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ARTICLE

PRINCIPLES OF U.S. FAMILY LAW

*Vivian Hamilton**

What explains U.S. family law? What are the origins of the current chaos and controversy in the field, the home of some of the most vituperative debates in public policy? To answer these questions, this Article identifies and examines family law's foundational principles. It undertakes a conceptual analysis of the legal practices that govern families. This analysis has yet to be done, and its absence hamstrings constructive thought on our family law. The Article develops a typology that conceptualizes U.S. family law and exposes its underlying principles. First, it identifies the significant elements, or rules, of family law. Second, it demonstrates that these rules reflect or embody four important concepts—conjugality, privacy (familial as well as individual), contract, and parens patriae. Third, it shows that the concepts of family law in turn embody two distinct underlying principles—Biblical traditionalism and liberal individualism. From these powerful principles, we can derive modern U.S. family law: They explain what our family law is.

With this deepened understanding of family law's structure, the Article next evaluates these principles, and family law as the expression of them. It concludes that each principle is individually flawed, and, taken together, they are too often in unproductive tension. Examining family law's expression of the principles both demonstrates this tension and illuminates the field's current controversies—including those surrounding marriage, same-sex couples and their families, and the balance between parents' and children's rights—and the sources of their intractability. It becomes clear that the very foundational principles of U.S. family law doom the field to incoherence and thus must be revised.

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At a minimum, this Article seeks to expose family law's generally implicit underlying principles and launch a much-needed debate on whether its current principles are desirable, or even defensible. More ambitiously, the Article aims to ground a new jurisprudence of family law that better reflects the social goals and needs of contemporary U.S. society.

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INTRODUCTION

U.S. family law is in chaos. Federal, state, and administrative bodies enact and apply constitutional, statutory, and judge-made laws. Together these laws regulate families and family life, but it is a struggle to find a thematic connection between one doctrine and the next. The chaos that results is apparent not just to those who practice law or ponder it in the academy, but to any layperson who reads the newspaper. Marriage promotion programs coexist with statutory schemes that promise speedy and painless divorces.[1] Same-sex couples and their families receive public benefits and protections in many cases, while proponents of the Defense of Marriage Act, state constitutional amendments, and the proposed Federal Marriage Amendment seek to withdraw or minimize those benefits and protections.[2] Parents' rights (especially those of married parents) can receive greater consideration than the best interests of their children.[3] The list goes on.

But is there a deeper coherence that unifies diverse family laws? If so, what is it?

This Article examines those questions and reaches two conclusions. First, there is an imperfect coherence to family law as it now exists, because two principles—Biblical traditionalism and liberal individualism—combine to explain its central concepts. Second, each of these principles is individually flawed, and, taken together, they are too often in unproductive tension. These conflicting concepts thus doom U.S. family law to incoherence.

Biblical traditionalism embraces a premodern notion of natural law molded by Biblical scripture and Judeo-Christian doctrine.[4] It dictates a normative view of the "moral family." Liberal individualism emphasizes the atomistic individual and safeguards freedom in a secular and pluralistic society. Through analysis of these powerful principles, we can explain what modern U.S. family law is.

This Article begins the development of a new normative jurisprudence of the laws regulating families. The necessary first step of this larger project is a conceptual analysis of the legal practices that govern families. The analysis resides at the intersection of positive and normative analysis, and it seeks to lay bare the ideological assumptions embodied in our institutional practices. To do this, the Article applies a pragmatic methodology that eschews top-down deductive analysis, which would proffer philosophical principles that *ought* to serve as the foundation of and justification for a

1. *See infra* notes 19, 41-42, 56-61 and accompanying text.

2. *See infra* note 135 and accompanying text.

3. *See infra* notes 58-60 and accompanying text.

4. *See infra* note 74 and accompanying text. I am indebted to my colleague John Taylor for helping me think about the legal-philosophical implications of certain terminology, and to Brian Bix for suggesting the term "traditionalism" to replace other, less workable terms.

legal system or institutional structure. The analysis instead begins closer to the metaphorical middle, identifying those principles that currently *do* serve as the foundation of and justification for our actual family law system.[5]

Identifying family law's foundational principles is critical. It exposes the underlying structure of family law and "deepens our understanding of its structure by displaying the coherence and mutual support of its component elements."[6] It is only once the structure is clear that we can begin to evaluate family law, including its underlying principles, intelligently.[7] This conceptual analysis of family law has yet to be done, and its absence hamstrings constructive thought on our family law.

The typology developed here to conceptualize U.S. family law and expose its principles is new. First, it identifies the significant elements, or practices, of family law.[8] Next, it analyzes those elements to reveal the concepts they embody. It then examines the concepts and concludes that, coupled with modern practices of family law, these concepts embody the twin principles of Biblical traditionalism and liberal individualism. Family law's practices and concepts thus effectuate and concretely express its principles.[9]

Scads of laws touch families in some way. Part I begins with a brief discussion of the corpus juris of family law. It comprises those rules that intentionally or directly (as opposed to incidentally) affect family relationships. This Part then argues that these rules reflect or embody four important concepts: conjugality (of the heterosexual sort), privacy (familial as well as individual), contract, and parens patriae.[10]

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5. H.L.A. Hart employed this process of criticism in books that explored various jurisprudential issues. *See generally*, H.L.A. Hart & A.M. Honore, Causation in the Law (1959) (fault); H.L.A. Hart, The Concept of Law (1961) (adjudication); H.L.A. Hart, Punishment and Responsibility: Essays in the Philosophy of Law (1968) (criminal law). The methodology was refined by legal philosopher Jules Coleman. *See* Jules L. Coleman, The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory, at xiv, 5-6 (2001). This Article looks primarily to Coleman's refinement for methodological guidance.

6. Coleman, *supra* note 5, at 23.

7. Coleman argues for uncovering a legal system's actual foundational principles:

> [This places us] in a position to ask . . . how attractive the principles themselves are. The key point is that the moral or justificatory questions are not prior to the explanatory ones, but can grow out of the explanatory project as it reveals the abstract principles in greater specificity and concreteness.

Coleman, *supra* note 5, at 6.

8. There is no effort, however, to exhaustively chronicle U.S. family law. A number of academics have ably and comprehensively described modern family law, and to do so here would not advance this project. *See, e.g.*, Homer H. Clark, Jr., The Law of Domestic Relations in the United States (2d ed. 1987); Sanford N. Katz, Family Law in America (2003). Instead, this Article outlines family law's most salient features—those that give it its shape—thereby rendering it susceptible to analysis.

9. *See* Coleman, *supra* note 5, at 6.

10. Parens patriae means, iterally, "father of the country." Parens patriae power is the state's power to act to protect from harm or promote the welfare of individuals who lack the capacity to act in their own best interests. *See, e.g.*, *Developments in the Law—The Constitution and the Family*, 93 Harv. L. Rev. 1156, 1198-99 (1980). For a discussion of its

Part II argues that the concepts of family law in turn embody two distinct underlying principles—Biblical traditionalism and liberal individualism. It describes each and traces, both historically and thematically, how they have shaped our family law. It identifies and further describes the concepts that figure in each principle and explains their interrelationships.

Part III concludes that liberal individualism and Biblical traditionalism each have their flaws, and together they are irreconcilable. The continued accommodation of both in today's law leads to incoherence and thwarts the achievement of important goals. As each pulls family law in a different direction, lawmakers and members of an increasingly divided populace may cling to one or the other principle, warts and all—but not both. If family laws are to generate outcomes that achieve some level of purposive coherence—or, at a minimum, outcomes that do not undercut family law's more important goals—the continued incorporation of both principles must be consciously and explicitly abandoned. In their place, we must substitute either a single unifying principle or an internally consistent set of principles. Identifying the current principles of U.S. family law and understanding their individual and in-tandem shortcomings will advance that important project.

I. A TYPOLOGY OF U.S. FAMILY LAW: ITS CONCEPTS AND THE RULES THAT EMBODY THEM

A. *Methodology*

This part examines the primary elements or rules of U.S. family law and argues that together they reflect its key concepts: conjugality, privacy, contract, and parens patriae. To come at it another way, each of these concepts warrants and is actualized by a range of inferences. If this list of concepts is correct and complete, this range of inferences corresponds with the important elements of our family law. For example, one can infer from the concept of conjugality many of the key practical elements of our marriage laws—a formalized relationship between an opposite-sex couple that is presumptively enduring and through which sex and procreation are legitimated. In this way, the rule or practice both reveals the content of the concept and can be inferred from it.[11]

Part II will argue that these concepts taken together in turn reflect two general principles—Biblical traditionalism and liberal individualism. These

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development as a doctrine, see Natalie Loder Clark, *Parens Patriae: History and Present Status of State Intervention into the Parent-Child Relationship*, *in* 1A Current Perspectives in Psychological, Legal and Ethical Issues 109 (Sandra Anderson Garcia & Robert Batey eds., 1991).

11. *See* Coleman, *supra* note 5, at 7-10. The rules of family law provide neither the concepts themselves nor the principles they embody with all of their content. Other legal systems and a full range of social practices contribute to and can be embodied in them as well. But the rules of family law certainly give the concepts and principles some, if not much, of their content. *Cf. id.* at 56-57.

principles are embodied in the concepts and rules of U.S. family law and simultaneously explain it—not its every aspect, but its core.[12]

Two notes on the structure of the rules/concepts/principles construct are called for. First, the reader should note that the boundaries between each category are not rigid; the categories are interconnected and must be viewed holistically. Precise demarcation is not always possible. Nor is it necessary—the goal of such a structure is to help illuminate the nature of a legal system, and this construct accomplishes that.

Second, the metaphorical structure represents a continuum of abstraction, from the law's concrete practices to its theoretical underpinnings.[13] This Article does not attempt to describe all points on that continuum; nor does it care to establish its endpoints. The rules themselves, for instance, represent a level of abstraction and warrant their own inferences (related to execution, actual effect on individuals, etc.). At the other extreme, principles may themselves embody other, higher-level principles, and so on. The analysis focuses on this range within the continuum for a simple, practical reason: Any analysis or explanation of a social institution should, of course, be useful; it should illuminate the institution's structure and reveal the coherence of its component parts.[14] Near one endpoint of the continuum, the rules of family law provide evidence, though necessarily imperfect, of actual practice. And from a purely practical perspective, they are vastly easier to work with than, for instance, actual sociological data. Near the other endpoint, the principles of Biblical traditionalism and liberal individualism are the most useful, in this case, because they best explain our particular legal order. An explanation of family law as an embodiment of some ultimate, still more basic principle would fall short of these goals. Ultimate principles explain our need for *some* legal order.[15] Societal goals of self-preservation, for instance, inform the family laws of all countries; focusing on that upper-level principle, however, tells us little about *our* family law. On the other hand, the closer one moves toward the levels of legal concepts and rules, the more difficult it is to see and discuss any overarching coherence. As when viewing an impressionistic painting or a 3-D poster, one needs some distance to make sense of what on too-close inspection appears to be a pointillist mess.

Let us turn now to the system to be analyzed.

Family law, as conceived here, comprises those sets of laws (1) whose purpose is to regulate relationships among intimates, or (2) whose operation hinges on the existence of a certain family status or relationship.[16]

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12. *Cf. id.* at 8.

13. *See id.* at 55 n.1.

14. *See id.* at 23.

15. *See, e.g.*, H.L.A. Hart, The Concept of Law 193-200 (2d ed. 1994); Wayne Morrison, Jurisprudence: From the Greeks to Post-Modernism 378-79 (1997) (discussing H.L.A. Hart's thesis of the minimum content of natural law).

16. This view of family law is consistent with the contemporary view of family in the United States. The concept of what constitutes family and family law has evolved.

Certain rules directly order family life and family relationships. These include obvious examples like laws regulating marriage, divorce, and parenting. Other rules that regulate intimate relationships or affect individuals based on their relationships to others, such as those governing child custody and child support, also belong in that category. Similarly, various rules, including those involving inheritance, tax, and insurance, link important benefits and obligations to legal family status.[17] It would be wrong to treat these kinds of laws as outside of family law or as existing merely in the penumbra of the core family law. Indeed, a legislature may more successfully influence family composition through indirect means (e.g., by subsidizing via tax benefits certain family forms but not others)[18] than by more direct legislation (e.g., by making divorce difficult or impossible to obtain).[19]

Professor Nancy Cott has noted that, at common law, the concept of "domestic relations" included "the relative privileges and duties of husbands and wives, employers and employees, and masters and slaves." Nancy F. Cott, Public Vows: A History of Marriage and the Nation 6-7 (2000); *see also* Peter W. Bardaglio, Reconstructing the Household: Families, Sex, and the Law in the Nineteenth-Century South 25 (1995) ("Central to the world view of . . . slaveholders was a broad conception of family, one that went beyond the nuclear unit to encompass non-nuclear kin, slaves, servants, and all other inhabitants of the plantation . . . ."). Contemporary treatises on family law more narrowly focus on relationships between intimates. *See, e.g.*, Clark, *supra* note 8; Katz, *supra* note 8.

17. *See infra* notes 61-64 and accompanying text. At the risk of stating the obvious, my placing certain laws or systems of laws within the "family law" category does not imply that these laws belong exclusively within that category. Laws may be considered "family law" while simultaneously falling into categories of "tax law," "employment law," or other types of law.

18. *See, e.g.*, Edward J. McCaffery, Taxing Women 11-28 (1997); Lawrence Zelenak, *Doing Something About Marriage Penalties: A Guide for the Perplexed*, 54 Tax L. Rev. 1, 6-7 (2000).

