

Ridding the Family-Law Canon of the Relics of Coverture: The Due Process Right to Alternative Fee Arrangements in Divorce

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ABSTRACT. The prohibition on contingency fee arrangements with divorce lawyers is a relic of the coverture regime. It cannot withstand Due Process scrutiny because the supposed governmental interests it purports to advance—burdening access to the divorce process for economically vulnerable persons—are not legitimate governmental interests under modern constitutional jurisprudence.

INTRODUCTION

There is an open secret among family-law practitioners that is also a painful truth for many who have experienced divorce: When marital wealth is concentrated in the hands of one spouse, the divorce process commonly and predictably produces unjust outcomes.¹ It does not have to be that way.

Alternative fee arrangements could obviate the problem of differential access to marital wealth at the outset of a case, which is a problem that has a tendency

1. The anecdotal evidence is supported by empirical data, although it would be difficult to test for nonmonetary impacts. See Carl Ray Grantham, Jr., *Why Does This River Flow?* In *Re Cooper and the Continued Prohibition of Contingency Fees in Divorce Actions*, 65 N.C. L. REV. 1378, 1387 (1987) (explaining how the statutory-fee system forces the dependent spouse to accept “less experienced and less successful attorneys” in the face of a general “reluctance” to take on such cases).

to reinforce historic and structural inequalities.² Specifically, a spouse without access to marital wealth, and therefore without the ability to pay legal fees upfront, could enter a contingency-fee agreement whereby their attorney would eventually earn a percentage of their final award. Indeed, in other areas of the law, alternative fee arrangements are regularly used to the benefit of litigants who cannot afford the out-of-pocket cost of paying lawyers by the hour.³

But for divorce proceedings, there are unique limits on alternative financial arrangements that are deeply embedded in the common law. Those limits stem from the period of “coverture” when men controlled marital property and women had to ask courts for money to pay for lawyers and other “necessaries.”⁴ When courts adopted rules against alternative fee arrangements in family law, the goal was not to even the playing field. Quite the opposite: Courts created those limits to maintain men’s privileged position in the divorce process.

These limits persist to this day.⁵ The primary justification for a family-law-specific prohibition on contingency fees is that “emotional,” economically dependent litigants cannot be trusted to withstand an attorney’s interference with a potential reconciliation of the marriage. To protect against this imagined vulnerability, the court supervises the poorer spouse’s access to legal services through the allocation of what is known as “suit money.” This practice started and remains based upon discriminatory and unsupported assumption⁶ about how “romantic paternalism” places women on a pedestal of protection, when it really placed them in a cage of unfair burdens.⁷

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2. Marsha Garrison, *How Do Judges Decide Divorce Cases? An Empirical Analysis of Discretionary Decision Making*, 74 N.C. L. Rev. 401, 460 (1996) (“The husband’s ownership of a large percentage of marital assets, of a business or professional license, and a higher value for net marital assets were all associated with an increased likelihood that the husband would receive a disproportionate percentage of marital net worth.” (internal citations omitted)).
 3. Linda J. Ravdin & Kelly J. Capps, *Alternative Pricing of Legal Services in a Domestic Relations Practice: Choices and Ethical Considerations*, 33 FAM. L.Q. 387, 394 (1999) (“The contingent fee is the most common form of alternative billing outside of the family-law context.”); Roberta Tepper, *Ethics in the Time of Covid*, ABA (Jan. 1, 2021), https://www.americanbar.org/groups/law_practice/publications/law_practice_magazine/2021/jf21/teppersupport [https://perma.cc/3W4D-XU7B].
 4. See *infra* Part I.
 5. See Tepper, *supra* note 3 (“[T]here are some fees strictly prohibited as a matter of public policy (Model Rule 1.5), such as a contingent fee in a divorce[.]”).
 6. Adam Shajnfeld, *A Critical Survey of the Law, Ethics, and Economics of Attorney Contingent Fee Arrangements*, 54 N.Y. L. SCH. L. REV. 773, 783 (2010) (“While this [reconciliation-promoting] justification is often bandied-about, there is little reported empirical data to support it.”).
 7. *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) (“There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such

The bar against alternative fee arrangements in divorce law is about much more than lawyers and money. At its core, it is about how procedural rules about access to counsel and the courthouse can either exacerbate or mitigate power differentials in a marriage.⁸ In that regard, it is about the compromised decisions that an economically dependent spouse faces when considering a process stacked in favor of the other side, such as staying in an unhappy or abusive marriage, or exiting to their own financial ruin.⁹ That version of “marital harmony,” where state-created disempowerment subordinates one party in the relationship, was the intended effect of coverture. It has no place in modern family law.¹⁰

This Essay argues that it is past time to rid the family-law canon of this relic of coverture. In applying modern constitutional jurisprudence to fundamental rights related to marriage, courts should recognize that prohibitions on alternative fee arrangements fail the heightened constitutional scrutiny that applies to state intrusions on intimate relationships.¹¹

This Essay argues for a due-process right to alternative fee arrangements in three parts. Part I describes the origins of restrictions on alternative fee arrangements in family-law cases. The rules effectively ensured women’s procedural and substantive subordination by preventing them from hiring counsel without proof that they met the discriminatory, one-sided preconditions of the coverture regime.¹²

Part II explains that over the past half century, academics and other commentators have dismantled the nondiscriminatory, post-hoc policy rationales that courts continue to use to justify the prohibition on contingency-fee arrangements in family-law cases. Despite this fact, the prohibition remains firmly embedded in the family-law canon, alongside other relics of coverture that are not

discrimination was rationalized by an attitude of ‘romantic paternalism’ which, in practical effect, put women, not on a pedestal, but in a cage.” (internal citation omitted)).

8. See *infra* Part I.

9. Elizabeth Horowitz, *The "Holey" Bonds of Matrimony: A Constitutional Challenge to Burdensome Divorce Laws*, 8 U. PA. J. CONST. L. 877, 898 (2006) (“Marriages that remain when a divorce is denied are not traditional marriages based on love and trust, but instead are forced companionships and often a mockery to traditional marriage[.]”).

10. Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 997 n.152 (2002) (“[Anti-suffragists] who talked about preserving the unity and harmony of marriages often fretted about the prevalence of divorce. Divorce in this conversation, however, was code for any threat to male authority and household headship in marriage.”).

