

# LEGITIMIZING ILLEGITIMACY IN CONSTITUTIONAL LAW

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## ABSTRACT

*The traditional constitutional law course is a staple of the first-year law school curriculum and a gateway to more advanced public law courses. In constitutional law, students are introduced to a range of topics—separation of powers, judicial review, suspect classifications, and protections for individual rights, among others. But curiously, few constitutional law courses discuss illegitimacy and the constitutional issues that nonmarital birth presents. This is perhaps surprising. After all, nonmarital births have grown increasingly common in the United States. More than forty percent of American children are born outside of marriage, and studies show that illegitimacy is especially pronounced among certain constituencies. Relatedly, many Americans have actively questioned marriage’s role in organizing adult intimate life, choosing instead to pursue nonmarital relationships. And even among those who have actively pursued marriage, the question of illegitimacy remains salient. One of the principal arguments lodged in support of expanding civil marriage to include same-sex couples was the fact that same-sex couples’ ineligibility for civil marriage exposed their children to the social stigma and legal impediments associated with illegitimacy. As these observations suggest, illegitimacy is a fact of modern family life. Yet it is frequently absent from constitutional law.*

*This Essay considers why illegitimacy has been sidelined in constitutional law curricula. As it argues, the exclusion of robust discussion of illegitimacy in constitutional law courses is not obvious or inevitable. Illegitimacy has, since the 1960s, been the subject of numerous constitutional challenges, and has, since the 1980s, been regarded as a quasi-suspect classification for equal protection purposes. Moreover, cases*

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*discussing the right to marry and abortion—two staples of most constitutional law courses—often explicitly reference illegitimacy (and its attendant penalties) as the likely consequences of restrictions on the right to marry or the right to choose an abortion.*

*As the Essay argues, illegitimacy's absence may be explained, in part, by casebook content. Some of the most popular constitutional law casebooks make only passing references to constitutional protections for illegitimacy, and some casebooks do not even excerpt leading constitutional law cases on illegitimacy—or if they do, the cases are framed in terms of other constitutional law topics, like gender or parental rights. Another likely issue is “silo-ing”—because illegitimacy may be understood as within family law, constitutional law instructors may bypass coverage of the topic on the assumption that the topic will receive in-depth coverage in other courses. This explanation, however, may ring hollow in light of other topics that are covered in both constitutional law and other parts of the law school curriculum. Instead, this Essay argues that the sidelining of illegitimacy in constitutional law reflects the liminal status of nonmarriage and nonmarital families in law and society more generally.*

*Recognizing the growing incidence of nonmarriage in life, and the importance of such recognition for law, this Essay makes the case—and offers concrete ideas—for incorporating more robust discussions of illegitimacy into the constitutional law curriculum.*

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## INTRODUCTION

The traditional constitutional law course is a staple of the first-year law school curriculum and a gateway to more advanced public law courses. Moreover, it is often considered a “prestige” course, highly coveted among faculty and touching on topics that are implicated in the most important events of the day.<sup>1</sup> In constitutional law, students are introduced to a range of issues—separation of powers, judicial review, suspect classifications, and protections for individual rights, among others. But curiously, few constitutional law courses discuss illegitimacy<sup>2</sup> and the constitutional questions that nonmarital birth presents.

Illegitimacy’s omission from the constitutional law curriculum is perhaps surprising. Over the last forty years, nonmarital births have grown

1. See Deborah Jones Merritt, *Who Teaches Constitutional Law?*, 11 CONST. COMMENT. 145, 145 (1994).

2. At the outset, I should note that throughout this Essay, I toggle between the terms “illegitimate,” “illegitimacy,” and “non-marital birth.” I do so purposefully. I recognize the stigma and derision that accompany the terms “illegitimate” and “illegitimacy,” which is why I often invoke the terms “nonmarital” and “nonmarital birth”—I do not wish to further entrench the stigmatization of those who live outside of marriage’s boundaries. But nor do I wish to concede that these terms *should* be stigmatized. To this end, by invoking the terms consciously, I hope to engage the notion that nonmarital birth should be stripped of any stigma and derision—that is, “legitimized.” With this in mind, it is worth reflecting on the multiple meanings associated with the terms “illegitimacy” and “illegitimate.”

increasingly common in the United States.<sup>3</sup> Approximately forty percent of American children are born outside of marriage,<sup>4</sup> and studies show that illegitimacy is especially pronounced among certain minority communities.<sup>5</sup>

Relatedly, marriage and the marital family no longer hold a monopoly on organizing adult intimate life. Many Americans are foregoing marriage in favor of nonmarital relationships.<sup>6</sup> But even among those who have actively pursued marriage, the question of illegitimacy remains salient. As the debate over same-sex marriage reached a fever pitch, one of the principal arguments lodged in support of legalizing same-sex marriage focused on illegitimacy.<sup>7</sup> Specifically, LGBT rights advocates argued that civil marriage should be expanded to spare the children of gay couples the social

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Typically used as an adjective, the term “illegitimate” may describe those who are “not recognized as lawful offspring” or children “born of parents not married to each other.” *Definition of Illegitimate*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/illegitimate>. Alternatively, it may also describe a practice that is unlawful or illegal or otherwise a departure from accepted custom. *Id.* Likewise, the term “illegitimacy” refers to “the state or quality of being illegitimate.” *Illegitimacy*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/illegitimacy> [<https://perma.cc/TU9X-8UNU>]. That is, “the state of not being in accordance with accepted standards or rules” or that which lacks “authorization by the law,” and “the state of being born to parents not lawfully married to each other.” *Illegitimacy*, OXFORD ENGLISH DICTIONARY. In this regard, the terms reflect not only being outside the boundaries lawful marriage, but also connotes a general incorrectness and impropriety—wrongness. In the same vein, the term “legitimate” not only refers to being born in wedlock, but also being proper, correct, and *right*. And the term “legitimize” can refer at once to the process of making something that was once deemed improper—indeed, illegitimate—legitimate through marriage or by asserting its general correctness and consistency with accepted standards. *Id.* I am grateful to Alice Ristroph, Karen Tani, and Sonja Starr for helpful conversations on this point.

3. CARMEN SOLOMON-FEARS, CONG. RSCH. SERV., R43667, NONMARITAL BIRTHS: AN OVERVIEW 8 (2014), <https://sgp.fas.org/crs/misc/R43667.pdf> [<https://perma.cc/6YV4-RUM3>] (reporting the percentage of nonmarital births in the U.S. as 10 percent in 1970 and approximately 41 percent in 2013); Joyce A. Martin, Brady E. Hamilton, Michelle J.K. Osterman & Anne K. Driscoll, *Births: Final Data for 2019*, NAT’L VITAL STAT. REPS., Mar. 23, 2021, at 6, <https://www.cdc.gov/nchs/data/nvsr/nvsr70/nvsr70-02-508.pdf> [<https://perma.cc/2H22-8VPZ>] (reporting the percentage of nonmarital births in 2019 as forty percent).

4. Martin et al., *supra* note 3, at 6.

5. *Id.* at 6, 27 (noting that the percentage of nonmarital births within specific groups in 2019 was seventy percent among non-Hispanic Black women, sixty-nine percent among non-Hispanic American Indian and Alaskan Native women, 52.1% among Hispanic women, 50.4% among non-Hispanic Native Hawaiian and Pacific Islander women, 28.2% among non-Hispanic white women, and 11.7% among non-Hispanic Asian women).

6. Nikki Graf, *Key Findings on Marriage and Cohabitation in the U.S.*, PEW RSCH. CTR. (Nov. 6, 2019), <https://www.pewresearch.org/fact-tank/2019/11/06/key-findings-on-marriage-and-cohabitation-in-the-u-s/> [<https://perma.cc/5NXX-ZVPM>] (reporting the percentage of U.S. adults between the ages of eighteen and forty-four who have ever lived with an opposite-sex unmarried partner as 59% between 2013 and 2017, and the percentage of those adults who had ever been married as only 50% during that time period).

7. See, e.g., *Baker v. State*, 744 A.2d 864, 882 (Vt. 1999); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 956 (Mass. 2003); *Hernandez v. Robles*, 855 N.E.2d 1, 32 (N.Y. 2006) (Kaye, C.J., dissenting). For a more in-depth discussion, see Melissa Murray, *What’s So New About the New Illegitimacy*, 20 J. GENDER, SOC. POL’Y & L. 387 (2012).

stigma and legal impediments associated with illegitimacy.<sup>8</sup> Indeed, the Supreme Court's decision legalizing same-sex marriage in 2015 emphasized that expanding civil marriage to include same-sex couples was necessary to prevent the children of gay parents from "suffer[ing] the significant material costs of being raised by unmarried parents [and being] relegated through no fault of their own to a more difficult and uncertain family life."<sup>9</sup>

This is all to say that illegitimacy is a fact of modern life and law. Yet it is frequently absent from the constitutional law curriculum. Despite differences in law schools and law school faculty, there is a surprising uniformity to the constitutional law curriculum. Courses may vary in credit hours, but most constitutional law courses cover the same core content—justiciability doctrines, separation of powers, presidential power, the commerce power, substantive due process, and equal protection. To be sure, for other topics, there is more variation. Depending on the number of credit hours and the instructors' proclivities and expertise, some constitutional law courses might cover topics like incorporation, the Dormant Commerce Clause, or an introduction to the First Amendment. But critically, in almost all of the constitutional law syllabi that I solicited, these core topics were covered and one topic was notably absent—illegitimacy.

This Essay considers this puzzling omission and asks why illegitimacy has been sidelined in constitutional law curricula. As it argues, the exclusion of robust discussion of illegitimacy in constitutional law courses is neither obvious nor inevitable. Illegitimacy has, since the 1960s, been the subject of numerous constitutional challenges and has, since the 1980s, been regarded as a quasi-suspect classification for purposes of equal protection doctrine. Moreover, cases discussing the right to marry and abortion—two stalwarts of the constitutional law curriculum—often explicitly reference the penalties associated with illegitimacy in their efforts to identify the implications of impositions on the right to marry or the right to choose an abortion or use contraception.

As this Essay argues, illegitimacy's absence in constitutional law may be explained, in part, by the topics covered in casebooks or the view that the topic is likely to be covered in other law school courses. But these explanations are not entirely satisfying. Instead, as this Essay argues, the sidelining of illegitimacy in constitutional law may also be explained by the

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8. See, e.g., Brief for Amici Curiae Scholars of the Constitutional Rights of Children in Support of Respondent Edith Windsor Addressing the Merits and Supporting Affirmance, *United States v. Windsor*, 570 U.S. 744 (2013) (No. 12-307), 2013 WL 840028; Brief of American Psychological Ass'n et al. as Amici Curiae in Support of Plaintiffs-Appellees, *Conaway v. Deane*, 932 A.2d 571 (Md. 2007) (No. 44), 2006 WL 3096521; see also Murray, *supra* note 7, at 419 (discussing the "illegitimacy as injury" argument in the context of marriage equality litigation).

9. *Obergefell v. Hodges*, 576 U.S. 644, 646 (2015).

liminal status of nonmarriage and nonmarital families in law and society more generally. Put differently, the topics covered in constitutional law reflect, to some degree, the weight and value that the law—and society—places on those topics. On this account, the fact that illegitimacy is clearly within the domain of modern constitutional law—but is often absent from the content of constitutional law classes—may reflect our collective unease and discomfort with the prospect of valuing and venerating life outside of marriage. To be clear, this contention is not meant to signal causality, nor does it mean to suggest that law professors and the legal academy are directly responsible for the marginalization of illegitimacy and nonmarriage in our society.<sup>10</sup> Instead, the argument proceeds on the view that legal education can be a site—and indeed, a medium—for reproducing and re-trenching, however inadvertently, various forms of inequality.<sup>11</sup>

This Essay proceeds in five parts. Part I considers illegitimacy, its increasing frequency in modern family life, and its relationship to constitutional law. As it explains, illegitimacy has become a fact of modern family life. Moreover, the legal impediments that have been associated with nonmarital birth have, in the past seventy years, been addressed in a series of constitutional law challenges at the Supreme Court. However, even as illegitimacy challenges have been a vibrant part of modern constitutional law, the topic is often absent in the constitutional law curriculum. As Part II argues, this omission is neither natural nor inevitable. To underscore this point, this Part considers the many places in the constitutional law curriculum where discussions of illegitimacy could be included but are not. Part III considers possible explanations for illegitimacy's curricular omission. As it concludes, while there are many plausible explanations for why illegitimacy remains marginalized in the constitutional law curriculum, at bottom, its omission reflects the liminal status of nonmarriage and nonmarital families in society and the constitutional order. Part IV considers the costs of illegitimacy's marginalization. Part V briefly concludes.

### I. ILLEGITIMACY IN LIFE AND LAW

The incidence of illegitimacy in the United States has increased over tenfold over the past eighty years and nearly fourfold in the past fifty years.<sup>12</sup> In 1940, nonmarital births made up only 3.8% of all births in the United States; by 1970, they comprised roughly eleven percent; by 2009, this

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10. I am grateful to Shaun Ossei-Owusu for helpful conversations on this point.

11. See generally DUNCAN KENNEDY, *LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM* 119–23 (1983); Melissa E. Murray, "I'd Like to Thank the Academy": *Eminem, Duncan Kennedy, and the Limits of Critique*, 55 J. LEGAL EDUC. 65 (2005).

12. SOLOMON-FEARS, *supra* note 3, at 24–26.

number rose to forty-one percent of all births in the United States.<sup>13</sup> In 2019, the most recent year for which birth statistics are available, the percentage of nonmarital births in the United States was approximately forty percent.<sup>14</sup> From 2007 through 2019, the percentage of nonmarital births in the United States has hovered between thirty-nine percent and forty-one percent.<sup>15</sup>

Even as nonmarital births are rising as a general matter, there are distinct demographic trends, particularly with respect to race/ethnicity and age. In 2019, the nonmarital birth rate among non-Hispanic Black women was seventy percent. And sixty-nine among non-Hispanic American Indians and Alaskan Natives. Among Hispanic women, the total of nonmarital births was 52.1%. Among non-Hispanic Native Hawaiian and Pacific Islander women, the nonmarital birth rate was 50.4%. By contrast the nonmarital birth rate for non-Hispanic white women and Asian women was 28.2% and 11.7%, respectively.<sup>16</sup>

With respect to age, the nonmarital birth rate is declining for women under thirty while reaching all-time highs for women aged thirty to thirty-four and forty to forty-four.<sup>17</sup> In 2010, the birth rate to unmarried women aged fifteen to nineteen was 31.1 births per 1,000 unmarried women; in 2019, it was 15.4.<sup>18</sup> For unmarried women aged thirty to thirty-four, the birth rate was 56.3 births per 1,000 in 2010 and 60.6 in 2019.<sup>19</sup> For unmarried women aged thirty-five to thirty-nine, the birth rate increased from 29.6 births per 1,000 in 2010 to 36.0 in 2019.<sup>20</sup> These data make clear that the increasing incidence of nonmarital births cannot be attributed exclusively to “teen moms” or young people more generally, since the highest rates (above sixty births per 1,000 unmarried women) are among those women aged twenty-five to thirty-four.<sup>21</sup> And critically, in stark contrast to prevailing stereotypes, since the late 1990s, cohabiting parents, as opposed to single mothers, comprise the majority of nonmarital births.<sup>22</sup> The share of births to single mothers under the age of forty has remained between fifteen and eighteen percent of all births since the 1980s, while the

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13. *Id.* at 7, 24.