19. Historically, state legislative measures aimed at restricting divorce were unable to thwart the growing demand for dissolution. *See generally* Hendrik Hartog, Man and Wife in America: A History (2000); Lawrence M. Friedman, *A Dead Language: Divorce Law and Practice Before No-Fault*, 86 Va. L. Rev. 1497 (2000); 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 Cal. L. Rev. 2017 (2000); Joanna L. Grossman, *Separated Spouses*, 53 Stan. L. Rev. 1613 (2001) (reviewing Hartog, *supra*); *Developments in the Law—The Law of Marriage and Family*, 116 Harv. L. Rev. 1996, 2087-91 (2003). Legislative divorce was a practice adopted by states that allowed state legislatures to issue divorces to couples on an ad hoc basis if, in the opinion of the legislature, the couple was deserving. Grossman, *supra*, at 1645. Until the mid-nineteenth century, this was the only way that married couples could legally divorce in most states. *Id.* This practice gave way to judicial divorce after most states enacted bans on divorce bills, as their legislatures were unable to meet the demand for divorces. *Id.* Fault-based judicial divorce replaced legislative divorce by the end of the nineteenth century. *See* Friedman, *supra*, at 1501. Courts granted divorces only to "innocent" spouses who could persuasively demonstrate that the breakdown of the marriage was the fault of their partners. *Id.* Through the late-nineteenth and into the twentieth century, the demand for divorce grew, and some states responded by enacting more stringent divorce laws. *Id.* at 1502-03. These measures, however, failed to reduce demand. *Id.* Some husbands and wives who both wished to divorce colluded to present (perjured) evidence of fault. *Id.* at 1507. Others traveled to states where divorce was easier to obtain. *Id.* at 1503-04. Ultimately, states accepted that efforts to enforce couples' commitments were doomed to fail. *See* Lynn D. Wardle, *No-Fault Divorce and the Divorce*

Thus defined, these varied family laws embody four underlying concepts: conjugality, contract, privacy, and parens patriae. These concepts organize family law.

B. *Embodying Conjugality and Contract: Rules of Marriage and Divorce*

1. Marriage and the Marital Family

Those rules of family law that formalize and shape the institution of marriage embody the concepts of conjugality, privacy, and contract.

Conjugality is a legal status (marriage), but it is also a powerful normative concept.[20] The rules that both reflect and actualize the concept of conjugality include those that permit only opposite-sex couples to marry;[21] limit to two the number of people who may enter into a marriage;[22] require that marriages be presumptively enduring and dissoluble only by the state;[23] impose on married couples—viewed in important respects as a single unit—mutual obligations of support;[24] and declare marriage to be the locus for legitimate sex and procreation.[25]

Conundrum, 1991 BYU L. Rev. 79. With the single exception of Arkansas, every state in the country has thus adopted some version of a no-fault divorce regime, granting divorce upon a showing that the marriage is irretrievably broken. *Id.* at 90.

20. *See, e.g.*, Martha Albertson Fineman, *Our Sacred Institution: The Ideal of the Family in American Law and Society*, 1993 Utah L. Rev. 387, 387.

21. Massachusetts is (so far) the singular exception. *Goodridge v. Department of Public Health* held the exclusion of same-sex couples from marriage "incompatible with the [Massachusetts] constitutional principles of respect for individual autonomy and equality under law." 798 N.E.2d 941, 949 (Mass. 2003). The First Circuit, in *Largess v. Supreme Judicial Court for the State of Massachusetts*, refused to enjoin the implementation of *Goodridge*. 373 F.3d 219, 229 (1st Cir. 2004). Together, *Goodridge* and *Largess* made Massachusetts the first state in the union to permit same-sex marriages.

22. All states prohibit polygamy. *See* Reynolds v. United States, 98 U.S. 145 (1878) (affirming criminal conviction of a Mormon man who participated in a plural marriage); Potter v. Murray City, 760 F.2d 1065 (10th Cir. 1985) (declining to extend the constitutional right to privacy to protect plural marriage); Kelly Weisberg & Susan Frelich Appleton, Modern Family Law: Cases and Materials 189-201 (3d ed. 2006).

23. Every state has implemented statutes requiring judicial approval and declaration of divorce. *See* Lawrence M. Friedman, A History of American Law 204-08, 498-504 (2d ed. 1985).

24. For a discussion of the development of the notion of conjugal unity, see *infra* notes 129-31 and accompanying text. Eight states, for example, retain inter-spousal tort immunities, on the theory that a person cannot sue him- or herself. *See* Jill Elaine Hasday, *The Canon of Family Law*, 57 Stan. L. Rev. 825, 845-46 (2004) [hereinafter Hasday, *The Canon of Family Law*]. Through the doctrine of necessaries, retained by two-thirds of all states, states require spouses to provide material support to each other. The doctrine requires a spouse to pay debts incurred by the other for the purchase of "necessary" items. *See id.* at 838 n.34 (cataloging the states that retain the doctrine). Other rules demonstrate the notion of conjugal unity by protecting spouses' interests in each others' bodies, companionship, and services. Tort doctrines, for instance, permit a spouse to sue for loss of consortium when her partner has been injured. *See* Jill Elaine Hasday, *Intimacy and Economic Exchange*, 119 Harv. L. Rev. 491, 503-04 (2005) [hereinafter Hasday, *Intimacy and Economic Exchange*] (discussing marital consortium doctrine and cataloguing cases acknowledging the doctrine);

Long before the U.S. Supreme Court explicitly named it a constitutionally protected individual right, states implicitly recognized and respected the concept of marital and family privacy.[26] Historically, states afforded marital couples privacy and viewed the marital family as an indivisible unit, under male authority. State noninterference permitted husbands to exercise authority over (and reflected their obligations towards) their wives, children, and other household members.[27] The concept of marital privacy has evolved, becoming officially gender-neutral.[28] Contemporary law continues in many respects to view the marital couple as a single unit,[29] but states have repealed noninterference policies that explicitly enabled husbands to dominate their wives.[30] In addition, states now recognize both parents' (as opposed to only fathers') authority over children.[31]

Rules governing entry into marriage have changed little since the country's founding and reflect not only the concept of conjugality, but also

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see also JoEllen Lind, *Valuing Relationships: The Role of Damages for Loss of Society*, 35 N.M. L. Rev. 301, 314-15 (2005) (discussing the history of the claim for loss of consortium).

25. The U.S. Supreme Court's decision in *Michael H. v. Gerald D.*, 491 U.S. 110, 129 (1989), provides a striking example of the societal importance attributed to the conjugal family. Here, the Court held that states may decide that any child born to a married woman may be treated as a legal child of the marriage (so long as husband and wife agree to this). *See id.* at 131. Actual paternity is irrelevant. *See id.* And the biological father's connection affords him no rights vis-à-vis the child. *See id.* at 128-29. For a discussion and critique of the Court's opinion in *Michael H.*, see June Carbone and Naomi Cahn, *Which Ties Bind? Redefining the Parent-Child Relationship in an Age of Genetic Certainty*, 11 Wm. & Mary Bill Rts. J. 1011, 1039-50 (2003).

What explains such a rule, where legal status creates a paternal fiction that can trump actual biological connection? The answer is a view that stable marital families are a critical social good, and thus preservation of the conjugal relationship and family outweighs recognition of biological parentage. The concept of conjugality thus explains the rule. For a discussion of the primary approaches to the presumtion of legitimacy followed by states, see Susan Frelich Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 86 B.U. L. Rev. 227, 228-37 (2006).

States have historically promoted conjugality not only by directly supporting that relationship but also by prohibiting intimate sex acts outside of marriage. Such prohibitions have all but disappeared, as courts have extended privacy protections to such acts. Yet some states retain laws (despite a near-certain inability to constitutionally enforce them, in light of the Supreme Court's decision in *Lawrence v. Texas*, 539 U.S. 558 (2003)) that prohibit consensual sodomy, fornication, or adultery. *See* Singson v. Commonwealth, 621 S.E.2d 682, 687 (Va. Ct. App. 2005) (stating that *Lawrence* did not declare all sodomy statutes facially unconstitutional); *see also* Utah Code Ann. § 76-5-403(1) (2003). After *Lawrence*, the constitutional validity of any such prohibition is highly doubtful. *See Lawrence*, 539 U.S. at 578.

26. *See infra* notes 137-39, 160-68 and accompanying text.

27. *Id.*

28. *See infra* notes 169-71 and accompanying text.

29. *See supra* note 24.

30. In efforts to overcome adherence to the tradition of noninterference, for instance, state domestic violence statutes seek to ensure that states do not turn a blind eye to intra-spousal violence.

31. *See infra* notes 52-53, 169-71 and accompanying text.

that of contract.[32] Embodying aspects of contract, rules require that marriages be entered voluntarily and consent freely given; marriages entered under duress or coercion, or otherwise absent true consent, are void.[33]

Once married, however, laws convert a couple's private relationship to a state-regulated legal status. That status is much more alterable than it once was, but even today, those of its terms considered essential to that status are unalterable. Couples usually may not alter by contract the rules that govern their ongoing marriages.[34] Courts refuse to enforce, for instance, agreements providing that one spouse will compensate the other for domestic services.[35] Their reasoning is that mutual entitlement to support and domestic services is an essential aspect of the conjugal status.[36]

Another basic, unalterable aspect of conjugality is its presumed lifelong status—the conjugal status. Couples cannot preestablish the duration of their marriages—once entered, a marriage presumptively continues until the death of either spouse. Nor may couples unilaterally dissolve their legal marriages; only the state, by divorce decree, may do so. Together with the essentially unalterable nature of the intact marital relationship itself, these examples demonstrate the continued primacy of the concept of conjugality in family law.[37] The rules of divorce have softened some of the more

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32. The essentials of marriage have long included both mutual consent and capacity. *See* Walter C. Tiffany, Handbook on the Law of Persons and Domestic Relations 6 (Roger W. Cooley ed., 3d ed. 1921) [hereinafter Tiffany's Domestic Relations]. To have the "capacity" to marry, couples could face no impediment of relationship (consanguinity or other prohibited degrees of kinship), incapacity for sexual intercourse, preexisting marriage, or "civil conditions"—i.e., race. *Id.* at 25-36. Tiffany notes that "in many states, marriages between negroes, Indians, or Chinese, and white persons, are prohibited." *Id.* at 30. Of these "essentials," only the requirement that the couple not violate certain racial criteria has been eliminated. *See* Loving v. Virginia, 388 U.S. 1, 2 (1967).

33. Consent must be given absent fraud, duress, mistake, or incapacity. Insanity, intoxication, or nonage could render a party incapable of giving true consent. Tiffany's Domestic Relations, *supra* note 32, at 7-25; *see also* Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 Va. L. Rev. 1225, 1257 (1998).

34. *See* Hasday, *The Canon of Family Law*, *supra* note 24, at 836-41.

35. *Id.* at 840-41 n.38 (cataloguing state-court decisions).

36. *Id.*

37. *See* Eric A. Posner, *Family Law and Social Norms*, *in* The Fall and Rise of Freedom of Contract 256 (F.H. Buckley ed., 1999). Posner argues,

> [W]e are far from a system in which parties are free to contract for any marital arrangement that they want . . . [P]otential mates cannot bind themselves legally to marriages in which spouses' domestic, financial, and sharing obligations are specified by contract. Polygamous and same-sex marriages are prohibited. These laws are . . . restrictions on freedom of marital contract, and they strikingly distinguish family law from contract law.

Id. Hasday has also argued that to claim that family law has moved from status to individual ordering through contract overstates changes that have occurred. Hasday, *The Canon of Family Law*, *supra* note 24, at 834-48. Most commentators emphasize the radical changes and "contractualization" of family law. *See, e.g.*, Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 Mich. L. Rev. 1803 (1985); Jana B. Singer, *The Privatization of Family Law*, 1992 Wis. L. Rev. 1443.

constraining aspects of conjugality, but they have not altered its essential form. We turn next to those elements of family law.

2. Divorce

Unlike laws governing entry into marriage, laws governing divorce have changed radically since the country's founding.[38] Early laws enforced lifelong conjugality. In the colonies and the early days of the country, the marital relationship was virtually indissoluble.[39] States gradually permitted judicial divorce, but only to an innocent party who could prove the "fault" of his or her spouse—through adultery, violence, cruelty, incurable insanity, etc.[40] Not until the latter part of the twentieth century did states begin permitting couples to divorce based essentially upon a showing that they were no longer compatible.[41] These changes in the rules and practices of family law relaxed one of the more stringent (and least successful)[42] requirements of conjugality and simultaneously expanded some individuals' abilities to determine their intimate lives.

But even in the current "no-fault" era, conjugality perseveres. Divorce is not automatic, nor is it always easy. Many states in fact permit relatively quick and easy divorce only if both parties consent to the dissolution of the marriage. When one spouse opposes dissolution, family-law rules require courts to put on the brakes and more deeply inquire into the couple's relationship. Usually, the petitioning spouse may then prove irreparable deterioration of the marriage relationship by showing that the couple has lived separate and apart (without engaging in sexual relations) for a statutorily prescribed period of time.[43] In some states, a couple must be separated for at least two years before a court will grant a divorce over the objection of one of the parties.[44]

Even when they allow marital bonds to be severed, states' laws have historically treated marital obligations of support (usually a husband's duty to support his wife) as enduring.[45] Alimony or spousal support has since become less favored (and officially gender-neutral).[46] Its goals have also

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38. *See* Shaakirrah R. Sanders, *The Cyclical Nature of Divorce in the Western Legal Tradition*, 50 Loy. L. Rev. 407 (2004) (tracking the evolution of Western divorce law).

39. *See supra* note 19 and accompanying text.

40. *See supra* note 19 and accompanying text.

41. *See supra* note 19 and accompanying text.

42. *See supra* note 19 and accompanying text.

43. Nearly half of all state divorce statutes impose "separate-and-apart" requirements. Doris Jonas Freed & Timothy B. Walker, *Family Law in the Fifty States: An Overview*, 21 Fam. L.Q. 417, 441-42 tbl.1 (1988).

44. Nine states and Puerto Rico impose a two-year minimum separate-and-apart requirement. *Id.*

45. Carolyn J. Frantz & Hanoch Dagan, *Properties of Marriage*, 104 Colum. L. Rev. 75, 122 (2004). *See generally* Laura A. Rosenbury, *Two Ways to End a Marriage: Divorce or Death*, 2005 Utah L. Rev. 1227.

46. *But see* Lee E. Teitelbaum, *Family History and Family Law*, 1985 Wis. L. Rev. 1135, 1162 (noting that, as of 1985, "support obligations typically remain in force until the wife's remarriage").

evolved from ensuring ongoing support to include "rehabilitating" a spouse who has been unemployed or underemployed during the marriage in order to facilitate his or her reentry into the workforce, thus ensuring economic self-sufficiency;[47] and reimbursing a spouse who has contributed (usually services) to the marriage "partnership."[48] Parties generally have the freedom, moreover, to privately order through contract some of the important consequences of marital dissolution.[49]

Family law rules that permit couples to enter into agreements establishing the financial consequences of dissolution actualize the concept of contract. States (with varying degrees of skepticism) generally recognize and enforce premarital agreements that set the financial terms of dissolution.[50]

Some of the legal rules affecting marriage and divorce reflect the concept of contract, and many of the developments in these family law rules aim to further equality and individual self-determination. But conjugality's essential aspects (as legal status and normative concept) remain, and remain largely unchanged.

