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# The Changing Tides of Adoption: Why Marriage, Race, and Family Identity Still Matter

Jessica Dixon Weaver

*Southern Methodist University*, [jdweaver@mail.smu.edu](mailto:jdweaver@mail.smu.edu)

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# THE CHANGING TIDES OF ADOPTION: WHY MARRIAGE, RACE, AND FAMILY IDENTITY STILL MATTER

*Jessica Dixon Weaver\**

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## I. INTRODUCTION

PROFESSOR Joseph W. McKnight was well known for his substantial contributions to the Texas Family Law Code and, particularly, for his leadership in establishing marital property rights for women alongside Texas trailblazer attorney Louise Raggio.<sup>1</sup> He remained active in state family law practice through 2010 as the appointed academic advisor for the Texas Family Law Council, the governing body of the Family Law Section of the State Bar of Texas. He graciously passed this mantle down to me, and I am humbled to have a voice among over seven thousand active family lawyers in Texas. Professor McKnight was typically in the library in the Rare Book Room, and I regret not taking more time to speak with him about the thousands of books he collected and studied throughout his sixty years as a law professor. He was like a walking encyclopedia of Texas family law and is credited with writing much of the Family Code from 1966 through 1975.

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\* Associate Professor of Law, SMU Dedman School of Law. I would like to thank Donna Wolff, my library research assistant, and Keisha Crane for their excellent research.

1. See Bill Hicks, *Joseph W. McKnight: Man of Scholarship and Service*, TEX. BAR BLOG (Apr. 21, 2015), <http://blog.texasbar.com/2015/04/articles/people/joseph-w-mcknight-man-of-scholarship-and-service> [<https://perma.cc/SAM5-JFDQ>]; Louise Raggio, Subheading of *Texas Trailblazer*, KERA (Mar. 2008), <http://www.kera.org/tv/trailblazer> [<https://perma.cc/3FUJ-XF6A>].

As a lawyer and advocate for children, I was recently drawn to a lesser-known chapter Professor McKnight wrote on the comparative history of adoption in the United States. His chapter, “The Shifting Focus of Adoption,” in the book *Critical Studies in Ancient Law, Comparative Law and Legal History* traces the evolution of adoption through Western European culture as an institution largely focused on succession to one primarily focused on parenthood.<sup>2</sup> McKnight noted that prospective adopters, the state, and the church used adoption as a tool to control succession, and throughout various time periods and countries, the number of adoptions waxed or waned depending on the current adoption laws and policies.<sup>3</sup> McKnight asserted that “old adoption” was used by families to control and protect wealth, but “new adoption” was used to create parenthood for couples who could not physically have children.<sup>4</sup> Old adoption was connected to succession, and it provided a legal way to legitimize a premarital child, a child who could not be legitimized because of a religious taboo or the political unavailability of legitimization.<sup>5</sup> The term “adoption” was sometimes confused with the practice of fostering, the process of apprenticeship, or domestic service.<sup>6</sup> Old adoption was used as a method to validate a child for property reasons or as property itself. While new adoption appeared to have more altruistic intentions, children were still viewed and legally treated as property up through the nineteenth century.<sup>7</sup>

Family formation in America has often been more complex than acknowledged.<sup>8</sup> In many ways, the history of race and gender have played a

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2. Joseph W. McKnight, *The Shifting Focus of Adoption*, in *CRITICAL STUDIES IN ANCIENT LAW, COMPARATIVE LAW AND LEGAL HISTORY* 297, 299 (John Cairns & Olivia Robinson eds., 2001). Interestingly, in the midst of writing this essay I learned that McKnight has an uncompleted manuscript entitled, “Adoption: The Old and the New,” that is over four hundred pages dating back to antiquity (on file with the SMU Underwood Law Library).

3. *See id.* at 303.

4. *See id.* at 299.

5. *Id.*

6. *Id.*

7. *See* Barbara Bennett Woodhouse, “Who Owns the Child?”: Meyer and Pierce and the Child as Property, 33 *WM. & MARY L. REV.* 995, 1036–50 (noting the history of American family as a patriarchal institution where women and children were considered dependent assets of the husband and father).

8. *See* HENDRIK HARTOG, *MAN AND WIFE IN AMERICA: A HISTORY* 1–5 (2000) (shedding light on the myth of the stable marriage in the nineteenth century by reviewing the ways that the law shaped marital roles and identities); JOANNA L. GROSSMAN & LAWRENCE M. FREIDMAN, *INSIDE THE CASTLE: LAW AND THE FAMILY IN 20TH CENTURY AMERICA* 3–9 (2011) (noting the ways in which family formation and development in America did not match the ideal American family, which was typically a middle class white family with a working father and homemaker mother with children); PETER W. BARDAGLIO, *RECONSTRUCTING THE HOUSEHOLD: FAMILIES, SEX, AND THE LAW IN THE NINETEENTH-CENTURY SOUTH* xi (1995) (noting that the legal regulation of sexuality among masters and slaves formed a family hierarchy that subverted the freedom of black and white women, as well as the legal status of their children); Margaret Burnham, *Property, Parenthood and Peonage: Reflections on the Return to Status Quo Antebellum*, 18 *CARDOZO L. REV.* 433, 437 (1996) (noting that after emancipation, the theoretical transfer of parental or property rights from slavemaster to black fathers was not a reality because of

key role in the legal status of children in our country.<sup>9</sup> The twenty-first century brings more intricacy because of modern advances in the area of assisted reproduction technology.<sup>10</sup> The development of legal literature analyzing how laws have affected children and parents of color within the family law canon is growing.<sup>11</sup> This essay expounds on the shifting motivation for adoption in the United States using a critical race feminist theory lens to explore how adoption remains wedded to marriage, the control of wealth, and family identity. These three elements have been historically and legally tied to race<sup>12</sup> in that the law was intentionally written to exclude certain persons of color from being able to access marriage or wealth, thereby diminishing their ability to establish family identity.<sup>13</sup> A recent report, *The Changing Face of Adoption in the United States*, reveals just how critical the race and ethnicity of the child adoptee can be in whether a child finds a forever home or remains a ward of the state.<sup>14</sup>

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forced apprenticeships of slaves, relegating both black fathers and their children to the status of property once again).

9. Dorothy E. Roberts, *Racism and Patriarchy in the Meaning of Motherhood*, in *MOTHERS IN LAW: FEMINIST THEORY AND THE LEGAL REGULATION OF MOTHERHOOD* 227–28 (Martha A. Fineman and Isabel Karpin, eds. 1995); See Peggy Cooper Davis, *NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES* 90–117 (1997) (noting how the antislavery movement and Reconstruction had a large impact on the recognition of a constitutional right to be a parent); See also Barbara Bennett Woodhouse, *HIDDEN IN PLAIN SIGHT: THE TRAGEDY OF CHILDREN’S RIGHTS FROM BEN FRANKLIN TO LIONEL TATE* (2010) (connecting themes of race and gender in the childhood experiences of Frederick Douglass, Dred Scott’s daughters, and African American children growing up in foster care).