11. See *infra* Part III.

12. See *infra* Part I.

addressed in this Essay.¹³ There is no reason for such rules to continue to escape serious constitutional scrutiny. If inequality and subordination remain problems with the family-law system, the discriminatory rules that were designed to accomplish those outcomes should be challenged and rejected, irrespective of the gender or sexual orientation of the economically dependent spouse.

Part III argues that the prohibition on contingency fees — as applied uniquely in the family-law context — is subject to the due process balancing test that applies to burdens on a trinity of fundamental rights associated with divorce.¹⁴ The discriminatory trope about saving the marriages of emotional litigants is not a narrowly tailored solution meeting an appropriate government interest that justifies a burden on any fundamental rights. If there is no justification to fill its place, then the restrictions must fall in the face of a due process challenge.

I. THE COVERTURE-BASED ROOTS OF THE RESTRICTIONS ON CONTINGENCY FEES IN FAMILY LAW

The origins of the modern rules governing attorney’s fees in divorce cases trace back to the nineteenth century, when marriage laws expressly discriminated against women.¹⁵ The common-law doctrine of “coverture” held that women, once married, “lost their independent legal identity and became the property of their husbands.”¹⁶

As part of the “disability” of coverture,¹⁷ the common-law doctrine treated married women as the legal equivalent of “infant[s]” who were incapable of entering into contracts, including contracts with legal counsel with respect to a

13. E.g., Sabrina Balgamwalla, *Bride and Prejudice: How U.S. Immigration Law Discriminates Against Spousal Visa Holders*, 29 BERKELEY J. GENDER L. & JUST. 25, 32 (2014) (“Aspects of coverture were eliminated from domestic law through a series of statutes in the mid-nineteenth century, but such reforms were never fully extended to immigrant women.”).

14. See *infra* Part III.

15. *Hernandez v. Robles*, 855 N.E.2d 1, 26 (N.Y. 2006) (Kaye, C.J., dissenting) (“Until well into the nineteenth century, for example, marriage was defined by the doctrine of coverture, according to which the wife’s legal identity was merged into that of her husband, whose property she became.”), *abrogated by* *Obergefell v. Hodges*, 576 U.S. 644 (2015).

16. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 958 (N.D. Cal. 2010), *aff’d sub nom.* *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012).

17. *Merch.’s Hostess Serv. of Fla. v. Cain*, 9 So. 2d 373, 375 (Fla. 1942) (“The disability of coverture is a hangover from the old common law and has no more place in present day equity practice . . .”).

divorce case.¹⁸ In other words, the disability of coverture effectively blocked women's exit path from marriage even though the status of being married created the disability in the first instance. A married woman's lack of access to legal counsel, and her related inability to access the courthouse on her own terms, created what has been called the "carceral law of marriage."¹⁹ Without access to judicial relief, women could effectively be "bound in unwanted marriages."²⁰

The courts' solution was not to provide the parties with equal access to, or decision-making power over, their financial assets to hire attorneys. To the contrary, courts typically awarded female spouses "suit money" that was limited in both amount and purpose.²¹ The judge – invariably male – would calculate "reasonable attorney's fees" for the wife to prosecute her case, based upon his view

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18. Note, *Who Pays for the Wife's Defense in a Divorce Action?*, 35 HARV. L. REV. 464, 464 (1922) ("[W]e may well wonder to find still blooming a doctrine [to provide legal fees to married women] which flowered when the married woman was at law the equal of the infant and the idiot."); Stewart Douglas Hendrix, "Better You Than Me:" *Shifting Attorney's Fees in Divorce Actions*, 34 U. LOUISVILLE J. FAM. L. 671, 672 (1995) ("There was but one legal entity in this relationship under the common law. The husband maintained complete control of the family assets because of the merger of the wife's legal existence with that of the husband. The wife could not act legally for herself in any way. This antiquated view of the marital relationship required the husband to provide suit money to ensure the wife was able to litigate adequately her claim." (footnote omitted)); see also Karin Carmit Yefet, *Divorce as a Substantive Gender-Equality Right*, 22 U. PA. J. CONST. L. 455, 480 (2020) ("The common-law doctrine of marital unity further worked to deprive wives of access to and ownership of income and property brought into or accumulated during the marriage – civil disabilities that greatly exacerbated women's already substantial economic and social dependence on their husbands. Anything that once belonged to a wife became her husband's property, and some commentators go so far as to suggest that a wife herself was viewed as her husband's property."); Herma Hill Kay, *From the Second Sex to the Joint Venture: An Overview of Women's Rights and Family Law in the United States During the Twentieth Century*, 88 CALIF. L. REV. 2017, 2021 n.8 (2000) (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *442 to define the disability of coverture).
19. Nan D. Hunter, *Reconstructing Liberty, Equality, and Marriage: The Missing Nineteenth Amendment Argument*, 108 GEO. L.J. 73, 78 (2020) ("Nineteenth century American women confronted not only the absence of a right to vote but also an almost carceral law of marriage, with its central feature of coverture, the legal regime that had the most direct material impact on early suffragists").
20. *The Supreme Court, 1970 Term*, 85 HARV. L. REV. 38, 106 (1971) ("[I]n a very real, practical sense, the legal relations of the [petitioners] were 'settled' by the state's refusal to hear their cases, for they were thereby forced to remain bound in unwanted marriages.").
21. A.F.S., Jr., *Recent Cases, Divorce-Liability of Husband for Wife's Attorney's Fees*, 18 TEX. L. REV. 87, 88 (1939) ("At present thirty-nine American jurisdictions by statute allow the wife suit money for actual expenses of trial and counsel fees."); Hendrix, *supra* note 18, at 672.

of which issues merited the expenditure of judicial resources.²² This policy tended to support the coverture regime, or at least the long tail of its legacy,²³ because the decision-making process over which issues would be litigated largely excluded women. The rule trapped married women in an “archaic . . . caste system” premised on the “completely discredited notion that a married woman, being a female, is without capacity to make her own contracts and do her own business.”²⁴ It also served as a powerful means of entrenching that “caste system” by creating the impression, but not the reality, of equal access to counsel to prosecute a divorce.²⁵ The most profound effects of this system were felt by women in the lower and middle classes because by the eighteenth century, elite women