We turn now to the laws of parenting and child welfare.

C. *Embodying Conjugality, Privacy, and Parens Patriae: Rules of Parenting and Child Welfare*

The concept of privacy restrains the state's ability to interfere in the family. Its counterpoise, parens patriae, empowers the state to interfere when necessary to protect families' more vulnerable members.[51] Along with conjugality, these concepts are embodied in the various rules governing parenting and child welfare.

As discussed above, the concept of family privacy historically recognized paternal authority over and obligations towards both wives and children.[52] Today, that concept shapes family law rules that largely permit parents to

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47. Michelle Murray, *Alimony as an Equalizing Force in Divorce*, 11 J. Contemp. Legal Issues 313, 317 (1997).

48. *Id.* at 313.

49. The Uniform Premarital Agreement Act, adopted by half of the states, authorizes couples to determine by contract the financial consequences of the marriage's dissolution. Unif. Premarital Agreement Act § 3(a)(3), 9C U.L.A. 43 (2001). But aspects of those agreements that purport to resolve nonfinancial issues such as custody of children or conduct during the marriage are typically not binding. *See* Principles of the Law of Family Dissolution § 7.08 (2002).

50. *See* Hasday, *Intimacy and Economic Exchange*, *supra* note 24, at 505 & n.32 (noting that prenuptial agreements were not favored by early common law, but modern state courts generally recognize and even encourage the use of these agreements); Karen Servidea, *Reviewing Premarital Agreements to Protect the State's Interest in Marriage*, 91 Va. L. Rev. 535, 536-41 (2005) (tracking the historical development of premarital agreements and state courts' increasing willingness to enforce them); *Developments in the Law—The Law of Marriage and Family*, *supra* note 19, at 2075-98 (outlining developments in the enforcement of prenuptial agreements).

51. *See supra* note 10.

52. *See infra* notes 160-65 and accompanying text.

raise their children as they see fit, generally free from state interference. Parents share significant authority—a constitutionally protected fundamental "right"—over their children.[53]

The concept of family privacy is in tension with the concept of parens patriae. Family laws have expanded the state's powers to protect children.[54] But the expansion of the influence of parens patriae on rules of parenting and child welfare does not necessarily demonstrate a weakening of respect for parents' rights and family privacy; instead, it demonstrates both (1) an increased recognition of children as full persons, themselves entitled to individual rights; and (2) the state's own interest in its future citizenry.

Indeed, parens patriae has not come close to superseding the concept of family privacy, especially that of the conjugal family.[55] The state intervenes in the "intact" family in limited situations[56]—namely, when it perceives a serious threat to the physical or mental health of the child, and even then, not in all cases.[57]

The "best interests of the child" standard expresses the state's parens patriae role and has been widely adopted by state legislatures to guide judges making custodial and other decisions related to children. But this standard is not intended to ensure that parents generally act in the "best interests" of their children. Instead, parents are *presumed* to act in their children's best interests.[58] When marriages or nonmarital households in which children are being raised fail, parties sometimes turn to the judicial system to resolve child-custody disputes. But judges make a small

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53. *See* Santosky v. Kramer, 455 U.S. 745, 758-59 (1982).

54. *See infra* notes 178-82 and accompanying text; *see also* Naomi Cahn, *State Representation of Children's Interests*, 40 Fam. L.Q. 109 (2006) (examining the state's role in speaking for children's interests).

55. *See supra* note 25 and accompanying text.

56. *See generally* Clark, *supra* note 8, § 10.3.

57. *See, e.g*, Troxel v. Granville, 530 U.S. 57, 68 (2000) ("[S]o long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family."); Marjorie R. Freiman, *Unequal and Inadequate Protection Under the Law: State Child Abuse Statutes*, 50 Geo. Wash. L. Rev. 243 (1982). States have struggled with cases where parents refuse medical care for a seriously ill or disabled child because of their assessment that treatment would be futile. An amendment to the federal Child Abuse Prevention and Treatment Act of 1974 (CAPTA), 42 U.S.C. §§ 5101-07 (2000), characterizes medical nontreatment as a form of child abuse. 42 U.S.C. § 5106g (2000). However, regulations issued pursuant to CAPTA by the Department of Health, Education, and Welfare (HEW) required states to include spiritual treatment exemptions to protect those parents whose refusal to consent to medical treatment for a child is based on religious beliefs. *See* Elizabeth A. Lingle, *Treating Children by Faith: Colliding Constitutional Issues*, 17 J. Legal Med. 301, 307 (1996). Later, the successor to HEW, the Department of Health and Human Services, passed subsequent regulations that excluded the spiritual-treatment exemption. *See id.* For a discussion focusing on children's rights, see James G. Dwyer, *The Children We Abandon: Religious Exemptions to Child Welfare and Education Laws as Denials of Equal Protection to Children of Religious Objectors*, 74 N.C. L. Rev. 1321 (1996).

58. *Troxel*, 530 U.S. at 68 ("[T]here is a presumption that fit parents act in the best interests of their children.").

percentage of custody determinations; generally, parents agree to a post-dissolution custodial arrangement.[59]

Once in the courts, respect for family privacy and parental rights can clash with, and indeed supersede, children's interests and the state's parens patriae power. Even after a child has bonded with a nonparent caretaker (in the event a parent has been found neglectful or has temporarily surrendered custody of her child to another), for instance, the parent seeking to regain custody almost always will have a superior claim to custody over his or her natural child. When courts decide such "parent vs. third-party" claims, they generally may not order a custodial arrangement they consider to be in a child's best interests in a biology-free vacuum; the parent benefits from the proverbial thumb on the scale.[60]

The concepts of family privacy and conjugality are expressed by rules that respect the notion of parents' "rights" over their children. But parents' rights are by no means absolute; increased recognition of children as individuals in their own right, needing and deserving protection, helps explain the state's parens patriae interventions in the private family.

D. *Embodying All of the Above: Rules that Depend on Family Status*

Laws whose operation hinges on family status embody the same concepts identified and discussed above, in particular, conjugality. Employment and insurance laws, tax laws, probate and inheritance laws, evidentiary rules, and aspects of tort law condition legal rights and financial benefits on the legal status of familial relationships.[61] Married couples receive myriad public protections and benefits, including Social Security insurance, employment and retirement benefits, inheritance and estate benefits, and entitlements under federal immigration law, to name but a few.[62] Most of these laws support the conjugal relationship and family; the exceptions are

59. Courts generally respect parental decisionmaking and approve child custody arrangements reached by parents; and in 80-90% percent of cases, parents do reach agreement. *See* Eleanor E. Maccoby & Robert H. Mnookin, Dividing the Child: Social and Legal Dilemmas of Custody 134 (1992).

60. *See Developments in the Law—The Law of Marriage and Family*, *supra* note 19, at 2053-54.

61. *See* 8 U.S.C. § 1151(b)(2) (2000) (exempting individuals from numerical limitations on immigration according to family status); 42 U.S.C. § 402(a)-(e) (2000) (providing derivative Social Security insurance benefits to the spouse, ex-spouse, or widow of an insured worker); Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1461 (regulating private employee benefit plans and allocating rights according to family status); *see also Baehr v. Lewin*, 852 P.2d 44, 59 (Haw. 1993) (listing the many benefits provided exclusively to the marital couple, including state income tax advantages, public economic assistance (including Social Security benefits), property rights, child custody awards, dower payments, inheritance rights, the right to spousal support, and the automatic right to change one's name); Office of the General Counsel, General Accounting Office, Report to the Honorable Henry J. Hyde, Chairman, Committee on the Judiciary, House of Representatives, GAO/OCG 97-16, at 1-2 (1997), *available at* www.gao.gov/archive/1997/og97016.pdf (reporting that more than 1000 places in federal law alone link rights or benefits to marriage).

62. *See supra* note 61.

generally, at worst, neutral with respect to family form.[63] Social Security, for instance, ensures the financial security of a non-wage-earning spouse should his or her partner become incapacitated or die.[64] A non-wage-earning single parent, however, must rely on need-based public programs that provide subsistence-level assistance.[65] Such programs emphasize self-sufficiency, but increasingly are including incentives for poor families to conform to conjugal norms.[66]

Myriad laws more incidentally affect families but do not belong in the category of family law. Compulsory education laws, for example, constrain parents' freedom to educate or not educate their children in the manner in which they see fit. Mandatory immunization laws similarly deprive parents of some control over their children. The purpose of such laws, however, is not to affect families or family life; nor does their operation depend upon family status.[67] In both examples, interference with parental authority is necessary but incidental. In short, while most laws affecting children interfere in some way with parental authority, they ought not all be considered family law as such.

The legal rules, or elements, of U.S. family law thus embody underlying concepts of conjugality, privacy, contract, and parens patriae. The next part argues that these concepts in turn embody underlying ideals, or principles.

II. PRINCIPLES OF FAMILY LAW

> [I]n certain kinds of practices, the inferential roles of concepts may be seen to hang together in a way that reflects a general principle. The principle can then be said to be *embodied in the practice* and, at the same time, to explain it.[68]

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63. One sometime—and unintentional—exception is the so-called "marriage penalty," where some dual-income marital families pay higher federal taxes than if they were to file singly. Some commentators argue that the federal tax structure benefits the marital family with a single- or primary-wage-earning spouse. *See, e.g.*, Edward J. McCaffery, Taxing Women 11-28 (1997); Marjorie Kornhauser, *Love, Money, and the IRS: Family, Income-Sharing, and the Joint Income Tax Return*, 45 Hastings L.J. 63, 64 (1993); Zelenak, *supra* note 18, at 6-8.

64. *See supra* note 61 and accompanying text.

65. *See generally* Jill Elaine Hasday, *Parenthood Divided: A Legal History of the Bifurcated Law of Parental Relations*, 90 Geo. L.J. 299 (2002).

66. *See* Personal Responsibility, Work, and Family Promotion Act of 2003, H.R. 4, 108th Cong. § 103(b)-(c) (2003) (providing $100 million per year to states for "healthy marriage promotion activities").

67. The goals of compulsory education, for instance, include helping secure the future liberty of the individual child and ensuring the future well-being of both the child and of society generally. To that end, public education is provided by the state directly and without cost to all U.S. children. Similarly, mandatory immunization laws reflect public health concerns.

68. Coleman, *supra* note 5, at 8.

The concepts of U.S. family law discussed above embody two foundational principles: Biblical traditionalism and liberal individualism.[69] The following sections examine first the development of the principles, and then the mechanics and character of their influence on U.S. family law.

A. *Biblical Traditionalism and Its Influence on U.S. Family Law*

> [W]hen the supreme being formed the universe, and created matter out of nothing, he impressed certain principles upon that matter, from which it can never depart . . . .[70]

That the Judeo-Christian tradition has helped shape U.S. family law is quite beyond dispute.[71] Law and religion scholar John Witte, Jr., reminds us that "[t]he laws born of the Catholic and Protestant models of marriage are not the artifacts of an ancient culture . . . . Until the twentieth century, this was our law in much of the West, notably in England and America."[72]

Two additional disputable issues remain. The first involves identifying the contours of this tradition through its inferential role in the concepts and practices of U.S. family law.[73] This Article argues that family law's

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69. Professor Ronald Dworkin uses the term "principle" to refer to "a standard that is to be observed . . . because it is a requirement of justice or fairness or some other dimension of morality." Ronald Dworkin, Taking Rights Seriously 22 (1977). A principle states or embodies a social goal or political value. *Id.*; *see also* Brian Bix, Jurisprudence: Theory and Context 87 (3d ed. 2003) (defining principles as "moral propositions that are stated in or implied by past official acts"). Principles inform legislative and judicial pronouncement of rules. *See* Dworkin, *supra*, at 28 ("[T]hey seem most energetically at work, carrying most weight, in difficult lawsuits . . . . [In these difficult cases,] principles play an essential part in arguments supporting judgments about particular legal rights and obligations. After the case is decided, we may say that the case stands for a particular rule . . . . But the rule does not exist before the case is decided; the court cites principles as its justification for adopting and applying a new rule.").

70. William Blackstone, 1 Commentaries *38. Blackstone refers here to the creation story of Genesis.

71. Its influence, however, has received surprisingly little scholarly attention from the legal academy. Allusions to the Christian derivation of U.S. family practice are not uncommon, but few legal commentators have systematically explored the connection. One exception is law and religion scholar John Witte, Jr., who has traced the influence of Christian theological traditions on the development of Western legal principles. John Witte, Jr., From Sacrament to Contract: Marriage, Religion, and Law in the Western Tradition (1997). Witte focuses on the various different Christian theologies (Roman Catholic, Lutheran, Calvinist, and Anglican) and their effect primarily on Western Europe, but also on the United States. *See also* Frances Gies & Joseph Gies, Marriage and the Family in the Middle Ages 36-42 (1987) (discussing the historical impact of Christianity on family life generally); *see generally* Andrew H. Friedman, *Same-Sex Marriage and the Right to Privacy: Abandoning Scriptural, Canonical, and Natural Law Based Definitions of Marriage*, 35 How. L.J. 173 (1992).

72. *See* Witte, *supra* note 71, at 194; *see also* Mary Ann Glendon, State, Law and Family: Family Law in Transition in the United States and Western Europe (1977). Professor Elaine Pagels has written more generally about the influence of the Book of Genesis creation stories on our culture's ideas concerning sexuality, morality, and moral freedom. *See* Elaine H. Pagels, Adam, Eve, and the Serpent (1988).

73. *See* Coleman, *supra* note 5, at 8.

concepts and practices combine in a way that reflects a premodern[74] view of natural law filtered through Judeo-Christian theology—Biblical traditionalism. The second issue is the extent to which this tradition continues to animate our law. The conventional wisdom is that the progress of U.S. family law has been a steady march "from status to contract" or from public to private ordering.[75] This Article counters that Biblical traditionalism retains a powerful grasp on our family law even—or perhaps especially—today.

The next three sections trace the development of the key ideas that make up Biblical traditionalism[76] and describe its specific influences on family law. They argue that this principle has not only remained a strong undercurrent in U.S. family law, but also that it is enjoying a period of renewed prominence and influence in public discourse. The first and second sections highlight significant aspects of the Jewish and Christian family traditions, respectively. The third section discusses premodern natural law theories that predominated in the early U.S. and which incorporated key elements of the Judeo-Christian tradition, helping shape first English, then U.S. family law.