10. See Michele Bratcher Goodwin, *Introduction*, in *BABY MARKETS: MONEY AND THE NEW POLITICS OF CREATING FAMILIES* xix–xxi (Michele Bratcher Goodwin ed., 2010) (exploring the supply and demand for children in the United States and how legal and illegal access to adoption and assisted reproduction technology impact children, the creation of families, and society); Naomi Cahn, *The New Kinship*, 100 *GEORGETOWN L.J.* 367, 374–79 (2012) (expounding on how assisted reproduction technology, specifically the expansion of donor gametes, has enhanced the formation of families for single men and women and gay and lesbian couples); Michael Boucai, *Is Assisted Procreation an LGBT Right?*, 2016 *WIS. L. REV.* 1065, 1082 (2016) (noting that “LGBT people constitute a substantial share of the market for assisted reproduction technologies”).

11. See R.A. Lenhardt, *The Color of Kinship*, 102 *IOWA L. REV.* 2017 (2017); Jessica Dixon Weaver, *Grandma in the White House: Legal Support for Intergenerational Caregiving*, 47 *SETON HALL L. REV.* 1 (2013); Shani King, *The Family Law Canon in a (Post?) Racial Era*, 72 *OHIO ST. L.J.* 575 (2011); Sacha Coupet, *Ain’t I A Parent?: Exclusion of Kinship Caregivers from Debate over Expansions of Parenthood*, 34 *NYU REV. L. & SOC. CHANGE* 595 (2010).

12. See Margaret A. Burnham, *An Impossible Marriage: Slave Law and Family Law*, 5 *LAW & INEQ.* 187, 213 (1987); Cheryl I. Harris, *Whiteness as Property*, 106 *HARV. L. REV.* 1707, 1758, 1787–88 (1993); Annette R. Appell, *Certifying Identity*, 42 *CAP. U. L. REV.* 361, 361–62 (2014) (noting that birth certification connects a person to “a whole regime of rights, entitlements, social scripts, and obligations” through identity according to government-prescribed categories of sex, race, family, and nation).

13. Dorothy E. Roberts, *Racism and Patriarchy in the Meaning of Motherhood*, in *MOTHERS IN LAW: FEMINIST THEORY AND THE LEGAL REGULATION OF MOTHERHOOD* 229 (Martha A. Fineman and Isabel Karpin, eds. 1995); Barbara Bennett Woodhouse, *Reflections on Loving and Children’s Rights*, 20 *U. FLA. J.L. & PUB. POL’Y* 11 (2009); Rose Cuison Villazor, *The Other Loving: Uncovering the Federal Government’s Racial Regulation of Marriage*, 86 *N.Y.U. L. REV.* 1361 (2011);

14. See Nicholas Zill, *The Changing Face of Adoption in the United States*, Inst. for Family Studies (Aug. 8, 2017), <https://ifstudies.org/blog/the-changing-face-of-adoption-in->

The concept of adoption in the United States has had various iterations that are similar to those in Western Europe, yet they are also different because of the Native American and African people who were a large part of the growing U.S. culture and population. Based on the terrible history of how race and ethnicity influenced virtually all aspects of American law, it should be no surprise that it still plays a significant role in not only who gets adopted but also who does the adopting<sup>15</sup> One of the largest debates within the field of adoption is transracial adoption, primarily because there is a shortage of white children to adopt and a disproportionate number of African-American children available for adoption.<sup>16</sup> Very few adoption cases have reached the Supreme Court,<sup>17</sup> but the majority of those cases have involved white adoptive parents seeking to adopt Native American children.<sup>18</sup> The Indian Child Welfare Act (ICWA) is one of at least ten federal laws that directly impact the placement and adoption of children. While sovereignty laws were the basis for the ICWA, the legal treatment of race, biology, and the establishment of parenthood continue to be disputed issues in the Court's decisions to essentially place the prospective children with the white adoptive parents.<sup>19</sup>

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the-united-states [https://perma.cc/SHP2-Y94P] (noting that the majority of adoptive parents are white, older, well-educated, and relatively affluent while the number of foreign-born Hispanic and Asian children has increased from 1999–2011, and that while multiracial adoptive families have become common, the number of black adoptees has decreased by 61% during this same time frame).

15. JOANNA L. GROSSMAN & LAWRENCE M. FRIEDMAN, *INSIDE THE CASTLE* 310–14 (2011) (noting the ways in which race and historical events impacted the number of white, black, Korean, and Native American children adopted in the twentieth century).

16. See Twila L. Perry, *Symposium Article: Race, Color and the Adoption of Biracial Children*, 17 J. GENDER RACE & JUST. 73, 73 (2014); Katie Eyer, *Constitutional Colorblindness and the Family*, 162 U. PA. L. REV. 537, 547, 549 (2014); Solangel Maldonado, *Discouraging Racial Preferences in Adoptions*, 39 U.C. DAVIS L. REV. 1415, 1415–17 (2006); R. Richard Banks, *The Color of Desire: Fulfilling Adoptive Parents' Racial Preferences Through Discriminatory State Action*, 107 YALE L.J. 875, 877, 880–81 (1998); Twila L. Perry, *The Transracial Adoption Controversy: An Analysis of Discourse and Subordination*, 21 N.Y.U. REV. L. & SOC. CHANGE 33, 36, 42, 72, 86 (1994); Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163, 1165–66 (1991).

17. Although at the time of this publication, a Petition for Writ of Certiorari, *D.T. v. W.G.*, is before the Supreme Court and may have a good chance of being granted. The legal question at issue is whether the Fourteenth Amendment gives adoptive parents the same right as biological parents to direct the upbringing of their children. Petition for Writ of Certiorari, *D.T. v. W.G.*, (U.S. 2017) (No. 17-913) (filed Dec. 26, 2017), [https://www.supremecourt.gov/DocketPDF/17/17-913/24229/20171226145627106\\_17-%20D.T.%20Cert%20Petition%20COMPLETE.pdf](https://www.supremecourt.gov/DocketPDF/17/17-913/24229/20171226145627106_17-%20D.T.%20Cert%20Petition%20COMPLETE.pdf) [https://perma.cc/Z7MK-ZNEW].

18. See *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989); *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013).

