surrogacy's history as a cultural and political flashpoint, it is now widely accepted.

Adoption records, similarly, were once grounds for contention. Through the first half of the twentieth century, adoption records were confidential, with information available only to birth parents, adoptive parents, and government officials.<sup>163</sup> By the end of World War II, confidentiality had turned to secrecy, with information about adoptions withheld from all parties.<sup>164</sup> This secrecy was intended to shield adoptive parents from the stigma of infertility and protect the reputation of birth mothers, most of whom were unmarried.<sup>165</sup> Beginning in the 1970s, however, adult adoptees began challenging the secrecy regime, igniting a heated debate over whether adult adoptees were entitled to their personal information or whether birth parents had a right to remain secret.<sup>166</sup> Adult adoptees did not win their claims in court, but their efforts led to legislative change across the country.<sup>167</sup> Although

<sup>157</sup> See *id.* at 411–12.

<sup>158</sup> See SUSAN MARKENS, *SURROGATE MOTHERHOOD AND THE POLITICS OF REPRODUCTION* 113–24 (2007) (describing the effectiveness of framing surrogacy as a response to the “plight of infertile couples,” *id.* at 119); see also Joslin, *supra* note 156, at 425–26 (describing rapid decline in opposition to surrogacy and increased support of the practice).

<sup>159</sup> See MARKENS, *supra* note 158, at 114; Elizabeth S. Scott, *Surrogacy and the Politics of Commodification*, *LAW & CONTEMP. PROBS.*, Summer 2009, at 109, 139–44 (attributing convergence to the increase in gestational surrogacy); *cf. id.* at 142–44 (also attributing convergence to feminists dropping their opposition because their arguments — which sounded in government paternalism for reproductive choices — were co-opted by the antiabortion movement).

<sup>160</sup> See Joslin, *supra* note 156, at 403; see also *U.S. Surrogacy Law Map*, CREATIVE FAM. CONNECTIONS, <https://www.creativefamilyconnections.com/us-surrogacy-law-map> [<https://perma.cc/F28Y-VDMT>] (classifying each state and listing only Louisiana, Michigan, and Nebraska as “red light” jurisdictions that prohibit or significantly restrict surrogacy).

<sup>161</sup> David Kaufman, *The Fight for Fertility Equality*, *N.Y. TIMES* (July 24, 2020), <https://www.nytimes.com/2020/07/22/style/lgbtq-fertility-surrogacy-coverage.html> [<https://perma.cc/YEV3-94Z8>].

<sup>162</sup> See N.Y. FAM. CT. ACT § 581-101 (McKinney 2022); David Dodge, *Meet the Women Who Become Surrogates*, *N.Y. TIMES* (Feb. 15, 2021), <https://www.nytimes.com/2021/02/15/parenting/fertility/surrogates-new-york.html> [<https://perma.cc/744C-NME2>] (describing the legislative battle).

<sup>163</sup> See E. WAYNE CARP, *FAMILY MATTERS* 102 (1998).

<sup>164</sup> See *id.*

<sup>165</sup> See *id.* at 28–29, 41, 110–11.

<sup>166</sup> See *id.* at 142–45 (describing the reasons for the shift in the 1970s and the subsequent opposition to the adoption rights movement).

<sup>167</sup> See *id.* at 181 (“If the [adoption rights movement] failed to make much headway in the courts, a small revolution was occurring among social workers, adoption agencies, and state legislatures.”).

plans vary in their particulars, most states now have a path for adult adoptees to open their adoption records,<sup>168</sup> and the issue is not a point of disagreement.

Marriage equality provides a twenty-first-century example of depolarization, even if the constitutional future of the doctrine is less certain after *Dobbs* and there continues to be some resistance. In 1996, when Congress passed the Defense of Marriage Act,<sup>169</sup> only 27% of Americans supported marriage equality,<sup>170</sup> and throughout the 2000s and early 2010s, the issue was one of the most salient points of political contestation, leading to a patchwork of state laws and court rulings and heated state constitutional amendments and ballot initiatives.<sup>171</sup> But by 2015, when the Supreme Court decided *Obergefell v. Hodges*,<sup>172</sup> 60% of Americans supported marriage equality, and by 2021, support reached 70%, including a majority of Republicans and a majority of older people.<sup>173</sup> Bipartisan support for marriage equality was reflected in the congressional votes for the Respect for Marriage Act,<sup>174</sup> which requires the federal government to recognize marriages between same-sex individuals<sup>175</sup>; in the final vote in late 2022, thirty-nine Republican representatives and twelve Republican senators voted in favor of the bill.<sup>176</sup>

This is not to paint an overly rosy picture about the past or the future. The fight for marriage equality was fierce and hotly contested. And resistance remains, whether asserted in court<sup>177</sup> or in the political

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<sup>168</sup> See *State Adoption Laws*, AM. ADOPTION CONG., <https://americanadoptioncongress.org/state.php> [<https://perma.cc/37MN-QTBQ>] (describing state laws on access to original birth certificates for adult adoptees).

<sup>169</sup> Pub. L. No. 104-199, 110 Stat. 2419 (1996), *repealed in part and amended in part by* Respect for Marriage Act, Pub. L. No. 117-228 (2022) (to be codified at 1 U.S.C. § 7 and 28 U.S.C. § 1738C).

<sup>170</sup> Justin McCarthy, *Record-High 70% in U.S. Support Same-Sex Marriage*, GALLUP (June 8, 2021), <https://news.gallup.com/poll/350486/record-high-support-same-sex-marriage.aspx> [<https://perma.cc/U9JM-8S78>].

<sup>171</sup> John F. Kowal, *The Improbable Victory of Marriage Equality*, BRENNAN CTR. FOR JUST. (Sept. 29, 2015), <https://www.brennancenter.org/our-work/analysis-opinion/improbable-victory-marriage-equality> [<https://perma.cc/YE3T-5HCB>].

<sup>172</sup> 135 S. Ct. 2584 (2015).

<sup>173</sup> See McCarthy, *supra* note 170.

<sup>174</sup> Pub. L. No. 117-228 (to be codified at 1 U.S.C. § 7 and 28 U.S.C. § 1738C).

<sup>175</sup> See *id.* The law includes a carve-out for “religious liberty and conscience.” *Id.* § 6.

<sup>176</sup> Office of the Clerk, *Roll Call 513 | Bill Number: H.R. 8404*, U.S. HOUSE OF REPRESENTATIVES (Dec. 8, 2022, 11:11 AM), <https://clerk.house.gov/Votes/2022513> [<https://perma.cc/WA7C-R5H2>]; *Roll Call Vote 117th Congress — 2nd Session*, U.S. SENATE, [https://www.senate.gov/legislative/LIS/roll\\_call\\_votes/vote1172/vote\\_117\\_2\\_00362.htm](https://www.senate.gov/legislative/LIS/roll_call_votes/vote1172/vote_117_2_00362.htm) [<https://perma.cc/YLA7-3EDA>].

<sup>177</sup> See, e.g., *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 1719, 1723 (2018); 303 *Creative LLC v. Elenis*, 142 S. Ct. 1106, 1106 (2022) (mem.) (granting certiorari in a case about a wedding website designer who refused services to a same-sex couple based on the designer’s religious beliefs).

sphere.<sup>178</sup> Not only have state Republican Party platforms outright rejected same-sex relationships<sup>179</sup> and religious conservatives sought recourse in court,<sup>180</sup> but also at least one state supreme court has expressed skepticism about the reach of *Obergefell*.<sup>181</sup> And ten states allow private agencies operating with public funding to refuse to place a foster or adoptive child with an LGBTQ individual or couple if doing so conflicts with the agency's religious beliefs.<sup>182</sup> The point, therefore, is not that depolarization on marriage equality is complete and irreversible but rather that legal and cultural acceptance is so much more widespread than would have seemed possible during the culture wars of even twenty years ago.

Two final examples — again, hardly exhaustive — are the Earned Income Tax Credit (EITC) and Medicaid expansion under the ACA. Beginning with the EITC, welfare has long been one of the most contentious fault lines in the culture wars, with President Reagan demagoguing about “welfare queens”<sup>183</sup> and President Clinton “ending welfare as we know it.”<sup>184</sup> Cash welfare programs continue to raise this ire,

<sup>178</sup> See, e.g., *LGBTQ Records of Candidates for Virginia Governor*, GLAAD (July 7, 2021), <https://www.glaad.org/blog/lgbtq-records-candidates-virginia-governor> [https://perma.cc/5RHW-AKZ2] (describing how Governor Youngkin refused to support marriage equality throughout his campaign); Gabriel, *supra* note 61 (describing how none of the five Michigan Republican candidates for governor outright defended marriage equality when asked in summer 2022).

<sup>179</sup> See REPUBLICAN PARTY OF TEX., REPORT OF THE PERMANENT 2022 PLATFORM & RESOLUTIONS COMMITTEE 21 (2022), <https://texasgop.org/wp-content/uploads/2022/06/6-Permanent-Platform-Committee-FINAL-REPORT-6-16-2022.pdf> [https://perma.cc/UF5U-9DZA] (“Homosexuality is an abnormal lifestyle choice.”); see also *Resolutions*, REPUBLICAN PARTY ARIZ., <https://azgop.com/call/resolutions> [https://perma.cc/4QYH-TAGK] (“[T]he American Library Association (ALA) is notorious for demanding books be available encouraging amoral sexual activity including books and methodologies which encourage sexual experimentation among children including pedophilia in childrens’ [sic] sections of libraries, distortion of non-harmful books in childrens’ [sic] reading events toward perversity, homosexual marriage, etc. . . .”).

<sup>180</sup> See, e.g., cases cited *supra* note 177.

<sup>181</sup> See *Pidgeon v. Turner*, 538 S.W.3d 73, 86–87 (Tex. 2017) (noting, in the context of taxpayers challenging the provision of public benefits to same-sex spouses, that “[t]he Supreme Court held in *Obergefell* that the Constitution requires states to license and recognize same-sex marriages to the same extent that they license and recognize opposite-sex marriages, but it did not hold that states must provide the same publicly funded benefits to all married persons”). *But see* *Obergefell v. Hodges*, 135 S. Ct. 2584, 2606–07 (2015) (declining to “allow slower, case-by-case determination of the required availability of specific public benefits to same-sex couples,” *id.* at 2606, and instead holding that “[t]he Constitution . . . does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex,” *id.* at 2607); *Pavan v. Smith*, 137 S. Ct. 2075, 2078 (2017) (reversing a state court decision that held the state did not need to list the same-sex spouse of the mother on a birth certificate even though it would do so for a father regardless of biological connection because the state court’s order “denied married same-sex couples access to the ‘constellation of benefits that the Stat[e] ha[s] linked to marriage’” (alteration in original) (quoting *Obergefell*, 135 S. Ct. at 2601)).

<sup>182</sup> See *supra* note 54 and accompanying text.

<sup>183</sup> See Gene Demby, *The Truth Behind the Lies of the Original “Welfare Queen,”* NPR (Dec. 20, 2013, 5:03 PM), <https://www.npr.org/sections/codeswitch/2013/12/20/255819681/the-truth-behind-the-lies-of-the-original-welfare-queen> [https://perma.cc/AG9Z-S3VC].

<sup>184</sup> JOEL F. HANDLER & YEHESEKEL HASENFELD, *BLAME WELFARE, IGNORE POVERTY AND INEQUALITY* 182 (2006).

but not the EITC, which Congress has significantly expanded since the mid-1970s.<sup>185</sup> Most low-income workers do not owe federal income tax, and thus what is called a tax credit operates as a cash transfer tied to work: if a low-wage worker files a tax return, they receive a check from the government in the amount of the “credit.”<sup>186</sup> The EITC mostly benefits workers with children, giving a far greater subsidy to these workers and only a nominal amount to workers without children.<sup>187</sup> The EITC is the backbone of antipoverty relief for families, providing \$64 billion to 31 million low-income workers annually.<sup>188</sup> And it has played a significant role in decreasing child poverty over the last thirty years.<sup>189</sup>

<sup>185</sup> See Anne L. Alstott, *Why the EITC Doesn't Make Work Pay*, LAW & CONTEMP. PROBS., Winter 2010, at 285, 285–86.

<sup>186</sup> See *Earned Income and Earned Income Tax Credit (EITC) Tables*, IRS (Jan. 26, 2023), <https://www.irs.gov/credits-deductions/individuals/earned-income-tax-credit/earned-income-and-earned-income-tax-credit-eitc-tables> [<https://perma.cc/HVW2-2TNH>] (setting forth graduated credit amounts, which are tied to earned income). The Child Tax Credit (CTC) is another federal “tax credit” that directs cash to families:

[T]axpayers [can] claim a CTC of up to \$2,000 for each child under age 17. The credit . . . decrease[s] by 5 percent of adjusted gross income over \$200,000 for single parents (\$400,000 for married couples). If the credit exceed[s] taxes owed, taxpayers . . . receive up to \$1,400 as a tax refund known as the additional child tax credit (ACTC) or refundable CTC. However . . . the ACTC . . . [is] limited to 15 percent of earnings above \$2,500, which means filers with very low income . . . [can]not claim the credit or they [can] claim a reduced credit . . .

*What Is the Child Tax Credit?*, TAX POL'Y CTR. (citation omitted), <https://www.taxpolicycenter.org/briefing-book/what-child-tax-credit> [<https://perma.cc/32DE-YZ5J>]. The federal government temporarily expanded the CTC during the pandemic, but the expanded monthly payments stopped in December 2021. See *Child Tax Credit*, U.S. DEP'T TREASURY, <https://home.treasury.gov/policy-issues/coronavirus/assistance-for-american-families-and-workers/child-tax-credit> [<https://perma.cc/GPA6-7779>].

<sup>187</sup> See *Earned Income and Earned Income Tax Credit (EITC) Tables*, *supra* note 186 (stating that for the 2022 tax year, the largest credit was \$560 for a filer with no qualifying children and \$6935 for a filer with three or more qualifying children).

<sup>188</sup> See *Statistics for Tax Returns with the Earned Income Tax Credit (EITC)*, IRS (Jan. 20, 2023), <https://www.eitc.irs.gov/eitc-central/statistics-for-tax-returns-with-eitc/statistics-for-tax-returns-with-the-earned-income> [<https://perma.cc/56YB-25GC>]. By contrast, the Temporary Assistance for Needy Families (TANF) program — what many people think of as welfare — provided only \$3.35 billion in federal cash payments to an average of under two million people per month in 2021. See ADMIN. FOR CHILD. & FAMS., U.S. DEP'T OF HEALTH & HUM. SERVS., FY 2021 FEDERAL TANF & STATE MOE FINANCIAL DATA, tbl.A.2 (2022), [https://www.acf.hhs.gov/sites/default/files/documents/ofa/fy2021\\_tanf\\_financial\\_data\\_table\\_20221201.pdf](https://www.acf.hhs.gov/sites/default/files/documents/ofa/fy2021_tanf_financial_data_table_20221201.pdf) [<https://perma.cc/W2QZ-W438>] (\$3.35 billion in payments); ADMIN. FOR CHILD. & FAMS., U.S. DEP'T OF HEALTH & HUM. SERVS., TEMPORARY ASSISTANCE FOR NEEDY FAMILIES (TANF) CASELOAD DATA — FISCAL YEAR (FY) 2021 (2022), [https://www.acf.hhs.gov/sites/default/files/documents/ofa/fy2021\\_tanf\\_caseload.pdf](https://www.acf.hhs.gov/sites/default/files/documents/ofa/fy2021_tanf_caseload.pdf) [<https://perma.cc/YU5T-Y77W>] (1.8 million average monthly recipients).

<sup>189</sup> See Dana Thomson et al., *Lessons from a Historic Decline in Child Poverty: Chapter 3. The Role of the Social Safety Net in Protecting Children from Poverty*, CHILD TRENDS, at tbl.3.4, <https://www.childtrends.org/publications/lessons-from-a-historic-decline-in-child-poverty-role-of-the-social-safety-net-in-protecting-children-from-poverty> [<https://perma.cc/A8LH-AMLL>] (calculating the contribution of different social welfare programs in reducing child poverty and finding that the EITC has the greatest impact, reducing child poverty by twenty-two percent in 2019).



Notwithstanding its cash nature, the EITC enjoys wide bipartisan support.<sup>190</sup>

Turning to the ACA,<sup>191</sup> it was highly controversial when first enacted in part because of claims that it unleashed federal power on individuals and infringed on states' rights.<sup>192</sup> Indeed, the ACA helped spark the creation of the Tea Party and, in the fall of 2010, contributed to the loss of Democratic control of the U.S. House of Representatives, hundreds of Democratic seats in state legislatures, and many Democratic governorships.<sup>193</sup> Conservative states resisted the ACA's Medicaid expansion requirement, with twenty-six states challenging its constitutionality.<sup>194</sup> When the Supreme Court agreed, striking down the provision as an unconstitutional condition on federal spending,<sup>195</sup> many conservative states refused to expand Medicaid.<sup>196</sup> Soon after the Court's decision, however, many of the same states that had resisted most strongly began to consider expansion.<sup>197</sup> Over the next several years, fifteen states expanded Medicaid, including Idaho, Montana, and South Dakota.<sup>198</sup>

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<sup>190</sup> See Cecile Murray & Elizabeth Kneebone, *The Earned Income Tax Credit and the White Working Class*, BROOKINGS INST. (Apr. 18, 2017), <https://www.brookings.edu/blog/the-avenue/2017/04/18/the-earned-income-tax-credit-and-the-white-working-class> [https://perma.cc/A42K-JYAW]; HANDLER & HASENFELD, *supra* note 184, at 81.

<sup>191</sup> The ACA required that states, as a condition of receiving Medicaid funding, expand Medicaid eligibility to all adults under age sixty-five with adjusted gross incomes up to 133% of the federal poverty level. See Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 2001(a)(1)(C), 124 Stat. 119, 271 (2010) (codified at 42 U.S.C. § 1396a(a)(10)(A)(i)(VIII)) (mandating that state Medicaid plans cover adults whose income is at or below 133% of the federal poverty line), *invalidated by Nat'l Fed'n of Indep. Bus. v. Sebelius (NFIB)*, 567 U.S. 519 (2012).

<sup>192</sup> See Abbe R. Gluck & Thomas Scott-Railton, *Affordable Care Act Entrenchment*, 108 GEO. L.J. 495, 531, 545 (2020).

<sup>193</sup> See *id.* at 531, 546 (describing this opposition and these losses, including Democratic loss of "twenty-two state legislative chambers and six governorships," *id.* at 546).

<sup>194</sup> See *NFIB*, 567 U.S. at 540, 542 (2012) (noting that twenty-six states challenged the Medicaid expansion requirement); *States' Positions in the Affordable Care Act Case at the Supreme Court*, KAISER FAM. FOUND., <https://www.kff.org/health-reform/state-indicator/state-positions-on-aca-case> [https://perma.cc/4GNZ-5UC4] (listing the states: Alabama, Alaska, Arizona, Colorado, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Louisiana, Maine, Michigan, Mississippi, Nebraska, Nevada, North Dakota, Ohio, Pennsylvania, South Carolina, South Dakota, Texas, Utah, Washington, Wisconsin, and Wyoming).

<sup>195</sup> See *NFIB*, 567 U.S. at 689 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting) ("Seven Members of the Court agree that the Medicaid Expansion, as enacted by Congress, is unconstitutional."); *id.* at 584–85, 587 (opinion of Roberts, C.J.) ("As a practical matter, that means States may now choose to reject the expansion; that is the whole point." *Id.* at 587.).

<sup>196</sup> See Carter C. Price & Christine Eibner, *For States that Opt Out of Medicaid Expansion: 3.6 Million Fewer Insured and \$8.4 Billion Less in Federal Payments*, 32 HEALTH AFFS. 1030, 1030 (2013).

<sup>197</sup> See Abbe R. Gluck & Nicole Huberfeld, *What Is Federalism in Healthcare For?*, 70 STAN. L. REV. 1689, 1752–53 (2018).

<sup>198</sup> *Status of State Medicaid Expansion Decisions: Interactive Map*, KAISER FAM. FOUND. (Feb. 16, 2023), <https://www.kff.org/medicaid/issue-brief/status-of-state-medicaid-expansion-decisions-interactive-map> [https://perma.cc/S2YX-9ARZ] (identifying nonexpansion states: Alabama, Georgia, Florida, Kansas, Mississippi, North Carolina, South Carolina, Tennessee, Texas, Wisconsin, and Wyoming).

3. *Nonpartisan Pluralism.* — Beyond convergence and depolarization, a third pattern in contemporary family law is a pluralism that defies reductionist red-blue tropes, even on controversial issues. Consider the doctrine of functional parenthood. As described above, the doctrine protects the relationship between a child and a person who serves the psychological and functional role of a parent but is not a legal parent.<sup>199</sup> Functional parenthood has protected same-sex couples,<sup>200</sup> but it is most frequently invoked by relatives acting as primary caregivers, often because of parental death or incapacitation, or a parent's different-sex partner who plays a central role in raising a child.<sup>201</sup> As with multiparenthood, functional parenthood is potentially polarizing because it challenges the traditional family. But the thirty-four states that recognize functional parents defy categorization: Kentucky, Montana, and West Virginia have functional parent doctrines, and Illinois, Oregon, and Virginia do not.<sup>202</sup>

Similarly, adoption of state-level EITCs does not follow predictable red-blue divides.<sup>203</sup> Thirty-three states and the District of Columbia have an EITC, usually pegged as a percentage of the federal EITC.<sup>204</sup> The availability of a state EITC, its amount, and whether it is fully refundable or nonrefundable<sup>205</sup> generally track the familiar partisan

<sup>199</sup> See *supra* notes 15, 25–29 and accompanying text.

<sup>200</sup> Gregg Strauss, *What Role Remains for De Facto Parenthood?*, 46 FLA. ST. U. L. REV. 909, 911 (2019).

<sup>201</sup> See Joslin & NeJaime, *supra* note 15 (manuscript at 43–50). Functional parenthood and similar doctrines also provide some measure of protection for unmarried same-sex couples who have children. See Susan Hazeldean, *Illegitimate Parents*, 55 U.C. DAVIS L. REV. 1583, 1598–611 (2022) (describing how marriage equality does not help unmarried same-sex parents, and thus the functional parenthood doctrine plays a protective role for these families).

<sup>202</sup> See Joslin & NeJaime, *supra* note 15 (manuscript at 32) (providing a map illustrating the thirty-four jurisdictions and noting that the states “are politically liberal, moderate, and conservative. They include large states and small states. They include more urban jurisdictions and more rural jurisdictions.”); *id.* (manuscript at 13–14) (explaining the doctrine and noting the different names and forms it takes, including psychological parenthood, de facto parentage, in loco parentis, and holding out parentage, as well as the varying sources of authority — statutory, common law, and equity). This is part of a larger functional turn in family law of defining family relationships by examining the conduct of individuals rather than formal legal ties. See Kate Redburn, Note, *Zoned Out: How Zoning Law Undermines Family Law's Functional Turn*, 128 YALE L.J. 2412, 2422–30 (2019) (describing this turn across multiple areas in family law).