1. The Jewish Tradition

The Hebrew Covenant, recorded between the latter half of the ninth and early part of the eighth centuries B.C., set down laws that had been in effect for as many as 300 years prior.[77] While Jewish society was in many respects similar to other societies of the time,[78] Hebrew law is notable in that its more than 600 commandments are said to have come directly from

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74. Significant differences exist between medieval (or premodern) and modern theories of natural law. Premodern theories argued the existence of a universal law derived from God, and the existence of objective moral principles dictated by nature and discoverable by reason. *See* Lloyd L. Weinreb, Natural Law and Justice 49-53 (1987). The Renaissance saw the beginning of the secularization of natural law. *See id.* at 67-68 (describing the transformation of natural law in the transitional period between the "dominion of medieval Christianity" and the age of "social contract theories of the seventeenth and eighteenth centuries"). In the eighteenth century, David Hume developed a modern, secular theory of natural law. *See generally* Duncan Forbes, Hume's Philosophical Politics (1975).

75. *See supra* note 37 and accompanying text.

76. For more exhaustive treatment of the history of the Church and family, see generally Theodore Mackin, Divorce and Remarriage (1984).

77. Frank Alvarez-Pereyre and Florence Heymann, *The Desire for Transcendence: The Hebrew Family Model and Jewish Family Practices*, *in* 1A History of the Family: Distant Worlds, Ancient Worlds 155 (Andre Burguière et al. eds., 1996). The five Books of Moses (the Pentateuch)—the foundation of Hebrew law—are complemented by the Talmud, a body of rabbinical writings which seeks to define rules and laws even more precisely. *Id.* at 155, 158.

78. *See* Jean-Jacques Glassner, *From Sumer to Babylon: Families as Landowners and Families as Rulers*, *in* 1A History of the Family: Distant Worlds, Ancient Worlds, *supra* note 77, at 103-05 (describing the family structure in Mesopotamia in the second millennium B.C.).

God.[79] Its provisions have thus carried throughout history the added weight of divine ordination. A description of these provisions germane to family law follows.

Patriarchy. One of Jewish law's most important provisions concerned male leadership of the family. In the Old Testament, God enters into a Covenant with Abraham alone, excluding his wife Sarah and giving "divine sanction to the leadership of the patriarch over his family and tribe."[80] The patriarch exercised authority over his wife and children, and the practice of agnatic descent ensured the continuation of that authority through future generations.

Monogamy and polygyny. Jewish law favored monogamy but did not forbid concubinage and polygyny.[81] Thus while some Jewish communities were monogamous, in others, polygyny endured well into the Middle Ages. In some communities, demographic and economic pressures limited its practice (a man had to be wealthy to obtain and maintain numerous wives); in others, local civil laws and custom (including in Christian environments) squelched the practice.[82]

Entry into marriage. In order to effectuate a legal marriage, Hebrew marriage law required payment by the man's father to the future wife's father, and the transfer to the wife of a dowry by her father.[83] The couples' consent was important, and the marriage became effective after the couple had executed a contract (*ketubah*), cohabited, and consummated their relationship.[84]

Procreation. The importance of marital procreation is highlighted early in the Old Testament, where God directs man and woman to "be fruitful and multiply."[85]

Ending marriage. A husband could unilaterally divorce his wife by giving her a bill (a *get*) terminating their marriage and dismissing her.[86]

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79. Moses Mielziner, The Jewish Law of Marriage and Divorce in Ancient and Modern Times, and Its Relation to the Law of the State (Fred B. Rothman & Co. 1987) (1884). "The Bible contains laws as well as ethical doctrines. . . . [A]ll laws contained in these books of Moses are proclaimed in the name of God, who is the source of all ethical truth . . . ." *Id.* at 14.

80. Gerda Lerner, The Creation of Patriarchy 190 (1986).

81. Mielziner, *supra* note 79, at 28. Mielziner notes that the law "endured" polygamy but did not sanction it. Parts of the Old Testament provide for polygyny. *See, e.g.*, *Exodus* 21:10; *Leviticus* 18:18; *Deuteronomy* 21:15-17. But other provisions presume monogamy as the norm. *See, e.g.*, *Deuteronomy* 20:7; 24:5; 25:5-11.

82. Alvarez-Pereyre & Heymann, *supra* note 77, at 182-84. (It should be noted that "[b]y [Judaism's] Roman period, monogamy seems to have been the common practice." The Oxford Companion to the Bible 496 (Bruce M. Metzger & Michael D. Coogan eds., 1993).

83. *Exodus* 22:16; *Deuteronomy* 22:28-29; *see also* Alvarez-Pereyre & Heymann, *supra* note 77, at 175. With trivial exception, the consent of both parties also was required. Mielziner, *supra* note 79, at 66-74.

84. Alvarez-Pereyre & Heymann, *supra* note 77, at 175-76.

85. *Genesis* 1:28.

These key elements of Jewish family law were then absorbed, for the most part, into the Christian tradition. The Christian family tradition, however, differs in a number of important respects from that of the Jewish tradition.[87] The next section touches on its more important elements and notes several significant areas where the Christian family tradition diverges from its Jewish roots.

2. The Christian Tradition

The early Christian church viewed marriage as "subject to the law of nature, communicated in reason and conscience, and often confirmed in the Bible."[88] Jesus and St. Paul both spoke at length about the marital family, "and their teachings have been the cornerstone of the Western tradition of marriage for nearly two millennia."[89] Beginning with their formalization in the twelfth century, the church's theology and laws of marriage became widely communicated and profoundly influential.[90] A description of its primary family traditions follows.

Patriarchy/marital unity. The husband's authority over the marital household in the Jewish tradition gave way in the New Testament to a more explicit description of the married couple as a unit, led by the husband: Paul's letters to the early Christian churches teach that husbands and wives "shall become one flesh," but that "the husband is the head of the wife."[91] The Christian tradition thus retained the patriarchy of the Jewish tradition but placed greater emphasis on unity.

Monogamy. The combination of monogamy and polygyny that had existed in the Jewish tradition gave way to a full commitment to monogamy in early Christianity.[92] The primary purpose of monogamy was not procreation, however, but chastity. The early Church sought to control sexual desires and sexual conduct; some, including St. Augustine, viewed sex as per se sinful.[93] Celibacy, which encouraged a close spiritual connection to the kingdom of God, was thought to be superior to marriage.[94] But monogamous marriage was still useful, according to one early theologian, because it "sets a limit to desire by teaching us to keep one

86. *Deuteronomy* 24:1; Alvarez-Pereyre & Heymann, *supra* note 77, at 178-79. This allowance for divorce ended sometime after the beginning of Christianity. *See* Mielziner, *supra* note 79, at 120-21.

87. Gies & Gies, *supra* note 71, at 37-40 (noting that, in comparing the Old and New Testaments, theologian St. Augustine "found a number of recurring tenets but not a completely harmonious consistency" and discussing key family-related distinctions).

88. Witte, *supra* note 71, at 25.

89. *Id.* at 16.

90. Gies & Gies, *supra* note 71, at 37; Witte, *supra* note 71, at 16.

91. *Ephesians* 5:23-32.

92. Cott, *supra* note 16, at 5-6.

93. Pagels, *supra* note 72, at 110-12; Witte, *supra* note 71, at 21.

94. One early Church thinker, on a scale of values, rated virginity at 100, widowhood at 60, and marriage at 30. Gies & Gies, *supra* note 71, at 39; David Herlihy, Medieval Households 22 (1985).

wife . . . [and] is a natural remedy to eliminate fornication."[95] God created marriage "to make us chaste, and to make us parents."[96] Marriage was a "remedy" provided by God for otherwise-illicit lust.[97]

Entry into marriage. Church teachings emphasized the importance of mutual consent and voluntariness for marriage to be legitimate.

Procreation and sex. The Old Testament made procreation mandatory,[98] but the New Testament merely paid it lip service.[99] St. Augustine, already viewing the world as old and in decline, observed in the fifth century that there was less need for procreation than had previously existed.[100]

Nonetheless, during the Reformation, procreation eclipsed libido control as the primary goal of marriage. Marital procreation was a good, although it remained a lesser good than celibate spirituality and contemplation. Marriage's secondary goal, however, continued to be the control of sinful lust. Marriage rendered sex, not good, but licit. But it perpetuated the species and expanded the Church. The Church thus came to prohibit contraception, abortion, and infanticide.[101]

The Church sought to closely control sex generally. St. Paul's letters contain litanies of prohibited sexual sins, which included lust, homosexuality, sodomy, prostitution, polygamy, and excessive primping.[102]

Ending marriage. Another significant difference between the early Jewish and Christian traditions concerned the end of marriage. As noted above, a Jewish husband could divorce his wife, on his terms.[103] This became impossible in the Christian tradition, with a single exception—a man could divorce a wife who had herself fornicated or committed adultery.[104] Otherwise, only through annulment of a marriage, which required a finding that a valid marriage never existed, could a person leave a spouse and remarry another.[105] Jesus himself emphasizes the enduring nature of the marital commitment with the words, "what God has joined together, no man must separate."[106] And emphasizing the break from the Jewish tradition, he continued that "[f]or your hardness of heart, Moses

95. Witte, *supra* note 71, at 20 (quoting John Chrysostom, On Marriage and Family Life 85 (1986)); *see also Corinthians* 1:7.

96. Chrysostom, *supra* note 95, at 85.

97. Witte, *supra* note 71, at 24.

98. *Genesis* 1:28.

99. Gies & Gies, *supra* note 71, at 37.

100. *See* St. Augustine, Treatises on Marriage and Other Subjects 21-22 (Roy J. Deferrari ed., Charles T. Wilcox et al. trans., 1955).

101. Witte, *supra* note 71, at 25.

102. *Id.* at 18.

103. *See supra* note 86 and accompanying text.

104. *Matthew* 19:9; *see also* Gies & Gies, *supra* note 71, at 38.

105. Note that Judaism evolved after the emergence of Christianity such that its views of divorce and practice with regard to monogamy came to match closely those of Christianity. *See* Alvarez-Pereyre & Heymann, *supra* note 77, at 178-79; Mielziner, *supra* note 79, at 30-32, 120-21.

106. *Matthew* 19:6-9.

allowed you to divorce your wives, but from the beginning it was not so . . . [W]hoever divorces his wife . . . and marries another commits adultery."[107]

Medieval theologian St. Thomas Aquinas offered both sacramental and naturalistic justifications for the indissolubility of marriage. First, he argued that marriage is a sacrament through which a couple becomes part of the perpetual union of Christ and the Church.[108] The couple's marriage, moreover, mirrors that perpetual union and thus must be similarly enduring. Second, Aquinas argued that nature intended marriage to be "'oriented to the nurture of offspring . . . . [S]ince offspring are the good of both husband and wife together, the latter's union must remain permanently, according to the [dictate] of the law of nature.'"[109]

Later canon law permitted both husbands and wives to seek legal separation (divorce from bed and board, or *a mensa et thoro*), but continued to prohibit complete divorce.[110] Church courts granted legal separations in cases of adultery, desertion, or cruelty.[111]

3. The Natural Law Tradition

English family law's historical and ideological origins can be traced directly to natural law principles, as revealed by Biblical teaching, including the Biblical teaching described in the previous two sections. Natural law theories, as conceived from the Medieval period through the Reformation, essentially asserted the existence of objective moral principles imposed by a divine creator[112] and (more or less) discoverable by reason.[113] In his seminal *Commentaries on the Laws of England*, Sir William Blackstone located coherence in the disparate judicial opinions that constituted English common law through principles of natural law.[114] Blackstone is important, not because he was an especially innovative legal theorist—he was not—but because so many early American lawyers and lawmakers closely studied his writings.[115] Blackstone links the core principles of English

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107. *Id.*

108. Mackin, *supra* note 76, at 340 (discussing Thomas Aquinas's views on marriage).

109. *Id.* at 342 (quoting Thomas Aquinas, Sancti Thomae Aquinatis Opera Omnia, Tomus VII: Commentum in Quatuor Libros Sententiarum Magistri Petri Lombardi, Volumen Secundum, at 972 (Parma, Typis Petri Fiaccadori 1858, reprinted 1948)).

110. Witte, *supra* note 71, at 36.

111. *Id.* at 65.

112. One may trace natural law positions, of course, to the classical Greek and Roman writers, including the Stoics, Plato, and Cicero. *See* Brian Bix, *supra* note 69, at 66-67. Important aspects of the theory change, however, with the early Church writers. *Id.* It is their conception of natural law that most directly influenced the Western tradition and U.S. law.

113. M.D.A. Freeman, Lloyd's Introduction to Jurisprudence 90 (7th ed. 2001).

114. Blackstone, *supra* note 70, at *39-43.

115. As one commentator has noted, "All of our formative documents—the Declaration of Independence, the Constitution, the Federalist Papers, and the seminal decisions of the Supreme Court under John Marshall—were drafted by attorneys steeped in Sir William Blackstone's *Commentaries on the Laws of England* (1765-1769)." Robert A. Ferguson, Law and Letters in American Culture 11 (1984).

common law to divinely inspired Biblical scripture. Under this view, God has set down certain immutable laws of nature, which may be discovered by humans and must not be contravened.[116] Human faculties of reason (imperfect ever since Adam's transgression in the Garden of Eden) alone are not up to the task of uncovering these truths. But "Divine Providence," through the Holy Scriptures, has intervened and revealed God's law.[117]

Early American lawmakers struggled to accommodate both their religious convictions, which mandated certain family practices, and their commitment to establishing a country that respected religious liberty. Principles of natural law helped them mediate these tensions by allowing them to incorporate their religious beliefs into law under theism, detached from any single denomination or theology.

4. The Influence of Biblical Traditionalism on U.S. Family Law

a. *The Mechanics*

By the fourth century, Christianity had become dominant throughout much of Europe, with the Roman Catholic Church becoming its most vast religious organization.[118] The Church's efforts to bring broader marital behavior under ecclesiastical administration and the canon law took centuries.[119] After it accomplished this, the Church grappled for a few more centuries with English and Continental monarchs. Reformers protested the Church's jurisdiction over marriage and its enforcement of canon law. In the sixteenth century, monarchs successfully wrested this control from the Catholic Church,[120] and Protestant theology helped justify the adoption of civil (as opposed to purely religious) marriage statutes.[121] The Protestant reformations differed somewhat theologically, but they all emphasized the importance of marriage to civil society and the propriety of state and community involvement.[122]

At the same time, however, the monarchies—the English being the most relevant for our purposes—got exactly what they fought to take from the church: a Biblical naturalist understanding of marriage and family law. The Protestant reformers accepted and incorporated much of the traditional canon law, which remained part of the common law of both Protestant and Catholic Europe into the late-eighteenth century.[123] As a result, English

116. *See* Blackstone, *supra* note 70, at *39-43.