19. See Solangel Maldonado, *Race, Culture, and Adoption: Lessons from Mississippi Band of Choctaw Indians v. Holyfield*, 17 COLUM. J. GENDER & L. 1, 18–40 (2008) (setting forth that the Court's interpretation of who qualified as Indian depended on biology and maintaining cultural customs of a tribe; noting that the same social and psychological considerations used to support retaining tribal culture for Native American children via ICWA were not as vital in the passage of the Multi-Ethnic Placement Act (MEPA), which prohibited the consideration of race, color, or national origin in the placement of foster or adoptive children); see also Bethany R. Berger, *In the Name of the Child: Race, Gender, and Economics in Adoptive Couple v. Baby Girl*, 67 FLA. L. REV. 295, 297–99 (2015) (noting

Who belongs in a family and how a child is recognized has always been tied to the status of the parent. Parental status in America has historically been bound to race and gender, which are social constructs that have largely been defined by family and property law.<sup>20</sup> Parenthood arguably has also been bound to economic standing—the parental rights of poor parents have typically been subject to greater legal scrutiny and have often been trampled because they lacked means with which to challenge either the state or a wealthy interested party.<sup>21</sup> In today's society, the definition of parenthood and why people desire to parent involves a consideration of what individuals and couples identify as the core components of their children's wellbeing.<sup>22</sup> While there are many things that influence child wellbeing—like nutrition, education, and safety—marriage, race, and identity in America are foundational concepts that either positively or negatively effect how children are legally and socially perceived.

Over twenty years ago, legal trailblazer Gilbert A. Holmes was a visiting law professor at SMU when he published an enduring article about the extended family system in the black community.<sup>23</sup> Dean Holmes argued in his article that a child-centered model for adoption would look similar to the extended family in the black family, which was centered on the representative family structures in West Africa.<sup>24</sup> Ironically, the most recent focus in the implementation of domestic adoption has been a new focus on the best family situation for the adopted child.<sup>25</sup> The suggestions for open adoptions and maintaining the child's right to a relationship with

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that the race of the adoptive couple played a large role in the Court's holding in *Adoptive Couple*).

20. See Adrienne D. Davis, *The Private Law of Race and Sex: An Antebellum Perspective*, 51 STAN. L. REV. 221, 249 (1999) (noting that wealth and marriage are racially ordered institutions that have ideological rules and distributive effects that support slavery and gendered hierarchies); see also ARIELA J. GROSS, WHAT BLOOD WON'T TELL: A HISTORY OF RACE ON TRIAL IN AMERICA 7–9, 297–98 (2008) (demonstrating through the analysis of various trials how persons of African, Mexican, Asian, and Indian descent fought to establish their whiteness to access full citizenship rights by proving their moral and civic character and how they presented themselves to society).

21. See Michele Estrin Gilman, *Welfare, Privacy and Feminism*, 39 U. BALT. L. FORUM 1, 9–11 (2008) (noting how the state's authority to enter a poor woman's home to search for signs of child abuse or neglect is only deemed valid in *Wyman v. James*, 400 U.S. 309 (1970), because of a special relationship with the state grounded in the receipt of welfare benefits; Robert Hornstein, *The Right to Counsel in Civil Cases Revisited: The Proper Influence of Poverty and the Case for Reversing Lassiter v. Department of Social Services*, 59 CATH. U. L. REV. 1057, 1099 (2010) (noting how Supreme Court Justice Stewart's viewpoint that counsel provided to Ms. Lassiter in a termination of parental rights suit would not have made any material difference because she was as an undeserving poor person).

22. See Linda C. McClain & Daniel Cere, *Introduction*, in WHAT IS PARENTHOOD? CONTEMPORARY DEBATES ABOUT THE FAMILY 1, 1–5 (Linda C. McClain & Daniel Cere eds., 2013) (noting how two different models of parenthood, the integrative model (centered on marriage) and the diversity approach (centered on caretaking function), focus on what framework is ideal or most supportive for children's wellbeing).

23. See generally Gilbert A. Holmes, *The Extended Family System in the Black Community: A Child-Centered Model for Adoption Policy*, 68 TEMP. L. REV. 1649 (1995).

24. *Id.* at 1655–66.

25. Annette Ruth Appell, *Reflections on the Movement Toward a More Child-Centered Adoption*, 32 W. NEW ENG. L. REV. 1, 14–15, 17 (2010).

his or her biological family mirror Dean Holmes's explication of the extended black family framework.

This new direction for adoption comes at a time when families are in flux, and family law is undergoing tremendous change. Same-sex marriage became legal across the country in 2015, and assisted reproduction technology continues to expand the methods by which children are created. The process and practice of adoption will have to change along with the times to be more child-centered as technology improves and the challenges faced by many adopted children become more well-known to the general public.<sup>26</sup> While ideally these changes could result in a legal expansion of children's rights, they may realistically place upon the state a larger duty under the *parens patriae* doctrine to provide a basic pathway to a child's biological family and identity. Even with new protections afforded to some adoptees, marriage, race, and family identity still remain a large part of the adoption process.

This essay proceeds in three parts. Part II sets forth an overview of the evolution of adoption by exploring the breakdown of formal adoption and informal adoption. Part III discusses how families have changed over time, how societal changes have changed family law, and how these changes have impacted adoption and the number of children available for adoption. Part IV analyzes why marriage, race, and family identity are still so salient in adoption practice and how the impediments they present could be overcome with an extended family network constructed of multiple families.

## II. THE EVOLUTION OF ADOPTION

Adoption provides a window on how a given society perceives family relationships and how it conceptualizes kinship. In many cultures, adoption, both formal and informal, is an important tool for cementing social bonds across families and for insuring that there will be plenty of willing parents for children in need of care. It is also an expression of values. For anthropologists, "kinship is not 'natural' but 'cultural,' representing an intense experience of love and of obligation between individuals." Therefore, "a study of adoption can shed light on definitions of and criteria for 'citizenship': What does it mean to belong to a group or nation, and is this linked with ideas about what it means to belong to a family?"<sup>27</sup>

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26. See Andrea B. Carroll, *Breaking Forever Families*, 76 OHIO ST. L.J. 259, 261–62 (2015); Sally Terry Green, *The Law Demands Process for Rehomed Children*, 69 ARK. L. REV. 729, 731–33 (2016); Gina Miranda Samuels, "Being Raised by White People": Navigating Racial Difference Among Adopted Multiracial Adults, 71 J. OF MARRIAGE AND FAM. 80 (2009).

27. Barbara Bennett Woodhouse, *Of Babies, Bonding, and Burning Buildings: Discerning Parenthood in Irrational Action*, 81 VA. L. REV. 2493, 2510 (1995) (footnotes omitted) (citing John Terrell & Judith Modell, *Anthropology and Adoption*, 96 AM. ANTHROPOLOGIST 155, 157, 159 (1994)).

