

2005

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Crossman, Brenda. "Contesting Conservatism, Family Feuds and the Privatization of Dependency." American University Journal of Gender, Social Policy & the Law. 13, no. 3 (2005): 415-509.

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CONTESTING CONSERVATISMS, FAMILY FEUDS AND THE PRIVATIZATION OF DEPENDENCY

BRENDA COSSMAN*

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INTRODUCTION

American public policy debates about the legal regulation of the family are often framed as a contest between liberals and conservatives, battling out their different political visions in gladiator-like performances. The dividing lines are easily drawn on issues ranging from welfare to abortion to same sex marriage: liberals with their emphasis on equality and an egalitarian family line up in favor, while conservatives with their emphasis on morality and the traditional family stand opposed. While this divide does characterize much political debate, it is by no means up to the task of explaining contemporary public policy debates over the legal regulation of the family. Indeed, a focus on this divide risks obscuring an equally important clash of political visions structuring these public policy debates, namely, the divisions within conservative political discourse. To risk stating the obvious—yet remarkably overlooked in analyses of contemporary family law and policy—conservatives do not always agree with one another, even on questions of the family. Rather, the clashes, cleavages, and contradictions within social, fiscal, and libertarian conservative political discourse, and the ebbs and flows in the relative power of each of these visions, have produced much of the current constellation of laws and policies regulating the family.

This Article examines these contesting conservatisms in public policy debates over the legal regulation of the family. It does so by focusing on the question of the privatization of dependency within the family. Family law has always involved the public enforcement of private responsibilities of individual family members. But, in an era of privatization and the emergence of a neo-liberal state, characterized by a reduction in government social spending and a transfer of these responsibilities to the private sphere,¹ it might be expected to have a

1. This process of restructuring and retracting the Keynesian welfare state has been extensively documented, although variously labeled within the literature. Compare PAUL PIERSON, *DISMANTLING THE WELFARE STATE?: REAGAN, THATCHER, AND THE POLITICS OF RETRENCHMENT* 17 (1994) (describing restructuring as the politics of retrenchment, which the author defines as “policy changes that either cut social expenditure, restructure welfare state programs to conform more closely to the residual welfare state model, or alter the political environment in ways that enhance the probability of such outcomes in the future”), with NEIL GILBERT, *TRANSFORMATION OF THE WELFARE STATE: THE SILENT SURRENDER OF PUBLIC RESPONSIBILITY* 45 (2002) (describing a similar restructuring process as a shift from a largely social democratic state to a more market oriented body, which the author calls “the enabling state”). He describes the enabling state as involving an increased emphasis on the private delivery of public goods and “less emphasis on providing income support to people out of work than does the welfare state and more weight on fostering social inclusion, mainly through active participation in the labor force.” *Id.* Others have described

newfound importance. Indeed, in many western nations, family law has become a more important regulatory instrument for the enforcement of private support obligations for economically dependent family members.² More specifically, society has called upon family law to address the economic needs of women and children at precisely the moment when it is dismantling the welfare state and public financial assistance has become increasingly scarce.

In the United States, however, this privatization has been partial. On one hand, a very public debate about welfare reform has been all about privatization. The privatization of child support obligations has

this process of restructuring as privatization. See, e.g., STEVEN RATHGEB SMITH AND MICHAEL LIPSKY, *NONPROFITS FOR HIRE: THE WELFARE STATE IN THE AGE OF CONTRACTING* 188 (1993) (describing privatization as “a broad policy impulse which seeks to change the balance between public and private responsibility in public policy”); see also PRIVATIZATION, LAW AND THE CHALLENGE TO FEMINISM 4 (Brenda Crossman & Judy Fudge eds., 2002) [hereinafter PRIVATIZATION] (describing privatization as capturing “the process of transition from welfare state to neo-liberal state as the material base upon which the Keynesian compromise rested has been undermined and its mode of governance transformed”). See generally Isabella Bakker, *Introduction: The Gendered Foundations of Restructuring in Canada*, in *RETHINKING RESTRUCTURING: GENDER AND CHANGE IN CANADA* (Isabella Bakker ed., 1991) (explaining that the neoliberal approach emphasizes the allocation of resources through markets, which reflect the motivation of individual self-interest); Gøsta Esping-Anderson, *After the Golden Age?: Welfare State Dilemmas in a Global Economy*, in *WELFARE STATES IN TRANSITION: NATIONAL ADAPTATIONS IN GLOBAL ECONOMIES* 23 (Gøsta Esping-Anderson ed., 1996) (noting that, in most countries, there have not been radical changes in the welfare state, though privatization is slowly gaining strength); JACOB HACKER, *THE DIVIDED WELFARE STATE: THE BATTLE OVER PUBLIC AND PRIVATE SOCIAL BENEFITS IN THE UNITED STATES* (2002) (examining alternative social welfare approaches); JOEL HANDLER, *DOWN FROM BUREAUCRACY: THE AMBIGUITY OF PRIVATIZATION AND EMPOWERMENT* (1996) (claiming that decentralization and privatization are now worldwide movements); MICHAEL B. KATZ, *THE PRICE OF CITIZENSHIP: REDEFINING THE AMERICAN WELFARE STATE* (2001) (insisting that the American welfare state is both a public and private structure); PAUL KRUGMAN, *THE GREAT UNRAVELING: LOSING OUR WAY IN THE NEW CENTURY* (2003) (condemning the Bush administration and its fiscal policies, including the welfare state); PAUL PIERSON, *THE NEW POLITICS OF THE WELFARE STATE* (2001) (stating that social conflict surrounds the welfare states of affluent democracies); JOSEPH E. STIGLITZ, *THE ROARING NINETIES: A NEW HISTORY OF THE WORLD’S MOST PROSPEROUS DECADE* (2003) (detailing the inconsistencies of American welfare policy and its shift toward privatization); Barbara L. Bezdek, *Contractual Welfare: Non-Accountability and Diminished Democracy in Local Government Contracts for Welfare-to-Work Services*, 28 *FORDHAM URB. L.J.* 1559 (2001) (arguing that welfare reform and privatization has led to the erosion of administrative law structures and government accountability); Martha T. McCluskey, *Efficiency and Social Citizenship: Challenging the Neoliberal Attack on the Welfare State*, 78 *IND. L.J.* 783 (2003) (condemning neoliberalism as promoting a racialized, genderized, and class-biased vision for society); Panel Discussion, *The Changing Shape of Government*, 28 *FORDHAM URB. L.J.* 1319 (2001) (discussing the positive aspects of privatization and government accountability as the welfare state shifts toward privatization); Lisa Phillips, *Taxing the Market Citizen: Fiscal Policy and Inequality in an Age of Privatization*, 63 *LAW & CONTEMP. PROBS.*, Autumn 2000, at 111 (using the Canadian system to illustrate that privatization may perpetuate gender inequalities).