117. *See id.*

118. Gies & Gies, *supra* note 71, at 36-37.

119. Cott, *supra* note 16, at 5.

120. *Id.* at 5-6.

121. *See* Witte, *supra* note 71, at 42-43.

122. *Id.* at 43-44. This is the briefest possible version of the complex early history of Christianity. But it is well beyond the scope of this Article (and unnecessary to its aims) to exhaustively chronicle that history.

123. *Id.* at 44.

marriage laws in the sixteenth century did not differ significantly from those of the medieval Catholic tradition.[124]

Seventeenth-century English theologians proffered the commonwealth model of marriage and the family to defend then-existing laws. This model "helped to substantiate the traditional hierarchies of husband over wife, parent over child, church over household, [and] state over church."[125]

English colonists brought to America with them then-prevailing English laws,[126] and we thus find the roots of U.S. family law in early modern England.[127] The English common law passed to and was largely accepted by early American civil authorities. The congruence between citizens' and the government's views on marriage reinforced the influence of the Bible on this elemental part of early American family law.

The Christian religious background of marriage was unquestionably present and prominent. It was adopted in and filtered through legislation. For Americans who envisioned marriage as a religious ceremony and commitment, the institution was no less politically formed and freighted; yet they were unlikely to object to secular oversight when both the national and the state governments aligned marriage policies with Christian tenets.[128]

b. *The Concept of Conjugality*

Biblical traditionalism shaped early Western concepts of family law, including that of conjugality. The conjugal concept found its most significant expression in early U.S. family laws implementing the Biblically derived unity of husband and wife.[129] Early family law rules, like those found in the New Testament, declared the marital couple a single unit headed by the husband. That unity took legal form in the doctrine of coverture, in which the wife's legal personhood became subsumed into her husband's.[130] Wives ceased to exist as separate legal entities and were

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124. *Id.* at 131.

125. *Id.*

126. Joel Prentiss Bishop, I Commentaries on the Law of Married Women Under the Statutes of the Several States and at Common Law and in Equity 1 (William S. Hein & Co. 1987) (1873) [hereinafter Bishop, Commentaries on the Law of Married Women I]; *see also* Joel Prentiss Bishop, I Commentaries on the Law of Marriage and Divorce, with the Evidence, Practice, Pleadings, and Forms; Also of Separations Without Divorce, and of the Evidence of Marriage in All Issues 36 (5th ed. 1873) [hereinafter Bishop on Marriage and Divorce I].

127. Bishop, Commentaries on the Law of Married Women I, *supra* note 126, at 1. Bishop observed that "[t]he law of married women came originally to us from England with the general mass." *Id.*

128. *See generally* Cott, *supra* note 16, at 9-10.

129. *See id.* at 10-11.

130. *See id.* at 10-12; *cf.* Norma Basch, In the Eyes of the Law: Women, Marriage, and Property in Nineteenth-Century New York 158-59 (1982).

unable to execute legal documents or own assets without their husbands' cooperation.[131]

Other aspects of Biblical tradition that were present in early American law included the importance of free consent for the creation of a valid marriage and the (theoretically) indissoluble nature of marriage. While the latter reinforced the importance of conjugality, the former foreshadowed the increasing importance of the concept of contract in family law.

In many important respects, facets of the principle of Biblical traditionalism and the concept of conjugality continue to be embodied in and effectuated by U.S. family laws. These rules define and carefully circumscribe membership in marriage and the marital family; establish unalterable terms governing the intact marriage, viewing the conjugal couple in many respects as a single unit;[132] presume marriages to be enduring; and require a state declaration for legal dissolution. State restrictions on consensual nonmarital and extramarital sexual activities persist, despite the Supreme Court's recent decision in *Lawrence v. Texas*.[133]

The continued vitality of the concept of conjugality is evident, moreover, in the widespread perception that the marital family is the "natural" and morally superior family form. Recent events and policies reflect these views. For example, when the federal government enacted the 1996 Welfare Act, it explicitly identified marriage formation as one of the goals of the statute.[134] States are increasingly adopting such programs, aimed at both their poor and their general populations. The Defense of Marriage Act, the proposed Federal Marriage Amendment, and proliferating state constitutional amendments restricting marriage to opposite-sex couples all seek to reinforce traditional conjugality.[135] Because much opposition to

131. Cott, *supra* note 16, at 11-12. When a man and woman married,

> the common law turned the married pair legally into one person—the husband . . . . This legal doctrine of marital unity was called *coverture* . . . . Coverture in its strictest sense meant that a wife could not use legal avenues such as suits or contracts, own assets, or execute legal documents without her husband's collaboration . . . . And the husband became the political as well as the legal representative of his wife, disenfranchising her.

Id.

132. *See generally supra* notes 24, 130 and accompanying text.

133. *See supra* note 25 and accompanying text.

134. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 42 U.S.C. §§ 601-19 (2000).

135. The Defense of Marriage Act (DOMA) ensures that same-sex couples receive no federal spousal benefits by defining "spouse" and "marriage" to include only the union of a man and woman. 28 U.S.C. § 1738C (2000). It also declares that the Constitution's Full Faith and Credit Clause, U.S. Const. art. IV, § 1, does not require states to recognize same-sex marriages formalized in other states. *See* 28 U.S.C. § 1738C. The Federal Marriage Amendment states, "Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution, nor the constitution of any State, shall be construed to require that marriage or the legal incidents thereof be conferred upon any union other than the union of a man and a woman." S.J. Res. 1, 109th Cong. (2005). To date, thirty-eight states have statutes or constitutional amendments restricting marriage to opposite-sex

homosexual marriage stems from beliefs with origins in Biblical traditionalism,[136] these notable examples may represent either lingering or renewed willingness to embrace legal rules whose justifications lie almost exclusively within that tradition.

The concept of conjugality supports (and has itself been reinforced by) another concept—family privacy. In many respects, U.S. law continues to view the conjugal couple as an impenetrable and indivisible unit. The metaphor of unity, combined with the concept of the male's individual rights as head of that unit, historically shielded the family from state interference. The next section briefly examines the Biblical-traditionalist roots of family privacy.

c. *The Concept of Privacy*

Biblical traditionalism also helped shape the concept of family privacy. Post-colonial notions of patriarchal authority over the home justified state noninterference in the family; such noninterference sought not to ensure individual autonomy and self-effectuation, but instead to enable the family, under male authority, to function as a distinct unit within society.[137] Social practice obligated the male head of the family to run a well-ordered household; legal rules empowered him to do so by granting him control over its inhabitants, family property, and other resources.[138] One seventeenth-century author expressed the common authoritarian view of parenting: "[C]hildren's wills and willfulness [must] be restrained and

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couples. *See* Lambda Legal, States with Laws Banning Marriage Between Same-Sex Couples, *http://www.lambdalegal.org/cgi-bin/iowa/news/fact.html?record=1427* (last visited Sept. 5, 2006) (listing states with statutory or constitutional provisions).

136. *See, e.g.*, John J. Coughlin, *Natural Law, Marriage, and the Thought of Karol Wojtyla*, 28 Fordham Urb. L.J. 1771, 1774 (2001).

> [T]he medieval canonists integrated various aspects of religious and secular thought to create a natural law theory of marriage. The theory held that marriage was a permanent association between a man and women intended to nourish the bond of conjugal love and to enable the procreation and education of children.

Id.; *see also* Andrew Koppelman, *The Decline and Fall of the Case Against Same-Sex Marriage*, 2 U. St. Thomas L.J. 5 (2004); Michael J. Perry, *Christians, the Bible and Same-Sex Unions: An Argument for Political Self-Restraint*, 36 Wake Forest L. Rev. 449 (2001). *But see* William N. Eskridge, Jr., The Case for Same-Sex Marriage: From Sexual Liberty to Civilized Commitment 99-100 (1996) (noting that "[t]here is no univocal Judeo-Christian tradition against same-sex marriage" and presenting alternate interpretations of religious texts commonly cited as condemning homosexuality).

137. Early Americans viewed the family as the unit entitled to privacy and freedom from state intervention. Larry Peterman & Tiffany Jones, *Defending Family Privacy*, 5 J.L. & Fam. Stud. 71, 74-76 (2003). Professors Peterman and Jones note that the early concept of familial privacy protected the family unit "so that members of the family could fulfill the responsibilities inhering in their particular roles." *Id.* at 75.

138. *See* Michael Grossberg, Governing the Hearth: Law and the Family in Nineteenth-Century America 5, 236-38 (1985). Into the nineteenth century, fathers had exclusive and extensive rights over their wives and children, who were subordinate to and dependent on them. *See supra* notes 130-31 and accompanying text (discussing doctrine of coverture); *supra* note 24 and accompanying text (discussing other doctrines).

repressed . . . . Children should not know, if it could be kept from them, that they have a will of their own, but in their parent's keeping."[139]

Notably, the concept of familial privacy was simultaneously supported in the early United States by the principle of liberal individualism. The next section discusses the nature of its influence and how liberal-individual ideals on this topic were adjusted to better correspond with Biblical-traditionalist ideals. It will also trace how the expansion of that principle shifted notions of privacy from the family to the individual.

Biblical traditionalism and the concepts that embody it have thus exerted great influence over the shape of family law as it existed in the early states. Early lawmakers shared the near-universal belief in a theistically ordained natural order, distinctly shaped by the Biblical tradition. In many ways, however, its directives conflicted with liberal individualism—a second principle to which the early United States was also committed. The ideal of liberal individualism, how it clashed with early Americans' Biblical traditionalist beliefs, and the effects of these on our family law are the focus of the following section.

B. *Liberal Individualism and Its Influence on U.S. Family Law*

Just as with Biblical traditionalism, it is clear that the principle of liberal individualism has helped shape U.S. family law.[140] Ideals of individual liberty were written into the country's founding documents and are part of our cultural discourse.[141] This Article argues that this is the second foundational principle of U.S. family law—like Biblical traditionalism, it has heavily influenced the original shape and later development of this area of the law.

Ideals of liberal individualism have moved U.S. family law along two axes. The first has extended guarantees of liberty to greater numbers and classes of individuals, including women and children. The second has increased the total quantum of liberty permitted each individual. Changes in laws have sought to expand individual autonomy and facilitate self-determination, frequently at the expense of Biblical-traditionalist ideals.

The next two sections describe the principle of liberal individualism and demonstrate its influence on concepts and practices of U.S. family law.

139. Teitelbaum, *supra* note 46, at 1139 (quoting J. Robinson, Of Children and Their Education (1628) (citations omitted)).

140. *See* Singer, *supra* note 37, at 1508-17 (noting the importance of individual autonomy and notions of privacy on U.S. political and legal thought but arguing that until recently, these concepts have been ascribed to the family unit rather than the individual). *See generally* Robert Bellah et al., Habits of the Heart: Individualism and Commitment in American Life (1985).

141. *See* U.S. Const. pmbl.; The Declaration of Independence paras. 1-2 (U.S. 1776); *see also infra* note 144-45 and accompanying text.

1. Liberal Individualism

The liberal theories articulated by John Locke significantly influenced American statesmen of the late-eighteenth century,[142] and his ideas have been considered "the touchstone of all subsequent liberal thought."[143] Locke's theory of liberal democracy espouses radical individualism[144] and a concomitant theory of the negative, limited state.[145] These ideals together

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142. *E.g.*, Steven Kautz, *Liberty, Justice, and the Rule of Law*, 11 Yale J.L. & Human. 435, 438 n.7 (1999) ("Classical liberalism is the view that liberty is the fundamental political good." (citing John Locke, Two Treatises of Government 267-85, 323-53 (Peter Laslett ed., Cambridge Univ. Press 3d ed. 1988) (1690))); Laurence H. Tribe and Michael C. Dorf, On Reading the Constitution 70-71 (1991) ("[O]ne of the most influential thinkers for American statesmen of the [late-eighteenth century was] the seventeenth-century English political philosopher John Locke."); Jeremy Waldron, Nonsense Upon Stilts: Bentham, Burke and Marx on the Rights of Man 7 (1987) ("[T]he argument set out in [Locke's] *Two Treatises of Government* will serve us, as it served the revolutionaries of the eighteenth century, as the paradigm of a theory of natural rights."); Bruce Kuklick, *Seven Thinkers and How They Grew: Descartes, Spinoza, Leibniz; Locke, Berkeley, Hume; Kant*, *in* Philosophy in History: Essays on the Historiography of Philosophy 125, 130 (Richard Rorty et al. eds., 1984) ("[I]n the United States, [Locke] was also the intellectual father of the Constitution. He was 'America's philosopher', 'the great and celebrated Mr Locke', whose claim on American affections dated from the Revolution.").

143. Brian R. Nelson, Western Political Thought: From Socrates to the Age of Ideology 208 (2d ed. 1996). Other liberal thinkers who influenced early Americans included Thomas Hobbes, Jean-Jacques Rousseau, and Immanuel Kant. Mary Ann Glendon, Abortion and Divorce in Western Law 125 (1987). Mary Ann Glendon points especially to Thomas Hobbes, especially as his ideas were expressed by the influential American jurist Oliver Wendell Holmes, Jr. *Id.* at 119-21 (1987). Hobbes's writings influenced Locke; however, Locke's conception of the natural state as one of liberty triumphed over the Hobbesian view of the state of nature as a state of war. *See* Nelson, *supra*, at 233-34.

144. In his second treatise, Locke writes that "[m]an being born . . . with a Title to perfect Freedom and an uncontrouled enjoyment of all the Rights and Priviledges of the Law of Nature, equally with any other Man . . . hath by Nature a Power . . . to preserve his Property, that is, his Life, Liberty, and Estate, against the Injuries and Attempts of other Men." John Locke, Two Treatises on Government 341, § 87 (Peter Laslett ed., Cambridge Univ. Press 2d ed. 1967) (1689).