14. Martin et al., *supra* note 3, at 6.

15. SOLOMON-FEARS, *supra* note 3, at 26; Martin et al., *supra* note 3, at 6.

16. Martin et al., *supra* note 3, at 6.

17. *Id.*

18. *Id.* at 28.

19. *Id.*

20. *Id.*

21. *Id.*

22. Huijing Wu, *Trends in Births to Single and Cohabiting Mothers, 1980-2014*, NAT'L CTR. FOR FAM. & MARRIAGE RSCH. AT BOWLING GREEN STATE UNIV. 1, <https://www.bgsu.edu/content/dam/BGSU/college-of-arts-and-sciences/NCFMR/documents/FP/wu-trends-births-single-cohab-mothers-fp-17-04.pdf> [<https://perma.cc/6YQZ-H8ZT>].

share of births to cohabiting mothers in the same age group has increased from six percent of all births in 1980 to twenty-six percent in 2014.<sup>23</sup>

I offer this demographic portrait of illegitimacy because it makes clear that the increasing incidence of nonmarital births dovetails with the law's liberalization of the legal impediments that traditionally have been associated with illegitimacy. At common law, children born out of wedlock were legally disfavored—*filius nullius*, the child of no one.<sup>24</sup> Parents had no obligation to recognize their illegitimate offspring or to provide for their upkeep, though this was later amended statutorily to place the duty of care for nonmarital children squarely on the shoulders of their unmarried mothers.<sup>25</sup> Vestigial aspects of this common law tradition persisted, even on this side of the Atlantic, well into the twentieth century.<sup>26</sup>

By the late 1960s, however, the legal impediments with which illegitimacy was traditionally associated were being challenged. In 1968, the U.S. Supreme Court took up two challenges to Louisiana's wrongful death statute, which excluded nonmarital children and parents as potential "survivors" entitled to recovery.<sup>27</sup> In *Levy v. Louisiana*,<sup>28</sup> the Court declared the wrongful death scheme invalid, concluding that "it is invidious to discriminate against [illegitimate children] when no action, conduct, or demeanor of theirs is possibly relevant to the harm that was done the mother."<sup>29</sup> In *Glonn v. American Guarantee & Liability Insurance Co.*,<sup>30</sup> decided on the same day as *Levy*, the Court reiterated the view that there was "no possible rational basis" for "the State [to] den[y] equal protection of the laws" solely because of illegitimacy.<sup>31</sup>

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23. *Id.*

24. See 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 459 (1769); see also MICHAEL GROSSBERG, GOVERNING THE HEARTH 197 (1985) (describing how nonmarital children were considered *filius nullius* and therefore did not have the same right of support as children born in a marriage).

25. Martha F. Davis, *Male Coverture: Law and the Illegitimate Family*, 56 RUTGERS L. REV. 73, 81–82 (2003); Kristin Collins, Note, *When Fathers' Rights Are Mothers' Duties: The Failure of Equal Protection in Miller v. Albright*, 109 YALE L.J. 1669, 1683–84 (2000).

26. See *Gomez v. Perez*, 409 U.S. 535, 538 (1973) ("[T]here is no constitutionally sufficient justification for denying [child support to] a child simply because its natural father has not married its mother. For a State to do so is 'illogical and unjust.'" (citation omitted)); *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972) ("[I]mposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent."); *Levy v. Louisiana*, 391 U.S. 68, 70 (1968) ("We start from the premise that illegitimate children are not 'nonpersons.' They are humans, live, and have their being. They are clearly 'persons' within the meaning of the Equal Protection Clause of the Fourteenth Amendment." (footnotes omitted)).

27. See Murray, *supra* note 7, at 391.

28. 391 U.S. 68 (1968).

29. *Id.* at 72.

30. 391 U.S. 73 (1968).

31. *Id.* at 75–76.

Taken together, *Levy* and *Glon* established that nonmarital children were a class deserving of more rigorous judicial scrutiny under the Equal Protection Clause. In the years that followed, the Court accordingly undertook more rigorous scrutiny of illegitimacy classifications, frequently invalidating the challenged statutory schemes. For example, in 1972's *Weber v. Aetna Casualty & Sureties Co.*, the Court held that Louisiana's workman's compensation law, which denied recovery to nonmarital children, violated the Equal Protection Clause of the Fourteenth Amendment.<sup>32</sup> Likewise, in *Gomez v. Perez*, decided in 1973, the Court held that a Texas law distinguishing between legitimate and illegitimate children in establishing a legal entitlement to paternal support violated the Equal Protection Clause.<sup>33</sup>

Despite these victories, the Court's treatment of illegitimacy classifications could be uneven. Although the Court often took a dim view of illegitimacy classifications, it also noted that in *some* circumstances, the state could permissibly draw distinctions on the basis of nonmarital birth.<sup>34</sup> In 1971's *Labine v. Vincent*,<sup>35</sup> for example, the Court held that Louisiana's intestate succession laws, which treated nonmarital children differently from those born in wedlock, did not violate the Due Process and Equal Protection Clauses.<sup>36</sup> As the Court explained, the State's interest in ensuring the orderly descent of intestate estates warranted the distinction between marital and nonmarital children.<sup>37</sup> Likewise, in *Mathews v. Lucas*,<sup>38</sup> the Court concluded that, under certain circumstances, legislative distinctions between legitimate and illegitimate children could be constitutionally permissible.<sup>39</sup> And in *Lalli v. Lalli*,<sup>40</sup> the Court appeared to retreat from *Trimble v. Gordon*,<sup>41</sup> where it struck down an Illinois law allowing nonmarital children to inherit only from the intestate estates of their mothers, rather than from their mother or father (as was the case for legitimate children).<sup>42</sup> In *Lalli*, the Court affirmed a state court ruling that allowed New York to ban an illegitimate child from inheriting from an

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32. 406 U.S. 164, 176 (1972) (“[T]he Equal Protection Clause does enable us to strike down discriminatory laws relating to status of birth where—as in this case—the classification is justified by no legitimate state interest, compelling or otherwise.”).

33. *Gomez v. Perez*, 409 U.S. 535, 538 (1973).

34. *See id.* (acknowledging that “lurking problems with respect to proof of paternity” may justify classifications based on illegitimacy in the support context).

35. 401 U.S. 532 (1971).

36. *Id.* at 539–40.

37. *Id.* at 539.

38. 427 U.S. 495 (1976).

39. *Id.* at 508–09.

40. 439 U.S. 259 (1978).

41. 430 U.S. 762 (1977).

42. *Id.* at 776.

intestate father without an order of paternity issued during the father's lifetime.<sup>43</sup>

But even as the Court permitted illegitimacy classifications to stand in some circumstances, its rulings made clear that such classifications were inherently suspect and should be subjected to intermediate judicial scrutiny—the same standard of review reserved for gender-based classifications. Under this exacting standard, “a statutory classification must be substantially related to an important governmental objective.”<sup>44</sup> Accordingly, the Court made clear in the *Levy* line of cases<sup>45</sup> that the State may not “burden illegitimate children for the sake of punishing the illicit relations of their parents, because ‘visiting this condemnation on the head of an infant is illogical and unjust.’”<sup>46</sup>

This is all to say that in the not-too-distant past, the federal courts—and the Supreme Court, in particular—grappled with how to reconcile illegitimacy classifications with the constitutional guarantee of equal protection of the laws. As I elaborate in the following Part, the Court's struggle over how to think about and address the legal harms of illegitimacy classifications mirrored its efforts to wrestle other identity classifications into the tiered structure of equal protection theory and practice. But while the Court's consideration of race, gender, and sexual orientation have made their way into the constitutional law curriculum and are likely to be taught in most constitutional law classes, illegitimacy remains on the sidelines of constitutional law. In the following Part, I argue that this marginalization is neither natural nor inevitable. In fact, there are numerous places in the extant constitutional law curriculum where illegitimacy could be covered—whether as a stand-alone topic or to complement coverage of existing constitutional law topics.

## II. ILLEGITIMACY AND CONSTITUTIONAL LAW

Constitutional law is a staple of the modern law school curriculum. Indeed, at many law schools, it is among the cadre of *required* courses. Constitutional law's curricular ubiquity may be explained by a range of justifications. Law schools may require students to take a constitutional law

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43. *Lalli*, 439 U.S. at 275–76.

44. *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (citations omitted).

45. To be sure, the line of cases that begins with *Levy* and culminates in *Clark v. Jeter* traditionally has defined the boundaries of the Court's treatment of illegitimacy. That said, it is worth noting that there are cases beyond this line that also surface the impediments related to illegitimacy, albeit outside of the traditional equal protection frame. *See, e.g.*, *King v. Smith*, 392 U.S. 309 (1968); *Fiallo v. Bell*, 430 U.S. 787 (1977); *Miller v. Albright*, 523 U.S. 420 (1998); *Nguyen v. Immigr. & Naturalization Serv.*, 533 U.S. 53 (2001); *Sessions v. Morales-Santana*, 137 S. Ct. 1678 (2017).

46. *Clark*, 486 U.S. at 461 (citing *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 (1972)).

survey course because the subject matter forms a kind of *lingua franca*, introducing students to core concepts and content that are hallmarks of the U.S. legal tradition. Alternatively, law schools may require the course on the ground that constitutional law exposes students to basic foundational principles and content that will enable them to pursue other public law courses, like administrative law, family law, and federal courts. More broadly, constitutional law may be a required course because it is a means of “teach[ing] a story about the transformation of American society through law.”<sup>47</sup>

Despite the varied justifications for its ubiquity, constitutional law courses are often surprisingly consistent in their content. Ten years ago, when I began teaching constitutional law, I reached out to colleagues in the field for guidance as I began to structure my course syllabus. Many were extraordinarily generous and sent along their class syllabi and, in some circumstances, class notes. The materials I collected reflected a certain homogeneity. Although there were minor variations, all of the syllabi included coverage of the same core topics: judicial review, the commerce power, federalism, equal protection, and substantive due process. The uniformity was surprising because the colleagues to whom I reached out were a broad and diverse group. Some were scholars whose interests in constitutional law focused on the rights recognized under the Fourteenth Amendment, while others were structuralists whose interests centered on the constitutional design and the division of authority between the federal government and the states and between the coordinate branches of the federal government. Put simply, they ran the gamut—from race scholars to those whose research probed the intricacies of the administrative state. And their institutional homes were similarly diverse, ranging from T-14 institutions to more regional law schools. Despite this diversity, their syllabi seemed to indicate a consensus as to a substantive canon of constitutional law topics.

But the syllabi were not only similar in what they covered—they were similar in what they *did not* cover. Specifically, most did not cover illegitimacy. Indeed, the few professors who did incorporate illegitimacy into their constitutional law coverage were, like me, individuals who also taught family law, where illegitimacy is often a specific topic of discussion.

The almost-uniform absence of illegitimacy in this wide range of constitutional law courses was puzzling. To my mind, discussion of illegitimacy and the cases associated with nonmarriage and nonmarital birth could be easily accommodated in the constitutional law curriculum. But it was not just that illegitimacy *could* be accommodated within the traditional

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47. Email from Noah Rosenblum to Melissa Murray (Apr. 9, 2022) (on file with author).

constitutional law curriculum, it was that it affirmatively *should* be included. Illegitimacy, in and of itself, is an important topic—one that creates opportunities to discuss issues that are unlikely to be covered elsewhere in the law school curriculum. And regardless of whether one views constitutional law as inculcating a *lingua franca*, imparting foundational principles for further study, or providing a narrative account of socio-legal change, coverage of illegitimacy serves these heterogeneous animating principles. In this regard, illegitimacy’s absence in the constitutional law curriculum was neither natural nor inevitable.<sup>48</sup> In fact, as the following sections document, there are a number of areas in the constitutional law curriculum that would benefit from more robust discussion of illegitimacy, nonmarriage, and nonmarital families.

#### A. Equal Protection

Tellingly, in all of the syllabi that I received and reviewed, there was significant coverage of equal protection doctrine (and in some cases, equal protection theory). As these syllabi reflected, constitutional law’s coverage of equal protection typically includes discussion of the tiers of scrutiny—strict scrutiny, intermediate (or heightened) scrutiny, rational basis review, and “rational basis with bite.”<sup>49</sup> As a general matter, the coverage of these standards of review corresponds to coverage of a set of underlying classifications that trigger a specific standard.<sup>50</sup> With this context in mind,

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48. To be sure, illegitimacy might be surfaced in other required law school courses, beyond constitutional law—property and criminal law immediately come to mind. However, I maintain that its exclusion from the constitutional law curriculum is especially puzzling because, as I will discuss, illegitimacy is a core aspect of equal protection doctrine. While illegitimacy is certainly related to topics like intestacy and primogeniture (property) and bastardy (criminal law), these topics, and their relationship to illegitimacy, are arguably more distant from the core doctrines—and pedagogical aims—of either property or criminal law.

49. See, e.g., ERWIN CHERMERINSKY, CONSTITUTIONAL LAW 684–903 (6th ed. 2020) (Chapter 7, on Equal Protection, includes a subsection on the framework of the equal protection analysis as well as individual sections on rational basis, classifications based on race and national origin, gender classifications, discrimination against non-citizens, and “[o]ther” types of discrimination.); GEOFFREY R. STONE, LOUIS M. SEIDMAN, CASS R. SUNSTEIN, MARK V. TUSHNET & PAMELA S. KARLAN, CONSTITUTIONAL LAW 509–715 (8th ed. 2017) (Chapter 5, on Equality and the Constitution, includes sections on rational basis review, heightened (strict) scrutiny as it applies to race, heightened (intermediate) scrutiny as it applies to gender, the standard of review for sexual orientation, and “[o]ther [c]andidates” for heightened scrutiny.); PAUL BREST, SANFORD LEVINSON, JACK M. BALKIN, AKHIL REED AMAR & REVA B. SIEGEL, PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 1053–375 (7th ed. 2018) (Brest et al. notably divide their discussion of equal protection into two chapters: Chapter 7 is on Race and the Equal Protection Clause, with an extensive discussion of strict scrutiny in the context of race; Chapter 8 is on Sex Equality, with a focus on intermediate scrutiny and the possibility for “[o]ther [s]uspect [b]ases of [c]lassification”).

50. See, e.g., CHERMERINSKY, *supra* note 49, at 684–903 (the discussions of strict scrutiny correspond with race and national origin classifications, while the discussion of intermediate scrutiny

illegitimacy's omission from the curriculum is especially puzzling. Illegitimacy could be deployed productively at various points in the constitutional law curriculum, but its omission is perhaps most glaring in the course's coverage of equal protection. In the following subsections, I explain how this material might be included in the discussion of equal protection, prompting richer and more nuanced consideration of this core aspect of the constitutional law curriculum.

### *1. Intermediate/Heightened Scrutiny*

The most obvious place to surface a robust discussion of illegitimacy and nonmarital families in the constitutional law curriculum is in the coverage of equal protection and its tiers of scrutiny. Illegitimacy classifications long have been subject to heightened scrutiny,<sup>51</sup> meaning that they pass constitutional muster only if they are substantially related to an important governmental interest.<sup>52</sup>

In most constitutional law classes, however, any discussion of heightened scrutiny is translated through the lens of sex-based classifications and the Court's efforts to locate gender-based discrimination in an equal protection paradigm, which had previously been articulated in the context of race-based classifications and racial discrimination. To this end, discussion of heightened scrutiny often focuses on the tortured trajectory from *Reed v. Reed*<sup>53</sup> to *Frontiero v. Richardson*,<sup>54</sup> ultimately culminating in *Craig v. Boren*,<sup>55</sup> where the Court debuted the heightened scrutiny standard.<sup>56</sup>

In the discussion of these cases involving gender discrimination, constitutional law instructors traditionally consider the Court's efforts to identify the appropriate level of scrutiny for classifications that present some, though not all, of the costs and consequences of racial discrimination and race-based classifications. In this regard, the focus on gender classifications elicits a deeper discussion of the factors that are used to denominate a group a suspect or quasi-suspect class, as well as consideration of why more rigorous judicial scrutiny may be appropriate in

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encompasses gender classifications); STONE ET AL., *supra* note 49, at 509–715 (likewise associating strict scrutiny with race and intermediate scrutiny with gender); BREST ET AL., *supra* note 49, at 1053–1375 (breaking the discussion of strict scrutiny and intermediate scrutiny into two chapters that correspond with race and gender, respectively).