Adoption is often characterized as an invention of law—a legal process that legitimizes a person, typically a child, as a member of a family to which he or she is not biologically related.

Typically, adoption is recognized as being either formal or informal, the primary difference being that formal adoption is sanctioned by the court system and informal adoption is an arrangement typically between family members or kin and is not legally approved. There are approximately four types of formal adoption: (1) legacy, (2) exploitative, (3) exclusive, and (4) inclusive. The first three types of formal adoption focus on family inheritance, the right to control children as property, and the legal privilege afforded to the nuclear family as the sole structure for adoption, respectfully. The last type of adoption is similar to kinship adoption and/or open adoptions. Inclusive adoptions allow for a more child-centered approach regarding the maintenance of biological ties for the adoptive child, with the core focus being collective caretaking for optimal child well-being.

While the tide of sociolegal history has changed the focus of the legally engineered concept of formal adoption, the central focus of informal adoption remains the same throughout U.S. history—community care of children. The diversity of families in the United States includes the structure of kinship networks from West Africa, Native Americans, Mexico, Asia, and a host of other non-European nations.<sup>28</sup> It is important to acknowledge how minority family systems have influenced changes in adoption policy. In fact, inclusive adoptions are very similar to the kinship network personified by black families during slavery.<sup>29</sup> As America becomes a majority-minority nation over the next thirty years, it is vital to note that the intersection of race, gender, and class have challenged how and why we create and sustain families.

#### A. FORMAL ADOPTION

Formal adoptions today are often the rare happy moments at the civil courthouse because much of family law concerns the breakdown of relationships. However, the legal addition of a child to a family has not always been about the joy he or she would bring to a close network of relatives. The arc of adoption shows that the process has been about the preservation of wealth, the use and abuse of children as labor, and the choices married, middle class and upper middle class couples have to expand their families. As family composition in American has changed to encompass more divorced, remarried, and single parents, formal adoption

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28. See generally *Facts on U.S. Immigrants, 2015*, PEW RESEARCH CENT. (May 3, 2017), <http://www.pewhispanic.org/2017/05/03/statistical-portrait-of-the-foreign-born-population-in-the-united-states-2015-trends/> [<https://perma.cc/G9XZ-2GBH>] (noting that, in 2015, approximately 27% of foreign-born U.S. residents were from Mexico and Asia, respectively).

29. Holmes, *supra* note 23, at 1660–64.



has morphed into a more inclusive process that allows for second-parent adoption and adoption by individuals.

### 1. *Legacy Adoption*

In addition to prospective adopters, the state and church used adoption as a tool to control succession. The number of adoptions approved by the court increased or decreased depending on the adoption or probate laws and policies. Historically, the legal concept of adoption has been closely related to succession of property. Old adoption families used adoption to control and protect wealth.<sup>30</sup> Formal adoption began through the traditional framework of a family—heterosexual couples with children born through marriage. The ultimate concern in old adoption was whether the adoptee was healthy and competent enough to continue the family line rather than whether the adoptee would bond with his or her new family. At an individual level, a man or woman without a child would look to legitimization first and then, perhaps, to the possibility of adopting other blood relatives. If these options were unavailable, the individual considered bringing a stranger into the family. However, strangers brought uncertainties regarding their abilities and health (chances of mortality). Adopting an infant may not have been so favored versus “the proven qualities of a young adult who had already survived the dangers of adolescence but without the early training in familial principles.”<sup>31</sup>

### 2. *Exploitative Adoption*

While adoption in Europe began for the purpose of ensuring proper succession of wealth and property within the family bloodline, in the formative years of the United States it was used for two other less honorable reasons: (1) the maintenance of chattel slavery and indentured servitude and (2) the indoctrination and assimilation of Native American and poor European immigrants into the dominant Anglo-Saxon culture. Children were exploited for labor for the first two and a half centuries in America, and this type of institutionalized legal abuse serves to illustrate how invaluable certain children were to society as well as how certain parents were stripped of the natural and cultural bonds between them and their progeny.<sup>32</sup>

As the core economic engine of U.S. growth for two and a half centuries,<sup>33</sup> slavery and its impact on children are impossible to disentangle

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30. *Id.* at 299.

31. *Id.* at 302.

32. Brian D. Gallagher, *A Brief Legal History of Institutionalized Child Abuse*, 17 B.C. THIRD WORLD L.J. 1, 12–20 (1997) (noting how children were slaves, indentured servants, and cheap labor in the United States, suffering horrible circumstances based on their birth status (illegitimate) and race).

33. EDWARD E. BAPTIST, *THE HALF HAS NEVER BEEN TOLD: SLAVERY AND THE MAKING OF AMERICAN CAPITALISM 19–20* (2014); DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II* (First Anchor Books 2009) (2008).

from the evolution of adoption. Children and their role within families have historically been tied to the paternal tie or bond because it was through the father that a child received his or her social position and inheritance.<sup>34</sup> However, the incentive to propagate slavery through breeding turned this family law principle on its head. Slave children received their legal status from their mother; therefore, no matter who impregnated a black female slave, her offspring would always be a slave and therefore her master's property.<sup>35</sup> Slave children were not exclusively raised by their mothers because nursing and child care were additional burdens to field work and household cooking.<sup>36</sup> Childcare was often a shared responsibility, and for those children who were sold away from their mothers, other women on different plantations typically took on a parenting role.<sup>37</sup> McKnight's broad statement that "adoption is the introduction of a stranger to the blood to a new familial relationship as though a blood relative" foretells the dichotomous role of race and identity in adoption.<sup>38</sup>

Even after slavery was abolished in America, parental rights for African Americans were fleeting. Without a way to establish or maintain family identity, minority families lacked the legal autonomy to assert care, custody or control over their own children, much less anyone else's.<sup>39</sup> In other words, they were not considered parents because of their race. How could acknowledgement of racism as a foundational doctrine of family law impact the evolution of adoption law? It would help explain what legacy, exploitative, and exclusive adoption were designed to protect and how the roots of inclusive adoption lie in the creation of families among those who fell outside of the norm.

While the most well-known instances of Native American or Indian adoption occurred during the twentieth century from the 1930s–1950s, Indian children were also purchased by Mormons in Utah and others in western states. In fact, Brigham Young advocated for the Act for the Relief of Indian Slaves and Prisoners of 1852 that "enabled Utah residents to become guardians of Indian minors for up to twenty years."<sup>40</sup> The Mormons believed that they could redeem the "degraded Lamanites" through enslavement.<sup>41</sup> Masters in Utah were required to clothe their indentured Indians appropriately and send children between seven and six-

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34. BARDAGLIO, *supra* note 8, at 89.