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22. See, e.g., *Van Vleck v. Van Vleck*, 47 N.Y.S. 470, 470 (App. Div. 1897) (“The power of the court to make an allowance to the wife for counsel fees and expenses, in an action for divorce, is limited to such sums as may be necessary to enable her to carry on or defend the action. . . . [T]he court has no power in such an action to grant an extra allowance.” (quoting WILLIAM E. BULLOCK, A TREATISE ON THE LAW OF HUSBAND AND WIFE IN THE STATE OF NEW YORK 309 (Albany, H.B. Parsons 1897))); *In re Cooper*, 344 S.E.2d 27, 29-30 (N.C. Ct. App. 1986) (“The second policy consideration [for prohibiting contingency fees was] that many states . . . provide[d] statutory authority for the court to award, in its discretion, reasonable attorney’s fees [in divorce cases.]”); Gaetano Ferro, *Attorney’s Fees in Dissolution of Marriage Cases – Is It Time for a Change?*, 7 J. AM. ACAD. MATRIM. L. 1, 6 (1991) (“[F]ee awards are often grounded on a combination of several factors used by virtually all courts in deciding what is a reasonable fee.”).
23. Statutory changes in the late-nineteenth and early-twentieth centuries purported to modify or abolish the strict laws of coverture. Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives’ Rights to Earnings, 1860-1930*, 82 GEO. L.J. 2127, 2137-49 (1994). The process extended well into the late 1900s, with active litigation over the issue being brought as late as the 1980s. E.g., *Mich. Nat’l Leasing Corp. v. Cardillo*, 302 N.W.2d 888, 889 (Mich. Ct. App. 1981) (“The primary issue on appeal is whether the common law principle of coverture remains a viable defense in Michigan.”); see Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825, 844 (2004) (“The married women’s property acts were in some respects an important strike against coverture, and the coverture regime that controlled the law of marriage at the beginning of the 1830s has certainly not survived perfectly intact to the present day. But the canonical story of coverture’s demise overstates the changes that have occurred in family law over time. There is substantial evidence within family law to support a counter-narrative that the end-of-coverture story excludes from the family-law canon and denies: the story of the persistence of coverture principles and rules.”).
24. *United States v. Yazell*, 382 U.S. 341, 361 (1966) (Black, J., dissenting).
25. Reva Siegel calls this phenomenon “preservation-through-transformation,” a process that eliminated “overtly hierarchical features of marital status law,” but adopted gender-based policies for domestic violence and labor that served similar purposes under the guise of preserving “family privacy” instead of “marital hierarchy.” Reva Siegel, *The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1111 (1996).

had developed prenuptial contracts maintaining their estates separately from their husbands.²⁶

The best illustration of how the historical provision of “suit money” supported, rather than challenged, the subordination of women can be found in courts’ justifications for denying “suit money” outright. For a woman, the ability to obtain procedural due process through legal counsel was tied to a “fault regime” – that is, the substantive question of whether the woman carried fault in the dissolution of the marriage.²⁷ To obtain suit money from the husband, “the wife could not be at fault in the dissolution of the marriage or otherwise guilty of a marital offense.”²⁸

Historically, the parameters of fault went far beyond modern conceptions of marital fault, which usually center on adultery. Under the coverture regime, “[w]ives owed their husbands strict obedience in all matters, along with domestic and sexual services, and they could not sue their husbands for mistreatment.”²⁹ A woman’s fault could be found in her failure to abide by these rules, which meant that a woman who wished to access the procedural rights and protections associated with legal counsel was first measured against an ideal of female subordination. In the context of a problematic or unhappy marriage, being free of fault could mean quiet tolerance of cruelty that would rise, under modern definitions, to criminal behavior.³⁰ Of course, the husband’s ability to access, use, and control the parties’ financial resources in a divorce case was wholly unconnected to his performance or nonperformance of some idealized version of his marital duties.³¹ While the rules may have been facially neutral, the fact that the

26. Joanna L. Grossman, *Separated Spouses*, 53 STAN. L. REV. 1613, 1628 (2001) (“[During the period of coverture], [i]t was not uncommon, however, for propertied spouses to enter into an arrangement to permit the wife to retain a ‘separate estate.’” (quoting HENDRIK HARTOG, *MAN AND WIFE IN AMERICA: A HISTORY* 172 (2000))).

27. Wenona Y. Whitfield, *Where the Wind Blows: Fee Shifting in Domestic Relations Cases*, 14 FLA. ST. U. L. REV. 811, 826 (1987).

28. *Id.*

29. Yefet, *supra* note 18, at 480 (footnote omitted). *But see* Grossman, *supra* note 26, at 1629 (analyzing the argument that “[t]he disabilities of coverture . . . were less onerous than treatises and courts suggested”).

30. Yefet, *supra* note 18, at 486 (“At the Tenth National Women’s Rights Convention in 1860, for example, Stanton advocated no-fault divorce to end ‘legalized prostitution of coerced marital intercourse and unwilling maternity.’ In her 1861 appeal to the New York legislature to liberalize divorce law, Stanton argued that restricting divorce to specific grounds especially burdens women and often confines them to a life of degradation, bodily harm, and economic dependence.”).

31. *Id.* at 482 (“Courts assiduously refused to intervene so long as a couple remained married, no matter how grossly the husband ignored his marital duties or abused his marital prerogatives.”).

husband controlled both parties' resources transformed the question of whether to provide "suit money" into a gendered, gatekeeping, and subordinating process.

The state's role in enforcing these subordinating principles was largely hidden because, as with other forms of so-called "romantic paternalism," suit money was viewed as a benefit for women, even though it was as much a part of the cage as the rest of the coverture system.³² The question of whether women could contract with attorneys on a contingency basis arose as a direct challenge to the male-controlled fault regime.³³ After all, contingency arrangements would have allowed women to acquire representation and litigate the issues that they deemed important or necessary – not only those that a judge deemed so.

Unsurprisingly, courts reacted negatively to such fee arrangements, prohibiting them outright. In the leading case on the topic from the late 1800s, *Jordan v. Westerman*, the court reasoned that contingency-fee arrangements would contravene the public-policy concern of "maintaining the family relation" because attorneys would be motivated to "induce" parties – meaning women who could not otherwise afford counsel – to pursue "dissolution of the marriage ties as a method of obtaining relief from real or fancied grievances, which otherwise would pass unnoticed."³⁴ In other words, contingency-fee arrangements would enable women to raise grievances that courts believed were better left ignored.