51. See *Clark*, 486 U.S. at 461.

52. *Id.* at 461.

53. 404 U.S. 71 (1971).

54. 411 U.S. 677 (1973).

55. 429 U.S. 190 (1976).

56. See, e.g., CHEMERINSKY, *supra* note 49, at 839–46; STONE ET AL., *supra* note 49, at 639–49 (with a more in-depth discussion of this trajectory at 641).

particular circumstances.<sup>57</sup> As importantly, the discussion of gender classifications typically prompts some exploration of circumstances where the State may permissibly draw distinctions on the basis of gender, and those circumstances where such distinctions run afoul of the Constitution.<sup>58</sup>

But focusing on illegitimacy, in addition to or in lieu of gender classifications, does not avoid such discussions. Indeed, a focus on illegitimacy may advance—and even enhance—such discussions. For example, consideration of illegitimacy, as much as gender, surfaces complicated questions about what role birth status should play in determining eligibility for particular opportunities. In this regard, a focus on the illegitimacy cases offers instructors an opportunity to reflect on what it means to denominate a group a suspect or quasi-suspect class and what more rigorous judicial scrutiny might require.

In the trajectory from *Levy v. Louisiana*, the first case in which the Court held unconstitutional a classification based on nonmarital birth, to *Clark v. Jeter*, in which the Court confirmed that heightened scrutiny was the appropriate standard of review for most classifications based on illegitimacy,<sup>59</sup> one can discern many of the same debates and concerns that attended the Court's efforts to deal with gender-based classifications. For example, as in *Reed v. Reed*<sup>60</sup> and *Frontiero v. Richardson*,<sup>61</sup> where the Court debated the merits of strict scrutiny versus rational basis or some form of heightened scrutiny for gender-based classifications, the Court in *Mathews v. Lucas*<sup>62</sup> and *Trimble v. Gordon*<sup>63</sup> struggled to identify the appropriate standard of review for illegitimacy classifications.<sup>64</sup> In challenging illegitimacy classifications, some advocates argued for the most rigorous standard of review—strict scrutiny.<sup>65</sup> As in the gender cases, the

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57. STONE ET AL., *supra* note 49, at 649–53.

58. *Id.* at 641.

59. See *Levy v. Louisiana*, 391 U.S. 68, 72 (1968); *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

60. 404 U.S. 71 (1971).

61. 411 U.S. 677 (1973).

62. 427 U.S. 495 (1976).

63. 430 U.S. 762 (1977).

64. See *Reed*, 404 U.S. at 75–76; *Frontiero*, 411 U.S. at 686–88; *Mathews*, 427 U.S. at 504–06; *Trimble*, 430 U.S. at 767.

65. See Motion of American Civil Liberties Union for Leave to File Brief Amicus Curiae and Brief Amicus Curiae at 8–12, *Gomez v. Perez*, 409 U.S. 535 (1973) (No. 71-575), 1972 WL 136564 (stating that “[a] classification based upon legitimacy at birth is invidious and requires strict scrutiny under the Equal Protection Clause”); see also Brief Amici Curiae of the American Civil Liberties Union Foundation et al. at 43, *Clark v. Jeter*, 486 U.S. 456 (1988) (No. 87-5565), 1988 WL 1031609 (stating that the Court has historically imposed a heightened level of scrutiny on classifications based on legitimacy); Brief of the American Civil Liberties Union, Amicus Curiae at 16–17, *Caban v. Mohammed*, 441 U.S. 380 (1979) (No. 77-6431), 1978 WL 223244 (identifying legitimacy classifications as a suspect classification that stems from prejudice); Brief Amicus Curiae of the Legal Aid Society of New York City and Legal Services for the Elderly Poor in Support of Appellant at 4, 25–

Court was not entirely convinced that strict scrutiny was the appropriate standard of review.<sup>66</sup> In *Mathews*, the Court concluded that while illegitimacy classifications were entitled to more exacting scrutiny than ordinary social and economic legislation, they were not entitled to strict scrutiny, the most rigorous form of judicial review.<sup>67</sup> However, just a year later in *Trimble v. Gordon*, a challenge to an Illinois intestate rule that allowed illegitimate children to inherit only from their mothers, the Court invalidated the statute and reiterated that illegitimacy classifications did not provoke strict scrutiny review, but suggested that such classifications warranted some kind of heightened review.<sup>68</sup>

In short, as it struggled to resolve the constitutionality of illegitimacy classifications, the Court was grappling with many of the same questions with which it had struggled in cases like *Reed* and *Frontiero*. How should it regard illegitimacy, which, like gender and race, “is an immutable characteristic determined solely by the accident of birth”?<sup>69</sup> Was the State owed deference in circumstances where it imposed “special disabilities upon the members of a particular [group] because of their [status],” or did such policies “violate ‘the basic concept of our system that legal burdens should bear some relationship to individual responsibility’”?<sup>70</sup> Could the State impose legal impediments on nonmarital children because of factors beyond their control (namely their parents’ sexual conduct)? As the illegitimacy cases suggest, these questions, which are central to equal protection theory and the doctrinal hierarchy of the tiers of review, are as easily surfaced in a discussion of illegitimacy as they are in the discussion of gender and sex-based classifications.

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26, *Lalli v. Lalli*, 439 U.S. 259 (1978) (No. 77-1115), 1977 WL 205249 (asserting that “discrimination against illegitimate children in the distribution of the assets of their fathers who die intestate . . . cannot withstand scrutiny under the requirements of the Equal Protection Clause”); Brief of the American Civil Liberties Union, Amicus Curiae at 23–24, *Trimble v. Gordon*, 430 U.S. 762 (1977) (No. 75-5952), 1976 WL 181304 (arguing that classification based on birth status are suspect classifications); *id.* at 30 (arguing that state laws that classify on the basis of legitimacy should be held to strict scrutiny under the Equal Protection Clause); Brief for the Executive Council of the Episcopal Church in the U.S.A. and the American Jewish Congress, Amici Curiae at 26, *Levy v. Louisiana*, 391 U.S. 68 (1968) (No. 508), 1967 WL 129635 (arguing that the same test should be used for discrimination based on illegitimacy as is used for racial discrimination); *see generally* Motion for Leave to File Amicus Curiae and Brief Amicus Curiae of Barbara Jenkins in Support of Appellee at 21, *United States v. Clark*, 445 U.S. 23 (1980) (No. 78-1513), 1979 WL 199270 (suggesting that no “less than the strictest scrutiny should be applied” to classifications based on legitimacy, and certainly more than the rational basis test).

66. *See* *Levy v. Louisiana*, 391 U.S. 68, 71, 71 (1968) (applying rational basis review to evaluate illegitimacy classifications); *Mathews*, 427 U.S. at 504–05.

67. *Mathews*, 427 U.S. at 504–05.

68. *Trimble*, 430 U.S. at 767.

69. *Frontiero*, 411 U.S. at 686.

70. *Id.* Notably, the *Frontiero* plurality was quoting *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972), an illegitimacy case.

As importantly, greater consideration of the illegitimacy cases in constitutional law would also highlight law's long-standing inattention to questions of intersectionality. In constitutional law's coverage of race and gender, it is easy (or at least easier) to sequester and isolate the influence of these two identity characteristics. Such isolation is less likely in the consideration of illegitimacy because the category historically has implicated the trifecta of race, gender, and class. In this regard, coverage of illegitimacy could usefully highlight the way that constitutional law (and indeed, other doctrinal areas) has obscured the confluence of race, gender, and class in decision-making, universalizing rights even as it elides important context.

## 2. *The Nature of Classifications and Categories*

At the heart of equal protection theory is the question of classification and categorization. Not surprisingly, much of constitutional law's coverage of equal protection focuses on delineating between those identity categories and classifications deemed suspect or quasi-suspect, and therefore worthy of more exacting judicial scrutiny, and those categories that raise few red flags, prompting greater deference to the State's decision to classify or categorize.<sup>71</sup> For most instructors, this inquiry focuses on what is perhaps the most famous footnote in all of constitutional law—footnote four of *United States v. Carolene Products Co.*<sup>72</sup> As the Court explained there:

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation . . . . Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities; whether prejudice against discrete and insular minorities

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71. Compare *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (“At the very least, the Equal Protection Clause demands that racial classifications, especially suspect in criminal statutes, be subjected to the ‘most rigid scrutiny,’ and, if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate.” (citation omitted)), and *Craig v. Boren*, 429 U.S. 190, 197–98 (1976) (“To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.”), with *Williamson v. Lee Optical of Okla.*, 348 U.S. 483, 489 (1955) (“The prohibition of the Equal Protection Clause goes no further than the invidious discrimination.”), and *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 533 (1973) (“Under traditional equal protection analysis, a legislative classification must be sustained, if the classification itself is rationally related to a legitimate governmental interest.” (citations omitted)).

72. 304 U.S. 144 (1938).

may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.<sup>73</sup>

Much of constitutional law's discussion of equal protection theory focuses on this passage and the tiers of scrutiny that have emerged from its identification of those circumstances that warrant "more searching judicial inquiry."<sup>74</sup> And indeed, the Court has set forth various criteria for determining which classifications should be considered suspect or quasi-suspect, thus triggering more rigorous review. Among the criteria to be considered is whether the group in question has experienced a history of past discrimination,<sup>75</sup> whether the group is politically powerless and unable to protect its interests in majoritarian politics,<sup>76</sup> whether the trait that defines the group is one that is irrelevant to the individual's ability to contribute to or participate in society,<sup>77</sup> and whether the trait that defines the group is immutable in nature.<sup>78</sup>

These criteria reflect certain essential attributes of those categories deemed suspect classifications. The emphasis on past discrimination and political powerlessness and the irrelevance of the trait to the individual's ability to contribute to society suggest that a suspect category is one that attracts scorn and stigma, making those in the group vulnerable to the preferences of the majority. In a similar vein, the emphasis on immutability suggests that the scorn and stigma to which the group is subject is, at some level, undeserved because the individual has no control over whether she is in possession of the trait or not. She can neither voluntarily acquire the disfavored status, nor can she shed it and the legal impediments it imposes.

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73. *Id.* at 152–53 n.4 (citations omitted).

74. *Id.* at 153 n.4.

75. *See Frontiero*, 411 U.S. at 684 ("There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination." (footnote omitted)).

76. *See Carolene Prods.*, 304 U.S. at 153 n.4 (observing that "prejudice against discrete and insular minorities . . . tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities"); *see also Romer v. Evans*, 517 U.S. 620, 645–46 (1996) (Scalia, J., dissenting) (noting that sexual minorities "possess political power much greater than their numbers," ostensibly belying the need for the additional protection of more rigorous judicial scrutiny).

77. *See Frontiero*, 411 U.S. at 686 ("[W]hat differentiates sex from such non-suspect statuses as intelligence or physical disability . . . is that the sex characteristic frequently bears no relation to ability to perform or contribute to society." (footnote omitted)).

78. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 442 (1985) ("[The cognitively disabled] are thus different, immutably so, . . . and the States' interest in dealing with and providing for them is plainly a legitimate one." (footnote omitted)). Critically, however, the Court has treated immutability inconsistently in determining suspect and quasi-suspect class status. For example, in *Nyquist v. Mauclet*, 432 U.S. 1, 9 n.11 (1977), the Court treated alienage as a suspect classification subject to strict scrutiny, even though naturalization may transform the alien into a citizen. Likewise, in *Cleburne*, 473 U.S. at 445–46, the Court declined to treat the cognitively disabled as a suspect class, even though it conceded that this group possessed "immutable disabilities."

In this regard, the criteria for determining suspect categories reflects an intuition that these classifications are, to a large extent, biologically determined.<sup>79</sup> That is, the categories correspond to traits with which the individual is born and which she carries throughout her life and cannot easily relinquish. With this in mind, it is easy to understand why race is the paradigmatic example of a suspect classification. One's race is an incident of birth, and outside of racial passing, it is not something that can be changed or altered at will. Historically, gender also hewed to this model of a biologically determined classification—a status into which one is born and which cannot be relinquished.

But does illegitimacy fit easily into this model of biological determinacy? At one level, illegitimacy, like race and gender, *is* an incident of birth—that is, it is a category over which the individual has no control. It is purely a function of one's parents' marital status. As importantly, it is a status that has little bearing on the individual's ability to contribute to society. All of these points were determinative in the Court's identification of illegitimacy as a quasi-suspect class entitled to more rigorous judicial review. In *Mathews v. Lucas*,<sup>80</sup> for example, the Court noted that illegitimacy "is, like race or national origin, a characteristic determined by causes not within the control of the illegitimate individual, and it bears no relation to the individual's ability to participate in and contribute to society."<sup>81</sup> Further, the fact that children, who had little control over their parents' sexual conduct, often bore the brunt of illegitimacy's impediments underscored its status as a suspect category.<sup>82</sup>

But while it may be true that race, gender, and illegitimacy are beyond the individual's control, are they beyond society's control? Many scholars have argued that race and gender are social constructs, not biological inevitabilities.<sup>83</sup> In this regard, individuals may not be able to control their

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79. See, e.g., Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503 (1994) (critiquing the use of biological determinism arguments by advocates relying on immutability in LGBTQ+ rights litigation); Michael A. Helfand, *The Usual Suspect Classifications: Criminals, Aliens and the Future of Same-Sex Marriage*, 12 U. PA. J. CONST. L. 1 (2009) (examining the role of immutability in equal protection analysis); Marcy Strauss, *Reevaluating Suspect Classifications*, 35 SEATTLE U. L. REV. 135 (2011) (arguing for reevaluating the Equal Protection Clause analysis).

80. 427 U.S. 495 (1976).

81. *Id.* at 505.

82. *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972) (observing that "no child is responsible for his birth" and concluding that "imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing").

83. See, e.g., JUDITH BUTLER, *GENDER TROUBLE* (Routledge Classics 2006) (1990) (arguing that gender and sex can only be understood as a performance that takes place within a historical framework of power dynamics); Angela Onwuachi-Willig & Mario L. Barnes, *By Any Other Name?: On Being*

phenotypical presentation, but it is *society* that confers social—and legal—meaning to the fact of skin color or specific genitalia.

In a similar vein, it is society—and law, more specifically—that constructs illegitimacy as a category. And intriguingly, unlike race and gender, law furnishes the conditions under which illegitimacy might be “cured.” That is, law sets forth the circumstances under which those of illegitimate birth may be rendered “legitimate.”<sup>84</sup> The etymologies of the terms “illegitimate,” “illegitimacy,” and “legitimate” underscore this point. These terms obviously have multiple meanings, referring at once to birth status *and* the propriety or correctness of a subject, but according to the Oxford English Dictionary (OED), the terms’ association with birth status emerged in the sixteenth century in conjunction with the law of primogeniture. Under the laws of primogeniture, only “legitimate” male heirs—that is, sons born within marriage—were eligible to inherit lands and titles.<sup>85</sup> However, landowners whose wives failed to produce sons might be compelled to legitimate a son “born on the wrong side of the blanket” in order to ensure the orderly descent of property.