<sup>203</sup> See *Earned Income Tax Credit Overview*, NAT'L CONF. ST. LEGISLATURES (Jan. 27, 2023), <https://www.ncsl.org/research/labor-and-employment/earned-income-tax-credits-for-working-families.aspx> [<https://perma.cc/R4PR-RL87>].

<sup>204</sup> *Id.* (describing state EITCs and noting differences). The amount of the credit varies widely, but most states are well below half of the federal credit. See *id.* (showing that fully refundable tax credits generally fall between 15% and 30% of the federal credit).

<sup>205</sup> A fully refundable tax credit requires only that the individual have worked and filed a return; by contrast, a nonrefundable tax credit offsets income tax liability. *State and Local Backgrounders: State Earned Income Tax Credit*, URB. INST., <https://www.urban.org/policy-centers/cross-center-initiatives/state-and-local-finance-initiative/state-and-local-backgrounders/state-earned-income-tax-credits> [<https://perma.cc/DJN3-R5P3>]. Many low-income individuals do not owe federal or state income tax. *Earned Income Tax Credit Overview*, *supra* note 203.

lines, but some red states also invest in the EITC.<sup>206</sup> Kansas has a fully refundable tax credit in an amount that mirrors many progressive states, and state EITCs in Louisiana, Nebraska, and Oklahoma are fully refundable, although amounts are lower than in Kansas.<sup>207</sup> South Carolina has the largest state EITC in the country, providing a nonrefundable tax credit that is 125% of the federal tax credit.<sup>208</sup> Supporters in that state are hopeful that the law will lay the groundwork for a refundable tax credit in the future.<sup>209</sup> Further, some red states without an EITC have laws that promote the use of the federal EITC.<sup>210</sup>

Finally, even though employment regulation is often politically divisive, state laws providing protections for pregnant workers run the political gamut, and most were enacted in the last decade.<sup>211</sup> Thirty states and the District of Columbia have a pregnant workers fairness act,<sup>212</sup> filling gaps that had been left by federal law until Congress acted in late 2022.<sup>213</sup> These laws typically require employers to make reasonable accommodations for pregnant workers, thus promoting women's access to the workforce — especially for women of color, who are overrepresented in the low-wage workforce and often work jobs that are physically demanding.<sup>214</sup>

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Describing patterns of convergence, depolarization, and nonpartisan pluralism in family law is not meant to gloss over countervailing

<sup>206</sup> See *Earned Income Tax Credit Overview*, *supra* note 203.

<sup>207</sup> *Id.* Kansas provides 17% of the federal credit, Nebraska provides 10%, and Louisiana and Oklahoma both provide 5%. *Id.*

<sup>208</sup> *Id.* Because it is nonrefundable, the state EITC impacts relatively few South Carolinians. See Cassie Cope, *150,000 Low-Income South Carolinians to Get Tax Break as Part of Gas-Tax Hike*, THE STATE (May 18, 2017, 4:55 PM), <https://www.thestate.com/news/politics-government/article151330562.html> [<https://perma.cc/J2GX-M5LS>] (estimating that 149,234 taxpayers will receive an average \$286 tax credit in 2023); *Statistics for Tax Returns with the Earned Income Tax Credit (EITC)*, *supra* note 188 (indicating that, for tax year 2021, 594,000 South Carolinians claimed a federal EITC).

<sup>209</sup> See Cope, *supra* note 208.

<sup>210</sup> *Earned Income Tax Credit Overview*, *supra* note 203 (describing how “laws related to the federal EITC” in Arizona and Texas operate to help families file for and receive the credit, and noting that West Virginia has a similar law); see also *EITC Participation Rate by States Tax Years 2012 Through 2019*, IRS (Nov. 16, 2022), <https://www.eitc.irs.gov/eitc-central/participation-rate/eitc-participation-rate-by-states> [<https://perma.cc/5X6M-7KCD>] (estimating that, nationally, 79% of eligible taxpayers filed for the EITC in the 2019 tax year, with an 80% filing rate in Arizona and Texas, and an 82% rate in West Virginia).

<sup>211</sup> See A BETTER BALANCE, PREGNANCY ACCOMMODATION LAWS IN STATES & CITIES (2021), [https://www.abetterbalance.org/wp-content/uploads/2017/05/PWFA\\_StateList\\_8.12.2021.pdf](https://www.abetterbalance.org/wp-content/uploads/2017/05/PWFA_StateList_8.12.2021.pdf) [<https://perma.cc/Q9VP-2CJ4>] (listing these states).

<sup>212</sup> See *id.*

<sup>213</sup> See Pregnant Workers Fairness Act, Pub. L. No. 117-328, div. II (2022); Deborah A. Widiss, *Pregnant Workers Fairness Acts: Advancing a Progressive Policy in Both Red and Blue America*, 22 NEV. L.J. 1131, 1136–43, 1153 (2022) (explaining the gaps left by federal law).

<sup>214</sup> See Widiss, *supra* note 213, at 1133.

forces.<sup>215</sup> Rather, it shows how often family law issues with the potential for intense contestation avoid or have moved past that contestation. This more complete description of family law serves as a predicate for gleaming lessons that can be used by legal actors, advocates, and scholars. But first, it is essential to understand whether there are common threads in the examples. The next Part begins that exploration.

## II. PRAGMATISM AS A METHODOLOGICAL LINK

How might we understand convergence, depolarization, and nonpartisan pluralism in contemporary family law? One way to approach the patterns is to highlight methodological similarities. In the examples in Part I, one consistent through line is that decisionmakers sidestep abstract ideals and political ideology and instead focus on whether a law or policy promotes family and child well-being in specific, grounded ways. And legal actors learn from the lives of affected families, consult empirical evidence, and make context-specific determinations.

This kind of approach to decision- and policymaking is not new. Indeed, it has deep roots in American culture and thought. Since the late nineteenth century, philosophers have been arguing in favor of a pragmatic method for resolving philosophical disputes.<sup>216</sup> Pragmatism in this sense focuses on whether an idea is useful in clarifying or deciding a debate, looking at the question in a specific context, and treating ideas as tentative and subject to testing and reconsideration based on empirical evidence and experimentation. Early pragmatism arose from philosophical debates, but scholars in law and many other disciplines have adapted the method for other discourses. And advocates have used the method to advance social reforms, from Jane Addams's embracing the principles of pragmatism in the settlement house movement<sup>217</sup> to Black feminists today invoking the principles to further social movements.<sup>218</sup>

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<sup>215</sup> Oklahoma and West Virginia are good examples of the nuances of this landscape. Both states expanded Medicaid, see *Status of State Medicaid Expansion Decisions: Interactive Map*, *supra* note 198, and are leaders in prekindergarten quality, see FRIEDMAN-KRAUSS ET AL., *supra* note 140, at 31 tbl.5, but they also were among the first to outlaw almost all abortions after the decision in *Dobbs*, see *Tracking the States Where Abortion Is Now Banned*, *supra* note 52 (tracking changes in state law in the wake of *Dobbs*).

<sup>216</sup> For an overview of American pragmatism, see generally CLASSICAL AMERICAN PRAGMATISM (Sandra B. Rosenthal et al. eds., 1999); MATTHEW FESTENSTEIN, PRAGMATISM AND POLITICAL THEORY (1997); PRAGMATISM: A READER (Louis Menand ed., 1997); and HILARY PUTNAM & RUTH ANNA PUTNAM, PRAGMATISM AS A WAY OF LIFE (David Macarthur ed., 2017).

<sup>217</sup> See Maurice Hamington, *Jane Addams*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta & Uri Nodelman eds., Fall 2022 ed.), <https://plato.stanford.edu/archives/fall2022/entries/addams-jane> [https://perma.cc/5U75-SRJC].

<sup>218</sup> See V. Denise James, *Theorizing Black Feminist Pragmatism: Forethoughts on the Practice and Purpose of Philosophy as Envisioned by Black Feminists and John Dewey*, 23 J. SPECULATIVE PHIL. 92, 97 (2009) (quoting Stanlie M. James, *Introduction to THEORIZING BLACK FEMINISMS: THE VISIONARY PRAGMATISM OF BLACK WOMEN* 3 (Stanlie M. James & Abena P.A. Busia eds., 1993)).

This Part describes the deep roots of pragmatism and its modern iterations and then argues that pragmatism provides a common methodological thread in the patterns of convergence, depolarization, and nonpartisan pluralism. This Part also explains why lawmakers are inclined to use the pragmatic method in family law: there is a relatively clear consensus that the goal of doctrine and policy is to promote child well-being, and pragmatic family law provides the tools to further this goal.

### A. *The Living Tradition of American Pragmatism*

Polarization has a long history in the United States, but so, too, does pragmatism. In the 1870s, philosophers Charles Sanders Peirce<sup>219</sup> and William James<sup>220</sup> sought an alternative to the two dominant modes of thinking at the time: British empiricism, which taught that concepts cannot be known a priori and are derived only from experience,<sup>221</sup> and European rationalism, which taught that concepts are innate and can be based on a priori knowledge.<sup>222</sup> As the early pragmatists understood these schools of thought, both laid claim to universality and immutability.<sup>223</sup>

Peirce and James — joined soon by John Dewey<sup>224</sup> — rejected the certainty of both approaches.<sup>225</sup> The basic insight of these early

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<sup>219</sup> For Peirce's foundational writings on pragmatism, see C.S. Peirce, *The Fixation of Belief*, 12 POPULAR SCI. MONTHLY 1 (1877), reprinted in 1 THE ESSENTIAL PEIRCE 109 (Nathan Houser & Christian Kloesel eds., 1992) [hereinafter Peirce, *The Fixation of Belief*]; and C.S. Peirce, *How to Make Our Ideas Clear*, 12 POPULAR SCI. MONTHLY 286 (1878), reprinted in THE ESSENTIAL PEIRCE, *supra*, at 124 [hereinafter Peirce, *How to Make Our Ideas Clear*].

<sup>220</sup> James is often credited with popularizing Peirce's ideas and using the terminology of pragmatism. For his principal work on pragmatism, see WILLIAM JAMES, PRAGMATISM: A NEW NAME FOR SOME OLD WAYS OF THINKING (1907).

<sup>221</sup> For a description of the early pragmatists' understanding and rejection of British empiricism, generally associated with John Locke, George Berkeley, and David Hume, see PUTNAM & PUTNAM, *supra* note 216, at 15–16, 276–81.

<sup>222</sup> For a description of the early pragmatists' understanding and rejection of European rationalism, generally associated with René Descartes and Gottfried Wilhelm Leibniz, see *id.* at 15, 276–81.

<sup>223</sup> See *id.* at 276–77 (describing how the early pragmatists saw both British empiricism and European rationalism as embracing a single truth).

<sup>224</sup> Peirce and James first developed their ideas during conversations in the Metaphysical Club — a discussion group of philosophers, psychologists, and lawyers who met in Cambridge for several months in 1872. See LOUIS MENAND, THE METAPHYSICAL CLUB: A STORY OF IDEAS IN AMERICA 201–03, 221–26 (2001). Dewey, who was born in 1859, David Hildebrand, *John Dewey*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Winter 2021 ed.), <https://plato.stanford.edu/archives/win2021/entries/dewey> [<https://perma.cc/4JHE-E5FP>], was not part of the Metaphysical Club, see MENAND, *supra*, at 201, but his work was highly influential in pragmatism, and he is considered one of the early pragmatists, see Hildebrand, *supra*.

<sup>225</sup> See WILLIAM JAMES, *Pragmatism's Conception of Truth*, in PRAGMATISM: A NEW NAME FOR SOME OLD WAYS OF THINKING, *supra* note 220, at 197, 218 (“Truth for us is simply a collective name for verification-processes . . .”); WILLIAM JAMES, A PLURALISTIC UNIVERSE 10

pragmatists was that human thought comes from experience, that ideas are developed socially, and that the purpose of ideas is to solve problems, enabling people to live in their environments. As people encounter new experiences and new problems, they will adapt their ideas and thinking. Based on this insight, the early pragmatists proposed a method to guide philosophical debates.<sup>226</sup>

Notwithstanding inevitable disagreements in the discourse,<sup>227</sup> pragmatism's philosophical method coalesced around several core tenets: usefulness, fallibility, empirically based experimentalism, and pluralism. Early pragmatists thus focused first on the utility of a concept, asking whether an idea or belief made a concrete difference to a debate or an understanding of the world.<sup>228</sup> This inquiry was necessarily context specific, exploring the idea in relation to a particular application. As to fallibility, Peirce was concerned that a person who believed they had a monopoly on truth would dominate others and impose their worldview on them.<sup>229</sup> Similarly, Dewey worried about rigid belief systems, ossified ideas, and adherence to universal truth.<sup>230</sup> The method responds to these concerns by treating ideas and beliefs as contingent and subject to constant revision. The early pragmatists' commitment to empirics and

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(1909) (arguing against one truth but acknowledging the human tendency to think that a person's own "conclusions are the only logical ones, that they are necessities of universal reason, they being all the while, at bottom, accidents more or less of personal vision which had far better be avowed as such"); JOHN DEWEY, *THE QUEST FOR CERTAINTY* 167 (1929) ("[I]deas and idealisms are in themselves hypotheses not finalities."); Peirce, *How to Make Our Ideas Clear*, *supra* note 219, at 286–89 (arguing that humans are tenacious in their beliefs but a superior means for furthering knowledge is the scientific method and human sociability).

<sup>226</sup> James often called it a temperament rather than a method. See WILLIAM JAMES, *The Present Dilemma in Philosophy*, in *PRAGMATISM: A NEW NAME FOR SOME OLD WAYS OF THINKING*, *supra* note 220, at 3, 7–9.

<sup>227</sup> See David Macarthur, *Introduction* to PUTNAM & PUTNAM, *supra* note 216, at 3 (describing one of the main differences: Peirce advocated a "scientifically oriented metaphysics and epistemology," what he called "pragmatism," and James and Dewey advocated a "wider, more humane 'experience'-based pragmatism . . . whose philosophical compass is always pointing toward moral, social, political, and religious questions and concerns").

<sup>228</sup> See WILLIAM JAMES, *What Pragmatism Means*, in *PRAGMATISM: A NEW NAME FOR SOME OLD WAYS OF THINKING*, *supra* note 220, at 43, 45, 50 (explaining this focus and defining pragmatism as "try[ing] to interpret each notion by tracing its respective practical consequences," *id.* at 45, and arguing that "[t]he whole function of philosophy ought to be to find out what definite difference it will make to you and me, at definite instants of our life, if this world-formula or that world-formula be the true one," *id.* at 50). This focus stemmed from Peirce's pragmatic maxim: that a concept or belief cannot be fully grasped in the abstract and instead a full understanding comes from considering how the concept or belief works in practice. See Peirce, *How to Make Our Ideas Clear*, *supra* note 219, at 132.

<sup>229</sup> See Peirce, *The Fixation of Belief*, *supra* note 219, at 117 (noting that if the holder of a belief has social and political power, they may persecute others for having different beliefs because the person who believes they hold a monopoly on truth is convinced they are right, and that "[c]ruelties always accompany this system").

<sup>230</sup> JOHN DEWEY, *EXPERIENCE AND NATURE* 409–10 (1925) ("Truth is a collection of truths; and these constituent truths are in the keeping of the best available methods of inquiry and testing as to matters-of-fact . . ." *Id.* at 410.); see also DEWEY, *supra* note 225, at 3–8 (arguing that the "quest for certainty," *id.* at 8, was a response to fear about a rapidly changing world).

experimentation flowed from embracing fallibility. To ensure that ideas are tested and empirically grounded, they advocated for constant inquiry and questioning.<sup>231</sup> Finally, the early pragmatists embraced pluralism of thought, politics, and aesthetics,<sup>232</sup> with a catholic understanding of empirical evidence that emphasized human experience as a source of knowledge.<sup>233</sup> This orientation was decidedly nonelitist, looking to a broad range of people who could bring new perspectives and describe how ideas or concepts affected them in practice.<sup>234</sup>

There has long been a vein of pragmatism specific to legal discourse. Legal pragmatism, as with cognate variations in other disciplines, focuses on the impact of a legal rule and not abstract ideals,<sup>235</sup> considers the context of a legal dispute to situate the analysis, and draws on empirical evidence to inform judgment.<sup>236</sup> Judge Richard Posner, who has written at length about legal pragmatism and judging, espouses what he calls “everyday pragmatism,”<sup>237</sup> which rejects formalism and instead looks to common sense to solve problems.<sup>238</sup> As with the early pragmatists, Judge Posner embraces multiple sources of empirical evidence,

<sup>231</sup> See JAMES, *supra* note 228, at 43–46, 51.

<sup>232</sup> WILLIAM JAMES, *The One and the Many*, in PRAGMATISM: A NEW NAME FOR SOME OLD WAYS OF THINKING, *supra* note 220, at 127, 146 (describing “the pluralist notion that there is no point of view, no focus of information extant, from which the entire content of the universe is visible at once”).

<sup>233</sup> See DEWEY, *supra* note 230, at 75; JOHN DEWEY, RECONSTRUCTION IN PHILOSOPHY 91, 150 (1920); JAMES, *supra* note 228, at 51–53; Peirce, *The Fixation of Belief*, *supra* note 219, at 110.

<sup>234</sup> See JAMES, *supra* note 228, at 80 (noting that pragmatism’s empiricism will “count the humblest and most personal experiences”); WILLIAM JAMES, ON SOME OF LIFE’S IDEALS 45–46 (1900) (“[N]either the whole of truth nor the whole of good is revealed to any single observer, although each observer gains a partial superiority of insight from the peculiar position in which he stands. Even prisons and sick-rooms have their special revelations.” *Id.* at 46.). This emphasis on experimentation and knowledge from those affected was especially true for Dewey, who eschewed the pragmatist label and called his method experimentalism because of his emphasis on testing the consequences of ideas and learning from those impacted. See ALAN RYAN, JOHN DEWEY AND THE HIGH TIDE OF AMERICAN LIBERALISM 20 (1995).

<sup>235</sup> See RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 59–73 (2003) (explaining pragmatism in judging as “a heightened concern with consequences or . . . ‘a disposition to ground policy judgments on facts and consequences rather than on conceptualisms and generalities,’” *id.* at 59 (quoting RICHARD A. POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY 227 (1999))). Legal pragmatism is sometimes — and mistakenly — conflated with utilitarianism. Farber, *supra* note 21, at 1332 (noting this phenomenon and explaining that “[t]his confusion is encouraged by the common usage of *pragmatic* to mean practical as opposed to principled,” *id.* at 1332 n.7).

<sup>236</sup> See POSNER, *supra* note 235, at 3–4, 77; see also JUSTIN DESAUTELS-STEIN, THE JURISPRUDENCE OF STYLE 241–44 (2018) (describing the two main approaches to pragmatism within law: experimentalism, associated with Professors Charles Sabel and William Simon, and eclecticism, associated with Judge Posner).

<sup>237</sup> POSNER, *supra* note 235, at 4.

<sup>238</sup> See *id.* at 59–73; see also *id.* at 79 (rejecting “abstract theorizing of which professors of constitutional law are enamored, in which decisions are evaluated by reference to abstractions common in law talk such as fairness, justice, autonomy, and equality”); *id.* at 11 (expressing skepticism about the precise philosophical method of pragmatism and contending that “academic philosophy [is] a field that has essentially no audience among judges and lawyers”).

advocating for work in the “empirical lowlands,”<sup>239</sup> which he defines as efforts to document the results of social policies.<sup>240</sup>

Pragmatism is also a foundation of democratic experimentalism.<sup>241</sup> In lieu of a governance regime that adopts a definitive goal, imposes top-down regulation, and polices compliance, democratic experimentalism is a normative and descriptive theory that bases legal regulation on American pragmatism, especially Dewey’s work, as well as subsequent organizational theory.<sup>242</sup> Democratic experimentalism responds to an uncertain future by constant learning and adjustment, and it addresses increasing social diversity by trying to accommodate different circumstances and perspectives.<sup>243</sup> This approach is evident in public, private, and international law.<sup>244</sup>

The early pragmatists used the method as a way of *thinking*, but both scholars and advocates have turned to pragmatism for guidance on *doing*. Dewey began this tradition in his work on social and political issues.<sup>245</sup> Dewey’s close friend and intellectual partner Jane Addams used the pragmatic method in the settlement house movement.<sup>246</sup> In running her settlement house and in her writing, Addams emphasized that knowledge comes from experience and that all people, regardless of background, have something to contribute to an evolving understanding of an issue.<sup>247</sup>

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<sup>239</sup> *Id.* at 3.

<sup>240</sup> *See id.* at 3–4 (making this argument, defining the uplands as theoretical discourses that pose abstract questions about justice and equality, and stating that “[t]he theoretical uplands, where democratic and judicial ideals are debated, tend to be arid and overgrazed; the empirical lowlands are fertile but rarely cultivated”).

<sup>241</sup> *See* Charles F. Sabel & William H. Simon, *Democratic Experimentalism*, in *SEARCHING FOR CONTEMPORARY LEGAL THOUGHT* 477, 477–80 (Justin Desautels-Stein & Christopher Tomlins eds., 2017) (describing this foundation for democratic experimentalism); Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Exceptionalism*, 98 *COLUM. L. REV.* 267, 316–23 (1998).

<sup>242</sup> *See* Sabel & Simon, *supra* note 241, at 477–83.

<sup>243</sup> *See id.* at 477–78, 483–84.

<sup>244</sup> *See id.* at 487–96.

<sup>245</sup> *See* Macarthur, *supra* note 227, at 3. Dewey believed philosophers should find problems to solve by looking at everyday life. *See* DEWEY, *supra* note 225, at 27–29. By contrast, James was not particularly interested in social change. *See* Bill E. Lawson & Donald F. Koch, *Introduction to PRAGMATISM AND THE PROBLEM OF RACE* 1, 3 (Bill E. Lawson & Donald F. Koch eds., 2004) (“The writings of the founders of pragmatism do not reveal much interest in racial questions.”); Erin McKenna, *Women and William James*, in *FEMINIST INTERPRETATIONS OF WILLIAM JAMES* 79, 90–91 (Shannon Sullivan & Erin C. Tarver eds., 2015) (arguing that although James taught classes to women, he did not champion their coeducation and he saw women’s purpose as supporting men).

<sup>246</sup> *See* Hamington, *supra* note 217 (noting that, combining theory and action, Addams helped people “live as neighbors in oppressed communities to learn from and help the marginalized members of society”).