The *Jordan* court's justification for the prohibition on contingency-fee agreements was unintentionally revealing. To a modern observer, it illustrates how structural inequality is preserved through discursive control over what is a "real" grievance.³⁵ Specifically, the court reserved unto itself, and by association the

32. Hasday, *supra* note 23, at 846 ("Courts often contend that the judiciary created the doctrine of necessities to mitigate the harshness of coverture for married women. But from another perspective, the doctrine of necessities functioned to preserve the legal disabilities on married women, by giving wives a means of securing support that did not challenge coverture and thus avoiding other possible solutions to the problem of married women's support.").

33. Ravdin & Capps, *supra* note 3, at 405 ("The ability of a dependent wife to leave an unhappy marriage with some measure of financial security was largely dependent [on] her ability to prove the husband was at fault. It is little wonder that contingency-fee arrangements permitting women, who otherwise had no access to counsel, to seek divorces were prohibited by male lawmakers seeking to preserve male prerogatives in a paternalistic society.").

34. 28 N.W. 826, 830 (Mich. 1886); see *In re Smith*, 254 P.2d 464, 468-69 (Wash. 1953) (stating that *Jordan* was "generally regarded as the leading case" and that, since then, the prohibition against contingency fees in divorce actions was an "almost universal rule").

35. Zachary Potter & C.J. Summers, *Reconsidering Epistemology and Ontology in Status Identity Discourse: Make-Believe and Reality in Race, Sex, and Sexual Orientation*, 17 HARV. BLACKLETTER L.J. 113, 115 (2001) (explaining that theorizations of race, sex, and sexual orientation as other than "essential," "natural," or "objective" were best understood as a well-policed game of make-believe designed to prevent the acknowledgment of ontological status for disruptive people, bodies, and beliefs).

male participants in the divorce process, the right to name which marital issues were “real” enough to allow someone to exit that relationship.³⁶ Courts did not treat the identification of “real”³⁷ issues as a matter of fact-finding, which would have triggered traditional process-based protections for separating truth from fiction, such as the right to a full hearing on the merits or a jury verdict. For example, even during the nineteenth century, a jury might have concluded that forced intercourse was a sufficient basis to find cause for a divorce. Instead, judges made threshold determinations of what constituted real, and not “fanciful,” grievances, thereby preempting and short-circuiting the fact-finding process.³⁸ By their very nature, these judicial fiats betray a deeper truth: What was at stake was not trivial or fanciful at all. So long as family-law doctrine assumed women to be too “vulnerable” and “emotional” to exercise independent judgment, the “natural order” of men’s hierarchical position over women was built into the framework of a case.³⁹

The historical fault regime’s power to reify a patriarchal family structure may be located more in these largely invisible acts of reinforcement than in the substance of the factual question of fault. Where the husband consented to the divorce process, fault-based regimes imposed little barrier to actual divorce.⁴⁰ On the other hand, where the husband wished to force his wife to remain in the marriage, he could wield the question of fault as a threshold barrier. On its face, fault was a “neutral” procedural rule, but in reality, the at-fault woman lost access to suit money, which closed the courthouse door to her. The “door was closed” because, before the case even started, a woman in this position would learn that the court thought so little of her position that she would receive no help to hire counsel. Certainly, as an unrepresented party with no money and no right to

36. Danaya C. Wright, “*Well-Behaved Women Don’t Make History*”: *Rethinking English Family, Law, and History*, 19 WIS. WOMEN’S L.J. 211, 237 (2004) (“The logic of separate spheres implied that women did not need public power because . . . [t]he law of coverture simply reflected the natural order. It did not create it.”).

37. Potter & Summers, *supra* note 35, at 115-16 (demonstrating how maintaining control over what is denominated “real” within a given paradigm, and preventing disruptive “speech acts” that challenge it, hides the fictional operator in the naming convention and then continually reinforces the fiction itself).

38. Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CALIF. L. REV. 1373, 1380 (2000) (“The only change in the law’s treatment of marital rape that nineteenth-century feminists lived to see consisted of marginal alterations in the terms on which divorce was available.”).

39. Ravdin & Capps, *supra* note 3, at 406 (“Wives contemplating divorce are often distraught and without experience in negotiating contracts.” (quoting *Barelli v. Levin*, 247 N.E.2d 847, 853 (Ind. App. 1969))).

40. Grossman, *supra* note 26, at 1621 (“By all accounts, nineteenth-century divorce cases were plagued by collusion.”).

enter into a contingency contract, she would have little to no hope to change the predicted outcome of her case.⁴¹

In Parts II and III, I argue that this vestige of coverture, through the hidden power of process, has escaped modern constitutional scrutiny, preventing the full realization of fundamental rights associated with marriage.

II. CONTINGENCY-FEE PROHIBITIONS FROM COVERTURE PERSIST WITHOUT SCHOLARLY OR LOGICAL SUPPORT

Over the century that followed the *Jordan* case, feminists and their allies succeeded in liberalizing divorce rules to lessen the substantive restrictions on marital exit.⁴² However, in celebrating the theoretical end of coverture, courts and legal scholars have ignored the ways in which procedural relics and biases of the old regime still survive and impact economically dependent spouses of all genders.⁴³

Of particular importance to this Essay, the impediments to financially dependent spouses accessing legal services on their own terms remain in place. As described above, financially dependent spouses must still ask the court for suit money because they are prohibited, by rule, from forming “contingency agreements” with divorce lawyers.⁴⁴ At the same time, many states make it difficult for the dependent spouse to directly access any of their marital wealth during the

41. See Hasday, *supra* note 23, at 843-44 (“The married women’s property acts . . . gave married women the rights to sue and be sued, make contracts, own separate property, and keep their wages. . . . The married women’s property acts were in some respects an important strike against coverture, and the coverture regime that controlled the law of marriage at the beginning of the 1830s has certainly not survived perfectly intact to the present day.” (internal citations omitted)); Siegel, *supra* note 10, at 1025 (“Sex discrimination doctrine may have prompted state actors to adopt gender-neutral terminology in regulating family relations, but too often this change has been cosmetic, exerting little or no effect on the regulatory incidence of the law. A constitutional regime that insists that the state regulate gender-specific conduct in gender-neutral language (for example, ‘spousal rape’) may do little more than mask the gender-specificity of the regulated conduct.”).