Henry VIII’s tumultuous reign provides perhaps the best example of law’s role in constructing—and deconstructing—the category of illegitimacy. Upon realizing that his lawful wife, Catherine of Aragon, would be unlikely to deliver the much-longed-for male heir, Henry apparently considered and dismissed the prospect of “legitimizing” Henry Fitzroy, the Duke of Richmond and Somerset and his son born of an out-of-wedlock relationship with Bessie Blount.<sup>86</sup> Happily, Henry’s third marriage to Jane Seymour resulted in the birth of a lawful male heir—Edward VI.

But this too raised questions about legitimacy and illegitimacy—and law’s role in creating these categories. In pursuing marriage to Jane Seymour, Henry nullified his second marriage to Anne Boleyn—she was

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“Regarded as” *Black, and Why Title VII Should Apply Even if Lakisha and Jamal Are White*, 2005 WIS. L. REV. 1283 (2005) (arguing that employment discrimination protections should be available to those whose identities are socially constructed as racial minorities); Candace West & Don H. Zimmerman, *Doing Gender*, 1 GENDER & SOC’Y 125 (1987) (arguing that gender is a social construction composed of quotidian actions); Michael Yudell, Dorothy Roberts, Rob DeSalle & Sarah Tishkoff, *Taking Race out of Human Genetics*, 351 SCI. 564, 565 (2016) (arguing from a public health and genetics perspective that race is misused as a “biological” or “genetic” category and should instead be understood as a social indicator of ancestry).

84. See, e.g., N.Y. DOM. REL. LAW § 24 (McKinney 2008); GA. CODE ANN. § 19-7-22 (2021); 8 U.S.C. § 1409, *invalidated by* Kiviti v. Pompeo, 467 F. Supp. 3d 293 (D. Md. 2020), *appeal dismissed*, No. 20-1882, 2020 WL 8509833 (4th Cir. Oct. 26, 2020).

85. *Illegitimate, adj. and n.*, OED Online, www.oed.com/view/Entry/91408 (last visited Mar. 27, 2022); *Legitimate, adj., adv., & n.*, OED Online, www.oed.com/view/Entry/107112 (last visited Mar. 27, 2022).

86. J. Duncan M. Derrett, *Henry Fitzroy and Henry VIII’s ‘Scruple of Conscience’*, 16 RENAISSANCE NEWS 1, 1–2 (1963).

ultimately beheaded on charges of witchcraft and incest.<sup>87</sup> Henry's zeal to rid himself of Anne Boleyn also meant dealing with the offspring of their now-discredited marriage. The nullification of a marriage would, in most cases, render the children of the marriage illegitimate. Again, law gives meaning to birth status. But given the stakes—and the throne in play—Henry took additional precautions, issuing a royal edict making Elizabeth, his daughter by Anne Boleyn, illegitimate.<sup>88</sup> With a single stroke of his pen and the invocation of his law, the king reiterated that a royal princess, and presumptive heiress to the throne, had been transformed into a bastard, ineligible to inherit from her father.<sup>89</sup> A few years later, during his sixth and final marriage to Katherine Parr, Henry VIII would once again use the law and royal edicts to legitimate Elizabeth and her half-sister Mary, his daughter by Catherine of Aragon, reinstating them in the line of succession as lawful heirs to the throne.<sup>90</sup>

The oscillating fortunes of sixteenth-century English princesses are, I concede, unlikely fare in a course about the United States Constitution. Still, the fact of primogeniture and the quest for “legitimate” heirs, whether royal or nonroyal, makes clear both the law's role in creating illegitimacy as a status, *and* the inherent instability of illegitimacy as a category. These historical examples, in tandem with modern efforts to legitimate offspring through marriage and other legal machinations, demonstrate that, even as illegitimacy is an incident of birth, it is a socially and legally constructed status that can be altered at will and by force of law. That is, it is not *immutable*.

And that is the point. Including illegitimacy in the coverage of the equal protection framework can prompt important questions about the assumptions on which the tiers of scrutiny rest. If suspect traits are assumed to be outside of the individual's control, what does it mean for equal protection theory and practice that they are not always beyond the control of law or society? To the extent that equal protection's tiered scrutiny is law's effort to protect stigmatized and vulnerable groups, should it matter that it is law that creates and constructs the conditions that render these traits stigmatized and vulnerable in the first place? What does it mean for a suspect class to be the product of both biology *and* law? If suspect class status is predicated on the fixed and immutable nature of categories, how should we account for categories like illegitimacy, alienage, and gender

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87. ERIC IVES, HENRY VIII 57 (2007). *See also* Margery Stone Schauer & Frederick Schauer, *Law as the Engine of State: The Trial of Anne Boleyn*, 22 WM. & MARY L. REV. 49 (1980).

88. IVES, *supra* note 87, at 59.

89. *Id.*

90. *Id.* at 87, 91.

that, whether because of law or other interventions, are not always fixed and immutable?

These questions admit no easy answers, but they are important questions to surface as we consider equal protection doctrine—and its future. To be sure, these questions might come to the fore in a discussion of gender or sexual orientation (and the refusal to treat sexual orientation as a suspect classification).<sup>91</sup> However, I maintain that a focus on illegitimacy provides an important lens for thinking about the distinctions between biology and social and legal construction in the denomination of suspect classes, as well as the inherent instability of many suspect categories. In this way, incorporating illegitimacy into the constitutional law curriculum can help reveal the inconsistencies—and indeed, failures—of equal protection’s unwavering focus on *identity* as a proxy for discrimination.<sup>92</sup> This, in turn, can prompt productive discussions about whether focusing on identity alone can properly address the scourge of discrimination—and indeed, whether equal protection’s tiered structure is compatible with a society in which identity is mutable and intersectional, and where classifications based on identity can serve benign *and* invidious ends.

### B. *Substantive Due Process*

Just as the illegitimacy cases offer another lens through which to discuss the central questions animating equal protection doctrine, they also are a fruitful conduit into the heart of substantive due process doctrine. Although illegitimacy classifications are traditionally resolved using equal protection principles,<sup>93</sup> as the Court acknowledged in *Levy*, the State’s use of illegitimacy classifications also pose questions involving “the intimate, familial relationship between a child and his own mother”<sup>94</sup>—the very kinds of rights that are typically protected as fundamental rights under the Court’s substantive due process jurisprudence.<sup>95</sup> More specifically, the cases concerning illegitimacy can help illuminate traditional substantive due

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91. See generally Russell K. Robinson, *Unequal Protection*, 68 STAN. L. REV. 151 (2016) (explaining that the Supreme Court’s jurisprudence on LGBT rights has declined to specify a classification or standard of review, instead relying on a broad animus framework).

92. For a critique of equal protection’s focus on identity, see Lauren Sudeall Lucas, *Identity as Proxy*, 115 COLUM. L. REV. 1605, 1620–22 (2015).

93. See *Levy v. Louisiana*, 391 U.S. 68, 70–71 (1968); *Mathews v. Lucas*, 427 U.S. 495, 504–07 (1976); *Clark v. Jeter*, 486 U.S. 456, 461–62 (1988).

94. *Levy*, 391 U.S. at 71.

95. See *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) (“[T]he right ‘to marry, establish a home and bring up children’ is a central part of the liberty protected by the Due Process Clause . . .”) (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (“The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.”); *Obergefell v. Hodges*, 576 U.S. 644, 675 (2015) (holding that “same-sex couples may exercise the fundamental right to marry”).

process topics, including the right to marry, the right to procreate, family integrity and autonomy, and parental rights. As such, coverage of substantive due process topics is another area in the constitutional law curriculum that could comfortably accommodate discussion of illegitimacy and the illegitimacy cases.

### *1. The Right to Marry and the Right to Procreate*

In most constitutional law courses, discussion of the right to marry begins with *Skinner v. Oklahoma*,<sup>96</sup> where the Court famously asserted that marriage and procreation are among the “basic civil rights of man . . . . fundamental to the very existence and survival of the race.”<sup>97</sup> *Skinner*’s pronouncements are subsequently elaborated through a discussion of *Loving v. Virginia*,<sup>98</sup> where the Court invalidated Virginia’s anti-miscegenation law, noting that in addition to equal protection concerns, the challenged legislation also burdened the right to marry, which, according to the *Loving* Court, “ha[d] long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.”<sup>99</sup> These themes are further developed in a line of cases that includes *Zablocki v. Redhail*,<sup>100</sup> *Turner v. Safley*,<sup>101</sup> and more recently, *Obergefell v. Hodges*.<sup>102</sup>

In most of the cases concerning the right to marry, the marriage right typically is presented in tandem with the right to procreate, underscoring marriage as the traditional site of procreation and childrearing.<sup>103</sup> Indeed, in *Zablocki*, Justice Thurgood Marshall noted that it was “not surprising that the decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, child rearing, and family relationships.”<sup>104</sup> After all, “it would make little sense to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society.”<sup>105</sup>

But the links between procreation and marriage go beyond marriage’s role as the licensed locus of procreation and childrearing. Almost all of the

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96. 316 U.S. 535 (1942).

97. *Id.* at 541.

98. 388 U.S. 1 (1967).

99. *Id.* at 12.

100. 434 U.S. 374 (1978).

101. 482 U.S. 78 (1987).

102. 576 U.S. 644 (2015).

103. *See e.g., Obergefell*, 576 U.S. at 667 (“A third basis for protecting the right to marry is that it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education.” (citations omitted)); *Zablocki*, 434 U.S. at 386.

104. *Zablocki*, 434 U.S. at 386.

105. *Id.*

canonical right to marry cases arose under factual circumstances in which the prospect of an illegitimate birth loomed large. In *Loving*, for instance, Mildred and Richard Loving's decision to marry in violation of Virginia's Racial Integrity Act of 1924 was precipitated by the discovery that Mildred was pregnant with the couple's child.<sup>106</sup> Put differently, the Lovings' decision to risk violating Virginia's antimiscegenation laws was prompted by their desire to see their child born in wedlock.<sup>107</sup>

Similarly, illegitimacy informed the Missouri prison regulations challenged in 1987's *Turner v. Safley*,<sup>108</sup> as well as the Court's resolution of that legal challenge. In *Turner*, Missouri "prohibit[ed] inmates from marrying unless the prison superintendent ha[d] approved the marriage after finding that there are compelling reasons for doing so."<sup>109</sup> Meaningfully, "only pregnancy or birth of a child [wa]s considered a 'compelling reason' to approve a marriage."<sup>110</sup> In striking down the policy, the Court adverted to the "important attributes of marriage," even in the carceral context. In addition to the emotional and spiritual aspects of marriage, the *Turner* Court specifically noted that "marital status often is a precondition to the receipt of government benefits," like public benefits and property rights, as well as "other, less tangible benefits," including the "legitimation of children born out of wedlock."<sup>111</sup>

In *Zablocki v. Redhail*, the specter of illegitimacy shadowed both the challenged Wisconsin statute and Roger Redhail's effort to have it invalidated. As a high school student, Redhail had fathered "a baby girl born out of wedlock,"<sup>112</sup> for whose financial support he was responsible.<sup>113</sup> Years later, he found himself in another romantic relationship with a baby on the way.<sup>114</sup> Wishing to have their child born in wedlock, Redhail and his fiancée applied for a marriage license, but were denied based on a Wisconsin statute that "specifie[d] that court permission cannot be granted unless the marriage applicant submits proof of compliance with the support obligation and, in addition, demonstrates that the children covered by the support order 'are not then and are not likely thereafter to become public charges.'"<sup>115</sup> Put

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106. Douglas Martin, *Mildred Loving, Who Battled Ban on Mixed-Race Marriage, Dies at 68*, N.Y. TIMES (May 6, 2008), <https://www.nytimes.com/2008/05/06/us/06loving.html> [<https://perma.cc/BJC8-TMKF>].

107. *Id.*

108. 482 U.S. 78 (1987).

109. *Id.* at 96.

110. *Id.* at 96–97.

111. *Id.* at 95.

112. *Zablocki v. Redhail*, 434 U.S. 374, 377–78 (1978). See also Tonya L. Brito, Raymond Anderson & Monica Wedgewood, *Chronicle of a Debt Foretold: Zablocki v. Red Hail*, in *THE POVERTY LAW CANON 240* (Marie A. Failing & Ezra Rosser eds., 2016).

113. *Zablocki*, 434 U.S. at 377–78.

114. *Id.* at 378.

115. *Id.* at 379 (quoting WIS. STAT. § 245.10(1) (1973) (repealed 1977)).

simply, even as Redhail sought marriage in effort to avoid an out-of-wedlock birth, the state of Wisconsin strictly limited the prospect of marriage in an effort to curb the public dependence and poverty that traditionally have been associated with illegitimacy.<sup>116</sup>

And, as importantly, in resolving Redhail's challenge to the Wisconsin statute, the *Zablocki* Court centered illegitimacy in its understanding of the right to marry and the State's authority to impose upon that right. Justice Marshall, who wrote for the *Zablocki* majority, mused "[i]t is not surprising that the decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, child rearing, and family relationships."<sup>117</sup> After all, "it would make little sense to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the *foundation of the family* in our society."<sup>118</sup> The Court's meaning was clear: the recognition of marriage as a fundamental right was due, at least in part, to the investment in securing the legitimacy of children within the family unit.

And just as concern for illegitimacy has shadowed the Court's pronouncements on the right to marry, it has also been a feature of the Court's consideration of the right to *avoid* procreation. For example, in 1972's *Eisenstadt v. Baird*,<sup>119</sup> the Court struck down a Massachusetts statute that prohibited the use of contraception by unmarried persons.<sup>120</sup> In invalidating the law, the Court mused that, although the State's interest in "discourag[ing] premarital sexual intercourse"<sup>121</sup> was a laudable goal, "[i]t would be plainly unreasonable to assume that Massachusetts has prescribed pregnancy and the birth of an unwanted child as punishment for fornication."<sup>122</sup> Although the *Eisenstadt* Court did not explicitly reference illegitimacy,<sup>123</sup> the point was clear: at a time when sex outside of marriage

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116. Murray, *supra* note 7, at 393–94 (“[I]llegitimacy often is imagined as engendering an unhealthy, but inevitable, dependence on the public fisc—a dependence that is wholly at odds with the norms of financial independence that the marital family is believed to cultivate.”).

117. *Zablocki*, 434 U.S. at 386.

118. *Id.* (emphasis added).

119. 405 U.S. 438 (1972).

120. *Id.* at 443.

121. *Id.* at 448.

122. *Id.*

123. Although the *Eisenstadt* Court did not reference illegitimacy directly, many briefs before the Court did so explicitly. Brief for the Appellee at 8–12, *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (No. 70-17) (discussing trends in illegitimacy, with a particular focus on the health impacts to unwed mothers and the economic cost to the community); Brief for the Appellant at 16, *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (No. 70-17) (arguing that the burden is on Baird to prove that “the free and lawful distribution of contraception has reduced the rate of illegitimacy in those states which permit such distribution”); Brief of the Planned Parenthood Federation of America, Inc., as Amicus Curiae at 20–25, 27, 28, *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (No. 70-17) (discussing the “effects of out-of-wedlock pregnancies and births” on “all concerned”, and the State’s interests in banning contraception if it leads

was still criminally proscribed, the State's effort to legislate morals was not served by a law that would result in nonmarital pregnancies and births.