<sup>247</sup> *See id.* Addams’s work in Hull House, the settlement she founded in Chicago, was built on the principle that the residents of the house should help develop the supportive programs, making clear what they wanted and needed. *See id.*



Similarly, scholars of race and feminism have long deployed the tools of pragmatism to deepen our understanding of the roles of race and gender in society and to imagine new possibilities for social change. W.E.B. Du Bois began this tradition by arguing both that previous pragmatist works had ignored race as an impediment to social experimentation and consensus and that adding this perspective was critical.<sup>248</sup> Working in a Black community in Philadelphia, Du Bois was the first researcher to gather empirical data on the living conditions of Black Americans.<sup>249</sup> Focused on the lives of Black individuals, Du Bois wrote that “one could not be a calm, cool, and detached scientist while Negroes were lynched, murdered and starved.”<sup>250</sup> Du Bois’s insistence on broadening the lens of experience-based learning was an important corrective to pragmatism.<sup>251</sup>

Today, scholars of race and advocates for political change continue to look to pragmatism. Professor Cornel West emphasizes the pragmatic method’s potential to resist social hierarchy, given its focus on problem-solving and collectivity.<sup>252</sup> Similarly, Black feminist scholars such as Professors Patricia Hill Collins, V. Denise James, and Deva Woodly look to pragmatism as a method for social change.<sup>253</sup> Collins, a sociologist, elaborates on the idea of “visionary pragmatism,” arguing that social change requires attention to both what *can* be and what *is* — at least today.<sup>254</sup> James, a philosopher, looks to Dewey for his rejection of utopian ideals, embrace of the possible, focus on consequences and outcomes, and treatment of lived experiences as a respectable source of knowledge.<sup>255</sup> James argues that this approach creates a vision for social hope.<sup>256</sup> And Woodly, a political scientist, argues that pragmatism

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<sup>248</sup> See CORNEL WEST, *THE AMERICAN EVASION OF PHILOSOPHY* 148 (1989) (“Du Bois goes beyond [previous pragmatists] in the scope and depth of his vision: creative powers reside among the wretched of the earth even in their subjugation, and the fragile structures of democracy in the world depend, in large part, on how these powers are ultimately exercised.”).

<sup>249</sup> See *id.* at 141.

<sup>250</sup> W.E.B. DU BOIS, *THE AUTOBIOGRAPHY OF W.E.B. DU BOIS* 222 (1968).

<sup>251</sup> See Robert Gooding-Williams, *W.E.B. Du Bois*, in *STANFORD ENCYCLOPEDIA OF PHILOSOPHY* § 2 (Edward N. Zalta ed., Spring 2020 ed.), <https://plato.stanford.edu/archives/spr2020/entries/dubois> [<https://perma.cc/2AM9-GDTV>] (describing W.E.B. Du Bois’s emphasis on exploring the subjectively lived and felt experiences of Black Americans).

<sup>252</sup> See WEST, *supra* note 248, at 4–5 (“The distinctive appeal of American pragmatism . . . is its unashamedly moral emphasis and its unequivocally ameliorative impulse.” *Id.* at 4.).

<sup>253</sup> I thank Professor Linda McClain for bringing this work on pragmatism to my attention in comments on an earlier draft of this Article. For her discussion of these theorists, see Linda C. McClain, *Experimental Meets Intersectional: Visionary Black Feminist Pragmatism and Practicing Constitutional Democracy*, 69 *DRAKE L. REV.* 823, 857–77 (2021).

<sup>254</sup> See PATRICIA HILL COLLINS, *FIGHTING WORDS: BLACK WOMEN AND THE SEARCH FOR JUSTICE* 188 (1998) (“The Black women on my block possessed a ‘visionary pragmatism’ that emphasized the necessity of linking caring, theoretical vision with informed, practical struggle.” (quoting James, *supra* note 218, at 3)).

<sup>255</sup> See James, *supra* note 218, at 92–93.

<sup>256</sup> See *id.* at 93 (noting that Dewey offers “a social hope reduced to a working program of action, a prophecy of the future, but one disciplined by serious thought and knowledge” (quoting 1 JOHN DEWEY, *Philosophy and Democracy*, in *THE ESSENTIAL DEWEY* 72 (Larry A. Hickman & Thomas M. Alexander eds., 1998))).

can encourage modern social movements by centering lived experience, asking “[w]hat does it mean to experience justice?” rather than “[w]hat constitutes justice?”<sup>257</sup> Woodyly thus contends that social movements, such as Black Lives Matter, reflect “radical Black feminist pragmatism”<sup>258</sup>: the movement is radical because it focuses on the roots of the problem, Black feminist because it embraces an ethical system that recognizes intersectional harm and a politics of care, and pragmatist because it elevates lived experience.<sup>259</sup> More generally, Black feminists emphasize that pragmatism facilitates analysis of intersectionality because its embrace of experience-based learning opens the door to understanding that “experience is both raced and gendered.”<sup>260</sup> And the pragmatic method can further social justice by encouraging listening, especially to marginalized voices and those directly affected by systems of discrimination and injustice.<sup>261</sup>

As this summary illustrates, American pragmatism is a vibrant living tradition, adopted in numerous contexts and for varying purposes. As with any body of thought, pragmatism has its share of intramural debates and disagreements across generations of scholars.<sup>262</sup> For present

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<sup>257</sup> See DEVA R. WOODYLY, RECKONING: BLACK LIVES MATTER AND THE DEMOCRATIC NECESSITY OF SOCIAL MOVEMENTS 51–52 (2021).

<sup>258</sup> *Id.* at 4.

<sup>259</sup> See *id.* at 50.

<sup>260</sup> James, *supra* note 218, at 92.

<sup>261</sup> McClain, *supra* note 253, at 842, 852–77. As McClain observes, feminist scholars have long argued that feminism and pragmatism share commitments and a methodology: both begin with the starting point that truth is provisional, and both favor contextualized, contingent, and historicized explanations over universally applicable theories. *Id.* at 842; see also Mari J. Matsuda, *Pragmatism Modified and the False Consciousness Problem*, 63 S. CAL. L. REV. 1763, 1763–66 (1990) (proposing the integration of pragmatist principles within feminism); Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 831, 880 (1990) (introducing “feminist practical reasoning,” *id.* at 831; arguing that “legal resolutions are pragmatic responses to concrete dilemmas rather than static choices between opposing, often mismatched perspectives,” *id.*; and proposing “positionality” as an approach to reasoning: a “stance from which a number of apparently inconsistent feminist ‘truths’ make sense,” *id.* at 880, and a “stance [that] acknowledges the existence of empirical truths, values and knowledge, and also their contingency,” *id.*); Margaret Jane Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699, 1706 (1990) (“Feminism and pragmatism are not things; they are ways of proceeding.”).

The philosopher Richard Rorty, who is often credited with reviving pragmatism as a philosophical tradition in the last quarter of the twentieth century, also applied pragmatism to feminism. See Richard Rorty, *Feminism and Pragmatism*, RADICAL PHIL., Autumn 1991, at 4–5 (arguing that pragmatism helps advance feminism because it acknowledges there are beliefs about women and then asks what purposes these beliefs serve, rather than trying to get at some universal truth about women, and noting that feminists should first develop semantic authority over themselves as women). For a persuasive critique of Rorty’s optimism about the possibilities of pragmatism for women, see Joan C. Williams, *Rorty, Radicalism, Romanticism: The Politics of the Gaze*, 1992 WIS. L. REV. 131, 134 (1992), who argues that Rorty did not account for the many ways women could not achieve this inner gaze and self-definition because of conditions of oppression.

<sup>262</sup> See, e.g., Macarthur, *supra* note 227, at 2–4 (describing some of these debates); Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. 267, 304 nn.161–62 (1997) (noting differences between the early pragmatists and later generations, notably Richard Rorty).

purposes, however, three elements of the living tradition are useful for seeing a methodological link in the patterns of convergence, depolarization, and nonpartisan pluralism in family law: (1) a rejection of abstract ideals and political ideology and, instead, a focus on what works to solve a problem; (2) a commitment to experience-based learning, empirical evidence, and experimentation — this ground-up theory of knowledge especially values lived experience; and (3) the use of contextualized decisionmaking, because what works in one area and context may not in another. As the next section shows, these elements of pragmatism flow through family law.

### B. Pragmatism in Family Law

American pragmatism provides a methodological link in the patterns of convergence, depolarization, and nonpartisan pluralism. This is not to argue that legal actors are using the pragmatic method consciously but rather that many contemporary aspects of family law reflect the method. This is unsurprising given the nature and structure of family law, which is the starting point for this section.

1. *Fertile Ground.* — Promoting child well-being is a deeply entrenched social and legal norm, rooted in the Progressive Era and continuing into the modern era.<sup>263</sup> This norm cuts across many aspects of family law and creates a strong consensus among legal actors and the public about the goal of family law.<sup>264</sup> Moreover, there is broad agreement among social scientists, policymakers, and the public about the core components of child well-being: children need strong, stable, positive relationships with a consistent caregiver; children need health care and education; and families need basic resources.<sup>265</sup> There are disagreements about some aspects of child well-being, many of which are culturally contingent,<sup>266</sup> but much doctrine and policy is focused on the core aspects of child well-being — caregiving and basic needs.<sup>267</sup>

This commitment to child well-being is fertile ground for the pragmatic method. Scholars, policymakers, and advocates generally agree about what family law should be doing, but they often disagree about how to achieve the goal. Pragmatism provides the tools for developing doctrine and policy that further the consensus goal. The method focuses legal actors on concrete, specific aspects of well-being. And it tells decisionmakers what to consider when assessing whether a doctrine or

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<sup>263</sup> See Huntington & Scott, *supra* note 37, at 1397–413.

<sup>264</sup> See *id.*

<sup>265</sup> See *id.* at 1453–54.

<sup>266</sup> See Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, LAW & CONTEMP. PROBS., Summer 1975, at 226, 229–30 (describing the inherent indeterminacy in defining a child's best interests in custody disputes in part because for any given family, there are different conceptions of what is best for the child); Huntington & Scott, *supra* note 37, at 1453–54 (describing potential disagreements about child well-being).

<sup>267</sup> See Huntington & Scott, *supra* note 37, at 1453–54.

policy advances well-being: lived experience, empirical evidence, context-specific factors, and information from experimentation.

Beyond this foundational commitment to child well-being, the doctrinal and institutional aspects of family law increase receptivity to the pragmatic method. In individual cases, context-specific decisionmaking is particularly appropriate because each child and family situation is unique. In response, the legal system invests courts with open-ended discretion in many areas of family law, including the best interests of the child standard, used to decide custody disputes between parents, and the equitable distribution standard, used to divide marital property on divorce.<sup>268</sup> As discussed in greater depth below,<sup>269</sup> this open-endedness is both a feature and a bug, but for present purposes, the point is that this inquiry is well suited to the pragmatic method. Further, diversity among families encourages courts to learn from families' lived experiences, to put a dispute in broader context by consulting empirical evidence on the needs of children and families, and to devise a solution that works for *that* family.<sup>270</sup>

For legislatures and agencies, the devolution of decisionmaking authority in family law, with considerable state and local discretion, facilitates experimentation, providing ample opportunity for decisionmakers to learn from other jurisdictions.<sup>271</sup> This trend is true both for state-based law as well as federal law that grants implementation authority to the states.

In short, pragmatism flourishes in family law because of a strong consensus about the goal of doctrine and policy and because of the nature of family law disputes and policies. Family law's receptivity to the pragmatic method does not necessarily translate into success for any particular rule or policy,<sup>272</sup> but it does help explain the policies that do take root, as the next section shows.

2. *A Common Method.* — Consistent with the pragmatic method, which begins with observations about the world and seeks to learn from them, this section explores how the patterns of convergence, depolarization, and nonpartisan pluralism display hallmarks of the pragmatic method.

(a) *Convergence.* — Doctrinal and policy convergence in family law — on corporal punishment, multiparenthood, universal prekindergarten, and more — provides ample evidence of the pragmatic method

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<sup>268</sup> See GROSSMAN & FRIEDMAN, *supra* note 75, at 196–200, 215–19 (describing these doctrines).

<sup>269</sup> See *infra* notes 423–25 and accompanying text.

<sup>270</sup> See *infra* notes 331–40 and accompanying text.

<sup>271</sup> See *supra* notes 78–82 and accompanying text.

<sup>272</sup> See, e.g., Ben Casselman, *Child Tax Credit's Extra Help Ends, Just as Covid Surges Anew*, N.Y. TIMES (Jan. 3, 2022), <https://www.nytimes.com/2022/01/02/business/economy/child-tax-credit.html> [<https://perma.cc/7GAH-W7QD>] (describing the failure of Congress to extend the COVID-19-era increase in the Child Tax Credit, which kept millions of children out of poverty).

in practice. The parental privilege to use reasonable corporal punishment, to take one example, is not based on abstract ideals or political ideology. When justifying the privilege as a matter of common law or in interpreting broadly worded statutes, courts often do not engage directly with difficult and controversial issues, such as desirable parenting, the relevance of religious beliefs, or the history of corporal punishment in subjugating children; instead, courts focus on the impact of the privilege on children and families.<sup>273</sup> Studies demonstrate that children are harmed by harsh forms of corporal punishment that are tantamount to child abuse.<sup>274</sup> But the privilege does not protect this kind of parental behavior.<sup>275</sup> By contrast, abundant evidence documents the risk of harm from coercive state intervention, either through the family regulation system, which could result in the placement of a child in foster care, or through the criminal legal system, which could result in the incarceration of a parent.<sup>276</sup> The privilege thus protects children from clearly established forms of harm (child abuse and foster care) and saves coercive intervention for the cases when it is truly necessary to protect children from their parents.

Another way the privilege reflects the pragmatic method is through context-based decisionmaking that turns on a close examination of the facts. In addition to harm to the child, courts consider “the existence of a disciplinary purpose; the type of corporal punishment; the amount of force used; the location of any injury; and the age, size, and physical and mental condition of the child.”<sup>277</sup> In case after case, courts take account of the stress on parents and the challenges of raising children, especially teenagers; courts also emphasize specific facts to distinguish impermissible physical abuse from regrettable but understandable parental lapses in judgment that result in a physical strike.<sup>278</sup>

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<sup>273</sup> See cases cited *infra* note 278.

<sup>274</sup> See Diana Baumrind, Robert E. Larzelere & Philip A. Cowan, *Ordinary Physical Punishment: Is It Harmful? Comment on Gershoff (2002)*, 128 PSYCH. BULL. 580, 581 (2002) (describing the consensus among social scientists that harsh forms of corporal punishment that amount to abuse are detrimental to children).

<sup>275</sup> See, e.g., FLA. STAT. § 39.01(2) (2022) (distinguishing civil child abuse from reasonable corporal punishment); MICH. COMP. LAWS SERV. § 750.136b(9) (LexisNexis 2019) (distinguishing criminal child abuse from reasonable corporal punishment).

<sup>276</sup> See RESTATEMENT OF CHILD. & THE L. § 3.24 cmt. c (AM. L. INST., Tentative Draft No. 1, 2018) (“[T]he privilege recognizes that state intervention imposes its own costs on the family and thus requires substantial justification.”).

<sup>277</sup> *Id.* cmts. f, h (listing these factors and further noting that the inquiry is holistic and fact specific and that no factor, other than the extent of the harm, is determinative).

<sup>278</sup> See, e.g., *Gonzalez v. Santa Clara Cnty. Dep’t of Soc. Servs.*, 167 Cal. Rptr. 3d 148, 152–53, 167–68 (Ct. App. 2014) (holding parental use of corporal punishment not per se unreasonable where a teenager was doing poorly in school, expressing an interest in gangs, and repeatedly lying to her parents; parents tried to change her behavior through the use of noncorporal punishment; parents warned they would use corporal punishment; and mother could not use her hand because of a previous injury so used a wooden spoon); *State v. Matavale*, 166 P.3d 322, 324–26, 338, 350 (Haw.

To turn to a second example, the movement for universal prekindergarten also reflects the pragmatic method. When seeking to expand access, advocates framed the question in concrete, specific terms focused on child well-being by asking whether prekindergarten improves academic performance during elementary school.<sup>279</sup> A strict focus on elementary-school performance shifts the emphasis away from broader, more politically contentious questions of whether children benefit from increased state spending. With the narrowly framed focus, empirical evidence thus played a central role in the movement.<sup>280</sup> This evidence helped ground the debate by clarifying the nature of the problem and evaluating the impact of potential solutions, with abundant research demonstrating the positive impact of prekindergarten on children's educational outcomes, at least for quality programs.<sup>281</sup>

Experimentation was also a core component of the movement. Rather than advocate for broad changes in state support of families, supporters of universal prekindergarten built the case from the ground up. Major foundations provided funding for demonstration projects, with the Pew Charitable Trusts and the Packard Foundation prioritizing universal preschool in the early 2000s.<sup>282</sup> Pew began by identifying receptive policymakers and advocacy groups willing to collaborate in

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2007) (holding that mother striking fourteen-year-old with various objects for repeatedly lying was protected parental discipline in criminal proceeding; noting especially that the mother wanted what was best for her child and was worried about the child's trajectory); *Willis v. State*, 888 N.E.2d 177, 179, 183 (Ind. 2008) (finding no criminal liability for a single mother with an eleven-year-old child with history of lying and stealing after the mother had spent two days considering disciplinary options and had used noncorporal methods before but without success); *State v. Lefevre*, 117 P.3d 980, 984–85 (N.M. Ct. App. 2005) (“Parents do not always act with calmness of mind or considered judgment when upset with, or concerned about, their children’s behavior. . . . Heat of the moment must not result in immoderate physical force . . . [but] an angry moment driving moderate or reasonable discipline is often part and parcel of the real world of parenting with which prosecutors and courts should not interfere.”).

<sup>279</sup> KIRP, *supra* note 140, at 73.

<sup>280</sup> *Id.* at 4–5, 50–72, 78–91, 160–61.

<sup>281</sup> See *id.* See generally Christina Weiland & Hirokazu Yoshikawa, *Impacts of a Prekindergarten Program on Children’s Mathematics, Language, Literacy, Executive Function, and Emotional Skills*, 84 CHILD DEV. 2112, 2125–27 (2013).

More generally, empirical evidence is a foundational part of family law. See Clare Huntington, *The Empirical Turn in Family Law*, 118 COLUM. L. REV. 227, 240–66 (2018). For a description of the benefits of and concerns with using empirical evidence in family law, see *id.* at 266–95, which identifies the benefits — such as helping the state act more effectively and efficiently, unmasking prejudice, and depoliticizing contentious battles — and the concerns, including familiar ones about reliability and translation by legal actors as well as more fundamental concerns about empirical evidence skewing decisionmaking by focusing attention on the outcomes of legal rules (not competing values), providing political cover for the value judgments that are made, and replicating historical discrimination against marginalized families. For an argument in favor of using empirical evidence in family law, see Elizabeth S. Scott, *In Defense of Empiricism in Family Law*, 95 NOTRE DAME L. REV. 1507, 1531–35 (2020), which argues that careful and sophisticated use of science by interdisciplinary teams of legal scholars and researchers has rightfully cemented the place of empirical evidence in family law.

<sup>282</sup> See KIRP, *supra* note 140, at 152, 158, 163–64.

several states and actively courted support from the business community.<sup>283</sup> The Packard Foundation concentrated its efforts in California and used many of the same strategies: funding demonstration programs; recruiting a broad range of supporters, from police chiefs to teachers' unions; and focusing on messaging.<sup>284</sup> Rigorous evaluation documenting the benefits of prekindergarten was a critical part of these early projects.<sup>285</sup> The foundations and their allies used the lessons and evidence from these early efforts and applied them more broadly, leading to investments across the country.<sup>286</sup>

Some experimentation in prekindergarten policy was serendipitous. Oklahoma became a leader partly by accident. A change in school financing formulas left some districts with additional money, which they used to fund prekindergarten programs.<sup>287</sup> After parents enrolled their children and saw the benefits firsthand, they began to support prekindergarten by a wide margin, advocating with school districts to continue the program, bringing the lived experience of families to the movement.<sup>288</sup>

Finally, the effort to expand prekindergarten relied on context-based decisionmaking, taking account of local politics and, especially, the resonance of messaging. And again, the movement deemphasized political ideology and instead focused on impact. As Oklahoma expanded prekindergarten around the state, for example, the movement avoided pronouncements about the proper role of government and instead focused on the effectiveness of preschool.<sup>289</sup> In Texas, advocates emphasized the evidence of cost savings, leading to greater support for prekindergarten.<sup>290</sup> Advocates and public actors in both states and elsewhere framed prekindergarten as a bipartisan issue.<sup>291</sup> In Oklahoma, for example, a Tulsa City Council member was quoted as saying: “‘This isn’t a liberal issue,’ . . . . ‘This is investing in our kids, in our future. It’s a no-brainer.’”<sup>292</sup>

As these examples demonstrate, convergence in contemporary family law reflects the central building blocks of the pragmatic method. In so many areas of family law, courts, policymakers, and advocates eschew ideology and instead focus on how a rule or policy might advance well-

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<sup>283</sup> See *id.* at 157–58, 162–63.

<sup>284</sup> See *id.* at 163–65.

<sup>285</sup> See *id.* at 160–61.

<sup>286</sup> See *id.* at 174–78.

<sup>287</sup> See *id.* at 182–83.

<sup>288</sup> See *id.* at 183–84.

<sup>289</sup> See *id.* at 183–86.

<sup>290</sup> See *id.* at 198–207. For evidence on the cost-effectiveness of preschool, see *id.* at 76–92, which summarizes research on this topic.

<sup>291</sup> See, e.g., *id.* at 199–200.

<sup>292</sup> Nicholas Kristof, Opinion, *Oklahoma! Where the Kids Learn Early*, N.Y. TIMES (Nov. 9, 2013), <https://www.nytimes.com/2013/11/10/opinion/sunday/kristof-oklahoma-where-the-kids-learn-early.html> [<https://perma.cc/7CDK-6LP5>] (quoting Skip Steele, Republican Tulsa City Council member).

being, particularly child well-being. Consistent with pragmatism, policymakers rely on empirical evidence, including the on-the-ground experiences of families affected by the laws and policies at issue. Emphasizing the experiences of families is one means for avoiding debates over ideals and ideology. With the recognition of multiparenthood, for example, rather than asking how many parents a child *should* have, pragmatic family law asks: How many parents *does* this child have?<sup>293</sup> By framing the questions this way, pragmatic family law directs attention to a family's needs and lived experience rather than political and social ideals and ideology. Finally, policymakers also employ context-based decisionmaking and proceed through experimentation, learning from prior experiences and adapting laws and policies accordingly.

(b) *Depolarization*. — Depolarization in areas such as the married women's property acts, illegitimacy, intimate partner violence, gestational surrogacy, open adoption records, marriage equality, and Medicaid expansion likewise coheres through the lens of the pragmatic method. The marriage equality movement, for example, faced the abstract ideal that marriage means a long-term relationship between a man and a woman.<sup>294</sup> In the 1980s, when advocates sought recognition through domestic partnerships and civil unions, they focused on concrete aspects of same-sex relationships, especially caregiving and economic interdependence.<sup>295</sup> During this period, a significant number of lesbians began to conceive and raise children, and advocates started arguing that same-sex relationships should be recognized to help protect children.<sup>296</sup> Gay and lesbian parenting as a lived experience thus became a central component of the marriage equality movement.<sup>297</sup> And again this debate centered on concrete harms to family and child well-being.<sup>298</sup> For

<sup>293</sup> See *supra* notes 134–39 and accompanying text.

<sup>294</sup> See *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971) (“The institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis.”), *appeal dismissed*, 409 U.S. 810, 810 (1972) (mem.) (dismissing the appeal “for want of substantial federal question”). For a full account of the success of marriage equality, see generally MICHAEL J. ROSENFELD, *THE RAINBOW AFTER THE STORM* (2021).