35. THOMAS R.R. COBB, AN INQUIRY INTO THE LAW OF NEGRO SLAVERY IN THE UNITED STATES OF AMERICA, TO WHICH IS PREFIXED, AN HISTORICAL SKETCH OF SLAVERY 68–69 (Negro Univ. Press 1968) (1858).

36. DEBORAH GRAY WHITE, AR'N'T I A WOMAN? FEMALE SLAVES IN THE PLANTATION SOUTH 113 (1999).

37. Emily West & Erin Shearer, *Fertility Control, Shared Nurturing, and Dual Exploitation: The Lives of Enslaved Mothers in the Antebellum United States*, WOMEN'S HIST. REV. 1–2, 7–9 (2017).

38. McKnight, *supra* note 2, at 297.

39. Margaret Burnham, *supra* note 8 at 435–36.

40. ANDRÉS RESÉNDEZ, THE OTHER SLAVERY: THE UNCOVERED STORY OF INDIAN ENSLAVEMENT IN AMERICA 270 (2016).

41. *Id.* at 268.

teen years of age to school for three months each year.<sup>42</sup> But other than that, the masters were free to put them to work. Though the term adoption was used to reflect the number of children that Mormon families took into their homes, many of the adopted children died relatively quickly after contact with their adoptive parents.<sup>43</sup> While Mormons claimed that they acquired Indian children with the intention of civilizing rather than enslaving them, there was difficulty integrating them into Mormon society.<sup>44</sup>

Children were unlawfully removed from Native American families to indoctrinate them into white society from 1946 to 1973. The Indian Child Welfare Act (ICWA) was passed to stop the wholesale removals of Native American children from their families and reservations. Orphaned or abandoned children were adopted by couples in Midwest America because they offered free labor in an agrarian society. Orphan trains orchestrated these child placements in cases where the parents did not understand that they were effectively giving up their parental rights, mostly because they could not afford to care for their children.<sup>45</sup> Child labor in new industrial cities provided a free or cheap workforce for both rural America and urban environments.<sup>46</sup>

The changing tide of adoption occurred in several waves; the first wave hit after the Civil War, and the second wave hit after the Industrial Revolution. In the immediate aftermath of emancipation, Orphan Courts run by pro-slavery judges relegated an estimated 10,000 children of freedmen and women to “apprenticeships,” which were really indentured servitude.<sup>47</sup> Black parents lost their children to their former slave owners, unable to obtain custody of them. Laws in Maryland, North Carolina, and throughout other southern states gave local judges the power to summon the child of any free black if “after examination the court found it ‘better for the habits and comfort of the child that it should be bound as an apprentice to some white person.’”<sup>48</sup> Free black apprentices did not have any of the nominal protection given to white apprentices.

Exploitation unfortunately still continues in modern day adoption via rehomings, which is the term used when adoptive families give their unwanted adopted children over to complete strangers via the internet.<sup>49</sup>

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42. *Id.* at 273.

43. *Id.*

44. *Id.* at 274.

45. See MARILYN IRVIN HOLT, *THE ORPHAN TRAINS: PLACING OUT IN AMERICA* (1992); Rebecca S. Trammell, *Orphan Train Myths and Legal Reality*, 5 *MOD. AM.*, Fall 2009, at 3, 6.

46. Trammell, *supra* note 45, at 9–10; BARBARA BENNETT WOODHOUSE, *HIDDEN IN PLAIN SIGHT: THE TRAGEDY OF CHILDREN’S RIGHTS FROM BEN FRANKLIN TO LIONEL TATE* 111–32 (2008); Edith Abbott, *A Study of the Early History of Child Labor in America*, 14 *AM. J. SOC.* 15, 17, 31 (1908).

47. See HERBERT G. GUTMAN, *THE BLACK FAMILY IN SLAVERY AND FREEDOM 1750–1925*, 402–10 (1976).

48. *Id.* at 402.

49. See S. Megan Testerman, *A World Wide Web of Unwanted Children: The Practice, the Problem, and the Solution to Private Re-Homing*, 67 *FLA. L. REV.* 2103, 2107 (2015).

Online Social networking via Facebook and message boards has provided greater avenues for persons seeking to take advantage of children to acquire access to vulnerable children. Because of gaps in the laws and social services available to adoptive families, there, the practice of private families relinquishing custody of unwanted adopted children to dangerous persons goes unregulated and unrestrained. Stories of children who are handed over to pedophiles, sex traffickers, and felons were part of an investigative expose in 2013.<sup>50</sup> This collection of stories detailed the horrible physical and sexual abuse of adopted children given away without state or federal oversight to persons who would typically never be able to legally adopt. A disproportionate number of these children are foreign-born and children of color. This underground market for adopted children is difficult to regulate and requires constant surveillance of social media. Children remain at risk of being discarded and maltreated with very limited means to escape.

### 3. *Exclusive Adoption*

A recent study revealed that while some things remain the same in the adoption landscape, other things have changed dramatically. First, the large majority of adoptive parents are still white, older, well-educated, and relatively affluent.<sup>51</sup> However, the racial and ethnic composition of the adopted child population in the United States has dramatically changed from 1999 to 2011, with Asian adoptees tripling in number and black adoptees decreasing by 61%.<sup>52</sup> Proportionally, white children still make up the majority (39%) of kids who are adopted,<sup>53</sup> but the increase in the size and prominence of different racial and ethnic groups of adoptees is illustrative of the shifting focus of adoption. The share of adopted kindergartners raised by mothers of a different race or ethnic group rose 50% between 1999 and 2011.<sup>54</sup>

There are various reasons offered for the increase in overall multiethnic adoptions. The increase in Asian adoptions is due to an increase in international adoptions from China and South Korea, and most of those children have been girls. China's one-child policy, which was in place for forty years up until 2015, was removed for primarily economic reasons.<sup>55</sup> As far as the reduction in the number of black children adopted, it is speculated that it has to do with the decline in teen pregnancy among African-Americans, the success of detractors or activists in discouraging transracial adoption, and the preference for black children

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50. Megan Twohey, *Americans Use the Internet to Abandon Children Adopted from Overseas*, THE CHILD EXCHANGE: INSIDE AMERICA'S UNDERGROUND MARKET FOR ADOPTED CHILDREN, REUTERS INVESTIGATES (Sept. 9, 2013), <http://www.reuters.com/investigates/adoption/#article/part1> [<https://perma.cc/2K5W-RT49>].