Relatedly, in resolving Roger Redhail's challenge to the Wisconsin statute at issue in *Zablocki*, the Court's understanding of the State's authority to impose upon the right to marry was informed by its understanding of the interaction between illegitimacy and abortion rights. As Justice Marshall acknowledged, Wisconsin's bar on marriage meant that Roger Redhail's fiancée, who had eschewed her "fundamental right to seek an abortion of their expected child,"<sup>124</sup> now risked "bring[ing] the child into life to suffer the myriad social, if not economic, disabilities that the status of illegitimacy brings."<sup>125</sup> Given the balance of fundamental rights in play, "[s]urely, a decision to marry and raise the child in a traditional family setting must receive equivalent protection."<sup>126</sup> The implicit reference to *Roe v. Wade*,<sup>127</sup> the 1973 decision that recognized a woman's right to terminate a pregnancy,<sup>128</sup> was no doubt purposeful. Although the *Roe* Court did not mention the prospect of avoiding illegitimacy as part of its rationale for recognizing abortion rights, both the petitioner and a number of amici expressly noted the financial difficulties and social stigma that women faced in raising children outside of marriage.<sup>129</sup>

## 2. Marriage Equality

More recently, concerns about the legal and social impediments of illegitimacy have bolstered the effort to expand civil marriage to include same-sex couples.<sup>130</sup> As I have discussed elsewhere, illegitimacy became an

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to increased rates of illegitimacy); Brief of the American Civil Liberties Union and Civil Liberties Union of Massachusetts, Amici Curiae at 20, 22, *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (No. 70-17) (discussing the impact of the statute on illegitimate births and the presumed state interest in reducing illegitimate births). See also Brief for Human Rights for Women, Inc., as Amicus Curiae at 8, *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (No. 70-17) (not explicitly referencing illegitimate children but claiming that the statute at hand "creates unwanted children" and describing the psychological & social harms that result).

124. *Zablocki*, 434 U.S. at 386 (citing *Roe v. Wade*, 410 U.S. 113, 152–53 (1973)).

125. *Id.* (citing *Trimble v. Gordon*, 430 U.S. 762, 768–70, 768 n.13 (1977); *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175–76 (1972)).

126. *Id.*

127. 410 U.S. 113 (1972).

128. *Id.* at 154.

129. See Brief for Appellants at 73, *Roe v. Wade*, 410 U.S. 113 (1973) (No. 70-18), 1971 WL 128054 (discussing Petitioner's desire to end an unwanted pregnancy due to social stigma and economic hardship, among other reasons); Motion for Permission to File Brief and Brief Amici Curiae on Behalf of New Women Lawyers et al. at 35, *Roe v. Wade*, 410 U.S. 113 (1973) (Nos. 70-18, 70-40), 1971 WL 134283 ("To deny an unmarried woman an abortion is even more obviously a punishment and an act of greater cruelty as she is totally alone, with all of the physical, financial and social burdens of raising a child." (emphasis omitted)).

130. See Serena Mayeri, *Marital Supremacy and the Constitution of the Nonmarital Family*, 103

important arrow in the quiver of arguments on either side of the marriage equality debate.<sup>131</sup> In tones that recalled *Zablocki*, those eager to preserve marriage's heterosexual character maintained that opposite-sex-only marriage laws were necessary to incentivize responsible heterosexual procreation.<sup>132</sup> *Hernandez v. Robles*,<sup>133</sup> the New York Court of Appeals decision upholding the State's laws restricting marriage to opposite-sex couples, is illustrative.<sup>134</sup> There, a majority of the court held that the legislature could rationally conclude that the promotion of heterosexual marriages was necessary "to create more stability and permanence in the relationships that cause children to be born" and the State could thereby offer "an inducement—in the form of marriage and its attendant benefits—to opposite-sex couples who make a solemn, long-term commitment to each other."<sup>135</sup> Though the *Hernandez* Court did not explicitly enumerate an objection to nonmarital births, its disdain for the prospect of illegitimacy was apparent.<sup>136</sup> As the court explained, the legislature could rationally limit the benefits of marriage to opposite-sex couples on the ground that "unstable relationships between people of the opposite sex present a greater danger that children will be born into or grow up in *unstable* homes than is the case with same-sex couples, and thus that promoting [through marriage] *stability* in opposite-sex relationships will help children more."<sup>137</sup> Meaningfully, the court's view of heterosexual procreation resulting in unstable and impermanent families aligned neatly with the standard account of illegitimacy.<sup>138</sup> In this regard, marriage was needed to steer irresponsible heterosexual progenitors into stable, committed environments in which they could rear their accidentally begotten children.<sup>139</sup>

If the marriage traditionalists' responsible procreation argument implicitly surfaced the prospect of illegitimacy as a scourge to be avoided, those arguing in favor of marriage equality explicitly centered illegitimacy in their arguments.<sup>140</sup> Specifically, marriage equality supporters emphasized

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CALIF. L. REV. 1277, 1282–83 (2015) (noting that while marriage equality advocates "attacked restrictions on same-sex marriage with a rich constitutional arsenal that included powerful arguments about equality, dignity, and autonomy for gay and lesbian adults and their families," those on "both sides of the same-sex marriage debate also invoked innocent children as primary victims or beneficiaries of same-sex marriage" (footnote omitted)).

131. Murray, *supra* note 7, at 419.

132. *Id.* at 418.

133. 855 N.E.2d 1 (N.Y. 2006), *abrogated by* Obergefell v. Hodges, 576 U.S. 644 (2015).

134. *Id.* at 12.

135. *Id.* at 7.

136. *Id.* See also Murray, *supra* note 7, at 418.

137. *Hernandez*, 855 N.E.2d at 7 (emphasis added).

138. Murray, *supra* note 7, at 418.

139. *Id.*

140. *Id.* at 419.

illegitimacy as an injury visited on those denied access to civil marriage.<sup>141</sup> In her dissent from the majority opinion in *Hernandez v. Robles*, Chief Judge Judith Kaye conceded that New York had “a legitimate interest in the welfare of children,” but maintained that the exclusion of same-sex couples from civil marriage “in no way further[ed] this interest. In fact, it undermin[ed] it.”<sup>142</sup> As she explained, excluding same-sex couples from marriage deprived the children of such couples of the many “tangible legal protections and economic benefits” with which marriage is associated<sup>143</sup>—a prospect that was undoubtedly “antithetical to their welfare.”<sup>144</sup>

The logic of the “illegitimacy as an injury”<sup>145</sup> argument was not confined to state-level claims on marriage. In *United States v. Windsor*,<sup>146</sup> a majority of the United States Supreme Court struck down section 3 of the Defense of Marriage Act (DOMA) on the ground that it impermissibly “single[d] out” same-sex couples for lesser treatment under federal law.<sup>147</sup> In so doing, however, the *Windsor* Court homed in on the illegitimacy as injury narrative, explicitly noting that DOMA “humiliate[d] tens of thousands of children now being raised by same-sex couples.”<sup>148</sup> As the *Windsor* majority continued, DOMA “ma[de] it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.”<sup>149</sup>

Two years later, this logic would be reiterated in the majority opinion in *Obergefell v. Hodges*,<sup>150</sup> which held that the right to marry included the right to marry a person of the same sex.<sup>151</sup> In so doing, Justice Kennedy, who wrote for the majority in *Obergefell* and *Windsor*, specifically noted that

[w]ithout the recognition, stability, and predictability marriage offers, [the children of same-sex couples] suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated through no fault of their own to a more difficult and uncertain family life.<sup>152</sup>

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141. *Id.*

142. *Hernandez*, 855 N.E.2d at 32 (Kaye, C.J., dissenting).

143. *Id.*

144. *Id.* (citation omitted).

145. Murray, *supra* note 7, at 419.

146. 570 U.S. 744 (2013).

147. *Id.* at 775.

148. *Id.* at 772.

149. *Id.*

150. 576 U.S. 644 (2015).

151. *Id.* at 675.

152. *Id.* at 668.

With these concerns in mind, the majority concluded that “[t]he marriage laws at issue here thus harm and humiliate the children of same-sex couples.”<sup>153</sup>

### 3. Parental Rights

While discussion of the right to procreate and the right to marry provides ready opportunities to integrate discussions of illegitimacy and nonmarriage into the standard constitutional law curriculum, these themes may also be surfaced through discussion of substantive due process protections for parental rights. While coverage of *Meyer v. Nebraska*,<sup>154</sup> *Pierce v. Society of Sisters*,<sup>155</sup> and *Prince v. Massachusetts*<sup>156</sup> often form the core of parental rights doctrine,<sup>157</sup> discussion of the cases concerning the rights of unmarried fathers provides a unique opportunity to probe the intersection of parental rights, gender roles, and the legal treatment of marital and nonmarital families.

This doctrinal line begins with *Stanley v. Illinois*<sup>158</sup> and includes *Quilloin v. Walcott*,<sup>159</sup> *Caban v. Mohammed*,<sup>160</sup> *Lehr v. Robertson*,<sup>161</sup> *Michael H. v. Gerald D.*,<sup>162</sup> and by some accounts, *Nguyen v. Immigration & Naturalization Service*.<sup>163</sup> Each case concerns an unmarried father’s claim to be recognized as a legal parent of his nonmarital child(ren).<sup>164</sup> And, as I have elsewhere argued, resolution of these claims typically depended on whether or not the unmarried father’s relationship with his children and their mother was more proximate to, or distant from, the marital family.<sup>165</sup>

In *Stanley*, for example, Peter Stanley prevailed in his challenge to an Illinois law that automatically designated the children of unmarried fathers to become wards of the state upon the death of their mothers.<sup>166</sup> The Court credited Stanley’s paternity claim, but critically, in so doing, it emphasized the degree to which Stanley’s conduct departed from the traditional account

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153. *Id.* (citation omitted).

154. 262 U.S. 390 (1923).

155. 268 U.S. 510 (1925).

156. 321 U.S. 158 (1944).

157. *See, e.g.*, CHEMERINSKY, *supra* note 49, at 942–45; BREST ET AL., *supra* note 49, at 1378–80.

158. 405 U.S. 645 (1972).

159. 434 U.S. 246 (1978).

160. 441 U.S. 380 (1979).

161. 463 U.S. 248 (1983).

162. 491 U.S. 110 (1989).

163. 533 U.S. 53 (2001).

164. Murray, *supra* note 7, at 400–11.

165. *Id.* at 408–09. *See also* Melissa Murray, Obergefell v. Hodges and Nonmarriage Inequality, 104 CALIF. L. REV. 1207, 1219–20 (2016); Alice Ristroph & Melissa Murray, *Disestablishing the Family*, 119 YALE L.J. 1236, 1252–54 (2010).

166. Stanley v. Illinois, 405 U.S. 645, 658–59 (1972).

of illegitimacy, which imagined the unmarried father as an unreliable, unsupportive, and disinterested presence in his children's lives.<sup>167</sup> By contrast, Stanley had been "a strong presence in his children's lives, living with them and supporting them financially for many years."<sup>168</sup> As importantly, although "they were not married, for most of their eighteen years together, Peter and Joan Stanley had lived together, shared the family's economic burdens, and co-parented their children together"—in the manner of a married couple.<sup>169</sup>

Conversely, in *Quilloin v. Walcott* and *Lehr v. Robinson*, the unmarried fathers did not prevail in their claims for custody.<sup>170</sup> In so ruling, the Court distinguished the facts of each case from those in *Stanley*.<sup>171</sup> Unlike Peter Stanley, who, despite the absence of a marriage certificate, had conducted himself in the manner of a husband and a father, the fathers in *Quilloin* and *Lehr* looked more itinerant and disinterested.<sup>172</sup> Leon Quilloin had been involved in his son's life, but only inconsistently—as the Court specifically noted, he had provided the child with "toys and gifts . . . from time to time,"<sup>173</sup> and had provided financial support "only on an irregular basis."<sup>174</sup> More troublingly, in the eleven years preceding the legal challenge, Quilloin had taken no steps to legitimate his son.<sup>175</sup> Unlike Quilloin, who, in the Court's view, had ample opportunities to forge a paternal relationship with his son, Jonathan Lehr was deprived of contact with his daughter because the girl's mother had left the state without advising him of her whereabouts.<sup>176</sup> Still, the Court zeroed in on Lehr's "inchoate relationship" with his daughter, observing that his name did not "appear on [his daughter's] birth certificate[.]" that he had "never provided [the girl and her mother] with any financial support," and that he had "never offered to marry [the girl's mother]."<sup>177</sup> More troublingly, at least for the Court, was that Lehr had not registered "his name in [New York's putative father] registry."<sup>178</sup> His failure to take even this modest step to establish paternity proved damning to a majority of the Court.<sup>179</sup>

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167. *Id.* at 655 ("[N]othing in this record indicates that Stanley is or has been a neglectful father who has not cared for his children."); see also Murray, *supra* note 7, at 401.

168. Murray, *supra* note 7, at 401.

169. *Id.*

170. *Lehr v. Robertson*, 463 U.S. 248, 267–68 (1983); *Quilloin v. Walcott*, 434 U.S. 246, 256 (1978).

171. Murray, *supra* note 7, at 402.

172. *Id.* at 402–03.

173. *Quilloin*, 434 U.S. at 251 (internal quotation marks omitted).

174. *Id.* (footnote omitted).

175. *Id.* at 249.

176. *Lehr v. Robertson*, 463 U.S. 248, 269 (White, J., dissenting).

177. *Id.* at 249–52 (majority opinion); Murray, *supra* note 7, at 403.

178. *Lehr*, 463 U.S. at 251; Murray, *supra* note 7, at 403.

179. *Lehr*, 463 U.S. at 265.

Critically, in both *Quilloin* and *Lehr*, the unmarried father's paternity claim was lodged in an effort to block the child's adoption by the mother's new husband.<sup>180</sup> In this regard, the father's claim for parental rights was in direct conflict with the stepfather's (and mother's) desire to forge a new (marital) family unit.<sup>181</sup> And tellingly, in assessing the conflict between the rights of an unmarried father and the prospect of integrating the child into a new marital family structure, the *Quilloin* Court acknowledged, albeit implicitly, the prospect of the child's continued illegitimacy: If the father's claim was credited, the proposed adoption would be blocked, preventing the "full recognition to a family unit already in existence. . . ."<sup>182</sup> The Georgia Supreme Court, which had heard the case below, articulated the stakes of the conflict more plainly:

To further the protection and care of its children, Georgia favors and encourages marriage and child rearing in a family relationship. . . . The state's interest is even stronger under the facts of this case. For eleven years the natural father took no steps to legitimate the child or support him. Yet when the stepfather, married to the child's mother, wishes to adopt the boy and accept responsibility for him, the natural father suddenly opposes legal recognition of this family unit.<sup>183</sup>

Unlike the *Levy* line of cases, which focus primarily on the State's authority to impose legal impediments based on illegitimacy, the line of unmarried fathers cases addresses these issues while also highlighting the interplay between illegitimacy classifications and parental rights. As importantly, the unmarried fathers cases help illuminate the way in which common law expectations regarding illegitimate birth and responsibility for illegitimate children have shaped the legal understanding of parenthood, in and outside of the marital family.<sup>184</sup> In this regard, these cases are not only a useful complement to the traditional parental rights cases, but they also go beyond those *Lochner*-era cases to highlight the imbrication of equality and liberty and offer the opportunity for a deeper discussion of the way in which sex-based stereotypes have informed our understandings of maternity and paternity.

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180. *Id.* at 250; *Quilloin*, 434 U.S. at 247.

181. Murray, *supra* note 7, at 403–04.

182. *Quilloin*, 434 U.S. at 255.