<sup>295</sup> See Douglas NeJaime, *Before Marriage: The Unexplored History of Nonmarital Recognition and Its Relationship to Marriage*, 102 CALIF. L. REV. 87, 117–21, 151 (2014) (describing the arguments made for and against recognition of relationships — usually domestic partnerships or civil unions — which centered primarily on the intimate bond between partners and their economic interdependency).

<sup>296</sup> See GEORGE CHAUNCEY, *WHY MARRIAGE?: THE HISTORY SHAPING TODAY'S DEBATE OVER GAY EQUALITY* 105–06 (2004). Many LGBTQ parents were already raising children, but typically the children were conceived in previous different-sex relationships. *Id.* The change in the 1980s was that lesbians began conceiving children within same-sex relationships. *Id.*

<sup>297</sup> For a full description, see KENJI YOSHINO, *SPEAK NOW: MARRIAGE EQUALITY ON TRIAL* 91–228 (2015); and Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 HARV. L. REV. 1185, 1196–240 (2016).

<sup>298</sup> See, e.g., Verified Complaint ¶¶ 14–120, *Goodridge v. Dep't of Pub. Health*, No. 01-1647-A (Mass. Super. Ct. May 7, 2002), 2001 WL 35920963 (listing numerous harms from nonrecognition, with an emphasis on the harms to children and the difficulty of caring for dependents without legal recognition).



example, Hillary and Julie Goodridge, two of the named plaintiffs in the landmark case establishing marriage equality in Massachusetts, alleged that after Julie gave birth, both she and their daughter had immediate complications, and yet Hillary had trouble seeing either of them in the hospital because she was not treated as a wife or mother.<sup>299</sup> Early commentators noted the benefits of advancing LGBTQ rights through family law cases, in part because it would focus courts on tangible harms experienced by real families.<sup>300</sup>

This emphasis on harms, well-being, and lived experience became more important after the Supreme Court held in 2003 that the state could not reflexively draw on traditional values and morality to regulate lesbians and gay men, at least in criminal law.<sup>301</sup> In the ensuing challenges to state marriage restrictions, the litigation centered children. Advocates seeking equality emphasized the importance of recognition to child well-being, and government actors defending restrictions contended that children are harmed when raised by same-sex parents.<sup>302</sup> Courts then evaluated these claims, typically rejecting the governments' arguments as unsubstantiated.<sup>303</sup> In two of the three cases on marriage

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<sup>299</sup> See *id.* ¶ 28. These kinds of allegations were standard in the filings challenging state marriage restrictions. See, e.g., Amended Petition for Declaratory Judgment and Supplemental Injunctive and Mandamus Relief ¶¶ 27–32, *Varnum v. Brien*, No. CV5965 (Iowa Dist. Ct. Aug. 30, 2007), 2006 WL 4803848; Verified Complaint ¶¶ 14–92, *Kerrigan v. State*, 909 A.2d 89 (Conn. Super. Ct. July 12, 2006) (No. CV-04-4001813), *rev'd sub nom.* *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008).

<sup>300</sup> See William B. Rubenstein, *The Myth of Superiority*, 16 CONST. COMMENT. 599, 608–09 (1999).

<sup>301</sup> *Lawrence v. Texas*, 539 U.S. 558, 571 (2003) (noting that “for centuries there have been powerful voices to condemn homosexual conduct as immoral” but that “[t]he issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law”).

<sup>302</sup> For a full description, see YOSHINO, *supra* note 297, at 91–228; for a description of the bench trials in cases challenging marriage restrictions, which thoroughly investigated the basis for this claim about harm and found no credible evidence, see Huntington, *supra* note 281, at 245–49. The defenders also argued that only different-sex couples need marriage because only these couples might procreate accidentally. See Edward Stein, *The “Accidental Procreation” Argument for Withholding Legal Recognition for Same-Sex Relationships*, 84 CHI.-KENT L. REV. 403, 403–04 (2009).

<sup>303</sup> See, e.g., *Varnum v. Brien*, 763 N.W.2d 862, 896, 899–901 (Iowa 2009) (applying intermediate scrutiny to Iowa’s marriage restriction and rejecting the governmental justification that different-sex parents provide children with the optimal childrearing environment). *But see* *Hernandez v. Robles*, 855 N.E.2d 1, 7, 10–12 (N.Y. 2006) (applying rational basis review to New York’s marriage restriction and finding that the legislature could rationally decide that different-sex couples are more likely than same-sex couples to procreate and could seek to channel these families into marriage; finding that the legislature could rationally conclude that it is better for a child to grow up with a man and a woman as the two parents; citing no evidence but rather stating that “[i]ntuition and experience suggest that a child benefits from having before his or her eyes, every day, living models of what both a man and a woman are like,” *id.* at 7). In one of the final lower court decisions striking down different-sex marriage requirements, Judge Posner wrote that “more than unsupported conjecture that same-sex marriage will harm heterosexual marriage or children or any other

equality that reached the Supreme Court, trial courts conducted lengthy bench trials, developing rich factual records that largely turned on the empirical evidence about parenting and that established no harm to children from being raised by same-sex parents.<sup>304</sup>

Throughout the movement, there was predictable pushback, as with the spate of laws and state constitutional amendments in 2004, and California's Proposition 8 battle in 2008.<sup>305</sup> Opposition to marriage equality was based on abstract ideals and values,<sup>306</sup> but the pragmatic method continued to influence the debate. Experience-based learning played a pivotal role in the success of the marriage equality movement. In a slow process, LGBTQ individuals and couples were increasingly visible and integrated in society, moving social views from moral condemnation to acceptance, and helping pave the way for legal recognition of same-sex relationships.<sup>307</sup> And in a virtuous cycle, as legal recognition became more common, marriages between same-sex couples became increasingly familiar and, in turn, accepted. In Massachusetts, for example, after the high court required the state to open marriage to same-sex couples,<sup>308</sup> state legislators advanced an amendment to the state constitution that would have limited marriage to different-sex couples.<sup>309</sup> Constitutional amendments in Massachusetts must go through two legislative sessions,<sup>310</sup> and in the interim, sponsors and others

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valid and important interest of a state is necessary to justify discrimination on the basis of sexual orientation" and that "the grounds advanced by Indiana and Wisconsin for their discriminatory policies are not only conjectural; they are totally implausible." *Baskin v. Bogan*, 766 F.3d 648, 671 (7th Cir. 2014).

<sup>304</sup> See *DeBoer v. Snyder*, 973 F. Supp. 2d 757, 761–68 (E.D. Mich. 2014), *rev'd*, 772 F.3d 388 (6th Cir. 2014), *rev'd sub nom. Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 932–38 (N.D. Cal. 2010), *aff'd sub nom. Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *vacated and remanded sub nom. Hollingsworth v. Perry*, 570 U.S. 693 (2013). In the third case, *Windsor v. United States*, 833 F. Supp. 2d 394 (S.D.N.Y. 2012), *aff'd*, 699 F.3d 169 (2d Cir. 2012), *aff'd*, 570 U.S. 744 (2013), the trial court did not conduct a trial and instead granted summary judgment to the plaintiff. See *id.* at 396.

<sup>305</sup> See generally Kowal, *supra* note 171 (describing this history).

<sup>306</sup> See Melissa Murray, *Marriage Rights and Parental Rights: Parents, the State, and Proposition 8*, 5 STAN. J. C.R. & C.L. 357, 366–72 (2009) (describing the arguments made in favor of Proposition 8 in California, which asserted the rights of different-sex couples not to have their personal and religious beliefs about marriage infringed upon and claimed the California judiciary had overreached in deciding this issue for the people).

<sup>307</sup> See Elizabeth S. Scott & Robert E. Scott, *From Contract to Status: Collaboration and the Evolution of Novel Family Relationships*, 115 COLUM. L. REV. 293, 344–59 (2015) (describing the growing acceptance of same-sex couples and attributing it to multiple forces, including the AIDS epidemic and the growth of lesbian couples raising children together, both of which highlighted the vulnerabilities of same-sex couples created by a lack of legal recognition); Huntington, *supra* note 2, at 618–24 (describing the relationship between acting like a family and being recognized as a family).

<sup>308</sup> Opinions of the Justices to the Senate, 802 N.E.2d 565, 571–72 (Mass. 2004).

<sup>309</sup> Proposal for a Legislative Amendment to the Constitution Relative to the Affirmation of Marriage, H. 3190, 2004 Leg., 183d Sess. (Mass. 2004), *reprinted in* COMMONWEALTH OF MASS., THE JOURNAL OF THE SENATE OF THE YEAR 2004, at 1533 (2004).

<sup>310</sup> *The Initiative Petition Process*, MASS.GOV, <https://www.mass.gov/info-details/the-initiative-petition-process> [https://perma.cc/2MSL-6WN2].

changed their minds, citing their experience with marriage equality in the intervening year.<sup>311</sup> In short, experience with same-sex couples changed attitudes, which then allowed for legal change and a solidification of the changed views.

In all these ways, the marriage equality movement was successful, at least in part, because the debate moved away from abstract ideals of what marriage means and instead focused on family and child well-being — first establishing there was no harm flowing from being raised by same-sex parents and then by establishing the harm from *non*recognition of parents' relationships. Empirical evidence played a critical role in persuading courts, and experience-based learning was important for the public and government actors. The Supreme Court's decision in *Obergefell* recognizing marriage equality swept broadly in the language of rights-based equality,<sup>312</sup> but without the evidence base and recognition of the lived experience of same-sex families, equality arguments would have found much less fertile ground.<sup>313</sup> Moreover, since the Supreme Court's decision in 2015, support for marriage equality has continued to grow, including among groups previously opposed.<sup>314</sup>

Medicaid expansion equally illustrates pragmatism's role in depolarizing an issue, with similar methodological elements at work: a focus on needs, not ideals; experience-based learning; context-based decisionmaking; and experimentation. Initial resistance to expansion in conservative states was based on political ideology, with policymakers vociferously asserting that the federal government had no power to strong-arm states in this manner.<sup>315</sup> But after the Supreme Court struck down the ACA's

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<sup>311</sup> See Pam Belluck, *Massachusetts Rejects Bill to Eliminate Gay Marriage*, N.Y. TIMES (Sept. 15, 2005), <https://www.nytimes.com/2005/09/15/us/massachusetts-rejects-bill-to-eliminate-gay-marriage.html> [<https://perma.cc/AG4F-EDPD>] (quoting Massachusetts Senators Brian Lees and James Timilty). This experience-based learning continued through the stories of the plaintiffs in high-profile cases, who were carefully chosen to represent an acceptable and sympathetic face of marriage equality. See Cynthia Godsoe, *Perfect Plaintiffs*, 125 YALE L.J.F. 136, 141–52 (2015).

<sup>312</sup> See Clare Huntington, *Obergefell's Conservatism: Reifying Familial Fronts*, 84 FORDHAM L. REV. 23, 25–30 (2015) (critiquing this aspect of the opinion and arguing it should have been decided on narrower grounds).

<sup>313</sup> See Huntington, *supra* note 281, at 248–49.

<sup>314</sup> See *supra* note 173 and accompanying text.

<sup>315</sup> See, e.g., Pam Bondi, Opinion, *The States Versus ObamaCare*, WALL ST. J. (Jan. 5, 2011, 12:01 AM), <https://www.wsj.com/articles/SB10001424052748703384504576055652391100520> [<https://perma.cc/L54K-SGVA>] (op-ed by then-Attorney General of Florida) (“No legislation in our history alters the balance of power between Washington and the states so much as ObamaCare does.”); Timothy Donley, *McMaster, 12 Others File Suit Against National Health Care Law*, WMBF NEWS (Mar. 23, 2010, 7:55 PM), <https://www.wmbfnews.com/story/12189187/mcmaster-12-others-file-suit-against-national-health-care-law> [<https://perma.cc/DU54-SZWY>] (quoting then-South Carolina Attorney General Henry McMaster as saying that the Affordable Care Act threatened “personal freedom, state sovereignty, and constitutional law”); Aly Van Dyke, *Kansas, Missouri Political Forces Begin Pushing Back on Health Care Reform*, KAN. CITY BUS. J. (Jan. 12, 2011, 3:41 PM), <https://www.bizjournals.com/kansascity/news/2011/01/12/kansas-missouri-health-care-reform.html> [<https://perma.cc/S2K4-7R9F>] (quoting then-Kansas Attorney General Derek Schmidt as saying that the dispute around the Affordable Care Act was a “historic defining of the relationship among our federal government, the states, and the liberty of individual American citizens”).

mandatory-expansion provision in *National Federation of Independent Business v. Sebelius*<sup>316</sup> (*NFIB*), politicians in many of the same states soon showed a willingness to focus on the health care needs of their low-income residents rather than ideology.<sup>317</sup> It helped that states had increased bargaining power in the wake of *NFIB*, giving states an opportunity to expand Medicaid on their own terms.<sup>318</sup> The Obama Administration was willing to cut almost any deal, granting many waivers.<sup>319</sup> And these efforts reflected context-based decisionmaking, with Kathleen Sebelius, President Obama's Secretary of the Department of Health and Human Services (and former Kansas governor), taking a bespoke approach to bargaining, working individually with states resisting expansion rather than approaching them as a unified group.<sup>320</sup>

Experience-based learning also played a significant role in shifting policy. Citizens communicating their on-the-ground experiences of receiving health care to government actors helped fundamentally change the politics of public funding.<sup>321</sup> In 2017, when Congress threatened to repeal the ACA after President Trump took office, voters came out in force to support the ACA, motivated in particular by Medicaid expansion.<sup>322</sup> Vocal support from individuals who had experienced the benefits of Medicaid expansion led some Republican senators to oppose the repeal of the ACA and galvanized Republican and Democratic governors to send a joint letter urging Congress not to repeal the law.<sup>323</sup> The politics surrounding the ACA had shifted from being toxic in 2010 to the point that, by 2017, the prospect of cutting back on Medicaid was politically untenable.<sup>324</sup> Put in the language of pragmatism, individuals experienced health care through expanded Medicaid and then insisted that government actors continue the coverage. And in some states where government officials refused to expand Medicaid, citizens took the lead

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<sup>316</sup> 567 U.S. 519 (2012).

<sup>317</sup> For a detailed account, see Gluck & Scott-Railton, *supra* note 192, at 539–42.

<sup>318</sup> See Gluck & Huberfeld, *supra* note 197, at 1752–53.

<sup>319</sup> See *id.* at 1733–34 (“[B]ecause the Obama Administration adopted a very long time horizon — the administration’s basic goal was to get the ACA entrenched and fix it later — states . . . achieved significant victories in their federalism negotiations. . . . Both sides viewed themselves victorious.”); see also *id.* at 1740 (“[T]he third wave . . . showcased [the Department of Health and Human Services]’s highly pragmatic approach to getting as many states to expand Medicaid eligibility as possible. Convincing a state to opt in, even with a waiver that deviated from the ACA as originally envisioned, was a critical step toward achieving the statute’s goal of near-universal coverage.”).

<sup>320</sup> See *id.* at 1740.

<sup>321</sup> See Gluck & Scott-Railton, *supra* note 192, at 540–42.

<sup>322</sup> See *id.*

<sup>323</sup> See *id.*

<sup>324</sup> See *id.* at 558–59 (describing the politics in 2017–2019 and noting “[t]his is a shift that has occurred as a result of the ACA as lived facts on the ground — benefits doled out, healthcare systems irrevocably changed, new constituencies created. These lived experiences have evolved into new understandings of rights. . . . But what has changed is more than the view that popular benefits cannot be taken away; it is, rather, a view of what people now think a healthcare system should be.” (emphasis omitted)).

through ballot initiatives, focusing on the concrete need of access to health care.<sup>325</sup>

Finally, experimentation was critical to Medicaid expansion. After *NFIB*, a few red states, including Indiana, under then-Governor Pence, and Arkansas, negotiated favorable agreements with the federal government to tailor Medicaid expansion.<sup>326</sup> This made it easier and more politically palatable for other red states to follow suit, but it also meant that states could learn from one another's experience: if one state negotiated a particular waiver, such as allowing it to privatize services or exclude coverage for certain services, subsequent states would negotiate similar or improved waivers, often tailored to each state's needs.<sup>327</sup> As a result, more states that initially resisted expansion slowly began to shift.<sup>328</sup>

As with most issues, the process of depolarization is not linear, and agreement is not complete. Some states continue to resist Medicaid expansion, and in states that expanded through ballot initiative, some

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<sup>325</sup> See Christopher Brown, *Medicaid Expansion Ballot Measures Brewing in Three More States* (1), BLOOMBERG L. (Jan. 26, 2021, 10:29 AM), <https://news.bloomberglaw.com/health-law-and-business/medicaid-expansion-ballot-measures-brewing-in-three-more-states> [https://perma.cc/N3AG-XEUY] (describing the successful ballot initiatives in Idaho, Maine, Missouri, Nebraska, Oklahoma, and Utah; noting that supporters are also pushing for ballot initiatives in Florida, Mississippi, and South Dakota); *Status of State Medicaid Expansion Decisions: Interactive Map*, *supra* note 198 (describing the successful ballot initiative in South Dakota in November 2022); Gluck & Scott-Railton, *supra* note 192, at 566–67 (describing these efforts and noting that the “grassroots, nonpartisan campaigns involving intensive community outreach [were] often spearheaded by individuals who had not previously been politically active”). Some aspects of the grassroots campaign drew on the tools of pragmatism, *see id.* at 567 (“The campaigns . . . consistently emphasized the stories of individuals who would gain coverage if the measures passed. One overarching strategy was to put a human face to the idea that no people should be left out of healthcare coverage because they cannot afford it.” (footnotes omitted)), although it also invoked ideals and identity:

These initiatives sometimes articulated the moral importance of Medicaid expansion in a traditionally conservative register; pro-expansion Republicans worked to depict Medicaid expansion — once pilloried as the worst kind of socialism — as not an exclusively Democratic issue. As one Republican legislator in Idaho put in: “Idaho is a conservative, Christian and right-to-life state, and Medicaid expansion fits right in with our morals and values we have.”

*Id.* at 567 (footnotes omitted) (quoting Phil Galewitz, *Republican Gun Store Owner and Legislator Campaigns for Medicaid Expansion in Idaho*, NPR (Oct. 23, 2018, 5:01 AM), <https://www.npr.org/sections/health-shots/2018/10/23/659576261/republican-gun-store-owner-and-legislator-campaigns-for-medicaid-expansion-in-id> [https://perma.cc/GN3U-2UF7]).

<sup>326</sup> See Gluck & Huberfeld, *supra* note 197, at 1737–38, 1741–42.

<sup>327</sup> See *id.* at 1733 (“[S]tates like Arkansas and Indiana became red-state thought leaders by pushing unconventional waiver elements and, in the process, taught other states how to negotiate and what could be gained. A clear learn-and-response pattern materialized, resulting from these negotiations within states, among states, and between states and the federal government.” (footnote omitted)); Gluck & Scott-Railton, *supra* note 192, at 519–20 (describing the waivers).

<sup>328</sup> See Gluck & Huberfeld, *supra* note 197, at 1733.

government actors have worked to limit expansion.<sup>329</sup> But, overall, the expansion efforts reflect the elements of pragmatism.<sup>330</sup>

(c) *Nonpartisan Pluralism*. — Finally, pragmatism is a methodological through line in the nonpartisan pluralism evinced in functional parenthood, pregnancy protections, state-level EITCs, and other aspects of family law. With functional parenthood, for example, parentage laws traditionally embodied abstract ideals and dominant norms, grounded in marriage and biogenetics.<sup>331</sup> In the late twentieth and early twenty-first centuries, judges and lawmakers increasingly invoked the functional parent doctrine and similar rules to address the needs of children.<sup>332</sup> Courts imposed support obligations on men who had held themselves out as fathers of nonbiological children but subsequently decided not to pay child support; and courts recognized relationships between children and primary caregivers who were not legal parents, such as grandparents.<sup>333</sup> As same-sex parenting became more common in the 1980s and 1990s, courts applied the doctrine to protect relationships between children and same-sex partners of biological parents.<sup>334</sup> In each of these contexts, nonrecognition of the parent-like relationship threatened child well-being: a man would not be responsible for providing for the child, depriving the child of economic support; and the child's relationship with a grandparent or same-sex partner acting like a parent would be vulnerable to disruption.

An empirical study by Professors Courtney Joslin and Douglas NeJaime of hundreds of state court decisions on functional parenthood from the last four decades supports the connection between the doctrine

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<sup>329</sup> See *Status of State Action on the Medicaid Expansion Decision*, KAISER FAM. FOUND. (Feb. 16, 2023), <https://www.kff.org/health-reform/state-indicator/state-activity-around-expanding-medicaid-under-the-affordable-care-act> [<https://perma.cc/34AG-3RXF>]. For example, in Missouri, despite a successful ballot initiative, both the governor and state legislature tried to limit expansion before the Supreme Court of Missouri ruled that the ballot initiative was constitutional. *Id.*; see *Doyle v. Tidball*, 625 S.W.3d 459, 465 (Mo. 2021).

<sup>330</sup> The other examples of depolarization in this Article also reflect the elements of pragmatism. The regulation of intimate partner violence, for example, started with an ideological view of private families. It then recognized the need to protect women from abusive husbands. And now there is a consensus that the law should prohibit intimate partner violence, even if there is also disagreement on the different approaches. See *supra* notes 152–55 and accompanying text. Similarly, when the Supreme Court determined that legitimacy classifications should be subject to intermediate scrutiny, the Court did not wade into the acceptability of nonmarital childbearing. The Court did, however, accept the reality that nonmarital births occur and determine that children should not be punished for the conduct of their parents. See *Mathews v. Lucas*, 427 U.S. 495, 505 (1976); *Trimble v. Gordon*, 430 U.S. 762, 770 (1977). The other examples of depolarization in this Article follow a similar trajectory.

<sup>331</sup> See NeJaime, *supra* note 25, at 2266–67 (describing these bases for legal parenthood).

<sup>332</sup> See Joslin & NeJaime, *supra* note 15 (manuscript at 16–17, 17 n.86) (describing this history and citing cases expanding the recognition of caregiver relationships in multiple states, including Ohio, Oklahoma, and West Virginia).

<sup>333</sup> See *id.*

<sup>334</sup> See Strauss, *supra* note 200, at 911, 931.

and the goal of promoting child well-being.<sup>335</sup> The study found that most electronically published cases of functional parenthood involve non-nuclear families, including stepparents and partners who came into a child's life sometime after the birth and relatives, especially grandparents, caring for a child, often after parental death or incapacitation.<sup>336</sup> The study found that courts make fine-grained distinctions that reflect the children's lived reality with caregivers, often ratifying family forms that depart significantly from the heteronormative ideal.<sup>337</sup> Joslin and NeJaime conclude that courts use the doctrine to promote child well-being by protecting relationships between children and their caregivers, making the lives of children more stable.<sup>338</sup>

Taking a pragmatic approach, the functional parenthood doctrine embodies on-the-ground observations by legal actors, advocates, and families. When family court judges recognize functional parents, they are basing their decisions on granular observations about what is happening in the lives of the families in the courtroom.<sup>339</sup> By hearing directly from affected families, judges center the lived experience of children and their caregivers and eschew ideology about the primacy of nuclear families, instead ratifying the family forms they observe.<sup>340</sup> In this way, courts see the concrete problem of children without a parent and respond by listening to and learning from the experience of families, crafting context-based solutions.