145. Nelson, *supra* note 143, at 194-95. Locke emphasized the primacy of individual rights and liberties, and viewed the function of government to be limited to safeguarding those liberties from intrusion. He wrote that

> [a] Man, . . . having in the State of Nature no Arbitrary Power over the Life, Liberty, or Possession of another, but only so much as the Law of Nature gave him for the preservation of himself, and the rest of Mankind; this is all he doth, or can give up to the Common-wealth, and by it to the *Legislative Power*, so that the Legislative can have no more than this . . . . It is a Power, that hath no other end but preservation.

Locke, *supra* note 144, at 375, § 135. There has been some debate as to whether the dominant political tradition in the fledgling Unites States was republicanism or the classical liberalism perhaps best articulated by John Locke. *See* Mark V. Tushnet, *A Conservative Defense of Liberal Constitutional Law*, 100 Harv. L. Rev. 423, 425 (1986) (reviewing Rogers M. Smith, Liberalism and American Constitutional Law (1985)). The traditions differ in their conceptions of individual liberty. In the republican ideal, liberty is the absence of domination; in the Lockean ideal, liberty is the absence of interference. *See* Philip Pettit, Republicanism: A Theory of Freedom and Government 41 (1997). In the republican view, "[t]he kindly master does deprive subjects of their freedom, dominating them without actually interfering. The well-ordered law does not deprive subjects of their freedom,

justify a state neutral about all but the thinnest conceptions of the human good. Thomas Paine's *Common Sense*, a highly influential 1776 pamphlet that stated the case for American independence, echoes Locke's theory of limited government as one charged with the protection of certain fundamental rights, including life, liberty, and property.[146] Other statesmen, including Alexander Hamilton and James Otis, explicitly refer in their writings to the importance of Locke's theories.[147] While many early Americans undoubtedly learned only second-hand Lockean liberal ideals (dissociated, perhaps, even from his name), those ideals nonetheless predominated. As one political theorist argues,

> The American Revolution was carried out, if only indirectly, in the name of Lockean ideals. The *Declaration of Independence* . . . speaks the language of natural rights . . . Locke's economic and social theories have by now become an American ideology. His emphasis upon the importance of . . . individual rights has been profoundly influential in this country.[148]

Also profoundly influential in the eighteenth century was the principle of Biblical traditionalism. It too shaped political thought and legal practice,

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interfering with those subjects but not dominating them." *Id.* There appears to be general consensus, however, that Lockean liberal individualism prevailed as the dominant political philosophy, and the notion of freedom as noninterference superceded the notion of freedom as non-domination. *See generally id.* at 41-42. Pettit argues that the republican ideal was gradually replaced by the liberal, noninterference ideal. *Id.* at 12, 35-50. Until the latter half of the twentieth century, historians accepted that the "American political tradition was unequivocally Lockean." Tushnet, *supra*, at 425 & n.5 (citing as the classic articulation of this view the discussion in Louis Hartz, The Liberal Tradition in America (1955)). Other historians have argued that, at least during the period leading up to the framing of the Constitution (and perhaps for some time thereafter), the predominant political philosophy was republican. *See, e.g.*, Garry Wills, Explaining America: The Federalist (1981); Gordon S. Wood, The Creation of the American Republic: 1776-1787 (1969). This view, however, has not gained universal acceptance. *See, e.g.*, John Patrick Diggins, The Lost Soul of American Politics: Virtue, Self-Interest and the Foundations of Liberalism (1984).

146. Thomas Paine, Common Sense: On the Origin and Design of Government in General, with Concise Remarks on the English Constitution (1776), *reprinted in* The Philosophy of Freedom: Ideological Origins of the Bill of Rights 171, 171 (Samuel B. Rudolph ed., 1993) ("Society is produced by our wants, and government by our wickedness; the former promotes our happiness *positively* by uniting our affections, the latter *negatively* by restraining our vices. Government, even in its best state, is but a necessary evil . . . ."); *see also*, J.S. McClelland, A History of Western Political Thought 346-51 (1996). Professor McClelland notes,

> According to the testimony of contemporaries, Paine's pamphlet had a remarkable effect on the minds of Americans in the year 1776 when even the most rebellious Americans were still wavering about the crucial step of declaring independence. George Washington himself is supposed to have been finally converted to independence by reading Paine.

Id. at 347.

147. *See generally* 1 Alexander Hamilton, *Response to "Farmer,"* in The Papers of Alexander Hamilton (Harold C. Syrett & Jacob E. Cooke eds., Columbia Univ. Press 1961); James Otis, *Of the Natural Rights of Colonists*, *reprinted in* The Philosophy of Freedom, *supra* note 146, at 129.

148. Nelson, *supra* note 143, at 212.

and early Americans sought to reconcile the two principles and accommodate both in law. Locke himself provides a striking example.

Locke hewed to a view of natural law that grounded his theory of rights and equality.[149] And the ideas expounded in his *Two Treatises* are, according to commentator John Dunn, "saturated with Christian assumptions."[150] Locke took the general subordination of women as evidence of its natural ordination. As did many early Americans, he viewed entry into marriage as properly governed by the liberal concept of contract, describing it as a "voluntary Compact between Man and Woman."[151] Locke nonetheless did not extend his notion of equality to women within marriages, reasoning that when husband and wife disagree, it becomes "necessary, that the last Determination, *i.e.*, the Rule, should be placed somewhere, [and] it naturally falls to the Man's share, as the abler and the stronger."[152]

Thus Locke, who convincingly argued for the safeguarding of individual liberty, was at the same time strongly constrained and deeply conflicted by Biblical tenets that reinforced the moral rectitude of the "natural" patriarchal family. After attempting in vain to reconcile Locke's position on women's subjection with his theories of basic human liberty and equality, Jeremy Waldron concludes,

> Locke's position on the natural subjection of wives *is* an embarrassment for his general theory of equality . . . Bible and nature are cited for the proposition that women are men's inferiors; and Bible and nature are cited for the proposition that women and men are one another's equals . . . . [H]ere is a philosopher struggling *not altogether successfully* to free his own thought as well as the thought of his contemporaries from the idea that something as striking as the difference between the sexes must count in itself as a refutation of basic equality."[153]

The difficulties of accommodating in public policy both the ideal of liberal individualism and Biblical traditionalist views of family were

149. Locke, *supra* note 144, at 289, § 7. "The *State of Nature* has a Law of Nature to govern it, which obliges every one: and Reason, which is that Law, teaches all Mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his Life, Health, Liberty, or Possessions." *Id.* His was a view widely held by Americans. *See, e.g*, The Philosophy of Freedom, *supra* note 146, at 84-85 ("The early Americans talked a good deal about what we would today refer to as natural law . . . . The laws of God and nature . . . afford an equality of liberty for all.").

150. John Dunn, The Political Thought of John Locke: An Historical Account of the Argument of the "Two Treatises of Government" 99 (1969). Dunn writes that "Jesus Christ (and Saint Paul) may not appear in person in the text of the *Two Treatises* but their presence can hardly be missed when we come upon the normative creaturely equality of all men in virtue of their shared species-membership." *Id.*

151. Locke, *supra* note 144, at 337, § 78.

152. *Id.* at 339, § 82.

153. Jeremy Waldron, God, Locke, and Equality: Christian Foundations in Locke's Political Thought 40 (2002) (discussing the *Two Treatises* and John Locke, The Reasonableness of Christianity, as Delivered in the Scriptures (Thoemmes Press, 1997) (1695)).

evident in early political debates. Delegates to the 1853 Massachusetts constitutional convention, for example, viewed as critical the need to safeguard individual rights through democratic political representation.[154] One delegate noted that, "in order to secure the rights of these families—these units, including all the individuals in them . . . each family must be represented."[155] But he insisted that the male head of household must be that sole representative, because inequality among the sexes was natural and ordained by God.

This Article does not suggest that early American lawmakers were intimately familiar with and/or influenced by all aspects of Lockean thought. Nor does it minimize the likely influence of other political theorists. Yet as a political philosophy, liberalism was foundational. Its ideas informed early Americans' thinking and writings; the latter were distributed and widely read. The tension between ideals of liberty and equality and the realities of social inequalities was one with which Locke himself grappled, largely unsuccessfully. Over the next two centuries, many of the changes in U.S. family law were designed to more closely align social practice with liberal ideals.

The next section turns to the influence of liberal individualism on U.S. family law and practice.

2. The Influence of Liberal Individualism on U.S. Family Law

The principle of liberal individualism has guided the direction of U.S. family law. Many developments in family law reflect its direct influence. To give just a few examples, rules have restored legal capacity to married women,[156] eased restrictions on divorce,[157] and relaxed legal constraints on sexual and intimate conduct generally.[158] Liberal ideals have also expanded society's willingness to view children, not exclusively or even primarily as subordinate to parental authority, but as individuals in their own right.[159]

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154. Jacob Katz Cogan, Note, *The Look Within: Property, Capacity, and Suffrage in Nineteenth-Century America*, 107 Yale L.J. 473, 488 (1997) (citing 2 Official Report of the Debates and Proceedings in the State Convention, Assembled May 4, 1853, To Revise and Amend the Constitution of the Commonwealth of Massachusetts 747 (Boston, White & Potter 1853) [hereinafter Massachusetts Convention of 1853] (statement of Abijah Marvin)).

155. *See* Massachusetts Convention of 1853, *supra* note 154, at 747 (statement of Abijah Marvin), *quoted in* Cogan, *supra* note 154, at 488. Another delegate argued that a family could "have but one will; and the man, who, by nature, is placed at the head of that government, is the only authorized exponent of that will." Massachusetts Convention of 1853, *supra* note 154, at 598 (statement of George Boutwell), *quoted in* Cogan, *supra* note 154, at 488.

156. *See supra* note 130 and accompanying text.

157. *See supra* note 23 and accompanying text.

158. *See supra* note 25 and accompanying text.

159. *See* Michael D.A. Freeman, *Taking Children's Rights More Seriously*, *in* Children, Rights, and the Law 52-71 (Philip Alston et al. eds., 1992).

Liberal individualism is also embodied in the following concepts: freedom from state interference, or privacy; freedom to enter into contracts; and, through the concept of parens patriae, the freedom (usually of children) from harm imposed by others. The next sections detail the manner in which these important concepts in American family law embody the principle of liberal individualism.

a. *The Concept of Privacy*

The principles of Biblical traditionalism and liberal individualism together gave shape to and were reflected in the early concept of familial privacy. Biblical traditionalism grounded the concept in patriarchal norms, which were embodied in rules that reinforced paternal authority.[160] Yet, liberal individualism also figured in the concept of familial privacy. In liberal rhetoric, family privacy protected from undue state interference the individual rights of the husband/father as the head and public representative of his family.[161]

Early law uneasily reconciled ideals of liberty and equality with the social reality of inequality by identifying white, male property owners as those individuals uniquely entitled to full citizenship and its attendant rights.[162] A man's liberty included control over his property and household.[163] The state respected that liberty and, hence, accorded the family privacy, intervening only minimally. The tradition of state noninterference in the family gave a man near-absolute control over his home and the individuals in it. It was his own "little commonwealth."[164] This carefully circumscribed conception of liberal individualism helped secure men's individual rights while simultaneously respecting Biblical-traditionalist norms dictating paternal authority over the family.[165]

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160. *See supra* notes 137-39 and accompanying text.

161. *See supra* notes 149-55 and accompanying text.

162. A married man became the political and legal representative of his wife and assumed her property—"[h]e became the one *full* citizen in the household, his authority over and responsibility for his dependents contributing to his citizenship capacity." Cott, *supra* note 16, at 12 (2000); *see also* Marchette Chute, The First Liberty: A History of the Right to Vote in America, 1619-1850 (1969); Nelson, *supra* note 143, at 193-95; Chilton Williamson, American Suffrage from Property to Democracy: 1760-1860 (1960). Nelson notes that Locke considered women "citizens" who were nonetheless excluded from full citizenship on the basis of paternal/patriarchal power (which he rejected as a legitimate form of political authority). According to Nelson, "[t]his was possible only on the assumption that the patriarchal family is natural, that it existed even in the state of nature, and that as a consequence women never possessed that property in either person or possessions that would have made them equal participants with men in the act of contracting." *Id.* at 215.

163. The husband's control over the marital property was absolute, and his authority over both his wife and children were extensive. *See generally* Grossberg, *supra* note 138, at 5; Katz, *supra* note 8.

164. *See* John Demos, A Little Commonwealth: Family Life in Plymouth Colony 82-83 (1970); Grossberg, *supra* note 138, at 4-5.

165. Teitelbaum, *supra* note 46, at 1174-80 (explaining that the law's emphasis on family privacy and autonomy reinforced male authority over the family); *see also* Katz, *supra* note

Society's stated liberal ideals were plainly inconsistent with the legal incapacities and social inequalities of certain classes of people, including women and enslaved people. Gradually, other individuals within the household—women, children, and slaves—gained full (or near-full) formal legal personhood, entitling them to share the rights previously enjoyed only by certain men.[166] Women gradually gained formal equality, and marriage officially became a relationship between equals.[167] The presence in the household of additional full citizens thus weakened the concept of male-headed familial privacy, but by no means did it eradicate altogether the concept of family privacy.[168]

Family privacy—modified by gains in gender equality—remains especially robust in the area of parent-child relationships.[169] Notions of privacy that earlier limited the state's interference with a man's absolute authority over his wife, children, and household have become officially gender-neutral. Men no longer have formal power over their wives, but parents continue to have power over their children—"paternal authority" has become "parental authority." Indeed, the U.S. Supreme Court in the early twentieth century explicitly grounded in principles of individual liberty a constitutionallyprotected "parental right" in the care and control over one's child.[170] Family privacy thus respects "the liberty of parents and guardians to direct the upbringing and education of children under their control."[171]

8, at 131 (citing Sanford N. Katz & William A. Schroeder, *Disobeying a Father's Voice: A Comment on* Commonwealth v. Brasher, 57 Mass. L.Q. 43 (1973)).

166. Within family law, the enactment of the Married Women's Property Acts restored to married women their legal personhood. *See* Basch, *supra* note 130. Other significant rights became incorporated in amendments to the Constitution. For example, women gained the absolute right to vote in 1920. U.S. Const. amend. XIX. The Fourteenth Amendment more broadly guarantees liberty and equal protection of the laws. U.S. Const. amend. XIV, § 1.

167. *See* Ann Dailey, *Federalism and Families*, 143 U. Pa. L. Rev. 1787, 1830 (1995).