183. *Quilloin v. Walcott*, 232 S.E.2d 246, 248 (Ga. 1977), *aff'd*, 434 U.S. 246 (1978).

184. See Collins, *supra* note 25, at 1683.

#### 4. Race Discrimination

While discussion of illegitimacy flows most naturally from coverage of heightened scrutiny and quasi-suspect classifications, illegitimacy might also be surfaced in discussions of race discrimination, and in particular, in discussions of the aftermath of *Brown v. Board of Education*.<sup>185</sup> *Brown* is often the centerpiece of the constitutional law's curricular focus on race,<sup>186</sup> and discussion of Southern opposition to *Brown* may prompt deeper discussions of the Court's institutional role and its legitimacy.<sup>187</sup> Yet, as I maintain here, discussion of *Brown*, and the reaction to the landmark decision, might also prompt a useful discussion of illegitimacy classifications. As legal historian Serena Mayeri has acknowledged, "Race and illegitimacy ha[ve] long been intertwined."<sup>188</sup> In the 1950s and 1960s, resistance to hard-fought civil rights gains often took the form of increased morals regulation aimed at curbing the mobility and perpetuating racial discrimination of Southern Blacks.<sup>189</sup> Indeed, as Anders Walker has documented, reeling from *Brown*, Southerners focused on the alleged immorality of Blacks in an effort to stave off the Court's integration mandate.<sup>190</sup>

This resistance often took the form of increased morals regulation and increased attention to indicia like illegitimacy, which was then strongly associated with immorality.<sup>191</sup> For example, in a nod to segregationists' interest in marriage and illegitimacy rates as indicia of immorality, Southern legislatures introduced a series of laws prescribing new requirements for obtaining a marriage license and recording nonmarital births.<sup>192</sup> As Walker explains, "[t]hese laws intentionally manipulated the indicia of marriage and legitimacy rates in order to bolster segregationist claims of [B]lack

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185. 347 U.S. 483 (1954).

186. See, e.g., NOAH R. FELDMAN & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 661–71 (20th ed. 2019) (using *Brown* as the anchor case for discussing race discrimination); CHEMERINSKY, *supra* note 49, at 732–36 (as a key case in the discussion of strict scrutiny); STONE ET AL., *supra* note 49, at 473–89 (laying the groundwork for the equal protection methodology).

187. In the wake of *Brown v. Board of Education*, conservative scholars like Alexander Bickel argued that the Court, as an undemocratic institution working against what Bickel perceived as the will of the majority of Americans, was undermining its own legitimacy. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 16–27 (1962).

188. Mayeri, *supra* note 130, at 1285.

189. See Anders Walker, *Legislating Virtue: How Segregationists Disguised Racial Discrimination as Moral Reform Following Brown v. Board of Education*, 47 DUKE L.J. 399, 423 (1997).

190. *Id.* at 403–04; ANDERS WALKER, THE GHOST OF JIM CROW: HOW SOUTHERN MODERATES USED *BROWN V. BOARD OF EDUCATION* TO STALL CIVIL RIGHTS 50 (2009).

191. Walker, *supra* note 189, at 408 ("[I]llegitimacy became perhaps the greatest statistically measurable sign of supposed immorality within [B]lack communities.")

192. *Id.* at 410, 416.

immorality.”<sup>193</sup> These legislative efforts allowed segregationists to frame their objections to integration in terms of morality, and in so doing, “laid a foundation for new strategies of racial discrimination in the South”—ones that relied on “moral character rather than color as an overt basis for racial discrimination.”<sup>194</sup>

For example, a number of Southern municipalities prescribed proof of legitimacy as a precondition for enrolling in public schools<sup>195</sup>—a policy that effectively reduced the number of Black matriculants and thwarted the prospect of integration.<sup>196</sup> Local school boards also deployed prohibitions on illegitimacy in recruiting teaching staff. Although these policies were ostensibly promulgated on the view that “school personnel should be charged with the responsibility for the moral as well as the intellectual development of the enrolled students[,]”<sup>197</sup> they also had the ancillary effect of narrowing the pool of Black teachers eligible to be hired.<sup>198</sup>

*Andrews v. Drew Municipal Separate School District*<sup>199</sup> is instructive. There, “two teacher’s aides, who were also unwed mothers, challenged the Drew Municipal Separate School District’s unmarried parent policy, which automatically disqualified unwed parents from employment in the school system. According to the superintendent who enacted the policy,”<sup>200</sup> the fact that a teacher or administrator had a child outside of marriage was, under all circumstances, “conclusive proof of . . . immorality or bad moral character,” and as such, was “a proper basis for precluding the employment of such persons . . . .”<sup>201</sup> Critically, the administration couched the policy in moral, rather than racial terms, opining that “the employment of a parent of

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193. *Id.* at 410. Specifically, the new laws increased the requirements for licensing, making legitimate marriages harder to obtain. This resulted in lower marriage rates and increased illegitimacy rates among Blacks. Further, the laws prescribed new regulations on birth certificates, ensuring “that out-of-wedlock births would be recorded and tabulated, thereby raising reported [B]lack illegitimacy levels.” *Id.*

194. *Id.* at 417. Meaningfully, during this period, resistance to civil rights was not limited to the proliferation of illegitimacy impediments. Throughout the South, legislatures introduced bills that proposed sterilization for Black women who bore nonmarital children. Serena Mayeri, *Intersectionality and the Constitution of Family Status*, 32 CONST. COMMENT. 377, 381 (2017).

195. WALKER, *supra* note 190, at 42.

196. *Id.* (noting that over twenty percent of Black children would not be able to produce a copy of their parents’ marriage license).

197. *Andrews v. Drew Mun. Separate Sch. Dist.*, 371 F. Supp. 27, 30 (N.D. Miss. 1973), *aff’d*, 507 F.2d 611 (5th Cir. 1975), *cert. granted*, 423 U.S. 820, *cert. dismissed as improvidently granted*, 425 U.S. 559 (1976) (per curiam).

198. See Mayeri, *supra* note 194, at 389; see also Melissa Murray, *Sex and the Schoolhouse*, 132 HARV. L. REV. 1445, 1479 (2019) (book review).

199. 371 F. Supp. 27 (N.D. Miss. 1973).

200. Murray, *supra* note 198, at 1464 (citing *Andrews*, 371 F. Supp. at 28–30).

201. *Andrews*, 371 F. Supp. at 30.

an illegitimate child for instructional purposes materially contributes to the problem of schoolgirl pregnancies.”<sup>202</sup>

Despite the veneer of moral concern, the policy’s racialized impact was obvious and immediate. The Drew Municipal Separate School District “had mightily resisted desegregation[,]” and “most white families had decamped to ‘segregation academies,’ leaving the schools more than eighty percent [B]lack but the ranks of teachers and administrators increasingly dominated by whites.”<sup>203</sup> On this account, the unmarried teachers policy provided a facially race-neutral means of maintaining segregation’s status quo.<sup>204</sup> As Serena Mayeri reports, “all five of the rejected applicants were African American women.”<sup>205</sup>

Given this landscape, it is not surprising that those challenging illegitimacy classifications made their claims in terms that clearly articulated the racial stakes of restrictions that were ostensibly about morality. In the briefs filed in *Levy v. Louisiana*, for example, lawyers arguing on behalf of Louise Levy’s children identified the racialized nature of illegitimacy, suggesting that the challenged law was an impermissible form of race discrimination subject to strict scrutiny.<sup>206</sup> Critically, the *Levy* Court “did not take up this aspect of the petitioners’ claim in its decision.”<sup>207</sup>

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As the foregoing sections make clear, illegitimacy’s absence in the constitutional law curriculum is neither natural nor inevitable. Illegitimacy, like gender, might itself be covered as a stand-alone topic in discussions of equal protection theory and practice. And, critically, discussions of illegitimacy and nonmarriage—and their legal and constitutional implications—can easily be integrated to complement other areas in the constitutional law curriculum, from parental rights and the right to marry, to abortion and the right to procreate to a deeper, more nuanced discussion of race discrimination. In this regard, integrating content about illegitimacy

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202. *Id.*

203. Mayeri, *supra* note 194, at 389.

204. In their expert testimony in *Andrews*, both Kenneth Clark, whose famous doll study influenced the Court’s decision in *Brown v. Board of Education*, and civil rights activist Fannie Lou Hamer underscored the intentional race and gender discrimination that underlay the challenged policy. *Id.* at 391.

205. *Id.* at 389.

206. Brief for Appellant at 8–9, *Levy v. Louisiana*, 391 U.S. 68 (1968) (No. 508), 1967 WL 113865 (noting that “statutes directed against illegitimates tend to fall most heavily on Negroes . . . and in some instances may have been designed to achieve this end” (footnote and citation omitted)).

207. Murray, *supra* note 7, at 424 n.193 (citations omitted); see also Davis, *supra* note 25, at 92–95.

may enhance and enrich discussion of these traditional constitutional law topics.

But at a deeper level, illegitimacy's absence is not just unfortunate or regrettable—a missed opportunity to explore these topics in greater depth and with added nuance—it is *harmful*. Illegitimacy's absence in the discussion of these constitutional law topics distorts the narratives we craft about individual rights and doctrinal development, eliding the connections between seemingly disparate topics like racial discrimination, sexual freedom, and gender discrimination.

### III. EXPLAINING ILLEGITIMACY'S OMISSION

If the constitutional law curriculum is replete with sites that might easily accommodate discussion of illegitimacy, what explains illegitimacy's curricular absence? Here, I consider four possible reasons why illegitimacy has been sidelined in the constitutional law course: (1) casebook content; (2) the “settled” status of illegitimacy in constitutional law; (3) curricular “silo-ing” within the law school curriculum; and (4) the liminal status of nonmarriage in constitutional law—and life.

#### A. Casebook Content

For many instructors, the development of syllabi and the structure of a course may depend in large part on the selected casebook. Pressed for time and without much guidance for course development, many instructors rely on the structure of the casebook (and its content) to develop and structure their courses. Happily, in constitutional law, there is no shortage of excellent casebooks from which to choose.<sup>208</sup> Still, as I elaborate below, despite this abundance of choice, few constitutional law casebooks have meaningful coverage of illegitimacy. Only a handful of the leading casebooks feature excerpts of the Court's illegitimacy rulings and fewer still mention or discuss the Court's invocation of illegitimacy in cases concerning the right to marry, the right to procreate, or parental rights.

Take for example, the leading casebook in the field: Erwin Chemerinsky's *Constitutional Law*,<sup>209</sup> now in its sixth edition.<sup>210</sup> The book has the highest adoption rate of all the extant constitutional law

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208. See, e.g., CHEMERINSKY, *supra* note 49; STONE ET AL., *supra* note 49; FELDMAN & SULLIVAN, *supra* note 186; CALVIN R. MASSEY & BRANNON P. DENNING, *AMERICAN CONSTITUTIONAL LAW: POWERS AND LIBERTIES* (6th ed. 2019); BREST ET AL., *supra* note 49; RUSSELL L. WEAVER ET AL., *CONSTITUTIONAL LAW: CASES, MATERIALS, AND PROBLEMS* (5th ed. 2021).

209. CHEMERINSKY, *supra* note 49.

210. Full disclosure: This is the casebook that I use—and have used the entire time I have taught constitutional law.

casebooks<sup>211</sup>—indeed, I have used it since I began teaching constitutional law almost ten years ago. Although the Chemerinsky casebook discusses illegitimacy as a stand-alone topic in its coverage of equal protection and heightened scrutiny,<sup>212</sup> it does not include excerpts of any of the relevant cases concerning illegitimacy classifications—instead *Levy*, *Glon*, and *Trimble* are paraphrased.<sup>213</sup> This is a stark contrast to the casebook’s treatment of gender-based classifications, where the relevant cases (*Frontiero*, *United States v. Virginia*) are excerpted and the text includes additional commentary on these topics.<sup>214</sup> Meaningfully, the casebook excerpts both *Stanley v. Illinois* and *Michael H. v. Gerald D.*, two leading cases on the rights of unmarried fathers, in its discussion of “fundamental rights under due process and equal protection.”<sup>215</sup> However, in so doing, the focus is on impact of these decisions on paternal rights.<sup>216</sup> The discussion does not connect the imposition of parental rights to the impediments associated with nonmarital birth that are covered (sparingly) in other parts of the casebook.<sup>217</sup>

Another leading casebook, *Constitutional Law* by Geoffrey Stone, Michael Seidman, Cass Sunstein, Mark Tushnet, and Pamela Karlan, discusses illegitimacy in a single paragraph devoted to “[o]ther potentially suspect classifications.”<sup>218</sup> Illegitimacy is not addressed as a stand-alone topic. Although the paragraph features an extensive string cite listing cases,<sup>219</sup> none of the illegitimacy cases are excerpted in the casebook. The casebook does excerpt and discuss *Nguyen v. Immigration & Naturalization Service*,<sup>220</sup> an unmarried father’s unsuccessful challenge of an immigration law that prescribed different requirements for unmarried mothers and unmarried fathers to confer citizenship to their nonmarital children born outside of the United States,<sup>221</sup> but the discussion does not mention the role that illegitimacy played in shaping the challenged law or the Court’s

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211. See *Amazon Best Sellers*, AMAZON, [https://www.amazon.com/gp/bestsellers/books/491510/ref=pd\\_zg\\_hsr\\_books](https://www.amazon.com/gp/bestsellers/books/491510/ref=pd_zg_hsr_books) [<https://perma.cc/BQZ6-76AB>] (Chemerinsky’s *Constitutional Law* is consistently the top constitutional law casebook in the Amazon bestsellers in constitutional law; it also regularly appears as the top result in searches for “constitutional law” on textbook sale sites like Chegg.com and Textbooks.com, which do not publish bestseller data).

212. CHEMERINSKY, *supra* note 49, at 891–94.

213. *Id.* at 892–93.

214. *Id.* at 840–42, 846–51.

215. *Id.* at 930–31, 931–938.

216. *Id.* at 929, 931.

217. *Id.* at 929, 931, 891–894.

218. STONE ET AL., *supra* note 49, at 716.

219. *Id.* (comparing *Levy v. Louisiana*, 391 U.S. 68 (1968), *Glon v. Am. Guarantee & Liab. Ins. Co.*, 391 U.S. 73 (1968), *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972), and *Gomez v. Perez*, 409 U.S. 535 (1973), with *Mathews v. Lucas*, 427 U.S. 495 (1976), and *Lalli v. Lalli*, 439 U.S. 259 (1978)).

220. *Id.* at 665–667.