42. Yefet, *supra* note 18, at 487-88 (reviewing history of feminist challenges to “marital bondage” and the ensuring liberalization of divorce law).

43. Hasday, *supra* note 23, at 834 (“[T]he family-law canon overstates the changes that have occurred in family law over time. . . . These stories are that family law has moved from status to contract, that common-law coverture principles no longer shape the law of marriage, and that common-law property norms no longer shape the law of parenthood. Each of these canonical stories presents a limited and even deceptive picture of family law and its animating principles, overstating the changes that have occurred in family law over time and denying and concealing the persistence of inequality in family law.”).

44. Shajnfeld, *supra* note 6, at 782-83; Ferro, *supra* note 22, at 5 n.11 (“In most states attorney’s fees [as suit money] are now authorized by statute.”).

divorce process, even though their marital assets are split in the end.⁴⁵ The fact of title – that is, the name on an account or a property – generally controls use of liquid assets up until the time that judgment is entered.⁴⁶ Therefore, dependent spouses must still convince judges that the claims they want to make are deserving of the legal resources that are necessary to voice them. The spouse with control over marital assets does not face these same limitations.

The current state of affairs raises the question: is the discriminatory policy rationale in support of the prohibition on contingency fees constitutional? Or has it somehow been redeemed by the passage of time, changes in society, narrowing of its impact, or the passage of other laws?⁴⁷ The answer, simply, is no. Nothing has redeemed these rules.

First, in implicit recognition of its weak foundations, courts have chipped away at the outright prohibition over time with exceptions here and there.⁴⁸ Nonetheless, it remains a largely universal rule.⁴⁹

Second, when commentators carefully scrutinize the policy rationales for the prohibition on contingency-fee arrangements in divorce cases, they commonly recognize that the arguments are without logical or empirical foundation.⁵⁰ For example, the most frequently repeated rationale is that a contingency-fee

45. Carolyn J. Frantz & Hanoch Dagan, *Properties of Marriage*, 104 COLUM. L. REV. 75, 124 (2004) (“In equitable division states, by contrast, a version of [the coverture] rule remains: Spouses – in particular, wives – have no management rights over property titled in the other spouse’s name, even if this property will eventually become part of the marital estate for the purposes of division.”).

46. *Id.*

47. Note, *Marriage, Contracts, and Public Policy*, 54 HARV. L. REV. 473, 474 (1941) (noting that mid-twentieth-century cases “stimulate[d] re-examination of the various situations in which contracts may be struck down because they impinge[d] upon the policies which surround marriage”); see also *Kraus v. Naumburg*, 36 Pa. D. & C.2d 746, 757 (Com. Pl. 1965) (noting that in divorce actions in Pennsylvania during the 1960s, it was still the case that “the amount of counsel fees allowed to the wife is fixed by the court”).

48. In recent years, courts have started interpreting the prohibition narrowly by allowing parties to use contingency fees for postdissolution litigation concerning child-support arrearages, financial issues, and property settlement. Ravdin & Capps, *supra* note 3, at 403 & n.85; see *Tepper*, *supra* note 3, at 56, 59; *Shajnfeld*, *supra* note 6, at 783 (explaining that “[m]any jurisdictions permit contingent fees in domestic relations matters where divorce is a certainty, such as suits to enforce previously awarded but unfulfilled monetary support obligations” – an exception that would not capture the typical, prejudgment divorce matter).

49. Grantham, *supra* note 1, at 1380-81 (stating that, at the time of publication, contingency fees in domestic-relationship matters had been held “void in every state except Texas”).

50. *Shajnfeld*, *supra* note 6, at 783 (describing the lack of empirical data to support the policy rationales in support of the ban).

arrangement would induce attorneys to discourage reconciliation.⁵¹ But this does not make sense when compared to the alternative that is the current norm: hourly billing.⁵² If an attorney bills by the hour, then she will make more money by exacerbating conflict and spending as much of the marital estate on the conflict as possible.⁵³ This is obviously not a path toward reconciliation and can have a devastating impact on the size of the marital estate that remains to be divided at the end of the litigation. In a contingency arrangement, by contrast, the attorney is incentivized to avoid unnecessary fights, to settle disputes quickly, and to protect the marital estate from being diminished by the litigation process.⁵⁴

Third, to the extent that contingency-fee arrangements provide an economic incentive for lawyers to behave badly (just like hourly fee arrangements), this is not a problem that is unique to family law. After all, the potential for attorney misconduct underlies the American Bar Association's rules of professionalism as well as state bar associations' disciplinary proceedings.⁵⁵ Only in the family-law space do we take seriously the debunked reasoning that "emotional litigants," which historically meant vulnerable wives, needed to be protected from the matrimonial bar in this specific way.⁵⁶ For example, litigants regularly contest rights

51. *Id.* (stating that this is the justification that is "often bandied-about"); Robert G. Spector & Carolyn S. Thompson, *The Law of Attorney Fees in Family Law Cases*, 69 OKLA. L. REV. 663, 691 (2017) (calling this the "oft-cited reason" for the prohibition).

52. Spector & Thompson, *supra* note 51, at 691 ("The insinuation that most attorneys would discourage reconciliation of spouses contemplating divorce is also tenuous. One can just as easily argue that a contingent fee promotes reconciliation because clients would be tempted to reconcile to avoid paying the fee.")

53. Ravdin & Capps, *supra* note 3, at 389 ("Because the attorney will bill the client solely on the basis of the number of hours worked, regardless of the result for the client, it is in the economic interest of the attorney to work as many hours as possible on each case.")

54. In family-law cases, there can be economic and noneconomic disputes, including noneconomic disputes related to children. But time that does not relate to collection of the *res* can be carved out for hourly billing, to the extent necessary, or other means of addressing the issue can be devised if the time invested in that portion of the case proves problematic. *See id.* at 404 (stating that contingency fees could not, obviously, be applied to success with child-related outcomes).

55. *Id.* at 408 ("The solution lies not in distinguishing domestic relations actions from other civil actions, but rather in accepting that some abuses will occur and policing those abuses."); e.g. *Rule 1.5: Fees*, A.B.A. (Apr. 14, 2020), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_5_fees [<https://perma.cc/7L9W-UA52>] ("A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses.")