51. Zill, *supra* note 14.

52. *Id.*

53. *Id.*

54. *Id.*

55. Margaret Ryznar, *Adoption in China: Past, Present and Yet to Come*, 45 GA. J. INT'L & COMP. L. 27, 45 (2016)

to be placed with relatives. Research shows that white adoptive families prefer to adopt foreign Hispanic and Asian children over native African-American children.<sup>56</sup>

At first blush, it would appear that new adoption is not about the control of disposition of wealth but rather about the control of the parent-child relationship. To protect their preferred family relationship or ideal family formation, prospective parents must pay—typically more money. The more wealth spent during the adoption or assisted reproduction process, the more control the parents have over the actual or potential features and attributes of their future child. In reality, new adoption still espouses the same tenets of old adoption—parents are concerned about who will inherit their wealth when they die. If infertile white wealthy or upper-middle class parents were to adopt black or brown children, their wealth would be passed down to black or brown descendants—no matter whom the children married.

Even after the Multi-Ethnic Placement Act (MEPA) was passed in 1994 to reduce the number of black children languishing in foster care, there was no exorbitant number of white families rushing to adopt black children from foster care across our country. Rather, the wealthier families looked to adopt children internationally and more from eastern European countries, Russia, or from the continent of Asia than from Africa. So while there are no legal barriers to transracial adoption, the social issues prevalent with regard to raising a black child in America have been highlighted in a recent lawsuit as stigmatizing and worthy of damages.<sup>57</sup>

#### 4. *Inclusive Adoption*

Adoption has now evolved beyond establishment of parental rights and duties to protection of children's well-being.<sup>58</sup> The focus is more on what family form serves the best interest of the child, rather than mandating an ideal family formation. Annette Appell notes that adoption trends have moved from closed to open and changed from taking the form of rebirth to being "second-order postmodern" families that do not cut off or seal the records from the biological family but instead allow for a larger kinship network that includes both biological and adoptive families.<sup>59</sup> The child's well-being is placed at the center of the kinship network and this allows the child to create an identity that encompasses both new and old families.<sup>60</sup> This was not a goal even considered in old adoption.

Adoption allows for families who are not ideal to create a family. Gay and lesbian couples adopt children at high/higher rates than heterosexu-

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56. Maldonado, *supra* note 16, at 1425–26.

57. Lenhardt, *supra* note 11 at 2072–74 (noting the Cramblett wrongful birth lawsuit where a white mother sued a sperm bank that mistakenly fertilized her egg with the sperm of a black man, resulting in the birth of a black daughter).

58. See Annette R. Appell, *Controlling for Kin: Ghosts in the Postmodern Family*, 25 WIS. J.L. GENDER & SOC'Y 73, 123 (2010).

59. *Id.* at 91–94.

60. *Id.* at 123.

als. Often they could only adopt those children who were “hard to place,” such as minority children, sibling groups, older children, and disabled children. Yet, there was and is tremendous discrimination with regard to adoption by LBGTO families. *Obergefell v. Hodges*<sup>61</sup> does not eliminate these issues, but it does go a long way in satisfying a prerequisite of some states and private adoption agencies.

### B. INFORMAL ADOPTION

The history of U.S. adoption is actually more nuanced than set forth in McKnight’s book chapter in that informal adoption has always existed in non-western European communities. Black slaves utilized informal adoption to provide parents for children who were separated from their parents by the slave economy.<sup>62</sup> Holmes identified three significant components of the extended family experience that affected child-rearing: “fostering of children with kin and non-kin households, expanding the family through fictive kin, and sharing parenting and child-rearing responsibilities for the betterment of children.”<sup>63</sup> The retention of the child’s connection to his or her birth family was necessary for the child-centered nature of this type of family network.<sup>64</sup> So even though children did not live with the birth family, they were permitted to understand their origins in the context of their contemporary lives.<sup>65</sup> In this way, they developed a sense of self-identity and heritage while at the same time developing an appreciation for the day-to-day care and love from a different kinship source.<sup>66</sup>

### III. THE CHANGING TIDE OF FAMILIES

The legal definition of family has expanded over time in the United States, and a quick glance at the Supreme Court roster of family law cases presents an ample view of the changes fought for by social movements. The roll call is steep—from *Moore v. City of East Cleveland*<sup>67</sup> (legitimizing the extended family) and *Loving v. Virginia*<sup>68</sup> (striking down interracial marriage bans) to *Obergefell v. Hodges*<sup>69</sup> (striking down same-sex marriage bans), family composition has transformed to represent the choices of citizens to love and commit to certain types of family units. A recent case illustrates how the Court’s ruling in *Obergefell* eliminates differential treatment of married couples that form families via assisted reproduction technology.<sup>70</sup> In *Pavan v. Smith*, two lesbian married couples

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61. 135 S. Ct. 2584 (2015).

62. Holmes, *supra* note 23, at 1663.

63. *Id.* at 1659–60.

64. *Id.* at 1665.

65. *Id.*

66. *Id.*

67. 431 U.S. 494 (1977).

68. 388 U.S. 1 (1967).

69. *Obergefell*, 135 S. Ct. at 2584.

70. *Pavan v. Smith*, 137 S. Ct. 2075 (2017).

asserted their right to have their names placed on birth certificates of the children born through artificial insemination.<sup>71</sup> The Supreme Court struck down the Arkansas code that limited the individuals who could appear on the state-issued birth certificate to birth mothers and husbands or the putative fathers.<sup>72</sup> This case informs how adoption laws will be interpreted with regard to same-sex married couples seeking to adopt post-*Obergefell*. Married same-sex parents will be able to avoid second-parent adoption in states where same-sex couples or unmarried parents were not allowed to adopt as a family unit. The 2017 Uniform Parentage Act changes Section 204 (formally the Presumption of Paternity section) to the Presumption of Parentage section and includes partially gender-neutral language to identify what types of parents are presumed under the expanded laws of marriage.<sup>73</sup> Unfortunately, cohabitating couples would likely still need to petition for a second-parent adoption unless they fall under one of the subsections of Section 204.<sup>74</sup>

In addition to the change of gender-neutral language in the UPA, it affords optional recognition of more than two parents.<sup>75</sup> This might allow for a unique arrangement within an extended family network, one that is not centered on marriage but on caretaking among family members, both intentional and functional. The fact that many children are either raised by a single parent or a network of family members may allow opportunities for the law to legally recognize the kin or friends who step in to fill the gap of parental responsibilities outside of the bounds of marriage. While in some instances the fictive kin network is static, there are many situations where a Godparent or other relative maintains a permanent status in a child's life, but with no corollary legal rights. This option obviously flies in the face of established constitutional rights of parents. Beyond allowing for more than one parent, a state might have to set forth in more detail what type of collaborative agreement among three or more persons would serve the best interest of a child.