168. *Id.* at 1830-35. Professor Ann Dailey notes that "[t]he expansion of individual rights within the domestic sphere, however, has not entirely eradicated the rhetoric of family privacy from legal discourse. The doctrine of family privacy . . . continues to control the state's ability to intervene in the parent-child relationship . . . ." *Id.* at 1830-31. However, the privacy that once respected male authority continued to exist and shielded from public view domestic violence and subordination of physically and economically weaker wives, as well as physical abuse of children. *Id.* at 1829-31. Thus, feminists have criticized the concept of privacy as one that has permitted the continued isolation and domination of women in homes.

169. Lee Teitelbaum notes that "[t]he notion of family privacy or family autonomy is . . . invoked regularly in connection with parent-child relations." Teitelbaum, *supra* note 46, at 1146.

170. Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923); *see also* David J. Herring, The Public Family: Exploring Its Role in Democratic Society 139-58 (2003). "Parental rights" include the presumptive right to custody of the child; to decide the nature and duration of their children's education; to leave their children in the care of another person for long periods of time and subsequently reclaim them; and to discipline the child, including corporal punishment or emotional manipulation. *Id.* at 140.

171. *Pierce*, 268 U.S. at 534-35. Dailey notes that the Court has sought to justify parental rights (within a constitutional philosophy that places great emphasis on individual

In the twentieth century, the concept of privacy that had earlier protected the family shifted to protect the individual. In 1973, the Supreme Court in *Eisenstadt v. Baird* extended the protections of privacy—initially belonging to the marital family—to the individual.[172] With this decision, the Court severed the theoretical link of privacy from its Biblical underpinnings and firmly anchored it exclusively in constitutional ideals of individual liberty. Privacy exists now as a fundamental right belonging to individuals. The ideal of state noninterference in private decisions (procreative decisions,[173] intimate sexual acts,[174] etc.) has been grounded in the Constitution's Due Process Clauses, the Ninth Amendment, and the penumbra of various other amendments to the Constitution. It is worth noting, however, that the concept of privacy itself may be ceding ground to the broader notion of liberty (with its more explicit constitutional grounding) as the justification for individual protections.[175]

b. *The Concept of State as Parens Patriae*

The principle of liberal individualism has helped to expand notions of children's distinct personhood and, in doing so, has (counterintuitively perhaps) helped shape the concept of parens patriae. It has been the impetus behind, and provides justification for, the extension of notions of full personhood to children as a class. The past few decades have thus seen development in the area of children's individual rights, but children's rights have in many respects continued to be viewed as secondary to parents' rights.[176]

Critics of the parental rights doctrine have argued that it conflicts with liberal ideals because the creation or expansion of parental rights necessarily restricts the rights of children. They argue that a strong conception of parental rights subjects children to the choices of another, subsumes their interests within those of their parents, and fails to recognize that children's and parents' interests can all-too-easily diverge.[177] Parents' rights include their ability to make choices for their children (religion,

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autonomy) by pointing to the unique role of parents in preparing their children for the responsibilities of citizenship. Dailey, *supra* note 167, at 1832-33.

172. Eisenstadt v. Baird, 405 U.S. 438 (1972).

173. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965).

174. In *Lawrence v. Texas*, the Court saw these laws as seeking to control, not merely a specific act, but more broadly "a personal relationship that . . . is within the liberty of persons to choose." 539 U.S. 558, 567 (2003).

175. *See* Stenberg v. Carhart, 530 U.S. 914, 921 (2000) (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 847 (1992) (discussing a woman's liberty interest in choosing whether to bear a child)).

176. *See supra notes* 51-60 and accompanying text; *see also* Herring, *supra* note 170, at 139-58; Freeman, *supra* note 159.

177. *See, e.g.*, Amy Gutmann, Democratic Education (1987); Dailey, *supra* note 167, at 1831-33; Barbara Bennett Woodhouse, *"Who Owns the Child?": Meyer and Pierce and the Child as Property*, 33 Wm. & Mary L. Rev. 995 (1992).

education, etc.) that can sharply limit their future abilities to choose their own life course.

To protect the individual rights of children, the state is increasingly willing to use the doctrine of parens patriae to intervene in even the intact family.[178] Historically, the state exercised its parens patriae power when no guardian was available to a child.[179] That power has gradually expanded. In the nineteenth century, state legislatures began enacting child abuse and neglect laws that authorized governmental intervention into abusive parent-child relationships.[180] And today, laws give states even broader powers to protect children.[181] States assert jurisdiction in the name of children's best interests in actions before separate juvenile courts, as well as in custody and adoption actions (including, perhaps most notoriously, allegations of child abuse and neglect).[182]

The state's interfering when necessary to safeguard the liberty of some (i.e., children) from harmful incursion by others (i.e., parents or guardians), is arguably the very embodiment of the Lockean ideals of government.

c. *The Concept of Contract*

An essential aspect of liberty is the freedom to contract. Both liberal individualism and Biblical traditionalism supported the concept of conjugality as a relationship entered into voluntarily.[183] That women freely sought and accepted the protection of a spouse gave early Americans some cover for the internal inequalities of the marital relationship.[184]

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178. Herring, *supra* note 170, at 159. Herring notes that, "[w]hile the rhetoric of parental rights comes under attack because of its negative effects on children and functioning family associations, the rhetoric of children's rights grows more robust. . . . In essence, society has used the rhetoric of children's rights to justify government involvement in the family association." *Id.* (citations omitted).

179. *See* Clark, *supra* note 10, at 109-10, 116, 119.

180. *See* Katz, *supra* note 8, at 132. *See generally*, Sanford N. Katz, Melba McGrath & Ruth-Arlene Howe, Child Neglect Laws in America (1976).

181. For a discussion of the current contours of the doctrine of parens patriae in the United States, see Natalie Loder Clark, *Parens Patriae and a Modest Proposal for the Twenty-First Century: Legal Philosophy and a New Look at Children's Welfare*, 6 Mich. J. Gender & L. 381, 403-14 (2000).

182. *See* Clark, *supra* note 181, at 384-87, 386 n.17, 403-14; *see also* Dorothy Roberts, Shattered Bonds: The Color of Child Welfare (2002) (arguing that state child-welfare systems operate to perpetuate racial inequality in the United States).

183. *See, e.g.*, Cogan, *supra* note 154, at 485. One nineteenth-century writer noted that married women "'conferred upon their husbands, by the marriage contract, all their civil rights: not absolutely, . . . but on condition, that the husband will make use of his power to promote their happiness.'" William C. Jarvis, The Republican; or, a Series of Essays on the Principles and Policy of Free States, Having a Particular Reference to the United States of America and the Individual States 66 (1820), *quoted in* Cogan, *supra* note 154, at 485.

184. *See supra* notes 151-52 and accompanying text.

The notion of indissoluble marriage clashed with liberal ideals.[185] States drastically lowered barriers to divorce, in part reasoning that voluntariness was an essential aspect of the marital "contract." Initially, divorce proceedings permitted courts to inquire into the details of the failed marriage. With the adoption of no-fault provisions in divorce statutes, however, the necessity of such inquiries has been drastically curtailed. The state thus continues to oversee dissolution of the marital bond. Yet, the gradual relaxing of divorce laws means that the formal strictures of the marital status have ceded ground to individualism and the right to self-determination. The conjugal unit is sufficiently important that the state does not want it severed lightly; but the countervailing principle of liberal individualism also requires that the state not impede its citizens' desire for freedom and self-determination.

Couples have limited freedom to alter by contract some of the default rules that govern the terms of their marriage because strong conjugal norms sharply circumscribe this ability.[186] They have more freedom, however, to alter by contract the financial consequences attendant to the dissolution of their marriage.[187] Even these contracts, however, often are scrutinized by courts to ensure that their enforcement would not offend public policy.[188]

III. EVALUATING THE PRINCIPLES

> [A] commitment to the *revisability* of all beliefs is (if anything is) the hallmark of the pragmatic attitude.[189]

This Article tackles the first part of a larger project—development of a normative jurisprudence of U.S. family law. This larger project comprises three sequential parts. First, it requires a conceptual analysis of the social and legal practices that govern families. Parts I and II have done this. The

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185. Arland Thornton, Reading History Sideways: The Fallacy and Enduring Impact of the Developmental Paradigm on Family Life 168 (2005). Thornton argues the incompatibility of enforced lifelong marriage with Lockean liberal ideals:

> That marriage was indissoluble had been a central [tenet] of the Catholic Church from about 1200 on. With the Protestant Reformation came the acceptance of divorce, but only in very limited sets of circumstances. Marriage continued to be viewed legally, socially, and religiously as a lifetime commitment. Clearly, Lockean principles were fundamentally at odds with the notion of indissoluble marriage.

Id. (citations omitted).

186. *See supra* notes 49-50 and accompanying text (discussing the Uniform Premarital Agreement Act and states' treatment of premarital agreements generally).

187. *See supra* notes 145-49.

188. *See supra* notes 49-50 and accompanying text; *see, e.g.*, Wis. Stat. § 767.255(3)(2) (2001) ("[N]o such [premarital] agreement shall be binding where the terms of the agreement are inequitable as to either party."); *see also* Principles of the Law of Family Dissolution, *supra* note 49, § 7.08 (seeking to systematize heightened judicial scrutiny of premarital agreements). The Uniform Premarital Agreement Act treats premarital agreements more like commercial contracts, although approximately one-third of the states have altered the terms to require heightened scrutiny.

189. Coleman, *supra* note 5, at 8.

goal of this type of analysis is to expose the structure of family law. Understanding its structure helps us think more clearly about what U.S. family law *is*, in order better to subject that *is* to analysis.[190] Second, the larger project requires critical or evaluative analysis of family law—a task made more manageable through our deepened understanding of its structure. This part undertakes that task, examining family law's most significant rules as expressions of interrelated concepts and underlying principles. The third and final part of the project will offer a normative jurisprudence of U.S. family law that will better reflect contemporary social values and whose outcomes will better meet contemporary social needs. That difficult and important task must be the focus of future work.

This Article turns now to the focus of this part—the evaluation of family law as the expression of its principles. This evaluation asks whether its principles are satisfactory, or as reasonably satisfactory as can be expected. This Article suggests one way to approach this difficult question. If we cannot answer yes to that question—and the next two sections conclude that we cannot—then we must undertake the final step of revising them.

To objectively evaluate the principles of family law is difficult, to say the least. By shaping our family laws and social experience, the principles have themselves affected, if not largely determined, many of our beliefs and values about families. The challenge, then, is to avoid evaluating the principles merely by reference to our moral sensibilities, which have been shaped by the principles themselves. That would, of course, be a circular and pointless exercise. To avoid that outcome, we can focus on the principles exclusively as they figure in family law,[191] yet allow our broader range of understanding and experience to enter into and inform our evaluation. That broader experience, by incorporating a full range of principles (and hierarchies of principles), helps ensure that we do not merely examine the principles by reference to themselves or in an analytical vacuum.

Good or useful principles, this Article posits, would share at least the following attributes. First, they would function well. In other words, their expression in law and practice would further a set of social goals we identify as useful and productive (e.g., provision of care for society's dependent members), while avoiding, as much as possible, outcomes that we determine to be harmful and destructive (e.g., impoverishment of those members). Second, they would work in concert with a full hierarchy of principles from other legal and social contexts that, through our broader social experience, we have come to embrace.

The next section evaluates each principle separately, examining its inherent attractiveness as well as its practical effect. The final section

190. *Cf. id.* at 12 (analyzing the benefits of reductive analysis of the law).

191. The principles figure in other aspects of U.S. law and practice; but their desirability as underlying principles in other contexts does not concern us here. Certain principles may properly be foundational in one context but inappropriate in another. This Article thus examines their desirability as they apply to the law of families.

evaluates the principles jointly, examining their combined effect on American family law.

A. *The Principles, Individually*

It is unsurprising that Biblical traditionalism and liberal individualism have become the dual foundations of U.S. family law. The conjugal family form fulfills many opposite-sex couples, and, at its best, provides a stable environment for procreation and childrearing. Additionally, most people highly value their autonomy and the safeguards that permit self-determination. Nevertheless, a marriage dissolution rate that exceeds fifty percent[192] and the existence of a steadily increasing number of nonmarital families should convincingly demonstrate that traditional lifelong conjugality cannot work for everyone—or even, perhaps, for the majority of us. Furthermore, while many of us enjoy having significant freedom from state interference, many others find themselves without social connection or the social supports that would enable true exercise and enjoyment of liberty. So what precisely is wrong with our principles? This Article turns first to Biblical traditionalism.

The grounding of the normative family in Biblical tradition lends divine sanction and purported moral superiority to that family form, even today. That same religious grounding, on the other hand, may render suspect any resulting system of rules. It could be argued that the "Biblical" premises of Biblical traditionalism make illegitimate those state policies that effectuate that principle—the state is not only entangling itself in religion, it is building legal systems upon a religious foundation. And to state the obvious, we are a pluralistic society whose members do not all espouse the Judeo-Christian tradition and the moral values it includes. Some might thus argue that Biblical traditionalism (as a foundational principle of U.S. family law) is per se illegitimate. Others might be less inclined to dismiss the principle (and the concepts and rules that express it) based only on its religious origins. After all, it is possible to locate religious influences in other areas of the law. Religious principles may coincide with principles important to societies (so the argument might go), and that coincidence alone ought not be sufficient to invalidate the principles. It is thus useful to judge the principle by those rules which give it expression and by its compatibility with other principles.

From Biblical traditionalism, we derive concepts of conjugality and family privacy. They help define the normative family and are in turn expressed most significantly in legal rules and social practices governing marriage and parenting. These rules and practices reinforce and privilege

192. In 1990, for example, there were 517 divorces per 1000 U.S. marriages. *See* Andrew J. Cherlin, *American Marriage in the Early Twenty-First Century*, The Future of Children, Fall 2005, at 33, 45-46.

the marital family.[193] To support marriage, for example, the federal government spends or declines to collect billions of dollars each year—and dozens of states follow similar policies.[194]

Privileging some families necessarily means not privileging others. What explains or justifies the privileging of individuals within marital families over those in nonmarital families? Here, we cannot simply refer back to Biblical traditionalism (which is, of course, the very principle supporting the privileging of the marital family). Instead, we must look beyond that principle for justification. Most people would agree, based on shared commitments to another principle—the right to treatment as equals[195]—that unequal treatment should exist only with justification.