That states across the political spectrum have enacted some form of a pregnant workers fairness act likewise reflects pragmatism at work.<sup>341</sup> In Indiana, for example, rather than engage in ideological debates about the role of government regulation in the workplace, advocates framed the issue in smaller-bore, practical terms: the concrete needs of pregnant women and the benefits to women, children, and business from clear

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<sup>335</sup> See Joslin & NeJaime, *supra* note 15 (manuscript at 31–43) (describing the methodology for finding and analyzing the 669 electronically available cases from 1980 to 2021 in thirty-four jurisdictions).

<sup>336</sup> See *id.* (manuscript at 44–45) (describing the identity of the person who would be recognized as a functional parent, including, in thirty-six percent of cases, relatives, usually grandparents); *id.* (manuscript at 79) (noting that functional parent cases typically involve “famil[ies] devising parental care arrangements in the face of economic insecurity, substance use disorders, health challenges, and instability”); *id.* (manuscript at 45–46) (noting that only eleven percent of cases involve an “intended parent,” *id.* (manuscript at 45), defined as a person who planned with another person to conceive a child through assisted reproductive technology and raise the child together).

<sup>337</sup> See *id.* (manuscript at 83–88).

<sup>338</sup> See *id.* (manuscript at 11) (“[O]ur data lend support to arguments in favor of functional parent doctrines on child-centered grounds. Our study shows how the doctrines are applied by courts to preserve relationships between children and their primary caregivers. In doing so, judicial application of the doctrines routinely makes children’s lives more stable and secure, not less.” (footnote omitted)); see also Huntington & Scott, *supra* note 37, at 1412, 1416 (explaining that stability in the relationship between a child and parent or caregiver is a foundational principle in family law, resting on abundant empirical evidence and understood to further child well-being).

<sup>339</sup> See Joslin & NeJaime, *supra* note 15 (manuscript at 95–99) (describing these cases).

<sup>340</sup> See *id.*

<sup>341</sup> See Widiss, *supra* note 213, at 1144–49.

rules.<sup>342</sup> To bring business leaders on board, advocates emphasized the uncertainty of an employer's liability under existing law and the benefits of clarifying legal obligations.<sup>343</sup> Advocates framed the issue in terms that resonated for many different groups: pro-business, pro-equality, and pro-family, assembling a broad-based coalition from both parties.<sup>344</sup> And supporters pointed to similar legislation from other red states, such as Kentucky and South Carolina,<sup>345</sup> although they also developed an Indiana-specific strategy, accounting for that state's politics.<sup>346</sup>

In short, as with convergence and depolarization, the pragmatic approach to family law decision- and policymaking downplays debates about ideals, ideology, and first principles and instead focuses on the impact of a rule or policy on family and child well-being. It frames the question about well-being in concrete, specific terms. And it reflects efforts to draw on lived experience and empirical evidence to make arguments that take account of context — factual, social, and political — and tailor solutions accordingly.<sup>347</sup>

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<sup>342</sup> See *id.* at 1147; see also *id.* at 1147–49 (noting that the Indiana law was ultimately watered down, requiring only that employers consider a request for a reasonable accommodation and not retaliate for the request, but also noting that this partial success may have helped lay the groundwork for bipartisan support by Indiana's congressional representatives for a federal law requiring reasonable accommodations).

<sup>343</sup> See *id.* at 1147.

<sup>344</sup> See *id.* at 1149.

<sup>345</sup> *Id.* at 1146.

<sup>346</sup> See *id.* at 1146–47.

<sup>347</sup> This Article does not address all aspects of family law. Due to space constraints and the complexity of the issues, I set aside the family regulation system for future work. I briefly note, however, that there are several developments in the field that reflect pragmatism. The growth of kinship foster care was highly contested in the 1980s and 1990s, see AMY JANTZ ET AL., URB. INST., *THE CONTINUING EVOLUTION OF STATE KINSHIP CARE POLICIES 1–5* (2002), <https://www.urban.org/sites/default/files/publication/60296/310597-The-Continuing-Evolution-of-State-Kinship-Care-Policies.PDF> [<https://perma.cc/Q97G-FB4R>], but based on strong support from empirical research and the lived experience of children and families, see Information Memorandum from U.S. Dep't of Health & Hum. Servs., Admin. for Child. & Fams., to State and Tribal Agencies Administering or Supervising the Administration of Title IV-E of the Social Security Act 2 (Dec. 29, 2020), <https://www.acf.hhs.gov/sites/default/files/documents/cb/im2008.pdf> [<https://perma.cc/W5E6-6XVK>], kinship foster care now includes more than a third of all foster care placements, CHILD.'S BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., *THE AFCARS REPORT 1* (2022), <https://www.acf.hhs.gov/sites/default/files/documents/cb/afcars-report-29.pdf> [<https://perma.cc/LL3R-7993>]. Moreover, this expansion happened not through rights-based claims to family placements but instead through changes to federal law that encouraged state agencies to be more flexible about issues like expedited licensing and licensing flexibility. See Information Memorandum from U.S. Dep't of Health & Hum. Servs., *supra*, at 4–5; Rob Geen, *The Evolution of Kinship Care Policy and Practice*, FUTURE CHILD., Winter 2004, at 130, 137–39. The decline in congregate care has followed empirical evidence and lived experience. CHILD.'S BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., *A NATIONAL LOOK AT THE USE OF CONGREGATE CARE IN CHILD WELFARE 1–11* (2015), [https://www.acf.hhs.gov/sites/default/files/documents/cb/cbcongregatecare\\_brief.pdf](https://www.acf.hhs.gov/sites/default/files/documents/cb/cbcongregatecare_brief.pdf) [<https://perma.cc/2YLK-Z739>]. And the expansion of subsidized guardianship, which includes kinship guardianship, has followed a similar path. See Cynthia Godsoe, *Parsing Parenthood*, 17 LEWIS & CLARK L. REV. 113, 145–48 (2013). But these reforms also illustrate the limits of



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Without being overly reductionist, the point of this section is that the patterns of convergence, depolarization, and nonpartisan pluralism display deep similarities in their methodological approach to widely divergent aspects of family law. Consistent with the fallibility tenet of pragmatism, this account is a hypothesis intended to prompt further exploration. There are numerous issues for future consideration, set out briefly below.

As an initial matter, scholars can and should consider alternative explanations for the patterns.<sup>348</sup> For any given example of pragmatic family law, there may be another way to explain the change in law and policy, whether it is the interest convergence in the married women's property acts<sup>349</sup> or the policy diffusion in Medicaid expansion.<sup>350</sup> But an alternative account for the overall patterns would need to apply across the examples of convergence, depolarization, and nonpartisan pluralism, and it would need to address the particular elements of family law, including the core commitment to child well-being and the strong reliance on standards rather than rules.

Another question for future consideration concerns the conditions that encourage — or thwart — convergence, depolarization, and nonpartisan pluralism. Identifying the pragmatic method invites an interdisciplinary conversation about these conditions. For example, each issue faces its own political economy. Each issue faces a set of social constraints. And so on. An in-depth exploration of these factors will enrich the understanding of the possibilities of pragmatism in family law.

Next, there is a question about causality, especially for depolarization: which comes first, the pragmatic method or the depolarization, and how do the two interrelate? The account above suggests a dialectic, as illustrated by marriage equality.<sup>351</sup> As noted, the growing visibility of same-sex couples led to increasing social acceptance. Social acceptance made it possible for initial recognition of relationships through domestic

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pragmatic family law, leading to marginal reforms that do not address the fundamental problems of removing too many children from their families, especially Native American and Black children. See DOROTHY ROBERTS, *TORN APART* 8–11, 23 (2022); Clare Huntington, *The Child Welfare System and the Limits of Determinacy*, 77 *LAW & CONTEMP. PROBS.*, no. 1, 2014, at 221, 231–41.

<sup>348</sup> Some of these explanations may well be consistent with pragmatism, even if they also offer additional nuance. See, e.g., Cass R. Sunstein, Commentary, *Incompletely Theorized Agreements*, 108 *HARV. L. REV.* 1733, 1735–36 (1995) (describing a model of incompletely theorized agreements and explaining that it is easier for people to agree on outcomes in particular cases and the accompanying low-level principles than it is for them to agree on overarching principles because it is easier for people to figure out what to do than to figure out what they think).

<sup>349</sup> See *supra* note 71 and accompanying text.

<sup>350</sup> See Craig Volden, Commentary, *Policy Diffusion in Polarized Times: The Case of the Affordable Care Act*, 42 *J. HEALTH POL., POL'Y & L.* 363, 366–70 (2017).

<sup>351</sup> See *supra* notes 294–315 and accompanying text. For a detailed study of marriage equality, which underscores the elements of the pragmatic method, especially lived experience and empirical evidence, see ROSENFELD, *supra* note 294, at 1–16.

partnerships and civil unions. Familiarity with this family form then created an opportunity for society-wide, experience-based learning, with people who had not previously known same-sex families experiencing this family form, whether through family members, the community, popular culture, or media stories. Simultaneously, social scientists were conducting research on the outcomes of children raised by same-sex parents, which created an evidence base for advocacy and court decisions.

Throughout this process, many factors were at play in helping family law move from polarization to convergence on marriage equality, but the pragmatic method had a central role. Initially, the two sides were dug in across an ideologically based divide, and views were defended in absolute terms based on political ideology, abstract ideals about values, tradition, and similar kinds of arguments. Then, fact-based considerations about family well-being came to the fore, showing that the law needed to change to enhance family well-being. This empirical basis helped undercut the ideologically based views. There was pushback in response, but consensus was possible through the tools of pragmatism: moving away from ideals and instead focusing on a granular question of family well-being, and relying on experience-based learning, empirical evidence, experimentation, and contextualized decisionmaking. This is but one example of the interrelationship between pragmatism and depolarization, and future scholarship should consider the question of causality across examples.

A related question is about the methods for fortifying the dialogue that is central to the pragmatic method. Centering lived experience requires close attention to process. Family law scholars should seek to identify the processes that foster this kind of engagement around child and family well-being, at the level of individual families and more broadly.<sup>352</sup>

A final question concerns the role of institutions in driving polarization and encouraging pragmatism. The above account touches on some of these issues and Part III returns to them as well, but there is clearly a need for more study of the different roles of courts, legislatures, political parties, professional organizations, and other institutions. This inquiry should examine, for example, the relative capacities of legislatures and courts to draw on lived experience, use empirical evidence, and so on. It should also look to new ideas for encouraging institutional development. It might be possible, for example, to have an independent children's bureau that examined empirical evidence and made recommendations about policies that would promote well-being. And scholars will need to grapple with the politicization not only of courts but also of facts themselves.

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<sup>352</sup> For two accounts of this kind of process, see generally CHRISTOPHER K. ANSELL, *PRAGMATIST DEMOCRACY* (2011); and ARCHON FUNG, *EMPOWERED PARTICIPATION* 173–97 (2004).

In short, this Article's account of pragmatic family law lays the groundwork for future scholarship that grapples with fine-grained differences in the examples as well as overarching issues. The point of this Part is that pragmatism is a core component of convergence, depolarization, and nonpartisan pluralism, even if pragmatism is also an incomplete account in important ways. There is no singular story, but pragmatic family law is a through line in the examples, and future investigation of both the method and the context will be fruitful. Moreover, as the next Part argues, identifying this methodological commonality is *useful*, generating larger lessons for family law in this time of polarization.

### III. LESSONS OF PRAGMATIC FAMILY LAW

William James captured the essence of pragmatism by asking about the "cash-value" of an idea.<sup>353</sup> In his words: "[W]hat concrete difference will [an idea] being true make in any one's actual life?"<sup>354</sup> Assuming, then, that pragmatism underlies the patterns of convergence, depolarization, and nonpartisan pluralism, what insights does this generate for scholars, government actors, and advocates seeking to improve child and family well-being in the current political climate?

This Part identifies several lessons. To begin, crystallizing pragmatic family law as a distinct approach to decision- and policymaking highlights its utility in advancing well-being for all families, and it encourages legal actors and advocates to use the method more intentionally. It also invites scholars to weigh the advantages of this approach against others, notably rights-based litigation and values-based debate. Further, identifying pragmatism as a distinct approach underscores its limitations. It does not dismantle family law's system of privatized dependency. And although it has improved the well-being of children and families of color, it has done so obliquely, without naming and explicitly addressing racial inequities. Finally, looking forward, pragmatism can recalibrate family law doctrine to mitigate concerns about indeterminacy and provide direction for institutional reform. The Part closes with case studies of two polarizing issues: one perennial site of conflict (child support orders for low-income parents) and one emerging flashpoint (parental notification of a child's expression of gender identity at school). The case studies show the promise — and limitations — of the pragmatic method.

#### A. *The Place of Pragmatism in Family Law*

To begin to answer James's question, explicitly recognizing pragmatism in family law emphasizes that the method can advance well-being

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<sup>353</sup> JAMES, *Pragmatism's Conception of Truth*, *supra* note 225, at 200.

<sup>354</sup> *Id.*

while helping lower the political temperature. It encourages legal actors and advocates to use the tool more consciously. And it invites scholars to debate the relative merits of this approach as compared with rights-based litigation and discourse, and values-based debate.<sup>355</sup> A full accounting of the three approaches will have to wait for future investigation, by myself and other scholars, but this and the next section sketch initial views.

As Part II demonstrated, the pragmatic method can lead to substantial advances in child and family well-being. The functional parenthood doctrine creates stability in the lives of many children. More than half a million same-sex couples who live together are currently married.<sup>356</sup> As a result of Medicaid expansion, twenty-one million more low-income adults have access to health care than before the ACA.<sup>357</sup> And the EITC transfers billions of dollars to low-wage workers every year.<sup>358</sup>

Further, the pragmatic method achieves these advances without triggering political conflagration. Polarization tends to sacrifice family law's longstanding commitment to child well-being in favor of ideology and political gain. The pragmatic method helps avoid this dynamic. Divides within family law are genuine and bring important views and values to light. Pragmatic family law can channel these disagreements productively by employing a granular, contextualized, experience-centered approach that focuses on specific, concrete questions that address core aspects of family and child well-being. Pragmatic family law can help defuse contestation in high-stakes debates. Moreover, the approach does not prioritize uniformity for its own sake. Given the diversity of the United States, the cultural and political values inherent in family law, and the largely decentralized institutional structure of family law, pluralism is inevitable and often desirable.<sup>359</sup> But pragmatism in

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<sup>355</sup> For an example of this kind of comparison, albeit not in family law, see William H. Simon, *Solving Problems vs. Claiming Rights: The Pragmatist Challenge to Legal Liberalism*, 46 WM. & MARY L. REV. 127 (2004). Professor Simon describes legal liberalism, and especially its focus on a “[v]ictim [p]erspective,” large institutions, and rights, *id.* at 133–38, and compares it to legal pragmatism, which adopts a “[c]itizen [p]erspective,” emphasizes broad participation by the public, and prioritizes solutions to concrete problems, *id.* at 173–81.

<sup>356</sup> See LAQUITTA WALKER & DANIELLE TAYLOR, U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, SAME-SEX COUPLE HOUSEHOLDS: 2019, at 2 (2021), <https://www.census.gov/content/dam/Census/library/publications/2021/acs/acsbr-005.pdf> [<https://perma.cc/S48V-BUN5>] (reporting 568,110 same-sex married couples living together in the United States in 2019).

<sup>357</sup> See Press Release, U.S. Dep't of Health & Hum. Servs., New Reports Show Record 35 Million People Enrolled in Coverage Related to the Affordable Care Act, With Historic 21 Million People Enrolled in Medicaid Expansion Coverage (Apr. 29, 2022), <https://www.hhs.gov/about/news/2022/04/29/new-reports-show-record-35-million-people-enrolled-in-coverage-related-to-the-affordable-care-act.html> [<https://perma.cc/MVR7-VKMP>].

<sup>358</sup> See *Statistics for Tax Returns with the Earned Income Tax (EITC)*, *supra* note 188.

<sup>359</sup> Lawmakers today face “a complex field of intense disagreement” on issues related to reproductive rights and gender politics. Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 385 (2007); *see id.* at 384–85. In

family law can foster the development of doctrine and policy without triggering the harms of polarization.

One nuance in this context is that although policymakers and advocates will not argue against *child* well-being,<sup>360</sup> when policy questions turn to adults, consensus can be harder. Government programs ensure that almost all children receive health care, for example, but before Medicaid expansion (and still in the nonexpanding states), Medicaid eligibility rules excluded many adults, despite the benefits to children of parental access to health care.<sup>361</sup> In pragmatic family law, then, to the extent decisionmakers use the method to anchor a doctrine or program serving adults to the broader goal of child well-being, the pragmatic approach is more likely to be successful.

Notwithstanding pragmatic family law's admirable track record, legal actors, advocates, and scholars should be clear-eyed that the approach will not fundamentally change law or society. Functional parenthood undermines traditional notions of parenthood and family, but many examples of pragmatic family law do not have similarly disruptive effects. Marriage equality sought full citizenship for same-sex couples, but it did not challenge the traditional institution of marriage or dislodge its place as the perceived pinnacle of commitment.<sup>362</sup> Moreover, marriage equality has not necessarily led to greater acceptance of queer families that do not fit the dominant norm,<sup>363</sup> and it is unlikely to lead to greater acceptance of other types of relationships,

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some areas of regulation, state-based experimentation is desirable, either leading to national change, as with marriage equality, or reflecting differences around the country. See Vivian E. Hamilton, *Expressing Community Values Through Family Law Adjudication*, 77 UMKC L. REV. 325, 325 (2008) (arguing that family court judges can and should play a role — albeit cabined — in expressing community values, at least in disputes between private parties). For a critical account of pluralism in family law, noting its limitations, see generally Erez Aloni, *The Puzzle of Family Law Pluralism*, 39 HARV. J.L. & GENDER 317 (2016).

<sup>360</sup> See Sean Hannon Williams, *Sacred Children, Taboo Tradeoffs, and Distorted Discourses* 1–2 (Jan. 31, 2023) (unpublished manuscript), <https://ssrn.com/abstract=4163131> [<https://perma.cc/8AMZ-CK4L>] (arguing that child well-being is “sacred,” and that no legislator or advocate will claim to be acting contrary to this value).

<sup>361</sup> See *Who's Eligible for Medicaid?*, U.S. DEP'T HEALTH & HUM. SERVS. (Dec. 8, 2022), <https://www.hhs.gov/answers/medicare-and-medicaid/who-is-eligible-for-medicaid/index.html> [<https://perma.cc/KZZ7-YY2P>]; *supra* notes 123–25 and accompanying text (identifying these benefits, including improved family functioning from parental access to mental health and substance abuse treatment and improved economic stability).

<sup>362</sup> See generally KATHERINE FRANKE, *WEDLOCKED* (2015); *id.* at 2–3 (arguing that the “freedom to marry” . . . inaugurates a new set of hard questions about what it means to be liberated into a social institution that has its own complicated and durable values and preferences”).

<sup>363</sup> See Kris Franklin & Noa Ben-Asher, *How to Bring Your Kids Up Queer: Family Law Realism, Then and Now*, 55 FAM. L.Q. 311, 314–15 (2022) (arguing that the legal recognition of same-sex couples does not extend more broadly to queer families that do not fit the dominant norm and calling for “family law realism” — that is, “having legal structures recognize the reality and lives of queer people,” *id.* at 315).

such as polyamory.<sup>364</sup> Similarly, Medicaid expansion helped fill critical gaps, but the United States still does not have universal health care, and nearly one in nine people under age sixty-five remains uninsured.<sup>365</sup>

Another way of stating these limitations is that pragmatic family law operates within existing political constraints, which narrow the range of options available to policymakers. Pragmatic family law may help shift the Overton window, with Medicaid expansion, for example, reflecting a changing view of the state's responsibility for health care. But pragmatism has not yet led to a sea change in the state's stance towards supporting families. Unlike other wealthy countries, the United States predicates public policy on the understanding that families will care for young, old, and disabled members of a family, and that they will do so with limited government support.<sup>366</sup> Ending this privatization of dependency would require fundamental changes to law and policy, which the pragmatic method — standing alone — is unlikely to achieve. Notwithstanding annual multi-billion-dollar transfers, for example, the EITC does not change the broader economic conditions that keep millions of low-wage workers in dangerous jobs earning poverty or near-poverty wages.<sup>367</sup> The EITC and similar programs lift millions of children out of poverty, but only by a marginal amount.<sup>368</sup> Moreover, the EITC and related programs do not address the many other barriers to work and economic stability, such as the need for subsidized childcare.

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<sup>364</sup> For a discussion of the relationship between legal recognition and nontraditional family forms, see Scott & Scott, *supra* note 307, at 313–15. Professors Scott and Scott argue that novel families can gain social and legal acceptance if they satisfy social-welfare criteria, especially interdependence and long-term mutual care, and that LGBTQ families and advocates were able to make this showing through what the authors identify as collaborative processes. However, they predict that polyamorous relationships will not be able to make a similar showing.

<sup>365</sup> See AIDEN LEE ET AL., U.S. DEP'T OF HEALTH & HUM. SERVS., HEALTH COVERAGE CHANGES UNDER THE AFFORDABLE CARE ACT: END OF 2021 UPDATE, Issue Brief HP-2022-17, at 7 fig.6 (2022), <https://aspe.hhs.gov/sites/default/files/documents/77ba3e9c99264d4f76dd662d3b2498co/aspe-ib-uninsured-aca.pdf> [<https://perma.cc/KP2C-YWVM>].

<sup>366</sup> See, e.g., MAXINE EICHNER, THE FREE-MARKET FAMILY 19–42 (2020) (describing this regime and noting that the United States and other wealthy countries spend approximately the same amount of money on children, but in the United States, much of this investment comes from families, rather than the state, leading to vastly unequal outcomes for children and placing an enormous burden on families); Rachel Minkin & Juliana Menasce Horowitz, *Parenting in America Today: 1. Gender and Parenting*, PEW RSCH. CTR. (Jan. 24, 2023), <https://www.pewresearch.org/social-trends/2023/01/24/gender-and-parenting> [<https://perma.cc/Z596-8XJF>] (describing the gendered caregiving in different-sex couples, with women shouldering considerably more responsibility, although further noting that perceptions about the discrepancy differ by gender).

<sup>367</sup> Alstott, *supra* note 185, at 287 (“[T]he EITC — in anything like its present form — does not, and cannot, ‘make work pay,’ because it operates in a legal context that creates deep disadvantage for low-wage workers and their children.”); *id.* at 289 (“[T]he EITC is part and parcel of the harsh and meager U.S. welfare state. It pays a wage subsidy that is too small to lift workers to a decent living standard, and it conditions payments on continuous employment — an aspiration that is unrealistic for many in the low-wage workforce.”).

<sup>368</sup> Thomson et al., *supra* note 189, at tbl.3.3 (noting that on average, the EITC and related programs lift children from somewhat below the supplemental poverty measure (SPM) to 130% of the SPM).