221. *Nguyen v. Immigr. & Naturalization Serv.*, 533 U.S. 53 (2001).

resolution of the dispute.<sup>222</sup> Instead, the case is discussed in terms of gender-based classifications and the distinction between sex-role stereotypes and “real” biological differences.<sup>223</sup>

Some constitutional law casebooks do not even broach the issue of illegitimacy. In *Processes of Constitutional Decisionmaking*,<sup>224</sup> by Paul Brest, and Sanford Levinson et al., illegitimacy is not covered as a stand-alone topic at all. The casebook acknowledges that illegitimacy is a classification that prompts heightened scrutiny,<sup>225</sup> but there is no further discussion of the topic, nor does the casebook excerpt any of the illegitimacy cases in its coverage of heightened scrutiny.<sup>226</sup> While the casebook does discuss the rights of unmarried parents in its discussion of fundamental rights, excerpting *Michael H. v. Gerald D.*,<sup>227</sup> a major decision in the *Stanley* line of unmarried fathers cases,<sup>228</sup> it does not specifically discuss illegitimacy or the legal impediments that have traditionally attended nonmarital birth.<sup>229</sup>

Critically, in recent years, some casebooks have *reduced* their already limited coverage of illegitimacy even further. Sullivan and Gunther’s *Constitutional Law* is instructive: Earlier editions of this venerable casebook included some modest coverage of illegitimacy. The fifteenth edition, for example, devoted several pages of a discussion of illegitimacy.<sup>230</sup> Although this edition did not excerpt any of the illegitimacy cases, it discussed the leading cases, including *Levy v. Louisiana* (complete with an extensive quote from Justice Douglas’s majority opinion), *Labine v. Vincent*, *Mathews v. Lucas*, and *Clark v. Jeter*.<sup>231</sup> And interestingly, in covering *Michael M. v. Superior Court*, a challenge to a California law that singled out men for criminal liability for statutory rape, the casebook mentions, in the context of the Court’s discussion of teenage pregnancy, the impact of nonmarital births on parents.<sup>232</sup>

Despite the fifteenth edition’s (limited) discussion of illegitimacy, subsequent editions of the casebook have excised almost all coverage of the topic. The seventeenth edition, published in 2010 as the marriage equality

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222. STONE ET AL., *supra* note 49, at 664–667.

223. *Id.*

224. BREST ET AL., *supra* note 49.

225. *Id.* at 1361, 1362.

226. *See id.* at 1361–75 (“Other Suspect Bases of Classifications: Thinking Outside the ‘Tiers of Scrutiny’ Model[.]” in which only *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), is excerpted).

227. *Id.* at 1408–10.

228. *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

229. BREST ET AL., *supra* note 49, at 1407–10.

230. KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 815–17 (15th ed. 2004).

231. *Id.*

232. *Id.* at 794–95.

debate was intensifying, includes no discussion of illegitimacy. Indeed, the terms “illegitimacy” and “nonmarital children” do not appear in the index and illegitimacy is not listed among the “[o]ther [a]rguably [s]uspect [c]lassifications” that would trigger heightened judicial scrutiny.<sup>233</sup> The nineteenth edition, in which Noah Feldman joined Kathleen Sullivan as co-author, similarly does not mention illegitimacy in its discussion of heightened scrutiny.<sup>234</sup>

Notably, all of the leading casebooks include recent editions that were revised to include updated coverage of the right to marry, and same-sex marriage specifically.<sup>235</sup> Despite this important update, none of the casebooks’ coverage of marriage equality highlight the “illegitimacy as injury” trope that proved so effective in marriage equality litigation—and in its reception at the Court. Likewise, although all of the casebooks include discussion of the right to abortion, none of the casebooks highlight the way in which concerns about illegitimacy—and the uneven burdens of nonmarital parenthood on unmarried mothers—intersected with the Court’s consideration of abortion rights.

Critically, two casebooks—*Constitutional Law* (Nowak & Rotunda) and *Constitutional Law: Cases, Materials, and Problems* (Weaver, Friedland et al.)—feature quite extensive coverage of the line of illegitimacy classification cases.<sup>236</sup> Both texts devote considerable attention to the topic, including excerpting the leading cases from the *Levy* line of cases.<sup>237</sup> But even as these two texts provide more significant coverage of illegitimacy, they boast adoption rates that are considerably lower than the other leading casebooks, most of which do not provide extensive coverage of illegitimacy.<sup>238</sup>

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233. KATHLEEN M. SULLIVAN & GERALD GUNTHER, *CONSTITUTIONAL LAW* 586–87 (17th ed. 2010).

234. KATHLEEN M. SULLIVAN & NOAH FELDMAN, *CONSTITUTIONAL LAW* 793–94 (19th ed. 2016).

235. CHERMERINSKY, *supra* note 49, at 909–29 (covering the right to marry broadly, including same-sex marriage); BREST ET AL., *supra* note 49, at 1566–1604 (discussing same-sex marriage specifically); FELDMAN & SULLIVAN, *supra* note 186, at 547–92 (covering substantive due process rights related to marriage and the family, including same-sex marriage); MASSEY & DENNING, *supra* note 208, at 559–67 (discussing the right to marriage with a focus on same-sex marriage); STONE ET AL., *supra* note 49, at 887–918 (considering same-sex intimacy, including same-sex marriage); WEAVER ET AL., *supra* note 208, at 821–61 (covering sexual orientation, including same-sex marriage).

236. JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* 866–84 (7th ed. 2004); RUSSELL L. WEAVER ET AL., *CONSTITUTIONAL LAW: CASES, MATERIALS, AND PROBLEMS* 949–63 (4th ed. 2017).

237. NOWAK & ROTUNDA, *supra* note 236, at 870–77; WEAVER ET AL., *supra* note 208, at 950–59.

238. Of the casebooks surveyed, only two—Nowak & Rotunda and Weaver, Friedland et al.—are authored by law professors who teach at institutions other than the top twenty law schools (T-20). The other casebooks are helmed by authors who teach at what are widely considered “elite” institutions—

The absence of sustained coverage of illegitimacy in constitutional law casebooks is meaningful. The content of casebooks strongly influences the material that is covered in constitutional law classes. If materials are not included in casebooks, instructors who wish to cover illegitimacy must compile these materials independently—a process that can be time-consuming and laborious. Given the amount of work that will be required to cover material that is not already included in casebooks, many instructors may choose to forego teaching these materials entirely.

### *B. The “Settled” Status of Illegitimacy*

Many constitutional law instructors may choose to allocate course coverage to those topics where the doctrine continues to be in flux or is evolving. For example, the Supreme Court’s teeth-gnashing over the questions of partisan gerrymandering, abortion, and Second Amendment rights may help explain why these topics continue to hold pride of place in constitutional law syllabi.

By contrast, the constitutional doctrine involving illegitimacy appears relatively settled—and indeed, has been since the late 1980s. In 1988’s *Clark v. Jeter*,<sup>239</sup> the Court invalidated Pennsylvania’s six-year statute of limitations for paternity actions. In so doing, Justice O’Connor, who wrote for the *Clark* majority, confirmed that intermediate scrutiny “applied to discriminatory classifications based on sex or illegitimacy.”<sup>240</sup> To withstand constitutional scrutiny, an illegitimacy classification “must be substantially related to an important governmental objective.”<sup>241</sup> With that standard in mind, O’Connor observed, the Court had earlier “invalidated classifications that burden illegitimate children for the sake of punishing the illicit relations of their parents, because ‘visiting this condemnation on the head of an infant is illogical and unjust.’”<sup>242</sup>

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Chemerinsky (Berkeley); Brest, Levinson et al. (Yale/Texas/Stanford); Sullivan, Feldman (Stanford/Harvard). As has been documented elsewhere, family law and related topics have often been marginalized in the curricula at elite institutions. Further, students at “elite” institutions may be more likely to pursue careers in law firms, rather than “hanging out a shingle” for family law practice. Perhaps the coverage of illegitimacy in the casebooks authored by academics at school outside of the T-20 reflects the appetite of the likely audience for greater content related to the legal regulation of the family. It is also worth noting the race and gender composition of these casebook authors. Of the casebooks reviewed, only one—Brest, Levinson et al.—featured an author of color (Akhil Reed Amar)—and just two—Brest, Levinson et al. and Sullivan, Feldman feature women authors (Reva Siegel and Kathleen Sullivan, respectively). None of the casebooks reviewed features an author of Black or Latinx descent. Given the relevance of illegitimacy classifications in the lives of women and certain minorities, perhaps its absence in the casebooks and the curricula reflects the fact that the casebooks (and thus the curricula) are shaped by those who may not have firsthand experience with these topics.

239. 486 U.S. 456 (1988).

240. *Id.* at 461 (citations omitted).

241. *Id.*

242. *Id.* (quoting *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972)).

That said, the *Clark* Court noted that illegitimacy classifications in the context of child support actions, might warrant different treatment because of “lurking problems with respect to proof of paternity.”<sup>243</sup> For that reason, the Court had “developed a particular framework for evaluating equal protection challenges to statutes of limitations that apply to suits to establish paternity, and thereby limit the ability of illegitimate children to obtain support.”<sup>244</sup> Noting that a six-year statute of limitations “does not necessarily provide a reasonable opportunity to assert a claim on behalf of an illegitimate child[,]”<sup>245</sup> the *Clark* Court expressed “confiden[ce] that the 6-year statute of limitations is not substantially related to Pennsylvania’s interest in avoiding the litigation of stale or fraudulent claims.”<sup>246</sup>

Having established intermediate scrutiny as the appropriate standard of review for illegitimacy classifications in *Clark*, the Court has yet to take up another major challenge to an illegitimacy classification. As a matter of constitutional law, at least, the issue appears “settled.” Indeed, some commentators maintain that the social and legal impediments that attend illegitimacy have essentially disappeared over the course of the last fifty years.<sup>247</sup> For all of these reasons, constitutional law instructors may decide to eschew this “settled” doctrine in favor of issues that are more dynamic and evolving.<sup>248</sup>

Pedagogical preferences may also contribute to the sidelining of the illegitimacy cases in the constitutional law curriculum. For some instructors, the doctrinal trajectory from *Levy* to *Clark* may be a less appealing vehicle for unpacking the evolution of equal protection standards and the vagaries of equal protection theory. For example, although the Court

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243. *Id.* (quoting *Gomez v. Perez*, 409 U.S. 535, 538 (1973)).

244. *Id.* at 461–62.

245. *Id.* at 463.

246. *Id.* at 464.

247. See Solangel Maldonado, *Illegitimate Harm: Law, Stigma, and Discrimination Against Nonmarital Children*, 63 FLA. L. REV. 345, 347 (2011) (“Many commentators assert that the social and legal disadvantages attached to ‘illegitimate’ status have disappeared in the last forty years.”); Nancy D. Polikoff, *A Mother Should Not Have to Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty-First Century*, 2 STAN. J. CIV. RTS. & CIV. LIBERTIES 201, 211–12 (2009) (noting that the “legal doctrine of ‘illegitimacy’ had all but disappeared”); Benjamin G. Ledsham, Note, *Means to Legitimate Ends: Same-Sex Marriage Through the Lens of Illegitimacy-Based Discrimination*, 28 CARDOZO L. REV. 2373, 2375 (2007) (“[I]llegitimacy-based discrimination against children of [opposite-sex] couples has largely faded from the legal (and social) landscape . . . .”); State *ex rel. Sanders v. Sauer*, 183 S.W.3d 238, 241 (Mo. 2006) (en banc) (Wolff, C.J., dissenting) (“[T]he law has tended to remove the stigma of illegitimacy by treating illegitimate children the same as children born of a marriage.”).

248. To be sure, the idea that the legal and social impediments associated with illegitimacy are in our collective rearview mirror is broadly overstated. As I, and others, have discussed, nonmarital birth continues to carry a range of legal impediments and social stigma. See Murray, *supra* note 7, at 414–17 (discussing the social stigma that continues to attend illegitimate birth); see generally Maldonado, *supra* note 247 (documenting the persistence of illegitimacy-related social stigma and legal penalties).

took up the issue of illegitimacy classifications well before it considered sex-based classifications, it did not settle on intermediate scrutiny as the appropriate standard of review for illegitimacy classifications until 1988—a full twelve years after the Court established intermediate scrutiny as the proper standard of review for sex-based classifications in *Craig v. Boren*.<sup>249</sup> For some, the lengthy path from *Levy* to *Clark*, where the Court appeared to struggle to pinpoint the reasons why illegitimacy classifications might require more rigorous judicial scrutiny, may be less dynamic—and therefore less appealing—than the trajectory of the gender cases.

Further, the Court's opinion in *Clark v. Jeter* may also limit pedagogical approaches. Although the Court established intermediate scrutiny as the appropriate standard of review for illegitimacy classifications, it did so only with respect to limits on establishing paternity for purposes of child support.<sup>250</sup> Further, Justice O'Connor, building on the logic of her concurrence in *Mills v. Habluetzel*,<sup>251</sup> provided a specific test for determining when an illegitimacy classification was improper.<sup>252</sup> As such, the *Clark* decision—and the illegitimacy cases more generally—may be less amenable to broader consideration of what interests might support the state's use of an illegitimacy classification and what the fit between “means and ends” might look like in scenarios that are more complicated than the establishment of paternity and child support. In these respects, the fact that illegitimacy is seen as “settled”—and indeed, settled in ways that may limit pedagogical approaches—may contribute to its marginalization in the constitutional law curriculum.

### C. Curricular “Silo-ing”

While limited casebook content provides one explanation for the marginalization of illegitimacy on constitutional law curricula, it is not the only reason. Also at issue is the problem of what I call curricular “silo-ing.” Curricular silo-ing refers to the isolation of certain topics in certain places in the law school curriculum. For example, coverage of the calculation of income tax basis is typically reserved for introductory courses on income tax. But while the calculation of income tax basis is a topic that arguably is properly silo-ed in one curricular offering or area, there are other doctrinal topics that might be covered in multiple doctrinal domains. Legal privacy, for example, could easily be covered in constitutional law, criminal

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249. 429 U.S. 190 (1976).

250. *Clark*, 486 U.S. at 462–63.

251. 456 U.S. 91 (1982).

252. *Id.* at 98–100.

procedure, family law, and even a course on information privacy and cybersecurity.

While illegitimacy may not stretch as far as privacy, it too may be properly covered in a number of curricular settings. As noted above, constitutional law is an obvious curricular home for discussions of illegitimacy. But, by the same token, coverage of illegitimacy could also fit nicely in courses like family law, reproductive rights and justice, trusts and estates, education law, or even criminal law (historically, out of wedlock births, like sex outside of marriage, were subject to criminal liability).

The fact that illegitimacy may be surfaced in a number of doctrinal domains may help explain, perhaps paradoxically, its absence in the constitutional law curriculum. Let me elaborate. At a time when an insurrection may threaten Congress's certification of a presidential election, a president may be impeached (twice!), a global public health crisis may prompt questions about the limits of state and federal authority, states may take steps that eliminate opportunities for democratic participation in the name of curbing electoral fraud, and reproductive rights may be curtailed entirely, there is no end to what can—and should—be covered in the basic constitutional law course.

Recognizing that not everything can be covered, some instructors may choose to forego particular content because it is likely to be covered in other courses.<sup>253</sup> For example, with a bulging family law syllabus, I have made the decision to limit my coverage of pregnancy discrimination because I know that this topic is covered extensively in employment discrimination and reproductive rights and justice courses.

Constitutional law instructors may make similar choices with regard to illegitimacy. That is, confident that illegitimacy will be covered in family law or trusts and estates or wherever, they omit this content from the constitutional law course in order to cover other topics—topics that may be considered more “core” to the constitutional law enterprise. Of course, this explanation is perhaps less convincing when one considers the range of topics that are covered in constitutional law *and* other parts of the law school curriculum, like standing, voting rights, and parental rights.<sup>254</sup>

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253. This impulse may be exacerbated by the racial and gender composition of the cadre of constitutional law professors across the academy. As has been documented elsewhere, until quite recently, the ranks of constitutional law professors were dominated by white men. *See* Merritt, *supra* note 1, at 152. In recent years, this has changed substantially as faculties have diversified (this may be especially the case at T-20 institutions, many of which now feature a significant number of women and people of color in their constitutional law rotations). Nevertheless, despite this diversification, the curriculum itself has not diversified to include illegitimacy—a development that may reflect the path dependency of the field, even as it has evolved in terms of race and gender composition.