#### IV. WHY MARRIAGE, RACE, AND FAMILY IDENTITY STILL MATTER

From a critical race theory perspective, old adoption and new adoption are connected because family identity is tied to family status, race, and class, all of which are still bound to the laws of succession. Three basic themes of critical race theory are: (1) racism is ordinary (and therefore difficult to cure because it is not acknowledged); (2) interest convergence offers few opportunities to eradicate racism; and (3) the social construc-

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71. *Id.*

72. *Id.* at 2076.

73. UNIFORM PARENTAGE ACT § 204 (UNIF. LAW COMM'N 2016) (last amended 2017).

74. *See, e.g., V.L. v. E.L.*, 136 S. Ct. 1017 (2016); *Nguyen v. Boynes*, 396 P.3d 774 (Nev. 2017).

75. UNIFORM PARENTAGE ACT § 613, *supra* note 73.

tion of race is built on thoughts and relationships.<sup>76</sup> Critical Race Feminist theorists Kimberle Crenshaw and Angela P. Harris expanded these themes to include issues relevant to women, introducing intersectionality<sup>77</sup> and anti-essentialism.<sup>78</sup> Patricia Hill Collins eloquently explains how the traditional family ideal functions as an example of intersectionality in the United States.<sup>79</sup> Since succession is the progression of family beyond the individual, adoption means a great deal to the adoptive family, as the adoptee carries on the family customs and traditions. The themes of critical race theory run smoothly through the evolution of adoption and its many forms, and it can be argued that the legal process is both a building block in the social construction of race as well as a wrecking ball. Harvard scholars Randall Kennedy and Elizabeth Bartholet are strong advocates for the idea that transracial adoption can be used as a means to attack both racism and the social construct of race through intentional and functional kinship relations that serve the best interest of the child.<sup>80</sup> Black feminist scholars Twila Perry and Dorothy Roberts advocate for both acknowledgement of the unique ways by which race frames the legal and social lenses of international and transracial adoption.<sup>81</sup> Through their research, it is clear that structural racism in many ways has destroyed black families and the intersectionality of race, gender, and class subordinates black women and their experience in raising children in America. Perry states that transracial adoption is a one-way street for white mothers to adopt black children, and that adoption should be “analyzed as a political institution in which issues of rights, inequality and the potential for exploitation must be central.”<sup>82</sup>

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76. RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* 8–10 (3rd. ed. 2017). Interest convergence, a thesis created by Derrick Bell, sets forth that because whites (as the dominant group) benefit both materially and psychologically from racism, large segments of society have little incentive to eradicate it. *Id.* at 9. Advances for racial justice are tolerated by the majority group when it suits its interests. *Id.* at 177.

77. Kimberly Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 *STAN. L. REV.* 1241 (1991).

78. Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 *STAN. L. REV.* 581, 585 (1990) (setting forth that gender essentialism, “the notion that a unitary, ‘essential’ women’s experience can be isolated and described independently of race, class, sexual orientation, and other realities of experience,” silences the voices of those who are not in the mainstream, such as black women).

79. Patricia Hill Collins, *It’s All In the Family: Intersections of Gender, Race, and Nation*, 13 *HYPATIA* 62 (1998) (setting forth how six dimensions of the family connect to form a gendered system of social organization, racial ideas and practices, and construction of U.S. national identity. The six dimensions include: (1) a naturalized gendered and age hierarchy; (2) the concept of home as a private, feminize space; (3) blood ties among kinship networks; (4) reciprocal rights and obligations; (5) the inheritance of social class and the family wage; and (6) reproductive planning. *Id.* at 62–63).

80. *See generally*, RANDALL KENNEDY, *INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION* (2003); ELIZABETH BARTHOLET, *NOBODY’S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE* (1999).

81. *See generally*, Twila L. Perry, *Transracial and International Adoption: Mothers, Hierarchy, Race and Feminist Legal Theory*, 10 *YALE L.J. & FEMINISM* 101 (1998); DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* (2002).

82. Perry, *supra* note 81 at 125–26, 147.



Because African Americans struggled to attain their full citizenship rights—from literally being property to having authority to enter contracts in order to own property, succession has meant something different for the majority of black families.<sup>83</sup> If African Americans had property to be inherited post-emancipation, the issue for children was one of status—those born during slavery whose parents did not have the legal right to marry sometimes had to go to court to obtain succession rights.<sup>84</sup> The informality with which African Americans still embrace kinship ties is rooted in the history of slavery, and extra-legal acceptance of children who were parentless came from West African traditions focused on the survival of the children as the future of the black community. While survival in the 21st century is vastly different than during Reconstruction, race and marriage are still very salient issues for black families and children. From encounters with police to the ability to afford either a good public or private school education, race is a central factor in whether a child might live or die, or live in a community that has more resources for children to advance to a higher socio-economic class. The fact that the U.S. remains fairly segregated in housing, education, and religious worship informs how all children grow and learn, and this unfortunately isolates them from bridging the racial divide through development of relationships.

The idea that children are our future is a common one, and the argument that children should maintain a cultural connection to their community has been set forth within debates about adoption by white families of Native American children and African American children. However, child-adoption matching may not have accounted for how white families wish to maintain their communities. When contemplating the permanent nature of formal adoption and the debates among scholars about the controversy over transracial adoption, one factor that may impact the desire of white couples to adopt Asian and Hispanic children is their maintenance of family legacy. Asian and Hispanic children are perceived to be able to assimilate into white culture easier. Statistically, they enter into interracial marriages with whites in larger percentages than blacks;<sup>85</sup> therefore, the property of the family will essentially be kept within the race. While there are obviously other more immediate reasons that whites prefer Asian and Hispanic children over African American chil-

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83. See DYLAN C. PENNINGROTH, *THE CLAIMS OF KINFOLK: AFRICAN AMERICAN PROPERTY AND COMMUNITY IN THE NINETEENTH-CENTURY SOUTH* 88–91 (2003) (explaining how children and adult slaves who were willing to contribute to the economic interests of the family were adopted into families, and how the interrelationship between kinship and property was complicated because property did not follow lines of blood and marriage).

84. *Wiley v. Bowman*, 80 So. 243 (La. 1918); *Wallace v. Godfrey*, 42 F. 812 (C.C.N.D. Miss. 1890).

85. Solangel Maldonado, *Romantic Discrimination and Children*, 92 *CHI.-KENT L. REV.* 105, 107–08, 127–28 (2017) (noting the higher rate of intermarriage with whites for Asian and Hispanic women and how this type of marriage has economic benefits, including intergenerational transfers of wealth).

dren,<sup>86</sup> the fact that their adopted children will inherit their wealth, and therefore perpetuate their form of community, should not be overlooked.