If policymakers relied on empirical evidence about the benefits of programs like subsidized childcare and listened to the lived experience of parents working low-wage jobs, that recognition would translate into a sea change of support for low-income families. But in practice, it does not.<sup>369</sup> Instead, pragmatism runs headlong into deeply engrained politics. In other words, the pragmatic method is a useful tool but has not, thus far, overcome other forces maintaining our system of privatized dependency.

Whatever its advantages and limitations, pragmatic family law does not, nor should it, wholly displace other approaches to decision- and policymaking, most notably rights-based litigation and discourse, and values-based debates. Some aspects of family law, including sexual liberty and a parent's right to the care and custody of a child, are rooted in the Constitution.<sup>370</sup> Litigation and discourse about these rights may be polarizing, but they also set the basic terms for family life. Pragmatic family law should not supplant rights-based litigation protecting these and other constitutional rights.

Similarly, pragmatic family law does not obviate the need to talk about values — at least in some contexts. For most family law issues, enhancing child and family well-being is an overarching goal, but well-being is not the only value at play. In the fight for marriage equality, for example, courts and advocates focused on child well-being, but they also acknowledged equality and dignity. Indeed, the district court judge in *Obergefell* recognized the danger of overemphasizing child well-being. After finding no evidence that children benefit from being raised by married different-sex parents, the court concluded that even if this were true, carrying the argument to its logical conclusion would lead the state to restrict marriage for demographic groups correlated with poor outcomes for children, such as low-income families, a proposition the court called an “absurdity.”<sup>371</sup>

Pragmatism, rights, and values are thus alternative approaches, but they can also be complementary. With the end of federal constitutional protection for abortion,<sup>372</sup> advocates for the right to abortion are filing

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<sup>369</sup> Or at least not yet. For a more optimistic account, see Farhad Manjoo, Opinion, *Biden Has Helped the Quiet Revolution of Giving People Money*, N.Y. TIMES (Sept. 23, 2022), <https://www.nytimes.com/2022/09/23/opinion/columnists/child-tax-credit-basic-income.html> [https://perma.cc/EW73-FBLD]. Manjoo argues that the United States is slowly warming to the idea of guaranteed income for low-income families, especially through mechanisms like the Child Tax Credit.

<sup>370</sup> See *Lawrence v. Texas*, 539 U.S. 558, 571 (2003); *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925).

<sup>371</sup> *DeBoer v. Snyder*, 973 F. Supp. 2d 757, 771 (E.D. Mich. 2014), *rev’d*, 772 F.3d 388 (6th Cir. 2014), *rev’d sub nom. Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

<sup>372</sup> See *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2242 (2022).

claims under state constitutions,<sup>373</sup> and advocates who oppose abortion are bringing fetal personhood claims in state and federal courts.<sup>374</sup> In both contexts, debates will focus on rights and values, covering familiar ground: When does life begin? Should there be limits on a woman's autonomy over her reproductive capacities? How should legislatures balance the interests of the fetus (or unborn child, depending on a person's perspective) and the interests of the woman? And so on.

Even with this focus on rights and values, lawmakers must inevitably grapple with practical questions, such as how to write into laws restricting abortion exceptions for rape, incest, and the health of the pregnant woman.<sup>375</sup> Indeed, these considerations have slowed down legislative zeal in some states, at least temporarily.<sup>376</sup> In the words of a Republican state senator in Indiana who supports abortion restrictions, lawmakers before *Dobbs* had not “spent enough time on those issues, because . . . you didn't have to really get into the granular level . . . . But we're now there, and we're recognizing that this is pretty hard work.”<sup>377</sup> Shortly after he made that statement, Indiana enacted a law prohibiting most abortions,<sup>378</sup> so the challenges did not prevent the lawmakers from returning to ideology rather than recognizing nuance. But in general, writing legislation adds a new aspect to the debate: rather

<sup>373</sup> See, e.g., Complaint at 2, *Planned Parenthood of Sw. & Cent. Fla. v. State*, No. 2022-CA-912 (Fla. Cir. Ct. June 1, 2022) (seeking protection under the Florida Constitution); Complaint for Declaratory & Injunctive Relief at 1, *Jackson Women's Health Org. v. Dobbs*, No. 22-cv-739013 (Miss. Ch. June 27, 2022) (same, under the Mississippi Constitution); Realtors' Verified Complaint in Original Action for Writ of Mandamus at 24, *State ex rel. Preterm-Cleveland v. Yost*, 189 N.E.3d 820 (Ohio 2022) (mem.) (No. 2022-0803) (same, under the Ohio Constitution); *Planned Parenthood Great Nw., Haw., Alaska, Ind., Ky. v. State*, 522 P.3d 1132, 1147, 1161 (Idaho 2023) (rejecting argument that Idaho's constitution protects a fundamental right to abortion).

<sup>374</sup> See, e.g., Petition for Writ of Certiorari at 23, *Benson v. McKee*, 143 S. Ct. 309 (2023) (mem.) (seeking review of a state supreme court decision rejecting a claim based on fetal personhood handed down before the Supreme Court decided *Dobbs*: “In light of this Court's overruling of *Roe* and *Casey*, this Court should answer whether there is any gestational age where an unborn human being is recognized as ‘any person’ under the Fourteenth Amendment — with legally cognizable rights deserving of constitutional protection”). Advocates are also introducing bills in state legislatures. See, e.g., H.B. 704, 134th Gen. Assemb., Reg. Sess. § 1 (Ohio 2022) (“The state of Ohio shall recognize the personhood, and protect the constitutional rights, of all unborn human individuals from the moment of conception.”).

<sup>375</sup> See Mitch Smith & Julie Bosman, *With Roe Gone, Republicans Quarrel over How Far to Push Abortion Bans*, N.Y. TIMES (July 27, 2022), <https://www.nytimes.com/2022/07/27/us/indiana-abortion.html> [<https://perma.cc/PSM5-4VYD>] (describing debates in state legislatures about how to write the exceptions and noting that it has led to stalled bills).

<sup>376</sup> See *id.*; cf. Paul Waldman & Greg Sargent, Opinion, *Those Radical Antiabortion Strategies? They're Already Imploding*, WASH. POST (Sept. 22, 2022, 5:54 PM), <https://www.washingtonpost.com/opinions/2022/09/22/radical-anti-abortion-plans-republicans> [<https://perma.cc/7UU4-3KE5>] (describing Republican lawmakers scaling back prohibitions on abortion in the face of public opposition to draconian restrictions, such as a prohibition on out-of-state travel).

<sup>377</sup> See Smith & Bosman, *supra* note 375 (quoting State Senator Rodric Bray, an Indiana Republican).

<sup>378</sup> S. 1, 122d Gen. Assemb., 1st Spec. Sess. (Ind. 2022); see also *Members of the Med. Licensing Bd. v. Planned Parenthood Great Nw., Haw., Alaska, Ind., Ky., Inc.*, 195 N.E.3d 384 (Ind. 2022) (mem.) (upholding trial court's preliminary injunction against the law).



than fighting only over first principles, lawmakers also must address practicalities, cracking the door to the tools of pragmatic family law.<sup>379</sup>

The pragmatic method can similarly play a complementary role in the adjudication of constitutional claims. For example, when the Court held in *Plyler v. Doe*<sup>380</sup> that school districts must enroll undocumented children,<sup>381</sup> the decision stood on firm pragmatic ground: the need to educate children growing up in the United States regardless of their immigration status.<sup>382</sup> And as noted throughout this Article, *Obergefell* was possible largely because of the pragmatic work that had come before, with courts and other decisionmakers consulting empirical evidence and listening to lived experience.<sup>383</sup> As these examples demonstrate, the role of pragmatism in rights discourse is an area ripe for exploration by scholars.

In sum, recognizing the utility and place of the pragmatic method encourages legal actors and advocates to use the tool more consciously. Sometimes pragmatism replaces rights-based litigation and values-based debates altogether, and other times it plays a complementary role. Pragmatism is not the only — and in some contexts may not be the most effective — way to approach the many and varied questions posed by family law. But the method does have its place, especially in a politically polarized climate.

### B. Pragmatism and Racial Equity

Scholars have identified the many ways family law both creates and reflects racial inequities.<sup>384</sup> Focusing on the gap between Black and

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<sup>379</sup> Although she does not frame her argument in the language of pragmatism, Professor Carol Sanger has called for more consideration of lived experience in this area of regulation. See CAROL SANGER, ABOUT ABORTION, at xiii–xiv (2017) (arguing that an absence of conversation impoverishes our views about abortion and, in turn, impoverishes our democracy and that policymakers and ordinary citizens need a deeper and more nuanced understanding of women’s experiences with abortion to determine the proper regulation of the practice).

<sup>380</sup> 457 U.S. 202 (1982).

<sup>381</sup> *Id.* at 230.

<sup>382</sup> *Id.* at 222 (“The inability to read and write will handicap the individual deprived of a basic education each and every day of his life. The inestimable toll of that deprivation on the social, economic, intellectual, and psychological well-being of the individual, and the obstacle it poses to individual achievement, make it most difficult to reconcile the cost or the principle of a status-based denial of basic education with the framework of equality embodied in the Equal Protection Clause.”).

<sup>383</sup> See *supra* notes 311–14 and accompanying text.

<sup>384</sup> See KHIARA M. BRIDGES, REPRODUCING RACE 201–49 (2011) (describing how the deep intrusion of the state into the lives of low-income women of color is effectively a condition of receiving prenatal care); NANCY E. DOWD, REIMAGINING EQUALITY 42–50 (2018) (describing the impact of centuries of racial discrimination on child development and family well-being); MICHELE GOODWIN, POLICING THE WOMB 116–28 (2020) (describing the role of race and class in the incarceration of women and the ensuing impact on families); ROBERTS, *supra* note 347, at 85–124 (describing the role of race in creating the family regulation system); R.A. Lenhardt, *The*

white families,<sup>385</sup> manifestations of racial inequity include the stark overrepresentation of Black children in foster care,<sup>386</sup> an infant mortality rate for Black infants that is twice as high as for white infants,<sup>387</sup> a maternal mortality rate for Black women that is more than three times as high as for white women,<sup>388</sup> and a poverty rate for Black children that is two and a half times as high as for white children.<sup>389</sup>

Pragmatic family law has made some headway in addressing aspects of these problems. Consider the EITC. The poverty rate for Black children decreased from 49% in 1993 to 18% in 2019 — a similar percentage decrease as across other racial groups.<sup>390</sup> Many factors played a role in this historic drop, but the EITC was the single biggest government program reducing child poverty.<sup>391</sup> Given the overrepresentation of Black adults in the low-wage workforce,<sup>392</sup> the EITC

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*Color of Kinship*, 102 IOWA L. REV. 2071, 2074–77, 2088, 2097–106 (2017) (outlining the significant structural disadvantages facing families of color due to past and ongoing systems of inequality and inequity).

<sup>385</sup> This Article uses Black children to illustrate the limitations of pragmatic family law with respect to racial inequity, but there are similar disparities and inequities for other children and families of color. In future work, I intend to develop the benefits and limits of pragmatic family law for different groups of children, with more fine-grained attention to the differences among these groups. To give two examples, children of immigrants may not benefit from the EITC, *see* Dana Thomson et al., *Lessons from a Historic Decline in Child Poverty: Chapter 4. A Subgroup Analysis of Child Poverty Shifts*, CHILD TRENDS, <https://www.childtrends.org/publications/lessons-from-a-historic-decline-in-child-poverty-subgroup-analysis-of-child-poverty-shifts> [<https://perma.cc/4HPM-DJCW>], and Latinx children may benefit less from Medicaid expansion, *see* Michael Ollove, *Enrollment in Health Insurance Lags Among Latino Children*, PEW (June 24, 2021), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/06/24/enrollment-in-health-insurance-lags-among-latino-children> [<https://perma.cc/WR85-U8EF>].

<sup>386</sup> *See* CHILD.'S BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., CHILD WELFARE PRACTICE TO PREVENT RACIAL DISPROPORTIONALITY AND DISPARITY 2–3 (2021), [https://www.childwelfare.gov/pubPDFs/racial\\_disproportionality.pdf](https://www.childwelfare.gov/pubPDFs/racial_disproportionality.pdf) [<https://perma.cc/FR5X-2TM9>] (noting that Black children are 14% of the child population but 23% of the foster care population).

<sup>387</sup> *See Infant Mortality*, CTNS. FOR DISEASE CONTROL & PREVENTION (June 22, 2022), <https://www.cdc.gov/reproductivehealth/maternalinfanthealth/infantmortality.htm> [<https://perma.cc/L5WH-MCWP>] (noting that the rate of infant mortality, defined as death before a first birthday, is 10.6 deaths per 100,000 Black infants as compared with 4.5 for white infants).

<sup>388</sup> *See* Press Release, Ctrs. for Disease Control & Prevention, Racial and Ethnic Disparities Continue in Pregnancy-Related Deaths: Black, American Indian/Alaska Native Women Most Affected (Sept. 5, 2019, 1:00 PM) <https://www.cdc.gov/media/releases/2019/p0905-racial-ethnic-disparities-pregnancy-deaths.html> [<https://perma.cc/V63U-FN2S>] (noting that the rate of pregnancy-related deaths is 40.8 per 100,000 Black women as compared with 12.7 for white women).

<sup>389</sup> *See* Thomson et al., *supra* note 385 (calculating an 18% child poverty rate for Black children and 7% child poverty rate for white children and further noting that the percentage of children in poverty has decreased sharply over the last three decades, but the decline is even across racial groups, so a racial gap remains).

<sup>390</sup> *See id.* (documenting this decrease and noting that the poverty rate for Black children declined at approximately the same rate as for children in other racial groups).

<sup>391</sup> *See* Thomson et al., *supra* note 189, at tbl.3.4 (noting that of the different programs, the EITC has had the greatest impact on reducing child poverty).

<sup>392</sup> *See* MARTHA ROSS & NICOLE BATEMAN, BROOKINGS INST., METRO. POL'Y PROGRAM, MEET THE LOW-WAGE WORKFORCE 9 (2019), <https://www.brookings.edu/wp->

disproportionately benefits Black families.<sup>393</sup> Other examples of pragmatic family law also address the needs of Black families. Black women, who are at higher risk for pregnancy complications and maternal mortality,<sup>394</sup> are overrepresented in physically demanding jobs, like home health aide work,<sup>395</sup> and thus especially benefit from pregnant workers fairness acts. Medicaid expansion has decreased the health care coverage gap between Black and white adults.<sup>396</sup> Expanded access to prekindergarten has boosted the academic achievement of Black children, who, unlike children in other racial groups, show strong academic gains from prekindergarten even after controlling for quality of the program.<sup>397</sup> And the functional parenthood doctrine stands to disproportionately benefit Black children, who are more likely to live with a grandparent than are white children.<sup>398</sup>

It is notable, however, that advocates and policymakers generally have not framed these policies as efforts to address racial inequity. And framing the programs in such terms may well erode support. Polling shows that only one-third of the American public supports reparations

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content/uploads/2019/11/201911\_Brookings-Metro\_low-wage-workforce\_Ross-Bateman.pdf [https://perma.cc/AXF6-CM99] (“Both Latino or Hispanic and Black workers are overrepresented [in the low-wage workforce] relative to their share of the total workforce, while whites and Asian Americans are under-represented.”).

<sup>393</sup> See CHUCK MARR & YIXUAN HUANG, CTR. ON BUDGET & POL’Y PRIORITIES, WOMEN OF COLOR ESPECIALLY BENEFIT FROM WORKING FAMILY TAX CREDITS 1 (2019), <https://www.cbpp.org/sites/default/files/atoms/files/9-9-19tax.pdf> [https://perma.cc/CN7P-9F2Z] (noting that “21 percent of Black women receive the EITC, more than double the 9 percent share of white women who receive it” and that further, the average benefit is higher for Black women than white women); see also Nora Cahill & William G. Gale, *Narrowing the Racial Wealth Gap Using the EITC and CTC*, BROOKINGS INST. (Feb. 2, 2022), <https://www.brookings.edu/blog/how-we-rise/2022/02/02/narrowing-the-racial-wealth-gap-using-the-eitc-and-ctc> [https://perma.cc/7ESB-2Y7K] (noting that “[t]he EITC lowers income inequality between Black and white households by roughly 5 to 10% each year” but also noting that it may not reduce the racial wealth gap).

<sup>394</sup> See Press Release, Ctrs. for Disease Control & Prevention, *supra* note 388 (describing heightened risks of pregnancy and birth for mothers who are Black).

<sup>395</sup> See *Labor Force Statistics from the Current Population Survey*, U.S. BUREAU LAB. STAT. (Jan. 25, 2023), <https://www.bls.gov/cps/cpsaat11.htm> [https://perma.cc/KZ65-JYXB] (indicating that 87% of home health aides are women, and 32% are Black).

<sup>396</sup> JESSE CROSS-CALL, CTR. ON BUDGET & POL’Y PRIORITIES, MEDICAID EXPANSION HAS HELPED NARROW RACIAL DISPARITIES IN HEALTH COVERAGE AND ACCESS TO CARE 1 (2020), <https://www.cbpp.org/sites/default/files/atoms/files/10-21-20health2.pdf> [https://perma.cc/9BMV-XKSB].

<sup>397</sup> See Bartik & Hershbein, *supra* note 143, at 34–35, 37.

<sup>398</sup> GRETCHEN LIVINGSTON, PEW RSCH. CTR., AT GRANDMOTHER’S HOUSE WE STAY 6 (2013), [https://www.pewresearch.org/social-trends/wp-content/uploads/sites/3/2013/09/grandparents\\_report\\_final\\_2013.pdf](https://www.pewresearch.org/social-trends/wp-content/uploads/sites/3/2013/09/grandparents_report_final_2013.pdf) [https://perma.cc/CNY6-J6RH]; Nefertiti Austin, *Grandparents, Kin and Play Cousins: The Soul and Survival of Black Families*, N.Y. TIMES (July 9, 2020), <https://www.nytimes.com/2020/07/07/parenting/black-families-children-kin-grandparents.html> [https://perma.cc/MJZ9-YRRJ].

for descendants of enslaved people.<sup>399</sup> Thus, if advocates restyled the EITC as a racial equity payment program, views on the desirability of the subsidy would likely be polarized, and much support would likely evaporate.<sup>400</sup>

If the warping effect of race on policymaking needs any illustration, compare family law's responses to the opioid and crack epidemics. The opioid epidemic is largely understood as a problem facing white families,<sup>401</sup> and family law has used the pragmatic method to develop effective responses that promote child well-being.<sup>402</sup> Courts invoke the functional parenthood doctrine to ratify the living arrangement of children whose parents have died or are incapacitated from opioid use disorder, with Kentucky standing as the national leader.<sup>403</sup> And Congress has relied on lived experience, empirical evidence, and contextualized decisionmaking to pass legislation that supports families without moralizing about drug use. In 2016 and 2018, Congress enacted two important pieces of legislation that prioritized family preservation over foster care placement and increased funding for mental health and drug treatment services for parents.<sup>404</sup> Research on substance use disorder played a key

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<sup>399</sup> *UMass Amherst/WCVB Poll Finds Nearly Half of Americans Say the Federal Government Definitely Should Not Pay Reparations to the Descendants of Slaves*, U. MASS. AMHERST (Apr. 29, 2021), <https://www.umass.edu/news/article/umass-amherstwcvb-poll-finds-nearly-half> [<https://perma.cc/TR7H-8VXV>] (reporting the results of a nationwide survey, which found that “[n]early two-thirds of Americans and 90% of Republicans oppose the idea of providing reparations to the descendants of slaves”).

<sup>400</sup> I advance this argument as a predictive matter given the political landscape I describe in this Article. There is a compelling case for reparations. See, e.g., KATHERINE M. FRANKE, *REPAIR: REDEEMING THE PROMISE OF ABOLITION* 101–13 (2019); Ta-Nehisi Coates, *The Case for Reparations*, *THE ATLANTIC* (June 2014), <https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631> [<https://perma.cc/W4LK-GZXA>].

<sup>401</sup> See VICTORIA CHAU, *SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., U.S. DEP'T OF HEALTH & HUM. SERVS., THE OPIOID CRISIS AND THE BLACK/AFRICAN AMERICAN POPULATION: AN URGENT ISSUE*, PUB. NO. PEP20-05-02-001, at 3 (2020), <https://store.samhsa.gov/sites/default/files/pep20-05-02-001.pdf> [<https://perma.cc/T5JX-AJ4R>] (“Attention to this epidemic has focused primarily on White suburban and rural communities.”).

<sup>402</sup> See *supra* notes 25–30 and accompanying text. This pragmatic response is not uniform across family law. The main exception is criminal law, with prosecutors charging women using opioids (including white women) with the crime of fetal endangerment. See WENDY A. BACH, *PROSECUTING POVERTY, CRIMINALIZING CARE* 85–98 (2022) (describing this trend); Khiara M. Bridges, *Race, Pregnancy, and the Opioid Epidemic: White Privilege and the Criminalization of Opioid Use During Pregnancy*, 133 *HARV. L. REV.* 770, 803–13, 825–51 (2020) (describing the prosecution of white women who use opioids during pregnancy and theorizing these women's relation to white privilege). But the other aspects of the family law response to the opioid epidemic do reflect pragmatism.

<sup>403</sup> See *supra* note 35 and accompanying text.

<sup>404</sup> See Family First Prevention Services Act, Pub. L. No. 115-123, 132 Stat. 232 (2018) (codified as amended in scattered sections of 42 U.S.C.); *id.* § 50723, 132 Stat. at 248 (codified at 42 U.S.C. § 629g(f)). The remarks of Adrian Smith, a Republican House member from Nebraska, reflect numerous elements of the pragmatic method. After describing empirical evidence of the increase in foster care placements from opioid use, the representative stated:

role, reframing opioid use not as a moral failing but instead as a medical condition and the product of unscrupulous pharmaceutical companies.<sup>405</sup> This research also encouraged states to use Medicaid funding for drug treatment.<sup>406</sup>

By contrast, two decades earlier, the crack epidemic was framed as a problem facing Black families, and this led to a very different response. Public reaction to crack cocaine use pathologized Black mothers, with a moral panic about “crack babies.”<sup>407</sup> Prosecutors charged pregnant Black women with the crime of fetal endangerment.<sup>408</sup> And there were no systemic efforts to address the root causes of the epidemic or treat its impact compassionately.<sup>409</sup>

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We worked together across the aisle and across the Capitol. Inspired by a desire to improve outcomes for children, we knew we had to strengthen families, whether they are biological, foster, or adoptive. We remained steadfast to the questions we were hearing from former foster youth, such as, “Why did you take me away,” “Why didn’t you help my mom,” or “Why didn’t you help my dad?” Backed by research in the field, we set out to change the role of Federal taxpayer dollars in foster care and adoption. We wanted to reset the incentives and focus resources earlier, with upfront prevention services for substance abuse, mental health, and parenting for all families, so fewer children would have to experience additional trauma of being removed from his or her home.