254. Standing (and other justiciability doctrines) are as likely to be taught in federal courts and

*D. Subject Marginalization—or Erasure?*

This last insight—that instructors may delegate coverage of illegitimacy to other curricular areas so that they may cover topics considered more “core” to constitutional law—warrants elaboration. At bottom, this observation comes laden with judgment. It suggests that there are certain topics that are central to constitutional law—and that illegitimacy is not among those core topics. On this account, the topics that are properly within the scope of the constitutional law curriculum are those that are covered in the leading casebooks—and those that are discussed in class. Based on my casual perusal of colleagues’ syllabi, that list of core constitutional law subjects includes topics like parental rights, sex-based stereotypes, marriage and procreation, and the use of heightened scrutiny. These are all topics that could easily accommodate discussion of illegitimacy—and yet, illegitimacy remains marginalized, largely excluded from the casebooks and the curriculum.

The marginalization of illegitimacy in the constitutional law curriculum may reflect the marginalization of illegitimacy—and nonmarital life, more generally—in life and law. Consider the majority decision in *Obergefell v. Hodges*,<sup>255</sup> where Justice Kennedy and the *Obergefell* majority praised marriage in extravagant terms.<sup>256</sup> As Justice Kennedy explained, marriage is not simply a religious or civic institution; it is an institution whose importance is deeply personal and meaningful to individuals.<sup>257</sup> Marriage’s “dynamic,” he explains, “allows two people to find a life that could not be found alone.”<sup>258</sup> Indeed, in marriage, the couple “becomes greater than just the two persons.”<sup>259</sup> In short, *Obergefell* underscores that “marriage is essential to our most profound hopes and aspirations.”<sup>260</sup>

By contrast, *Obergefell* paints life outside of marriage as a decidedly sad affair. Those living outside of marriage forego the “enduring bond[s]” of their married counterparts.<sup>261</sup> Absent a partner, they are consigned to perpetual loneliness and solitude—at night, a “lonely [single] person might

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civil procedure as in constitutional law. Likewise, voting rights is a staple of election law and law of democracy courses. Parental rights are routinely covered in family law, as well as in the Child, Family, and the State course.

255. 576 U.S. 644 (2015).

256. *Id.* at 656–57 (“From their beginning to their most recent page, the annals of human history reveal the transcendent importance of marriage . . . . Since the dawn of history, marriage has transformed strangers into relatives, binding families and societies together.”).

257. *Id.* (“Marriage is sacred to those who live by their religions and offers unique fulfillment to those who find meaning in the secular realm.”).

258. *Id.* at 657.

259. *Id.*

260. *Id.*

261. *Id.* at 666.

call out only to find no one there.”<sup>262</sup> And most troublingly, the children born outside of marriage are relegated to “a more difficult and uncertain family life,” where they must live with “the stigma of knowing their families are somehow lesser.”<sup>263</sup> They must endure the “harm and humiliat[ion]”—not to mention “the significant material costs”—of being raised outside of the marital fold.<sup>264</sup>

Justice Kennedy’s condemnation of nonmarital life is not entirely surprising. His statements merely reflect the Supreme Court’s own crabbed vision of sexual rights outside of marriage. As I have argued elsewhere, the Court’s recognition of rights relating to sex and sexuality has been deeply contingent. As cases like *Griswold v. Connecticut*,<sup>265</sup> *Loving v. Virginia*,<sup>266</sup> and *Obergefell v. Hodges*<sup>267</sup> make clear, constitutional protections for sex and sexuality are at their most robust when sex is confined to marriage and the marital family.<sup>268</sup> While constitutional protections for sex outside of marriage are available, they are not always assured.<sup>269</sup> And, meaningfully, constitutional law casebooks and syllabi reflect—and perhaps, entrench—this liminal status.

But to be clear, the concern is not solely that the failure to cover illegitimacy in constitutional law contributes, whether inadvertently or not, to the continued marginalization of nonmarriage in law and society; it is that illegitimacy’s omission in constitutional law may reflect, perhaps unconsciously, the desire to *erase* nonmarriage and prioritize marriage as the normative ideal of adult intimate life. *Obergefell* is again instructive on this point. Justice Kennedy’s majority opinion stubbornly focuses on the social value of marriage—and indeed, on extending the benefits of marriage to a new constituency, same-sex couples. But the opinion’s prioritization of marriage is implicitly structured on the erasure of nonmarriage and nonmarital relationships. For example, in referencing *Lawrence v. Texas*,<sup>270</sup> an earlier decision in which the Court struck down prohibitions on same-sex sodomy, Justice Kennedy seemed to take a dim view of *Lawrence*’s

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262. *Id.* at 667.

263. *Id.* at 668.

264. *Id.*

265. 381 U.S. 479 (1965).

266. 388 U.S. 1 (1967).

267. 576 U.S. 644 (2015).

268. *See generally* Murray, *supra* note 165.

269. *Id.* at 1229–39.

270. 539 U.S. 558 (2003).

constitutional protections for sexual conduct undertaken in furtherance of “a personal bond that is more enduring.”<sup>271</sup> As he noted in *Obergefell*:

[W]hile *Lawrence* confirmed a dimension of freedom that allows individuals to engage in intimate association without criminal liability, it does not follow that freedom stops there. Outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty.<sup>272</sup>

On this account, *Lawrence*'s protections for nonmarital sexual relations did no more than merely transform same-sex couples from criminals into outcasts—still subject to society's disfavor, though perhaps less thickly as under a regime of criminal prohibition.

It is telling that Kennedy framed *Lawrence*, a decision that provided constitutional protection to sex outside of marriage, in such a dim light. Perhaps even more telling is the utter absence of life outside of marriage in the *Obergefell* opinion. Although fifty percent of marriages end in divorce and more Americans are eschewing marriage or marrying later in life, any mention of nonmarriage—the status in which most American adults will live a significant portion of their lives—is entirely absent from the majority opinion in *Obergefell*.<sup>273</sup> In this regard, perhaps nonmarriage's absence—in *Obergefell* and in constitutional law more generally—reflects a broader cultural impulse to not see illegitimacy or nonmarital relations? To deny the social and legal importance of a status that continues to shape the lives of many individuals?

As I have argued elsewhere, there is a deep cultural and legal investment in the institution of marriage.<sup>274</sup> Perhaps the absence of illegitimacy in constitutional law texts and teaching is part of that larger project of building up marriage by tearing down—or ignoring entirely—all that might exist outside of marriage? Put differently, perhaps it is not enough to simply discredit nonmarriage and nonmarital relationships as the sad and lonely lives of social outcasts in our legal opinions. To fully convey the priority of marriage and marital relationships, we must actively *erase* life outside of marriage in our teaching and study of constitutional law.

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271. *Id.* at 567.

272. *Obergefell*, 576 U.S. at 667.

273. A majority opinion that three (at the time) unmarried Justices (Ginsburg, Sotomayor, and Kagan) joined.

274. See generally Melissa Murray, *Marriage as Punishment*, 112 COLUM. L. REV. 1 (2012); Murray, *supra* note 165.

#### IV. THE COSTS OF ILLEGITIMACY'S MARGINALIZATION

As I have discussed, despite its increasing frequency in intimate life, illegitimacy remains an outlier in constitutional law courses. But does this omission matter? As I note above, some constitutional law instructors may defer discussion of illegitimacy on the assumption that the topic is likely to be covered in other areas of the curriculum. This may be an astute assumption—certainly, some family law instructors and reproductive rights instructors (me!) cover illegitimacy in their courses. But it may also be the case that illegitimacy falls prey to the tragedy of the curricular commons—everyone assumes that the topic is being discussed elsewhere in the curriculum, and as a consequence, no one actually covers the topic at all. Or, as likely, illegitimacy's omission from constitutional law is not an issue of coverage in other doctrinal courses, but rather is a function of the general view that the topic is unimportant and need not be covered at all.<sup>275</sup>

Either way, the omission matters, both practically and normatively. Let me take each in turn. Covering illegitimacy in constitutional law is important because, as discussed above, illegitimacy is—and continues to be—a reality in the lives of many Americans, including those from minority communities. We cannot speak of the constitutional rights of parents and families without grappling with what the guarantees of equal protection and substantive due process mean for those who live their intimate lives beyond marriage's boundaries. More profoundly, in the age of #MeToo, Occupy Wall Street, and Black Lives Matter, we cannot aspire to an antiracist, anticlassist, antisexist curriculum while sidelining, whether willfully or inadvertently, a topic that implicates questions of race, gender, and class. To ignore the changing reality of family life—and the role of nonmarriage in it—is to transform constitutional law from a set of tools that can be deployed to address and resolve legal conflicts into a relic preserved in amber that we bequeath uncritically from generation to generation.

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275. Or it may be the case that instructors recognize the importance of illegitimacy in modern life, but, given the broad array of topics that could be covered in constitutional law, they have made difficult choices to omit certain topics (illegitimacy) so that others (the Dormant Commerce Clause?) might be included. If we take seriously the view that illegitimacy *should* be covered, it begs the question: what *should* be excised? I do not profess to have easy answers for this curricular *Sophie's Choice*. And perhaps it is not necessary to jettison certain topics entirely in order to make room for others. It strikes me that some of constitutional law's sacred cows are ripe for trimming down. Take the commerce power, for example. Instructors may devote as many as four or five classes to charting the oscillating fortunes of Congress's authority to regulate commerce "among the several states." But is it necessary to spend quite so much time examining the twisty trajectory from *Gibbons v. Ogden* to *NFIB v. Sebelius*? Could some of this content be condensed to focus on the most important developments, creating space to include other topics? Perhaps the issue is not an overstuffed syllabus that cannot be strained to include more topics. Maybe it is simply a question of discipline, will, and the belief that illegitimacy is a topic that warrants inclusion in constitutional law.

It also matters practically because constitutional law is, across law schools of all types, a required course for graduation and a subject that is tested and evaluated on the bar examination in every state. Students may never take family law, trusts and estates, or reproductive rights and justice. But they are all required to take constitutional law. If we hope to inculcate any content regarding illegitimacy and nonmarital life—or offer students the opportunity to grapple with the prevailing narrative about illegitimacy—constitutional law is the place in the curriculum where such content will reach the maximum number of students.

Relatedly, constitutional law is, by most accounts, a “prestige” course—that is, it is a coveted course that academics jockey to teach.<sup>276</sup> As an associate dean charged with curricular coverage once told me, “No one ever has to worry about covering con law. I could get someone to cover the course in five seconds flat. This school is filled with would-be con law scholars moonlighting as civil procedure and tax experts.”<sup>277</sup> Indeed, those who are tapped to staff the constitutional law course frequently are viewed as luminaries (or soon-to-be luminaries) in the field.<sup>278</sup> This is all to say that the constitutional law course is not simply one whose content is *required*; it is a plum assignment to which significant institutional resources are dedicated.

This last observation bleeds into the normative concerns. Constitutional law is a required course to which significant institutional resources are devoted because we, as members of the academy, believe that its content is important—indeed, essential—for the training of new lawyers. We require it—not because we think that *all* of our students will become constitutional lawyers arguing before appellate courts, but because we insist that

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276. Merritt, *supra* note 1, at 145 (“Constitutional Law is a plum teaching assignment.”).

277. This exchange dovetails with Dean William Prosser’s observation that “[t]he overwhelming majority’ of teaching applicants ‘have wanted to teach Constitutional Law.’” *Id.*

278. See William L. Prosser, *Advice to the Lovelorn*, 3 J. LEGAL EDUC. 505, 508 (1951) (noting that, in the post-World War II law school, constitutional law and its close cousin, administrative law, were “a drug on the law school market[,] . . . skim[ming] the cream of the crop, the pick of the younger generation”). Meaningfully, the determination of those who are considered luminaries in their fields—and therefore equipped to teach constitutional law—may have profound race and gender implications. As Deborah Jones Merritt observed in the 1990s, constitutional law was the province of white men, with few women—even those credentialed with Ivy League degrees and Supreme Court clerkships—admitted to this elite fraternity within the academy. Merritt, *supra* note 1, at 156 (“The most startling and disturbing result of my regression analysis, however, is the significant negative relationship between being female and teaching constitutional law.”); see also Carmen G. Gonzalez, *Women of Color in Legal Education: Challenging the Presumption of Incompetence*, FED. LAW., July 2014, at 49 (noting that women of color in academia are likely to teach “low status” courses); Deborah Jones Merritt, *Are Women Stuck on the Academic Ladder? An Empirical Perspective*, 10 UCLA WOMEN’S L.J. 249, 254 (2000) (noting that, even after many years on the tenure track, “[m]en are still significantly more likely to teach constitutional law; women disproportionately teach trusts and estates or skills courses”); Meera E. Deo, *The Ugly Truth About Legal Academia*, 80 BROOK. L. REV. 943 (2015) (discussing the implications of racism and sexism for legal academia).

knowledge of the structure of government, and the rights protected therein, is absolutely essential to the enterprise of training lawyers.

And in many respects, knowledge of constitutional law goes beyond the question of the practical training of lawyers. From *Marbury v. Madison*<sup>279</sup> to *Loving v. Virginia*<sup>280</sup> to *Brown v. Board of Education*,<sup>281</sup> constitutional law, in broad brushstrokes, furnishes a common vernacular for our democracy. Lay people may not know the vagaries of contract formation and the particularities of efficient breach, but they know that *Marbury v. Madison* established the Supreme Court's authority "to say what the law is"<sup>282</sup> and that *Brown v. Board of Education* laid the foundation for our multiracial society. This is all to say that to exclude illegitimacy from the constitutional law curriculum is to exclude it from our democratic *lingua franca*. It is to cast it as unmentionable—and therefore distinguishable from the panoply of constitutional rights that we deem worthy of discussion.

And perhaps that is the point. Illegitimacy's exclusion from constitutional law connotes that it is not part of this *lingua franca*—it is not one of the topics deemed so important and consequential that you cannot graduate from law school without some exposure to it. Its exclusion from those topics deemed important and weighty underscores, and indeed perpetuates, whether consciously or not, illegitimacy's marginalization in law and in life.

#### CONCLUSION

Almost fifty years ago, the United States Supreme Court, in *Levy v. Louisiana* felt obliged to confirm the personhood of nonmarital children. As Justice William O. Douglas began, "We start from the premise that illegitimate children are not 'nonpersons.' They are humans, live, and have their being. They are clearly 'persons' within the meaning of the Equal Protection Clause of the Fourteenth Amendment."<sup>283</sup> That the Court felt that this needed to be said is, by itself, startling. But perhaps not necessarily surprising. In declaring that nonmarital children were "persons" entitled to constitutional protection, the Court acknowledged the raft of legal impediments, both civil and criminal, that attended nonmarital birth. Moreover, it sought to bring nonmarital children into the constitutional fold as persons worthy of—and entitled to—the protections that constitutional law and doctrine might afford.

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279. 5 U.S. 137 (1803).

280. 388 U.S. 1 (1954).

281. 347 U.S. 483 (1954).

282. *Marbury*, 5 U.S. at 177.

283. *Levy v. Louisiana*, 391 U.S. 68, 70 (1968) (footnotes omitted).

Yet, despite the Court's efforts to read nonmarital children into the fabric of the Constitution and constitutional law, today, illegitimacy (and nonmarriage, more generally) remains liminal—even as it grows more commonplace. Responsibility for the continued marginalization of illegitimacy and nonmarital life might be attributed to various institutions—the law, the courts, a culture that remains deeply invested in marriage and the marital family. But as I maintain here, at least some of the blame might be laid squarely on the academy, and in particular, on an academic culture that omits coverage of this important topic from one of its signature curricular offerings. If, going forward, we wish to make good on the Court's efforts to better protect nonmarital children, we might begin by integrating this content into the constitutional law curriculum itself.