In many ways the process of adoption reinforces the privilege and status representative of the potential parent's identity.<sup>87</sup> Potential adoptive parents can choose what race child they are willing to raise, yet the average child awaiting adoption, regardless of ethnicity, is unable to state a racial preference. Neither the court system nor the state are allowed to take race into account. This process undercuts the voice of the child and maximizes the desires of parents and sense of efficiency for the state. But race alone does not cut to the heart of the privilege that old or new adoption holds. Class, gender, and sexual orientation intersect to reduce the likelihood of successful private adoption.<sup>88</sup>

Research on marriage and wealth gaps have largely focused on race and gender differences in family composition. The laws that impact family wealth the most are tax and inheritance laws, or the law of wills and estates. While the definition of marriage has certainly expanded since the Supreme Court decided *Obergefell v. Hodges*, the status of what type of family comprises a normative unit remains the same.<sup>89</sup> Certainly, the tax and probate laws that benefit married couples were an integral part of why Edith Windsor prevailed in the case where part of the Defense of Marriage Act (DOMA) was struck down as unconstitutional.<sup>90</sup> In fact, much of the rationale for striking down the state laws banning homosexual marriage was grounded in the rights of children to have stable families regardless of the sexual orientation of their parents.<sup>91</sup> Marriage is still the brass ring of stability for American families,<sup>92</sup> and as a family form, it dominates the sociopolitical discussion despite the fact that other types of families are also prominent in our country.<sup>93</sup> Some scholars cautioned

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86. See Mariagiovanna Baccara, et al., *Child-Adoption Matching: Preferences for Gender and Race*, 6 AM. ECON. J.: APPLIED ECON. 133, 153–54 (2014) (noting that the equal desirability for Hispanic children in the adoption process indicates that homophily may manifest in the desire to adopt children who are similar to them and could appear as their biological offspring).

87. Twila L. Perry, *Transracial Adoption and Gentrification: An Essay on Race, Power, Family and Community*, 26 B.C. THIRD WORLD L.J. 25 (2006) (making the argument that blacks and whites are not similarly situated in competition for children within the adoption market or property within the urban real estate market because of racial discrimination and its impact on availability of family resources).

88. See Baccara, et al, *supra* note 86 at 148–56 (concluding that gender, race, and adoption finalization costs impact the demand for adoptive children); Elizabeth Raleigh, *Are Same-Sex and Single Adoptive Parents More Likely to Adopt Transracially? A National Analysis of Race, Family Structure, and the Adoption Marketplace*, 55 SOC. PERSP. 449 (2012).

89. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2588, 2614 (2015).

90. *United States v. Windsor*, 133 S. Ct. 2675 (2013) (where Windsor sought to claim protection under the federal tax exemption statute for surviving spouses).

91. *Obergefell*, 135 S. Ct. at 2613.

92. Angela Onwuachi-Willig, *The Return of the Ring: Welfare Reform's Marriage Cure as the Revival of Post-Bellum Control*, 93 CALIF. L. REV. 1647, 1680 (2005).

93. Jessica Dixon Weaver, *The First Father: Perspectives on the President's Fatherhood Initiative*, 50 FAM. CT. REV. 297, 299 (2012); June Carbone & Naomi Cahn, *Red v. Blue Marriage*, in MARRIAGE AT THE CROSSROADS: LAW, POLICY, AND THE BRAVE NEW WORLD OF TWENTY-FIRST-CENTURY FAMILIES 9 (Marsha Garrison & Elizabeth S. Scott

LGBT activists that using marriage as the primary civil right to obtain for their groups comes with some drawbacks—reinforcement of a heterosexual norm that does not fit the family type of many families, including immigrants and minorities.<sup>94</sup>

The idea of the normative or nuclear family remains prevalent, and even though the marriage laws have changed, adoption laws still discriminate against nonmarital couples and singles.<sup>95</sup> There have been arguments made that the expansion of adoption to single parents and unmarried homosexual couples recognizes parenthood as being separate from marital status, thereby establishing a family framework grounded in the function of caretaking.<sup>96</sup> The ebb of flow of family law as well as adoption still exists above a family foundation centered on marriage, race, and identity. As proposals for dealing with the aspects of adoption that are harmful to children surface, the extended or multi-family approach continues to be a viable, albeit complex, option for children.<sup>97</sup> It could be that *D.T. v. W.G.*, a Petition for Writ of Certiorari currently before the U.S. Supreme Court, will be the first case where the court determines whether adoptive parents' rights are exclusive and exactly the same as biological parents' rights. This case is especially relevant because the child was adopted by a maternal grandparent, and the state law at issue has allowed for the paternal grandparent to have visitation rights over the legal parent's objection. Will this case be the first to allow for a legally sanctioned extended family approach to adoption? And is the approach necessarily child-centered if the law positions the right of access within the hierarchy of adults versus the child? It remains to be seen—but inevitably marriage, race, and/or family identity will play a role in the court's decision.

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eds., 2012); RALPH RICHARD BANKS, *IS MARRIAGE FOR WHITE PEOPLE? HOW THE AFRICAN AMERICAN MARRIAGE DECLINE AFFECTS EVERYONE* (2011); *The American Family Today*, PEW RESEARCH CTR. (Dec. 17, 2015), <http://www.pewsocialtrends.org/2015/12/17/1-the-american-family-today> [https://perma.cc/E257-R886].

94. See Katherine Franke, *The Curious Relationship of Marriage and Freedom, in MARRIAGE AT THE CROSSROADS: LAW, POLICY, AND THE BRAVE NEW WORLD OF TWENTY-FIRST-CENTURY FAMILIES* 87, 88–89 (Marsha Garrison & Elizabeth S. Scott eds., 2012); Nancy D. Polikoff, *Equality and Justice for Lesbian and Gay Families and Relationships*, 61 RUTGERS L. REV. 529, 532, 551–52 (2009); Nancy D. Polikoff, *Concord with Which Other Families?: Marriage Equality, Family Demographics, and Race*, 164 U. PA. L. REV. ONLINE 99 (2016); I. Bennett Capers, *The Crime of Loving: Loving, Lawrence, and Beyond, in LOVING v. VIRGINIA IN A POST-RACIAL WORLD: RETHINKING RACE, SEX, AND MARRIAGE* (Kevin Noble Maillard & Rose Cuison Villazor, eds. 2012).

95. Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 HARV. L. REV. 1185, 1249 (2016); Cynthia Godsoe, *Adopting the Gay Family*, 90 TUL. L. REV. 311, 342–344 (2015).

96. NeJaime, *supra* note 95 at 1261–64; Godsoe, *supra* note 95 at 363–70.

97. CLARE HUNTINGTON, *FAILURE TO FLOURISH* 118, 128–29 (2014) (advocating for the law to recognize the multiple ties a child has within birth and adoptive families, but acknowledging flexible rules may alter the parental rights of adoptive parents).