56. *Id.* at 407 ("[T]he image described . . . of the vulnerable wife needing special protection survives into the present day with little thought of its historical origin. Yet, the concern for the overreaching attorney preying on an emotionally distressed client is equally applicable in personal injury cases, where clients are often unemployed, emotionally distraught, and physically

to a limited fund or specific property—such as in partnership disputes, interpleader actions, and bankruptcy cases. In such instances, lawyer-client fee arrangements are as varied as the creativity of the participants.⁵⁷ The economics of such disputes can be identical to those in divorce cases because, as in divorces, it is a dispute over a defined *res*. For example, there are also numerous types of cases where one can assume that “clients are equally distraught [as in a divorce], if not more so,” such as in wrongful death or other types of tort cases.⁵⁸ In those types of cases, relatively modest protections are typically used to protect the litigants from hasty choices, such as mandatory “statements of client rights,” which include mandated revocability periods with respect to the fee agreement, and/or a limited review of the fee for “fraud or overreaching.”⁵⁹ Inherent in these more modest protections is an assumption not present in the family-law canon: Emotional litigants are capable of making rational decisions with respect to who they want to represent them and how they want to pay for it.

The overall picture that currently exists is fairly straightforward. Rules prohibiting contingency arrangements in divorce cases were adopted for expressly discriminatory purposes. There was no well-reasoned, nondiscriminatory explanation for the rules in the first instance. Now, discriminatory tropes of the past continue to pollute current discussions of the topic, often without notice. And, finally, the prohibition remains in place in most if not all states as a core part of the canon of family law, which thereby preserves and reinforces a unique legacy of the coverture regime.⁶⁰ This is because victory over the coverture regime was

injured. Nevertheless, contingent fees are accepted and widely used in personal injury cases, and are disapproved only where there has been a specific finding of fraud or overreaching.” (citations omitted)).

57. Steven Susser, *Contingency and Referral Fees for Business Disputes: A Primer*, MICH. BAR J. 35, 38 (Nov. 2011).
58. Grantham, *supra* note 1, at 1380; Ravdin & Capps, *supra* note 3, at 407 (“[T]he concern for the overreaching attorney preying on an emotionally distressed client is equally applicable in personal injury cases, where clients are often unemployed, emotionally distraught, and physically injured.”).
59. Ravdin & Capps, *supra* note 3, at 407.
60. Wayne F. Foster, Annotation, *What Constitutes Contract Between Husband or Wife and Third Person Promotive of Divorce or Separation*, 93 A.L.R.3d 523, § 3[a] (1979) (“It is well established that a contract for the payment of an attorney’s fee, contingent upon his procuring a divorce for his client, or contingent upon the amount of alimony obtained, is void as against public policy.”); Hasday, *supra* note 23, at 844 (“There is substantial evidence within family law to support a counter-narrative that the end of coverture story excludes from the family law canon and denies: the story of the persistence of coverture principles and rules.”).

declared much too early,⁶¹ and also because gender-neutral language in the family-law space masks profound inequalities that such rules can create.⁶²

As set forth below, modern jurisprudence on fundamental rights associated with marriage makes this artifact of a discriminatory past vulnerable to constitutional challenge.⁶³

III. THE PROHIBITION ON CONTINGENCY FEES VIOLATES DUE PROCESS

Rules that arose from the coverture regime, including the family-law prohibition on contingency-fee arrangements, were designed to entrench inequality, both in terms of disincentivizing certain litigants from seeking access to the courts and ensuring inequitable outcomes. Because such rules are over a century old and appear facially neutral, they are often treated as a matter of “common sense” when, in reality, they are not.⁶⁴ The question remains whether there is a viable path to effectuate change around these vestiges of the past.

To mount a constitutional challenge to these rules, one must dust off the foundations of modern jurisprudence on the fundamental right to marry. The recognition of a fundamental right to marry under the Constitution is of relatively recent origin – tracing back to 1967 – but the recognition of the fundamental rights associated with divorce goes back to the foundations of the country, and beyond.⁶⁵

The right to seek and obtain a divorce implicates what has been called a “due process trinity” of fundamental rights protected by the Due Process Clause of

61. Hasday, *supra* note 23, at 844 (“Consider again, for instance, the marital rape exemption, interspousal tort immunity, the prohibition on interspousal contracts for domestic services, and the doctrine of necessaries. All of these status rules originated as part of common law coverture, and each continues to preserve substantial elements of the coverture regime.”).

62. *Id.* at 848 (“The modern doctrine of necessaries preserves a regime in which the spouse in need of support, usually the wife, is unable to enforce her marital rights directly and instead has to make her claims through third parties.”).

63. *See id.* at 898 (“Challenging the family-law canon’s construction – subjecting to scrutiny and doubt what currently functions at the level of common sense – is the first step toward changing the family-law canon and restructuring the terms on which family law debates take place.”).

64. *Id.* at 898–90.

65. Meg Penrose, *Unbreakable Vows: Same-Sex Marriage and the Fundamental Right to Divorce*, 58 VILL. L. REV. 169, 174 (2013) (tracing the theorization of divorce as a component of freedom, happiness, and liberty to the foundation of the United States and, even, to the original Puritan settlers).

the Fourteenth Amendment.⁶⁶ The first right is a person's "access to the judicial process [of divorce] in the first instance."⁶⁷ The second right is the choice to be free from the "constraints" and "legal obligations"⁶⁸ that go with marriage—to avoid a carceral application of marriage laws. The third right is the choice to remarry, which, of course, cannot occur until an earlier marriage is dissolved.⁶⁹

In the early 1970s, in *Boddie v. Connecticut*, the Court addressed the intersection of the above three rights in a class-action suit against the State of Connecticut on behalf of women receiving state-welfare assistance.⁷⁰ The named plaintiffs in the lawsuit, because of their limited means, were unable to afford the court fees and costs incident to a divorce proceeding, which, at the time, averaged \$60.⁷¹ The cost, according to the plaintiffs, locked them out of the sole state-created means for divorce—a process the Court described as an "adjustment" of the "fundamental human relationship" that is "marriage."⁷²

In assessing the plaintiffs' claims, the Court applied a balancing test: "[D]ue process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard."⁷³ It was a precursor to the *Mathews v. Eldridge* test for Due Process rights, one we might call the family-law version of *Mathews*.⁷⁴

In terms of the fundamental right to access judicial processes, the Court differentiated divorce cases from ordinary civil cases on the basis that the State exercises a monopoly over the status of marriage: If access to the courthouse is closed, there is nothing that private parties can do to change their marital

66. Mary Patricia Byrn & Morgan L. Holcomb, *Wedlocked*, 67 U. MIAMI L. REV. 1, 33 (2012).

67. *Id.*; *Boddie v. Connecticut*, 401 U.S. 371, 375 (1971).