*The Opioid Crisis: Implementation of the Family First Prevention Services Act (FFPSA): Hearing Before the Subcomm. on Hum. Res. of the H. Comm. on Ways & Means*, 115th Cong. 3 (2018) (statement of Rep. Adrian Smith, Chairman, Subcomm. on Hum. Res. of the H. Comm. on Ways & Means). Another Republican supporter, Representative Jackie Walorski of Indiana, stated, “I was proud to vote for the Family First Prevention Services Act because we needed to reframe the conversation and to put a greater emphasis on prevention rather than just treating problems as they happened and to verify that children were being placed in quality settings.” *Id.* at 25. Congress also allocated additional funding for prevention and treatment efforts. *See* Comprehensive Addiction and Recovery Act of 2016, Pub. L. No. 114-198, 130 Stat. 695 (codified in scattered sections of 21, 34, 38, and 42 U.S.C.).

<sup>405</sup> *See, e.g.*, ROBERT L. DUPONT, CHEMICAL SLAVERY: UNDERSTANDING ADDICTION AND STOPPING THE DRUG EPIDEMIC 17 (2018) (describing the chemical process behind addiction); BARRY MEIER, PAIN KILLER: AN EMPIRE OF DECEIT AND THE ORIGIN OF AMERICA’S OPIOID EPIDEMIC 175–76 (2018) (describing the choices of Purdue Pharma to continue promoting OxyContin despite clear evidence of its addictiveness and potential for harm).

<sup>406</sup> *See* LISA CLEMANS-COPE ET AL., URB. INST., STATE VARIATION IN MEDICAID PRESCRIPTIONS FOR OPIOID USE DISORDER FROM 2011 TO 2018, at 2–3 (2019), [https://www.urban.org/sites/default/files/publication/100817/2019.08.19\\_av\\_state\\_medicaid\\_rx\\_oud\\_final\\_v3\\_4.pdf](https://www.urban.org/sites/default/files/publication/100817/2019.08.19_av_state_medicaid_rx_oud_final_v3_4.pdf) [<https://perma.cc/Q3JL-WETV>].

<sup>407</sup> *See* LAURA E. GÓMEZ, MISCONCEIVING MOTHERS 3–4 (1997); GOODWIN, *supra* note 384, at 18–27, 88–91, 146, 164; ROBERTS, *supra* note 114, at 154–94; *see also* Editorial, *Slandering the Unborn*, N.Y. TIMES (Dec. 28, 2018), <https://www.nytimes.com/interactive/2018/12/28/opinion/crack-babies-racism.html> [<https://perma.cc/Q8GA-8VPP>] (“News organizations shoulder much of the blame for the moral panic that cast mothers with crack addictions as irretrievably depraved and the worst enemies of their children.”).

<sup>408</sup> *See* GOODWIN, *supra* note 384, at 34–35.

<sup>409</sup> *See* sources cited *supra* note 407. To give one more example of the warping effect of race on pragmatic policymaking, it is noteworthy that the states that still have not expanded Medicaid are overwhelmingly in the South, *see Status of State Medicaid Expansion Decisions: Interactive Map*, *supra* note 198, which is the region of the United States where Black Americans are most likely to live, *see* Christine Tamir et al., *Facts About the U.S. Black Population*, PEW RSCH. CTR. (Mar. 25, 2021), <https://www.pewresearch.org/social-trends/fact-sheet/facts-about-the-us-black-population> [<https://perma.cc/A7P5-HQWP>] (reporting that 56% of Black Americans live in the South, as compared with 17% in both the Northeast and the Midwest and 10% in the West).

In short, pragmatism in family law should work for all families, but race, racism, and deep divides about whether the United States should do more to address racial inequity are fundamental cleavages in the United States. This makes it significantly harder to use the pragmatic method to address the root causes of racial inequity in family law.

Given this fundamental challenge to the pragmatic method, one question is whether rights- and values-based approaches are more effective at addressing racial inequity in family law. Rights-based litigation has undoubtedly had some success in advancing racial equality, striking down antimiscegenation statutes and limiting the role of race in child custody disputes, for example.<sup>410</sup> But the Supreme Court typically does not address the impact of race unless a case involves explicit racial discrimination.<sup>411</sup> This is true as a matter of constitutional doctrine, with the Court not recognizing equal protection claims based on disparate impact,<sup>412</sup> and as a matter of judicial reasoning. When the Court struck down state statutes discriminating against nonmarital children, the Court did not engage with the anti-Black impetus behind many illegitimacy statutes.<sup>413</sup> And when the Court decided the Constitution does not protect the right to abortion, the Court did not address the differential impact on women of color.<sup>414</sup>

More generally, as important as rights are in family law, rights-based litigation has not addressed — and likely cannot address — many of the racial inequities that manifest in family law. Racial disproportionality and disparities in foster care, maternal and infant mortality, and poverty are largely the result of structural inequities, not intentional discrimination, and rights will likely have limited traction in redressing these problems.<sup>415</sup>

Approaching racial inequity in family law through a values-based debate that elevates considerations of justice and equality would surface the reality of structural inequity, but it, too, may not translate into structural change. Immediately following the murder of George Floyd in May 2020, many members of the public acknowledged racial inequity

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<sup>410</sup> See *Loving v. Virginia*, 388 U.S. 1, 11–12 (1967) (striking down Virginia’s antimiscegenation statute); *Palmore v. Sidoti*, 466 U.S. 429, 433–34 (1984) (reversing a court’s decision to award custody to a father because the white mother was in a relationship with a Black man).

<sup>411</sup> See Khiara M. Bridges, *The Supreme Court, 2021 Term — Foreword: Race in the Roberts Court*, 136 HARV. L. REV. 23, 24–25 (2022).

<sup>412</sup> *Washington v. Davis*, 426 U.S. 229, 248 (1976) (requiring intentional discrimination to establish a violation of the Equal Protection Clause).

<sup>413</sup> See *supra* note 148 and accompanying text.

<sup>414</sup> See *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2338 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting) (noting that the majority did not address the impact on women’s health and the differences by race); *id.* (“Experts estimate that a ban on abortions increases maternal mortality by 21 percent, with white women facing a 13 percent increase in maternal mortality while black women face a 33 percent increase.”).

<sup>415</sup> See GREENE, *supra* note 97, at 195–216 (describing the limits of constitutional rights, as adjudicated in the United States, to address structural inequities).

and expressed a willingness to tackle it.<sup>416</sup> But public support for these efforts quickly dissipated.<sup>417</sup>

Notwithstanding these challenges for pragmatism in the current political climate, the method still has an important, if perhaps aspirational, role to play. As W.E.B. Du Bois, Denise James, Cornel West, and other scholars of race have argued, pragmatism's call to learn from lived experience opens the door to understanding the role of race, gender, and other important aspects of identity in that experience.<sup>418</sup> Indeed, one of the core tenets of American pragmatism is listening to those most affected by a problem and learning from their experience.<sup>419</sup> This tool has the potential to reform aspects of family law that disproportionately affect families of color, such as the government's response to child abuse and neglect. Scholars have long decried the racial inequity of the family regulation system.<sup>420</sup> If the government centered the experience of families, this could transform the government's response to child abuse and neglect by focusing on the support that families themselves so often identify as welcome and needed.<sup>421</sup>

In sum, all approaches to addressing racial inequity face opposition. By centering lived experience, the pragmatic method provides the tools — if not the political will — for this essential work.

### C. *Recalibrating Doctrine and Reforming Institutions*

Armed with this understanding of the advantages and limitations of the method, an intentional approach to pragmatism in family law can help with the development of doctrine and the reform of institutions. Beginning with doctrine, scholars have long argued that family law's open-ended standards — described above<sup>422</sup> — give too much discretion to courts with too little guidance for application.<sup>423</sup> Scholars contend that the indeterminacy in standards such as the best interests of the child leads to unpredictable results that both imperil well-being and discourage efficient settlement negotiations.<sup>424</sup> Attempts to rein in

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<sup>416</sup> See Hakeem Jefferson & Victor Ray, *White Backlash Is a Type of Racial Reckoning, Too*, FIVETHIRTYEIGHT (Jan. 6, 2022, 6:00 AM), <https://fivethirtyeight.com/features/white-backlash-is-a-type-of-racial-reckoning-too> [<https://perma.cc/L97U-3TQY>].

<sup>417</sup> See *id.*

<sup>418</sup> See *supra* text accompanying notes 248–61.

<sup>419</sup> See *supra* notes 233–34 and accompanying text.

<sup>420</sup> See generally DOROTHY ROBERTS, *SHATTERED BONDS* 3–99 (2002).

<sup>421</sup> See ROBERTS, *supra* note 347, at 277–303 (envisioning this approach to working with families); Stephanie K. Glaberson, *The Epistemic Injustice of Algorithmic Family Policing* 60–64 (Nov. 7, 2022) (unpublished manuscript) (on file with the Harvard Law School Library) (arguing for this kind of radical listening).

<sup>422</sup> See *supra* note 268 and accompanying text (describing this discretion and providing two examples: the best interests of the child standard, used in numerous contexts including child custody disputes, and the equitable distribution standard, used to divide property upon divorce).

<sup>423</sup> See Mnookin, *supra* note 266, at 231.

<sup>424</sup> See *id.* at 277, 287–88.

discretion, by delegating authority to mental health experts, for example, have been largely ineffective.<sup>425</sup>

For all the reasons this Article has highlighted, the pragmatic method can help ground these and similar inquiries, adding structure to channel the discretion so that it is not simply a freewheeling tool of judicial power. Pragmatism underscores the goal of promoting core aspects of child and family well-being. The best interests standard implicates a child's attachment relationships and seeks to preserve these relationships following parental divorce or separation;<sup>426</sup> and the equitable distribution standard implicates the availability of resources for the family after divorce, giving a judge broad discretion to value the contributions of spouses who invested in caregiving rather than career advancement.<sup>427</sup> With these goals in mind, the method provides guidance for what courts should be doing in applying the standards: promoting these aspects of well-being, relying on lived experience, using empirical evidence, and making contextualized decisions. Pragmatism thus provides a template and set of expectations for judicial decisions. It coalesces the elements of a useful approach and directs decisionmakers to ground decisions using concrete tools rather than abstractions rooted in ideals and dominant norms.

Once we recognize the value of pragmatism in family law, it is easier to identify institutions that are implementing the method effectively and develop reforms for the institutions that are not implementing the method at all or doing so ineffectively.<sup>428</sup> Many institutions in family law already focus on child and family well-being, listen to lived experiences, rely on empirics, and engage in contextualized decisionmaking. Consider the experience of the American Law Institute (ALI) producing the *Restatement of Children and the Law*.<sup>429</sup> Restatements are written for courts, and they capture trends in the law and elevate underlying commonalities and rationales.<sup>430</sup> The process for producing restatements embodies pragmatism's commitment to learning from observation and building theory from granular on-the-ground observations.<sup>431</sup> Reporters review legal sources to identify through lines, then develop

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<sup>425</sup> See Elizabeth S. Scott & Robert E. Emery, *Gender Politics and Child Custody: The Puzzling Persistence of the Best-Interests Standard*, 77 *LAW & CONTEMP. PROBS.*, no. 1, 2014, at 69, 91–92.

<sup>426</sup> See GROSSMAN & FRIEDMAN, *supra* note 75, at 216–17 (illustrating how the best interests standard has developed over time to take into account such considerations).

<sup>427</sup> *Id.* at 199.

<sup>428</sup> See Huntington, *supra* note 42, at 413–19 (arguing for more institutional analysis in family law).

<sup>429</sup> RESTATEMENT OF CHILD. & THE L. (AM. L. INST., Tentative Draft No. 4, 2022).

<sup>430</sup> See *How ALI Works*, ALI ADVISER, <http://www.thealiadviser.org/how-ali-works> [https://perma.cc/PC6G-8QX3].

<sup>431</sup> See, e.g., Huntington & Scott, *supra* note 37, at 1436–37 (describing how the *Restatement of Children and the Law* has relied on research about how children react to interrogation to inform its doctrine in that area).



their final positions through iterative revisions that include opportunities for group learning.<sup>432</sup> Each black letter section proceeds through three layers of review and input.<sup>433</sup> Reporters meet regularly with advisers who specialize in the field — judges, academics, and practicing lawyers<sup>434</sup> — for input on early drafts and sharing of perspectives, and then each substantive section in the restatement is reviewed and discussed by the ALI Council and finally the full membership.<sup>435</sup> This process, with repeated opportunities for listening and learning from varying perspectives, is decidedly different from politicians and advocates using family law as a wedge issue to gain political power.

Additionally, an ALI principles project is written for legislatures, agencies, and other policymakers, and it is intended to reinforce desirable patterns or lay the groundwork for future changes.<sup>436</sup> It goes through a similar process to a restatement.<sup>437</sup> The first (and thus far only) principles project in family law was the 2002 *Principles of the Law of Family Dissolution*.<sup>438</sup> Some scholars initially criticized the *Principles*,<sup>439</sup> but more recent scholarship demonstrates that the *Principles* laid the groundwork for important changes in embracing a functional definition of the family, especially the doctrine of functional parenthood.<sup>440</sup>

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<sup>432</sup> See *How ALI Works*, *supra* note 430.

<sup>433</sup> See *id.*

<sup>434</sup> See, e.g., *Restatement of the Law, Children and the Law*, AM. L. INST., [https://www.ali.org/projects/show/children-and-law/#\\_participants](https://www.ali.org/projects/show/children-and-law/#_participants) [<https://perma.cc/THG5-G9U7>] (listing the advisers for the *Restatement of Children and the Law*).

<sup>435</sup> See *How ALI Works*, *supra* note 430.

<sup>436</sup> See *id.*

<sup>437</sup> See *id.*

<sup>438</sup> PRINCIPLES OF THE L. OF FAM. DISSOLUTION: ANALYSIS AND RECOMMENDATIONS (AM. L. INST. 2002).

<sup>439</sup> See Katharine T. Bartlett, *Prioritizing Past Caretaking in Child-Custody Decisionmaking*, 77 LAW & CONTEMP. PROBS., no. 1, 2014, at 29, 35–38 (describing and addressing criticism of the *Principles*, including claims that it had limited impact on courts and legislatures).

<sup>440</sup> See Linda C. McClain & Douglas NeJaime, *The ALI Principles of the Law of Family Dissolution: Addressing Family Inequality Through Functional Regulation*, in THE ALI AT 100: ESSAYS ON ITS CENTENNIAL (Andrew S. Gold & Robert W. Gordon eds., forthcoming 2023) (manuscript at 14–24) (on file with the Harvard Law School Library); see also Bartlett, *supra* note 439, at 34–35 (“[T]he Principles captured trends that had already begun[,] . . . [including] the emphasis on parents themselves resolving their conflicts over children . . . [and] substitut[ing] the traditional win–lose categories of custody (win) and visitation (lose) with terminology that reflects the assumption that both parents have a meaningful caretaking role.” (footnotes omitted)).

The Uniform Law Commission (ULC) plays a similarly constructive role in the development of family law, bringing together experts for a thoughtful, considered discussion. See *Joint Editorial Board for Uniform Family Law*, UNIF. L. COMM’N, <https://www.uniformlaws.org/committees/community-home?communitykey=1e989ea5-ad22-4777-9805-cb5f14cae658> [<https://perma.cc/WD2P-8NgV>]. Like the ALI, the ULC uses a multistage process intended to gather input and create consensus. See *About Us*, UNIF. L. COMM’N, <https://www.uniformlaws.org/aboutulc/overview> [<https://perma.cc/EDL3-LH46>]. The uniform laws are immensely influential in family law, providing nonpartisan model legislation on potentially polarizing issues, such as parentage rules and the economic rights of cohabitants. See, e.g., UNIF. PARENTAGE ACT (UNIF. L. COMM’N 2017);

This kind of approach holds lessons, in turn, for other institutions that have the potential to problem-solve in more pragmatic ways. One example is family court. Family court judges can and sometimes do make context-specific decisions based on granular observations that reflect the lived experiences of those before the court.<sup>441</sup> But family courts face overwhelming caseloads with limited resources.<sup>442</sup> Chaotic and impersonal, family courts too often dispense one-size-fits-all solutions, and they can be sites of racial, gender, and other forms of bias.<sup>443</sup> The mismatch between the social needs of litigants and the tools of family courts is an equally challenging problem, with individual litigation ill-suited to address the social problems underlying disputes, poverty first and foremost.<sup>444</sup> In other words, no amount of listening is going to change the limited resources and inadequate tools that family courts bring to cases that are often the result of deeply entrenched social problems.<sup>445</sup> There are no easy answers to these challenges, but pragmatic family law highlights the goal and provides a pathway for a specific kind of reform.

Finally, as legal actors and advocates use pragmatic family law more intentionally, they must attend to the question of comparative institutional advantage. The examples catalogued in Part I emerge from numerous legal institutions, including courts, legislatures, and agencies. But some institutions may be better able to embrace a pragmatic approach. Through case-by-case development, courts often operate under

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UNIF. COHABITANTS' ECON. REMEDIES ACT (UNIF. L. COMM'N 2021). The uniform laws promote contextualized decisionmaking by containing alternatives that states can adapt to their policy preferences. See, e.g., UNIF. PARENTAGE ACT, *supra*, § 613.

<sup>441</sup> See *supra* notes 332–41 and accompanying text (discussing the role of family courts in functional parenthood cases).

<sup>442</sup> See Colleen F. Shanahan et al., *The Institutional Mismatch of State Civil Courts*, 122 COLUM. L. REV. 1471, 1473, 1486, 1521 (2022).

<sup>443</sup> The literature documenting the serious issues with family court is voluminous, but for two examples, see Tonya L. Brito, David J. Pate, Jr. & Jia-Hui Stefanie Wong, “*I Do for My Kids*”: *Negotiating Race and Racial Inequality in Family Court*, 83 FORDHAM L. REV. 3027, 3029–30 (2015), which describes the many ways family courts, when imposing child support orders, do not account for the significant challenges stemming from structural inequality facing Black men, and Jane M. Spinak, *Romancing the Court*, 46 FAM. CT. REV. 258, 270 (2008), which explains:

[Judges] do not understand the psychological assistance provided by mental health professionals, they impose dispositions riddled with personal biases about how families should live their lives or how children should behave, they use ‘superficial devices’ (like an arm around the youngster’s shoulder) to show the children that they care, and they lack effective interactive skills for interviewing and explaining what is happening to the child.

<sup>444</sup> See Shanahan et al., *supra* note 442, at 1477–502 (using quantitative and qualitative data to support this argument); see also *id.* at 1521–28 (further contending that family courts are filling a policymaking role in addressing inequality because of the absence of action in the political branches).

<sup>445</sup> Another institutional design problem is the challenge of family courts using empirical evidence constructively. I have argued that family courts use empirical evidence in problematic ways, see Huntington, *supra* note 281, at 256–57, and have suggested several mechanisms for helping family courts identify and use reliable empirical evidence on issues such as adolescent development, intimate partner violence, and coparenting, see *id.* at 303–04.

the political radar, slowly developing doctrines like functional parenthood. And as compared with legislatures, agencies are often positioned to engage in contextualized decisionmaking, as the Department of Health and Human Services did when negotiating Medicaid waivers with states that initially resisted expansion.<sup>446</sup> By contrast, legislative work is often more visible and structurally reflects many of the problematic forces driving polarization, such as partisan gerrymandering.<sup>447</sup> Legal actors and advocates will need to address these and related questions in much greater depth. The point here is to begin to surface important institutional dynamics that might support a pragmatic method in an era of polarization, reserving in-depth exploration for future work.

#### D. Case Studies

To put the lessons of pragmatic family law into practice, this section considers two case studies. The first involves a recurring site of conflict: child support orders for low-income parents. And the second addresses an emerging flashpoint: school policies about informing parents of a child's gender identity at school. These case studies describe steps legal actors and advocates can take to intentionally deploy pragmatism, minimizing the risks of polarization and promoting child and family well-being. The case studies also underscore the limits of pragmatic family law in addressing the root causes of racial inequity and disrupting the system of privatized dependency.

1. *Child Support Orders for Low-Income Parents.* — Child support laws provide vital resources for children and are a significant part of family law and family life in the United States: one in five children, and one in three children living in poverty, is the subject of a child support order.<sup>448</sup> The system works relatively well for the three-quarters of families with a noncustodial parent who can afford to pay child support.<sup>449</sup>

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<sup>446</sup> See *supra* notes 319–20 and accompanying text. This kind of innovation may well be more challenging with the rise of a hard-edged nondelegation doctrine that requires Congress to provide greater granularity in policy choices. See, e.g., *Gundy v. United States*, 139 S. Ct. 2116, 2133–37 (2019) (Gorsuch, J., dissenting).

<sup>447</sup> See *supra* note 101 and accompanying text.

<sup>448</sup> HEATHER HAHN, KATHRYN EDIN & LAUREN ABRAHAMS, US P'SHIP ON MOBILITY FROM POVERTY, TRANSFORMING CHILD SUPPORT INTO A FAMILY-BUILDING SYSTEM, at iv (2018), [https://www.urban.org/sites/default/files/2022-05/child\\_support\\_paper.pdf](https://www.urban.org/sites/default/files/2022-05/child_support_paper.pdf) [<https://perma.cc/5BQH-7JSF>].

<sup>449</sup> See OFF. OF CHILD SUPPORT ENF'T, U.S. DEP'T OF HEALTH & HUM. SERVS., 2021 CHILD SUPPORT: MORE MONEY FOR FAMILIES, [https://www.acf.hhs.gov/sites/default/files/documents/ocse/2021\\_infographic\\_national.pdf](https://www.acf.hhs.gov/sites/default/files/documents/ocse/2021_infographic_national.pdf) [<https://perma.cc/6436-HPDH>] (stating that child support payments “lift[ed] 750,000 people out of poverty” in a single year); OFF. OF CHILD SUPPORT ENF'T, U.S. DEP'T OF HEALTH & HUM. SERVS., THE CHILD SUPPORT PROGRAM IS A GOOD INVESTMENT 6 fig.2, 7 fig.3 (2016), [https://www.acf.hhs.gov/sites/default/files/documents/ocse/sbtn\\_csp\\_is\\_a\\_good\\_investment.pdf](https://www.acf.hhs.gov/sites/default/files/documents/ocse/sbtn_csp_is_a_good_investment.pdf) [<https://perma.cc/FC95-UZLX>] (stating that, as of 2013, child support payments account for 10% of all income for custodial families living in

But the system poses significant challenges for the remaining families. Given the correlation between income, race, and marriage in the United States, problems with the child support system disproportionately impact unmarried, low-income families of color.<sup>450</sup>

The main problem is that child support laws do not account for the economic circumstances of low-income, noncustodial parents (overwhelmingly fathers<sup>451</sup>) and instead create unrealistic obligations.<sup>452</sup> Many of these men face significant hardships,<sup>453</sup> and yet when they do not pay, they face imprisonment<sup>454</sup> and other counterproductive measures, such as the loss of a driver's license.<sup>455</sup>

This failure to pay becomes a central point of contention between parents, complicating coparenting and making it harder for fathers to maintain relationships with their children.<sup>456</sup> Contrary to media portrayals of one-night stands and uncommitted fathers, unmarried parents typically conceive children within the context of an ongoing relationship.<sup>457</sup> Parents often stay together through the birth but then, due to the pressures of poverty and parenting, tend to end their relationship

poverty and 41% of all income for custodial families living in poverty who receive child support payments); OFF. OF CHILD SUPPORT ENF'T, U.S. DEP'T OF HEALTH & HUM. SERVS., FAMILY-CENTERED INNOVATIONS IMPROVE CHILD SUPPORT OUTCOMES 2, [https://www.acf.hhs.gov/sites/default/files/documents/ocse/family\\_centered\\_innovations.pdf](https://www.acf.hhs.gov/sites/default/files/documents/ocse/family_centered_innovations.pdf) [<https://perma.cc/AC3S-MEWT>] (acknowledging that the child support program "has been less effective for the approximately 25 percent of noncustodial parents who have a limited ability to pay child support").