In order, then, for privileging of one family form over others to be legitimate, that family form should be demonstrably "better" in some relevant respect—for individuals and/or for society—than other forms.[196] Perhaps it could be demonstrated that the marital family performs some useful societal function that other groupings fail to perform. The marital family form aims to provide individual fulfillment (through shared love and commitment) and the publicly beneficial work of mutual support and dependent caretaking. But so do other family forms. Indeed, while marriage may provide individual fulfillment to some,[197] the socially useful functions which it performs, mutual support and dependent caretaking, can be and are similarly performed (albeit with less social support) by other family groupings.[198]

193. *See supra* notes 20, 62 and accompanying text. For additional discussions of the mechanisms through which marital nuclear families have received public support throughout U.S. history, see Stephanie Coontz, The Way We Never Were: American Families and the Nostalgia Trap 680-91 (1992); Martha L.A. Fineman, *Masking Dependency: The Political Role of Family Rhetoric*, 81 Va. L. Rev. 2181, 2205-06 (1995).

194. *See* Anita Bernstein, *For and Against Marriage: A Revision*, 102 Mich. L. Rev. 129, 141 (2003).

195. *See* Dworkin, *supra* note 69 at 272-75.

196. It might be argued that the Biblical-traditionalist family structure best actualizes human potential, and it is therefore legitimate for the state to encourage people to act accordingly. But this is a slippery sort of claim. Is the argument that such family structure makes people happiest? That it is best for children? Best for overall economic stability? It may be that what is meant is that individuals in marital families enjoy improved outcomes across a number of measurements—i.e., they function better. This can be conceded, but the playing field is hardly level, as the marital family enjoys a built-in advantage.

197. To the extent that personal fulfillment through entry into marriage is a good, it is arguably an individual, private good. The sense in which marriage is individually fulfilling and desirable is (at least partly) due to the public approbation and support it brings. Nonconforming groupings do not receive these less tangible, but meaningful, supports. For an elaboration of the argument that marriage's expressive, companionate, and procreative functions are private goods best left to private ordering, but that support and dependant caretaking are public functions that should receive public support regardless of family form, see generally Vivian Hamilton, *Mistaking Marriage for Social Policy*, 11 Va. J. Soc. Pol'y & L. 307 (2004).

198. One result is the continued success of the marital family relative to nonmarital families. Hence, the Biblical-naturalistic compulsion is perpetuated, and the continued relative success of the *is* helps justify and perpetuate the *ought*. And the power of the

Biblical-traditionalist concepts of conjugality and family privacy promote the values of commitment and unity. Importantly, however, Biblical traditionalism irrevocably ties these values to a single family form—the opposite-sex, formally married couple and their children (or at least, their procreative potential). It has led to rules in U.S. family law that elevate family form over family function. The privileging of a single family form obscures consideration and support of societal functions performed by nonmarital families.[199] It provides unsatisfactory justifications for withholding from those families (and their children, who of course play no role in determining their family form) the extensive public benefits afforded the conjugal family.[200] Furthermore, Biblical traditionalism leads to some socially harmful outcomes, as it results in the unequal treatment of a significant portion of society. It is thus inconsistent with other principles that we embrace, equal treatment and liberal individualism. This Article now turns to consider liberal individualism.

On the positive side of the ledger, liberal individualism aims to promote autonomy and resists majority efforts to impose conformity. The principle has historically been invoked to increase the liberty of individuals within the conjugal family. It has guided society's increasing respect for the liberty and equal treatment of both women and children.[201] It is now being invoked by those who seek to increase the liberty of individuals outside of the conjugal family (i.e., those families that don't conform to the traditional marital norm, including same-sex families) and are thus denied its benefits.

However, acceptance of liberal individualism as an ideal is neither universal nor unequivocal. Theorists have critiqued its adoption as a political goal. As early as the nineteenth century, Alexis De Tocqueville argued that liberal individualism emphasizes self-interest at the expense of community life. The liberal individual "exists but in himself and for himself . . . . As for the rest of his fellow citizens, he is close to them, but he does not see them."[202] Liberal individualism's contemporary critics echo

conjugal norm is such that, even when empirical evidence shows that, in nonconforming relationships, care between adult partners and success of childrearing virtually mirror that of the traditional relationship, the nonconforming ones continue to be viewed as less moral (at best). *See* Judith Stacey & Timothy J. Biblarz, *(How) Does the Sexual Orientation of Parents Matter?*, 66 Am. Soc. Rev. 159 (2001).

199. Indeed, society's refusal to permit nonmarital families the same abilities undermines their ability to perform socially useful functions. In many gay families, only one member may legally adopt a child being raised by both. The other member risks losing all rights to and authority over the child should the couple's relationship fail (a protection afforded both natural and adoptive parents), and the child risks losing benefits derived from its relationship with the non-adoptive parent. *See, e.g.*, Herring, *supra* note 170, at 156-57; Devjani Mishra, *The Road to Concord: Resolving the Conflict of Law over Adoption by Gays and Lesbians*, 30 Colum. J.L. & Soc. Probs. 91 (1996).

200. *See generally* Hamilton, *supra* note 197.

201. *See supra* notes 166-68 (discussing expansion of women's rights), 176-82 (discussing expansion of children's rights) and accompanying text.

202. II Alexis de Tocqueville, Democracy in America 318 (Francis Bowen ed., Phillips Bradley trans., Alfred A. Knopf, Inc. 1945) (1840). De Tocqueville argued that liberal society required a large and powerful central government, which was necessary to ensure

the theme. They argue that its conception of autonomy and self-determination protected by legal rights fosters individual pursuit of self-interest, detached from consideration for others. Indeed, the focus on individual rights elides civic responsibility and destroys social cohesion.[203]

The flaws of liberal individualism as a founding principle of family law become evident if one examines how that principle, if operating alone, would find expression in family rules. Within families, dependency and codependency are virtually inevitable and can constrain individual fulfillment. Imposing on individuals obligations towards others finds scant support in a liberal-individual theory.[204]

Professor Martha Fineman has further criticized as a fictional construct the concept of the autonomous individual itself.[205] Fineman points out that, at some point in life, every individual is dependent on others, and even individuals who appear to be "autonomous" are in many ways supported by others (e.g., the "autonomous" adult male whose market or public activities are made possible by the at-home support of a woman and family association).[206] Fineman argues that the concept of the private family, a unit entitled to both protection from the state and freedom from state intervention, assumes away universal dependency. Thus, while liberal democratic society purports to rest on the autonomous individual, in fact it is the family association that is its supporting unit.

In this case, family law's principles do work in concert to achieve the socially desirable goal of mutual support. Yet, there are many examples where the principles together affect not coherence, but dissonance. The next section illustrates this.

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maximum and equal liberty to all. The combined effect of individualism and bureaucratic despotism was that "people are far too much disposed to think exclusively of their own interests, to become self-seekers practicing a narrow individualism and caring nothing for the public good." Alexis de Tocqueville, The Old Regime and the French Revolution xiii (Stuart Gilbert trans., Doubleday 1955) (1856). For de Tocqueville's prescient critique of liberal democracy generally, see 1 Alexis de Tocqueville, Democracy in America 200-02 (Francis Bowen ed., Phillips Bradley trans., Alfred A. Knopf, Inc. 1945) (1835).

203. *See, e.g.*, Mary Ann Glendon, Rights Talk (1991); Martha Minow, Making All the Difference (1990); Michael J. Sandel, Liberalism and the Limits of Justice (1982); Roberto Mangabeira Unger, Knowledge and Politics (1975); Robin West, *Jurisprudence and Gender*, 55 U. Chi. L. Rev. 1 (1988). *But see, e.g.*, Linda C. McClain, *"Atomistic Man" Revisited: Liberalism, Connection, and Feminist Jurisprudence*, 65 S. Cal. L. Rev. 1171 (1992) (arguing that contemporary legal liberal theory, as expounded by Ronald Dworkin and John Rawls, cannot be reduced to the view of the atomistic individual but instead supports social connection).

204. *See* Glendon, *supra* note 203, at 76-108. *See generally supra* note 203 and accompanying text.

205. Fineman, *supra* note 193, at 2205-06; *supra* note 193 and accompanying text.

206. Fineman, *supra* note 193 at 2200; *see also* Martha Albertson Fineman, The Neutered Mother, the Sexual Family and Other Twentieth Century Tragedies 145 (1995).

B. *The Principles, Working Together*

The existence of principles in tension in a given field of law is not inherently objectionable.[207] To the contrary, such tension can lead to productive compromise. Sometimes, in the case of Biblical traditionalism and liberal individualism in family law, it does. For instance, liberal ideals have operated to relax some of the more oppressive aspects of the traditional conjugal relationship, expanding the liberties of women and children and lowering barriers to individuals wishing to exit broken relationships. These ideals enable marriage (which originated as a patriarchal and, in many ways, oppressive institution) to evolve and perform socially useful support and child-raising functions.[208] However, in other significant respects, the foundational principles that undergird our family law are irreconcilable. Together, they too-often produce not productive compromise but rather incoherence and discord. The most significant examples follow, beginning with membership in the gravitational center around which family law revolves—the marital, nuclear, family.

The previous section argued that Biblical traditionalism ultimately expresses an ideal that elevates family form over family function, unfairly excluding many families from the institutional benefits afforded marital families. Liberal individualism has been able to operate within the conjugal construct, expanding the liberties of those within it, but not significantly opening its membership to other groups. Some argue that, as it did with divorce, conjugality can adjust to accommodate same-sex couples;[209] but compromise here is proving challenging. As those who would defend marriage did with indissolubility (and then racial purity) in earlier centuries, many today view the opposite-sex requirement as one of the essential terms of the conjugal relationship. A relationship that does not conform to that form is, by definition, not a conjugal/marital relationship. Hence, those who would maintain the status quo rely heavily on natural law and Biblical theories.

Individuals who do not meet the formal pattern (one man, one woman) but seek to formalize their relationships advance numerous arguments. Among them is the argument that the principle of liberal individualism permits them to structure their intimate lives as they see fit and that, by excluding their relationships (which can perform the same socially useful function as the traditional conjugal relationship) from the benefits accorded marriage, they are made less equal and left with less freedom than is afforded to conforming groupings. Giving same-sex couples entry into

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207. Contract law, for instance, can be seen as a constant compromise between autonomy and state paternalism aimed at protecting people from their bad bargains.

208. That the institution excludes other family forms that perform the same functions remains, of course, its fundamental flaw. The observation here, however, is simply that the marital family also performs these necessary functions.

209. No one seriously believes that the two-person limit will be revisited any time soon.

marriage would further liberal individual principles.[210] To many, however, eliminating the opposite-sex requirement denatures the institution. They can perceive no compromise.

Another area where the coexistence of both principles produces incoherence is the law of parenting, including the doctrine of parental rights, abuse and neglect laws, and child custody determinations. Rights "over" children reinforced the conjugal, patriarchal family and were reflected in the concept of family privacy, which empowered a man to control his household, wife, and children.[211] Now gender-neutral, the parental rights doctrine continues to exist. The doctrine is couched in liberal-individual and rights-respecting terms, but it clashes with the fundamental tenets of liberal individualism, which denies that one individual could have rights over another.[212] According to one critic, "[t]he parents are not trustees of a public good (society's future citizens), but are owners of the individuals they have created (their children)."[213]

Liberal individual protections are now extended to children as well. In custody proceedings, the state attempts to exert its parens patriae power to further children's best interests. But only to a limited extent. The coexistence of parents' rights (Biblical traditionalism) and children's rights (liberal individualism) leads to undesirable outcomes that disserve children. It has resulted in child-custody rules in which a parent's biological connection with a child can trump the child's stronger emotional attachment to a nonparent.[214] Conjugality, in turn, can trump both biology and emotional attachment.[215] In cases of suspected neglect or abuse, institutional practice is even more chaotic. It is all too easy for the state to justify a child's "temporary" removal from the home, because it does not view itself as disrupting the legal right of parents to their children in these cases. That a "legal" parent-child relationship continues to exist means nothing to a child, of course. Temporary removals, in about half of all cases, become long-term removals. Because many parents fail to respond to state-provided services and requirements (even when, as is not always the case, those services are actually offered), children remain in temporary care arrangements, often developing new attachments. Also, because it is difficult to meet the heightened legal standard required to terminate parents'

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210. It would not give them total freedom, of course, since their marriages would then exist within a preexisting institutional structure.

211. *See supra* notes 52-57, 137-39, 160-71 and accompanying text.

212. *Cf.* John Elster, *Solomonic Judgments: Against the Best Interest of the Child*, 54 U. Chi. L. Rev. 1 (1987). Elster discusses the tension between children's rights/interests and parental rights, but argues that children's interests should not trump those of their parents and that parental rights and needs should be considered. *Id.* at 4-5.

213. *See* Herring, *supra* note 170, at 145 (citing Woodhouse, *supra* note 177).

214. *See supra* notes 51-58 and accompanying text.

215. *See* Michael H. v. Gerald D., 491 U.S. 110 (1989); *supra* notes 25, 55 and accompanying text.

rights to their children, it is usually years before children receive permanency.[216]

Together, the laws that express Biblical traditionalism and liberal individualism shape doctrines that affect the lives of millions of individuals. And together, their foundational principles are wreaking havoc on the most significant and wide-ranging of our family laws.

CONCLUSION

This Article has proposed a theory of the nature of U.S. family law that explains our social practices. It draws from the structure of family law's rules and practices the content of its key concepts: conjugality, privacy, contract, and parens patriae. These practices and concepts both effectuate and make explicit the principles of Biblical traditionalism and liberal individualism.[217] These principles underlie our family law and unify many of our ordinary, unreflective beliefs and practices.[218] Now that those principles have been exposed, we must examine what place in our public life we wish to give them.[219] At a minimum, this Article seeks to launch an overdue debate in family law on whether our current foundational principles are desirable, or even defensible. More ambitiously, the Article seeks to ground a much-needed jurisprudence of family law that better reflects the social goals and needs of contemporary U.S. society.

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216. *See* Santosky v. Kramer, 455 U.S. 745 (1982) (requiring that decisions terminating parental rights be proven by clear and convincing evidence); *see also* Jennifer Wriggins, *Parental Rights Termination Jurisprudence: Questioning the Framework*, 52 S.C. L. Rev. 241 (2000).

217. *See* Coleman, *supra* note 5, at 54-55.

218. *See* Ronald Dworkin, Taking Rights Seriously 155-56 (1977); John Rawls, A Theory of Justice 48 (1971).

219. *See* Coleman, *supra* note 5, at 5.