68. Byrn & Holcomb, *supra* note 66, at 33.

69. *Id.*

70. *Boddie*, 401 U.S. at 371.

71. *Id.* at 372.

72. *Id.* at 376, 383.

73. *Id.*

74. See *M.L.B. v. S.L.J.*, 519 U.S. 102, 128-29 (1996) (Kennedy, J. concurring) (citing *Boddie* along with other "decisions addressing procedures involving the rights and privileges inherent in family and personal relations"; citing *Mathews* and concurring with the Court's use of due process principles to balance fundamental rights against the cost of providing counsel in dissolution of parental-rights cases).

status.⁷⁵ The Court cautioned against over-reading its opinion; it did not guarantee “access for all individuals to the courts” under the Due Process Clause.⁷⁶

Nevertheless, the interrelated fundamental rights of divorce and re-marriage qualified as claims of “right and duty;” the Court described them as rights of “substantial magnitude.”⁷⁷ The Court held that the state’s machinery for “adjustment of [this] fundamental human relationship” needed to be operated in a manner that was not only “generally valid,” but also valid as it operated with respect to a “particular party’s opportunity to be heard.”⁷⁸ In *Boddie*, the salient characteristic of the “particular party” before the Court was a lack of access to assets that, of course, was unrelated to “the seriousness of [her] motives in bringing suit.”⁷⁹ The State’s countervailing interests, the prevention of “frivolous litigation” and the allocation of “scarce resources,” were not weighty enough to justify burdening the plaintiffs’ fundamental right to divorce.⁸⁰

The Court in *Boddie* was careful to limit its decision to the “case before [it,]” but the basic balancing test it articulated was then employed in a line of cases related to the “rights and privileges inherent in family and personal relations.”⁸¹ The framework that it utilized can therefore be applied to the present issues.

When the above balancing test is applied to the ban on contingency fees in family law, the rule does not withstand scrutiny. In terms of weighing “the

75. *Boddie*, 401 U.S. at 375-76.

76. *Id.* at 382.

77. *Id.* at 381 n.8.

78. *Id.* at 383.

79. *Id.* at 381.

80. *Id.*

81. *M.L.B. v. S.L.J.*, 519 U.S. 102, 128-29 (1996) (Kennedy, J. concurring). The least rigorous application of the above test occurred in a case decided four years after *Boddie*. In *Sosna v. Iowa*, 419 U.S. 393 (1975), the Court affirmed a one-year durational residency requirement prior to petitioning for divorce. The delay, in the Court’s view, did not amount to total deprivation of the right to divorce, so that feature distinguished it from *Boddie*. However, durational residency requirements weigh differently in the balancing act because, in some ways, they support the right to divorce by preventing forum shopping or collateral attacks on divorce decrees. The best way to reconcile the two cases is to recognize that it is a balancing test and not a bright line test. See generally Penrose, *supra* note 65, at 205 (“When these cases are considered together, in light of the settled criteria for recognizing fundamental rights, a viable argument can be made that divorce qualifies as a liberty right under substantive due process.”).

character and intensity of the individual interests at stake,”⁸² it would be easy to suggest that the ban on contingency fees is a minimal burden because people have other options, including “suit money” or representing themselves *pro se*. Indeed, there is not a recognized overarching right to counsel in divorce cases, so stopping certain types of fee arrangements would seem to be a lesser burden than providing no counsel at all.⁸³ But this approach is ahistorical.

As set forth in Part I, rules designed to limit access to counsel in the context of family law were not a solution to discrimination and inequality; rather, they were a pillar of the discriminatory system in the first place. This fact, which could be referred to as an equal protection concern, can and should be taken into account when weighing the State's purported interests in maintaining such rules.⁸⁴ As the Supreme Court recently stated, “[t]he Due Process Clause and the Equal Protection Clause are connected in a profound way . . . [and while] [r]ights implicit in liberty and rights secured by equal protection may rest on different precepts . . . in some instances each may be instructive as to the meaning and reach of the other.”⁸⁵

The above proposition, that due process and equal protection principles interrelate, is something that “feminist proceduralists” have recognized for a long time.⁸⁶ They have argued that, with respect to procedural rules, scholars “must consider how women actually fare as litigants, and whether rules of evidence and procedure respond to the documented disabilities that women still face.”⁸⁷ In this instance, a rule was designed to create unequal access to counsel for women and

82. *M.L.B.*, 519 U.S. at 104 (“Placing this case within the framework established by the Court's past decisions in this area, the Court inspects the character and intensity of the individual interest at stake, on the one hand, and the State's justification for its exaction, on the other.”).

83. *E.g.*, *In re Smiley*, 36 N.Y.2d 433, 439 (1975) (“But in any event the *Boddie* case (*supra*) does not support, or by rationale imply, an obligation of the State to assign, let alone compensate, counsel as a matter of constitutional right.”).

84. *M.L.B.*, 519 U.S. at 120 (“We observe first that the Court's decisions concerning access to judicial processes . . . reflect both equal protection and due process concerns.”); *see also* *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020) (considering the racist history of nonunanimous jury verdicts when finding that the Sixth Amendment right to jury trial, as incorporated against the states by the Fourteenth Amendment, required a unanimous verdict to convict a defendant of a serious offense, abrogating *Apodaca v. Oregon*, 406 U.S. 404 (1972)).

85. *Obergefell v. Hodges*, 576 U.S. 644, 672 (2015).