<sup>450</sup> See Huntington, *supra* note 149, at 186–87, 205–09.

<sup>451</sup> See TIMOTHY S. GRALL, U.S. CENSUS BUREAU, CUSTODIAL MOTHERS AND FATHERS AND THEIR CHILD SUPPORT: 2007, at 2 (noting that in 2008, of all children living with one parent without the other parent in the home, 82.6% of the children lived with their mothers, as compared with only 17.4% living with their fathers). For more recent data, see Tonya L. Brito, *Nonmarital Fathers in Family Court: Judges' and Lawyers' Perspectives*, 99 WASH. U. L. REV. 1869, 1875 (2022), a study of child support orders in six counties that found that "the custodial parents were overwhelming[ly] mothers, and the defendants were most often low-income Black fathers." *id.*

<sup>452</sup> Brito, *supra* note 451, at 1872 ("The majority of these fathers are 'unable nonpayers,' meaning they lack the financial resources to pay the support they owe."); *cf.* Flexibility, Efficiency, and Modernization in Child Support Enforcement Programs, 81 Fed. Reg. 93,492 (Dec. 20, 2016) (to be codified at 42 C.F.R. pt. 433 and 45 C.F.R. pts. 301–05, 307–09) (describing this problem and efforts by the federal government to address it in a new regulation).

<sup>453</sup> In one study of unmarried fathers, at the time of the birth of the child, 45% did not have a high school diploma and 39% were formerly incarcerated. Sara S. McLanahan & Irwin Garfinkel, *Fragile Families: Debates, Facts, and Solutions*, in MARRIAGE AT THE CROSSROADS 147 tbl.8.1 (Marsha Garrison & Elizabeth S. Scott eds., 2012); *cf.* Robert I. Lerman, *Capabilities and Contributions of Unwed Fathers*, FUTURE CHILD., Fall 2010, at 63, 70.

<sup>454</sup> *Child Support and Incarceration*, NAT'L CONF. ST. LEGISLATURES (Feb. 1, 2022), <https://www.ncsl.org/research/human-services/child-support-and-incarceration.aspx> [<https://perma.cc/DB63-TCLU>] (describing state laws allowing the incarceration of a parent for nonpayment of child support).

<sup>455</sup> See OFF. OF CHILD SUPPORT ENF'T, U.S. DEP'T OF HEALTH & HUM. SERVS., *Chapter 5: Collecting Support*, in CHILD SUPPORT HANDBOOK 3 (2019) (listing possible administrative actions against a parent with an outstanding child support order, including loss of a driver's license).

<sup>456</sup> See KATHRYN EDIN & TIMOTHY J. NELSON, DOING THE BEST I CAN 111–12, 144, 165, 215 (2013).

<sup>457</sup> See *id.* at 37–45; *cf.* KATHRYN EDIN & MARIA KEFALAS, PROMISES I CAN KEEP: WHY POOR WOMEN PUT MOTHERHOOD BEFORE MARRIAGE 50–70 (2005).

relatively quickly.<sup>458</sup> Children almost invariably stay with the mother.<sup>459</sup> By issuing child support orders, the legal system creates an expectation that mothers will receive money, even if this promise is false.<sup>460</sup> Partly out of frustration that they have not been paid but also to avoid friction with their new partners, mothers tend to keep fathers away from their children.<sup>461</sup> Fathers, frustrated that the legal system looks to them for only financial support, often choose to stay away because their inability to pay makes them feel ashamed.<sup>462</sup> In short, the child support system penalizes fathers for not paying money they do not have, exacerbates tensions between parents, drives fathers away from their children, and does not increase funds available to children.<sup>463</sup>

Child support is not only a family problem but also a political problem. Nonpayment of child support is politically combustible: non-custodial parents unfurl the flag of fathers' rights, and legal actors and advocates respond with ringing denunciations of "deadbeat dads."<sup>464</sup> It is easy to demagogue this issue, but neither the rights-based approach of invoking fathers' rights or the values-based approach of emphasizing a parent's duty to provide for a child has had much success in directing more money to low-income families.<sup>465</sup> Nor have these approaches encouraged cooperation between coparents.<sup>466</sup> Instead, strict enforcement of child support orders has only hurt low-income fathers and their families, again with disproportionate consequences for Black and brown communities.<sup>467</sup>

Consider what might be different if lawmakers approached the issue using the tools of pragmatic family law. Rather than invoking the abstract ideal of making parents pay for their children, lawmakers would begin by defining goals in concrete, specific terms that emphasize core aspects of child well-being: economic support for low-income children,

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<sup>458</sup> See EDIN & NELSON, *supra* note 456, at 77–85.

<sup>459</sup> See *id.* at 209–10.

<sup>460</sup> See *id.* at 110–13.

<sup>461</sup> See *id.* at 169–70.

<sup>462</sup> Cf. *id.* at 208.

<sup>463</sup> See *id.* at 111–12, 144, 165, 215.

<sup>464</sup> See Deborah Dinner, *The Divorce Bargain: The Fathers' Rights Movement and Family Inequalities*, 102 VA. L. REV. 79, 138 (2016) (describing current debates and their historical roots: "[T]he image of the 'deadbeat dad' formed the counterpart in the Reagan era to that of the 'welfare queen.' Fathers' rights activists both critiqued the political discourse about 'deadbeat dads' and deployed it to their own ends. They argued that the fathers accused of irresponsibility toward their children were often not to blame. Instead, they were the victims of divorced mothers and a biased legal system that deprived fathers of visitation and custody rights.").

<sup>465</sup> See EDIN & NELSON, *supra* note 456, at 222–24. Nor has it resulted in greater protections for noncustodial parents. See, e.g., *Turner v. Rogers*, 564 U.S. 431, 448 (2011) (holding that a non-custodial parent facing incarceration for nonpayment of child support does not have an automatic right to appointed counsel under the Due Process Clause, especially if the proceeding had alternative procedural safeguards, such as "notice of the importance of ability to pay, fair opportunity to present, and to dispute, relevant information, and court findings").

<sup>466</sup> See EDIN & NELSON, *supra* note 456, at 169–70.

<sup>467</sup> See Huntington, *supra* note 149, at 186–87, 205–09.

an ongoing relationship between a child and the noncustodial parent, and a functioning relationship between coparents.

After identifying these goals, the pragmatic approach would use empirical evidence about the economic resources of low-income fathers as the starting point for policy. Policymakers would then consider the lived experience of custodial mothers and noncustodial fathers. As described above, these experiences tend to follow a pattern, and the legal response to child support must acknowledge the frustration of mothers and the dynamics that drive fathers away from their children. Turning to experimentation, policymakers would look at pilot programs that take a different approach to child support in low-income families to learn what efforts have worked. An EITC for noncustodial parents, for example, has had some success in channeling money to children<sup>468</sup> and improving coparenting relationships. And other countries guarantee child support payments when fathers cannot pay.<sup>469</sup> To this end, the Child Tax Credit could be increased by the outstanding amount of child support. In sum, by deemphasizing ideology and emphasizing core and concrete aspects of child well-being, pragmatic family law would focus the conversation on what works to channel resources to children, keep fathers in the lives of their children, and facilitate more cooperation between parents.<sup>470</sup>

Consistent with the limitations of the pragmatic method, this approach does not address the root causes of why low-income fathers have low earnings in the first place. It would not, for example, address the problem that low-income unmarried fathers are much less likely to graduate from high school and much more likely to have been incarcerated than married fathers. Nor would it address the problem of a lack of decent paying jobs for men with limited education<sup>471</sup> and a record of criminal legal involvement.<sup>472</sup> But it would help address the immediate

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<sup>468</sup> See AUSTIN NICHOLS ET AL., *URB. INST., THE NEW YORK NONCUSTODIAL PARENT EITC: ITS IMPACT ON CHILD SUPPORT PAYMENTS AND EMPLOYMENT*, at iii–iv (2012), <https://www.urban.org/sites/default/files/publication/25611/412610-The-New-York-Noncustodial-Parent-EITC-Its-Impact-on-Child-Support-Payments-and-Employment.PDF> [https://perma.cc/59F5-KT2Q].

<sup>469</sup> See DUNCAN LINDSEY, *THE WELFARE OF CHILDREN* 313–38 (2d ed. 2003) (describing these programs and the evidence that they are more effective at providing for children’s basic needs than enforcing child support against noncustodial parents who cannot pay). Although not highlighted throughout this Article, one benefit of the pragmatic method is that it encourages a broad search for relevant evidence, within the United States and from other countries.

<sup>470</sup> For a nuanced discussion of the complexities of child support orders and low-income nonmarital families, see Pamela Laufer-Ukeles, *The Children of Nonmarriage: Towards a Child-First Family Law*, 40 *YALE L. & POL’Y REV.* 384, 456–61 (2022).

<sup>471</sup> See DAVID AUTOR, *CTR. FOR AM. PROGRESS & THE HAMILTON PROJECT, THE POLARIZATION OF JOB OPPORTUNITIES IN THE U.S. LABOR MARKET: IMPLICATIONS FOR EMPLOYMENT AND EARNINGS* 4–7 (2010), <https://economics.mit.edu/sites/default/files/publications/the%20polarization%20of%20job%202010.pdf> [https://perma.cc/U8UT-X8ZY].

<sup>472</sup> Lucius Couloute & Daniel Kopf, *Out of Prison & Out of Work: Unemployment Among Formerly Incarcerated People*, *PRISON POL’Y INITIATIVE* (July 2018), <https://www.prisonpolicy.org/reports/outofwork.html> [https://perma.cc/FPX8-TNKQ].

problem of fathers unable to pay child support and the ensuing consequences for children and families.

Revamping the child support system for low-income families will face inevitable headwinds, especially around race and class stereotypes. Professor Tonya Brito's qualitative study of child support administrators and judges found that these legal actors generally subscribe to the "deadbeat-dad" understanding of noncustodial fathers who do not pay child support, without reflecting more broadly on the ability of fathers to pay.<sup>473</sup> These views tend to reflect racial stereotypes about irresponsible Black men.<sup>474</sup> And any reform effort in a state or local legislature is likely to face skepticism about reducing the financial obligations of noncustodial fathers. Pragmatic family law does not overcome these biases and entrenched views, but it does change the conversation by focusing on the concrete impact of policies. As with so many issues in family law, there is no easy answer, but pragmatic family law identifies the questions that need to be asked and the challenges that lie ahead. And it provides a path forward that can be more effective than invoking rights or focusing only on values.

2. *School Policies About Gender Identity and Parental Notification.* — A rapidly emerging, highly contentious issue in family law is whether schools must tell parents if a child identifies at school as a different gender from their sex assigned at birth.<sup>475</sup> Consistent with broader polarization around the legal treatment of trans people,<sup>476</sup> this issue has already become a battleground. In March 2021, the Virginia Department of Education, under then-Governor Northam, issued guidance for school districts on the treatment of transgender students.<sup>477</sup> The detailed guidance addressed issues including bullying, privacy, and access to facilities and school activities.<sup>478</sup> The guidance noted that if a child did not want their parents to know about their gender identity, schools should decide each case individually, working with the student

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<sup>473</sup> Brito, *supra* note 451, at 1876–81.

<sup>474</sup> See *id.* at 1881 (reporting comments by a defense attorney that reflected ideas that “Black men have casual relationships with multiple women, that childbearing is careless or casual, and that Black fathers are irresponsible and attempting to shift blame onto the system”). Judges and administrators are sometimes dismissive of fathers’ claims that they often provide in-kind support and that they want to see their children in addition to paying for them. See *id.* at 1889–92.

<sup>475</sup> Katie J.M. Baker, *When Students Change Gender Identity, And Parents Don't Know*, N.Y. TIMES (Jan. 22, 2023), <https://www.nytimes.com/2023/01/22/us/gender-identity-students-parents.html> [<https://perma.cc/YAT3-D9GF>].

<sup>476</sup> See Farhad Manjoo, Opinion, *America Is Being Consumed by a Moral Panic over Trans People*, N.Y. TIMES (Sept. 1, 2022), <https://www.nytimes.com/2022/09/01/opinion/america-is-being-consumed-by-a-moral-panic-over-trans-people.html> [<https://perma.cc/9DUB-D9TH>].

<sup>477</sup> See VA. DEP'T OF EDUC., MODEL POLICIES FOR THE TREATMENT OF TRANSGENDER STUDENTS IN VIRGINIA'S PUBLIC SCHOOLS 2 (2021) [hereinafter 2021 POLICY]; see also VA. CODE ANN. § 22.1-23.3 (2022) (directing the Department of Education to issue guidance addressing the treatment of transgender children in public schools).

<sup>478</sup> See VA. DEP'T OF EDUC., *supra* note 477, at 9–12, 17–18. The guidance did not address athletics as these were governed by a different set of standards. See *id.* at 17.

to help them share the information with their family when ready.<sup>479</sup> The guidance noted that there is no legal requirement for a school to notify a parent of a child's gender identity and that "[i]f a student is not ready or able to safely share with their family about their gender identity, this should be respected."<sup>480</sup>

In September 2022, under the direction of Governor Youngkin, who had won office partly by invoking parental rights over education,<sup>481</sup> the Virginia Department of Education withdrew the 2021 guidance and issued new guidance.<sup>482</sup> The Department stated that the earlier guidance had "promoted a specific viewpoint aimed at achieving cultural and social transformation in schools" and "disregarded the rights of parents and ignored other legal and constitutional principles."<sup>483</sup> Accordingly, the new guidance states that schools must defer to a parent's determination about a child's name, pronouns, and any social transition at school.<sup>484</sup> Further, a school must inform parents about "all matters that may be reasonably expected to be important to a parent, including, and without limitation, matters related to their child's health, and social and psychological development."<sup>485</sup>

Given this politicization of a sensitive and important issue, the challenge is for legal actors, advocates, and scholars to find a way forward that avoids harm to children. Analyzing the issue through the lens of the three main approaches to family law decisionmaking and policymaking — rights based, values based, and pragmatic — illustrates the trade-offs in each approach.

A rights-based approach would address the issue by balancing the rights and interests of the parent, child, and state. The Constitution clearly protects a parent's right to make major decisions for a child.<sup>486</sup> Legal recognition of the minor's interests is far less clear. Courts and legislatures recognize adolescents' emerging interest in exercising agency as they prepare for adult roles,<sup>487</sup> but courts have not addressed whether

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<sup>479</sup> See *id.* at 12.

<sup>480</sup> See *id.*

<sup>481</sup> See *supra* note 67.

<sup>482</sup> See VA. DEP'T OF EDUC., 2022 MODEL POLICIES ON THE PRIVACY, DIGNITY, AND RESPECT FOR ALL STUDENTS AND PARENTS IN VIRGINIA'S PUBLIC SCHOOLS (2022) [hereinafter 2022 POLICY]; see also Colby Johnson, *Virginia Governor Discusses New Education Model Policies*, WHSV3 (Sept. 19, 2022, 5:50 PM), <https://www.wHSV.com/2022/09/19/virginia-governor-discusses-new-education-model-policies> [https://perma.cc/S7KK-7LMH].

<sup>483</sup> 2022 POLICY, *supra* note 482, at 1.

<sup>484</sup> See *id.* at 2.

<sup>485</sup> *Id.* at 3.

<sup>486</sup> See *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923).

<sup>487</sup> See *Huntington & Scott*, *supra* note 37, at 1432–51 (describing how family law generally recognizes rights in minors if doing so does not threaten harm to the adolescent or others or is necessary to promote the well-being of the minor). As a constitutional matter, courts recognize some speech



this general interest translates into a right of the minor to explore their gender identity without parental involvement.<sup>488</sup> Finally, a rights-based approach would acknowledge the authority of the state to intervene if a parent's decision poses a substantial risk of serious harm to a child.<sup>489</sup> In the context of Virginia's new guidance, it is unclear how a court would rule on a challenge to the policy. Parental rights are strong but not absolute. A child's right to explore their gender identity is not clearly recognized. And the state has an interest in protecting children, but only if there is a substantial risk of serious harm.

What is clear, however, is that using a rights-based approach poses serious risks to children and families. It asks courts to resolve a difficult issue with no clear answer and multiple interests at stake. It asks courts to use the blocky tools of rights to weigh multiple and nuanced interests. And it requires courts to make definitive conclusions about children, gender identity, and parental involvement without clear guidance from social science. Moreover, the process of court adjudication would pose its own risks to child well-being, with children required to testify and lawyers making arguments that pit the parent against the child.

A values-based approach also poses risks to children. A debate on this issue invokes numerous abstract ideals, including family privacy, parental decisionmaking, and children's self-determination. And it would require weighing the importance and desirability of allowing minors to explore their gender identity without parental involvement. Views on all these values are likely to vary widely for judges, legislators, and members of the public. And the stakes are high, tapping into family law's expressive function.<sup>490</sup> In short, focusing on values would not necessarily advance the debate and instead would likely trigger polarization.

As fights like the one dividing Virginia spread to other states, the pragmatic method would suggest a different approach. Decisionmakers would start by defining goals in concrete, specific terms that focus on core aspects of child well-being. This process would focus on a child's need for a relationship with a parent (who is and likely will continue to

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rights of minors, for example, and most states recognize, through statutes or the common law, the right of a minor to access contraception and substance abuse treatment without parental consent. *See id.* at 1440–46.

<sup>488</sup> Courts have not recognized such a right, but some scholars contend that a broader conception of children's rights does and should include the right to explore gender identity. *See* Anne C. Dailey & Laura A. Rosenbury, *The New Law of the Child*, 127 *YALE L.J.* 1488, 1496–500 (2018) (arguing that children have an interest in exploring and developing their identities, including gender identity); Clifford J. Rosky, *No Promo Hetero: Children's Right to Be Queer*, 35 *CARDOZO L. REV.* 425, 502, 510 (2013) (“The Constitution protects every child’s right to an open future in sexual and gender development — an equal liberty to be straight or queer.” *Id.* at 510.). No court has addressed the issue of whether a child has the right to consent to medical treatment such as hormones or surgery.

<sup>489</sup> *See Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); Huntington & Scott, *supra* note 37, at 1418.

<sup>490</sup> *See supra* note 2.

be the child's primary caregiver) and the child's mental and physical health. The pragmatic method does not immediately say how best to advance these aspects of child well-being, but it focuses attention in the right direction.

The pragmatic approach would then look to empirical evidence to inform decisions. This would begin by turning to experts for guidance on how to work with children who are questioning their gender identity. In the United States, experts advise a tailored, child-centered approach that looks to the needs of an individual child.<sup>491</sup> Medical care is not at issue — only parents, not children or schools, can consent to medical treatment for gender affirmation — therefore, there is no need to address that question. Instead, the inquiry would concentrate on the narrow issue of disclosing a child's expression of gender identity at school. For this, decisionmakers would again emphasize that children need tailored approaches suited to their individual needs.<sup>492</sup>

The pragmatic method would emphasize the importance of contextualized decisionmaking. As Virginia's 2021 guidance set forth, school officials were encouraged to work with children to help them address their concerns about telling parents and provide support as needed.<sup>493</sup> Pragmatic family law does not provide an answer for the hardest cases, such as children who believe telling their parents poses a risk to them, in which case the school must decide whether to honor the child's preference for nondisclosure. But the method does narrow the conflict to this smaller subset of hard cases. And the method underscores the needs of the child: for an ongoing relationship with a parent and for physical and mental health. Both considerations would likely provide some guidance in individual cases. Finally, the pragmatic method would direct decisionmakers to learn from other school districts on this thorny issue.<sup>494</sup>

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<sup>491</sup> See *Children and Gender Identity: Supporting Your Child*, MAYO CLINIC (Oct. 1, 2022), <https://www.mayoclinic.org/healthy-lifestyle/childrens-health/in-depth/children-and-gender-identity/art-202668111> [<https://perma.cc/A98X-L73H>] (noting the diversity of circumstances and suggesting that parents of children questioning their gender identity explore options that are right for that child); Jason Rafferty, *Ensuring Comprehensive Care and Support for Transgender and Gender Diverse Children and Adolescents*, PEDIATRICS, Oct. 2018, at 1, 4 (“[G]ender-affirmation guidelines are . . . focused on individually tailored interventions on the basis of the physical and cognitive development of youth who identify as [transgender and gender diverse].”).

<sup>492</sup> See sources cited *supra* note 491.

<sup>493</sup> See 2021 POLICY, *supra* note 477, at 13–14.

<sup>494</sup> The discussion in this section addressed a school's disclosure to a parent of a child's gender identity. A related and potentially harder issue is whether the school should take steps to affirm a child's gender identity when a child and parent disagree. The 2021 Virginia policy contemplated a school affirming a child's gender identity over a parent's objections, at least in some circumstances:

In the situation when parents or guardians of a minor student . . . do not agree with the student's request to adopt a new name and pronouns, school divisions will need to determine whether to respect the student's request, abide by the parent's wishes to continue using the student's legal name and sex assigned at birth, or develop an alternative that respects both the student and the parents. This process will require consideration of short-

In short, the pragmatic method would emphasize granular considerations that center the needs of a child. The one-size-fits-all approach of the new guidance allows anything but a tailored approach, instead politicizing a complex issue with no clear answer.

#### CONCLUSION

Polarization in the United States today, refracted through the lens of family law, causes real harm to children and families. Too often, legal actors, advocates, and the public weaponize, divide, and fundamentally do not try to solve the significant problems facing families. Despite all this, there is another vein in contemporary family law that has gotten much less attention from scholars and in popular discourse: an approach to problem-solving that focuses on the impact of laws and policies on concrete aspects of well-being, relies on empirical evidence, experiments with different solutions, centers the lives of real families, and makes decisions based on what works in a particular context.

The pragmatic method is not the only way family law can develop doctrine and policy. Rights-based litigation and values-based debates can and should continue. But even in its place and with its limits, pragmatism has the potential to advance the well-being of all families in a climate of retrenchment on rights and paralyzing division on values. A better, clearer understanding — descriptively and conceptually — of the pragmatic method in family law can point to a more promising future for family law and, even more importantly, for families in an era of polarization.

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term solutions to address the student's emotional needs to be affirmed at school as well as the long-term goal of assisting the family in developing solutions in their child's best interest.

*Id.* By contrast, the 2022 policy does not allow a school to take such a step, and thus a school must reject the child's gender identity if the parent does not know about and approve the affirmation. See 2022 POLICY, *supra* note 482, at 2–3. In both contexts, the school is not simply sharing or withholding information but is also playing an active role in affirming or rejecting a child's gender identity.