86. Judith Resnik, *Revising the Canon: Feminist Help in Teaching Procedure*, 61 U. CIN. L. REV. 1181, 1191 (1993).

87. *Id.*

it continues to do so for economically dependent spouses of all genders. It is a weapon against equality and fundamental fairness reserved for divorce cases and it endangers the “trinity” of fundamental rights that they entail.⁸⁸ Notably, and consistent with the arguments in this Essay, an unbalanced playing field in family cases is of such constitutional import that the right to state-appointed counsel has been recognized in an increasing number of family law contexts.⁸⁹ Therefore, it is difficult to understand how a rule designed to enhance inequality and unfairness in this space could survive.

The other side of the Due Process balancing test is the state’s interest in maintaining the ban. Part II of this Essay showed that courts and commentators often repeat the nineteenth-century justifications for the ban, even though the ban was invented for discriminatory and subordinating purposes.⁹⁰ This is no justification at all. Even in the absence of discriminatory tropes about “emotional” litigants, the purpose of “discouraging divorce” by limiting access to counsel is not “a countervailing state interest of overriding significance.”⁹¹ Further, the use of unfairness, an unequal playing field, and/or inequality to incentivize forced companionship by economically dependent spouses is *not* the same thing as promoting love and stability in marriage.⁹² As the Supreme Court has recognized, it is

88. Grantham, *supra* note 1, at 1387 (1987) (explaining how the statutory fee system forces the dependent spouse to accept “less experienced and less successful attorneys” in the face of a general “reluctance” to take on such cases).

89. Martha F. Davis, *Participation, Equality, and the Civil Right to Counsel: Lessons from Domestic and International Law*, 122 YALE L.J. 2260, 2271 (2013) (“[A] number of state courts have expanded the right to counsel to areas involving significant interference with intimate familial relationships, that is, parental termination, child custody, and guardianship. In doing so, courts have interpreted due process principles while appealing to concepts of equality and ‘fundamental fairness[.]’”).

90. Yefet, *supra* note 18, at 473 (arguing that previously unchallenged procedural and substantive impediments to divorce can and do implicate fundamental rights).

91. The Ninth Circuit has suggested that discouraging divorce does not even survive rational-basis review. *Aleman v. Glickman*, 217 F.3d 1191, 1204 n.10 (9th Cir. 2000) (“The government does not raise this argument on appeal, and we do not rely on ‘discouraging divorce’ as a rational basis. Because one has a fundamental right to marry, *see Zablocki v. Redhail*, 434 U.S. 374, 386 (1978), which includes the right to divorce so that one can remarry, *see Boddie v. Connecticut*, 401 U.S. 371, 376 (1971), a statute whose only purpose is to hinder this right, even if it does not actually, in its effect, ‘interfere directly and substantially with the right to marry,’ *Zablocki*, 434 U.S. at 387, would not be supported by a legitimate government purpose.”).

92. Yefet, *supra* note 18, at 515-16 (“[G]iven the historical and contemporary role that marriage and divorce have played in the lives of women, legislation that thwarts marital exit imposes special sex-specific burdens on women and cultivates gender hierarchy within the family. Moreover, divorce-restrictive regulations deprive women of an important mechanism to

more akin to a direct constitutional injury to individual autonomy.⁹³ Finally, as to the desire to avoid litigation over “fancied grievances,” which would today be described as “frivolous” divorce cases, the prohibition on contingency fees does not address that end. Once again, the *Boddie* Court faced this same argument and, in rejecting it, the Court held that such problems have solutions that specifically address them, such as “penalties for false pleadings or affidavits, and actions for malicious prosecution or abuse of process.”⁹⁴ Because these solutions already exist, the state’s purported justification does not have “overriding significance.”⁹⁵

Notably, it is not just concepts like freedom, dignity, love, and self-realization that are at issue.⁹⁶ Some of the inchoate rights that accompany marriage, which have motivated the Supreme Court’s recognition of its “fundamental importance for all individuals,”⁹⁷ vest upon divorce, and the distribution of assets that attend these events. As just one key example, in equitable-distribution states, the property rights attendant to “marital” property remain unvested until a divorce decree is entered, meaning that, up until that date, there is a danger that the dependent spouse’s one-half interest could be transferred or dissipated, particularly without effective representation. Thus, the ban on contingency fees makes the economically vulnerable party even more vulnerable, all in the service of discouraging an economically dependent spouse from seeking a divorce. The use of the power of the state to help the affluent impair the autonomy of their less affluent counterparts has the ring of coverture, and worse.

CONCLUSION

Family law is not necessarily unique in the issues it is asked to address, particularly with respect to economic disputes. If a rule restricting attorney-client

incentivize gender equality *during* marriage, as the implicit or explicit threat of exit allows women to renegotiate the balance of power in their marriage and put pressure on husbands to be responsive to their needs.”).

93. *Obergefell v. Hodges*, 576 U.S. 644, 665 (2015) (“A first premise of the Court’s relevant precedents is that the right to personal choice regarding marriage is inherent in the concept of individual autonomy.”); *see generally* Horowitz, *supra* note 10, at 898 (“It was people’s attitudes towards marriage, divorce, and their own autonomy and liberty that led to the widespread adoption of no-fault divorce options, and it is this autonomy and liberty that the Fourteenth Amendment is meant to protect.”).

94. *Boddie v. Connecticut*, 401 U.S. 371, 381-82 (1971).

95. *Id.*

96. *See, e.g.*, Horowitz, *supra* note 10, at 877-78.

97. *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978).

relationships could not be justified in related fields of law, such as in partnership disputes, it should not be permitted in family law. The concerns about “emotional” and “vulnerable” clients that justify family law’s sui generis restrictions are, at their core, the same discriminatory impulses that drove long-rejected sex-based restrictions on women’s rights to contract and own property generally.

The ills of the past—where courts used economic dependency as a proxy for mental and emotional incapacity—need not be revisited on any party to a marriage, whether the problematic marriage involves a same-sex couple or a marriage where a husband is dependent on a wife. Economic dependency is not a basis for treating anyone’s decision-making capacity with less respect and dignity than that of a person with independent resources.⁹⁸ Restrictions on contingency and alternative fee arrangements in family law therefore fail constitutional scrutiny.

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⁹⁸. *Boddie v. Connecticut*, 401 U.S. 371, 386 (1971) (“Affluence does not pass muster under the Equal Protection Clause for determining who must remain married and who shall be allowed to separate.” (Douglas, J. concurring)).