2. See PRIVATIZATION, *supra* note 1, at 4 (recognizing the shift toward privatization in Canada and its effects on women and children).

been identified as an explicit policy objective of welfare reform, and the literature has debated the appropriateness of this privatization.³ However, this form of privatization is not evident in other family support obligations, where there has been very little expansion of the scope or content of family obligations. In contrast to the developments in other jurisdictions where there has been a broadening of definitions of spouse, domestic partners and marriage for the purposes of support obligations, as well as a significant expansion of the support obligations often quite explicitly in pursuit of savings to government spending, both the scope and content of family support obligations (other than child support) has remained relatively unchanged. The story of the privatization of public responsibility in American family law is then a story of partial privatization.

This Article seeks to analyze some of the factors underlying this partial privatization. Why, given the extent to which the United States has lead the way in the privatization of a range of once public goods ranging from education and environmental regulation to electricity and prisons, is the privatization of the family so partial? Why have some areas of family law been amenable to privatization, while others have been resistant? The question has been surprisingly unaddressed. The legal literature on privatization in the United States is unhelpful in addressing this question, since it pays such scant attention to the family. Privatization overwhelmingly refers to the delegation of once governmental services to the private sector—specifically, to the market (private enterprise) and the voluntary sector (non-profit charitable actors).⁴ The idea of delegating public goods and services to the family is all but invisible.⁵ But, even the social welfare and

3. See *infra* note 11 and accompanying text (detailing the debate over the privatization of what has traditionally been considered public responsibility).

4. See, e.g., Jack M. Beermann, *Privatization and Political Accountability*, 28 FORDHAM URB. L.J. 1507, 1508-30 (2001) (admitting that privatization is difficult to define and dividing the concept of privatization into various categories, touching briefly on the role of the family in privatization); Ronald A. Cass, *Privatization: Politics, Law, and Theory*, 71 MARQ. L. REV. 449, 450 (1988) (explaining that in the United States, privatization is not a clear-cut term, though it generally refers to the idea that government should have less involvement in particular activities); Matthew Diller, *Introduction: Redefining the Public Sector: Accountability and Democracy in the Era of Privatization*, 28 FORDHAM URB. L.J. 1307, 1309 (2001) (explaining that privatization may take many forms and emanates from skepticism that the government is able to solve problems); Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229, 1230 (explaining that the new form of privatization calls for market-style competition in providing social services).

5. See Martha Albertson Fineman, *Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency*, 8 AM. U. J. GENDER SOC. POL'Y & L. 13 (1999) (detailing the exclusion of the family as a site of analysis in mainstream

family literature, which has observed the privatization of dependency in the family, has offered little by way of explanation for its partial nature.

A notable exception is found in the work of Grace Blumberg, who has observed that unlike other Western nations, in which private rights and obligations have expanded as public welfare rights contract, in the United States, there has been no similar expansion of private rights and obligations.⁶ She has suggested that this is due to the fact that unlike other Western nations, the United States never had a particularly robust welfare state, nor an ethic of collective responsibility for the social welfare of its citizenry.⁷ As a result, the dismantling of the more limited welfare state has not lead to a concomitant expansion of private rights in order to ensure the basic welfare of its citizens.⁸ This is no doubt an important part of the story—if there is but a limited welfare state and no sense of social responsibility, then the dismantling of welfare need not be accompanied by a transfer of social responsibility to the private realm

legal literature). “Feminist legal theorists can legitimately complain that most mainstream work fails to take into account institutions of intimacy, such as the family.” *Id.* at 13 According to Fineman, the family is typically treated separately from the market and the state. *Id.* at 13-14.

6. See Grace Ganz Blumberg, *The Regularization of Nonmarital Cohabitation: Rights and Responsibilities in the American Welfare State*, 76 NOTRE DAME L. REV. 1265, 1267-69 (2001) (tracing the laws of cohabitation in the United States and noting that as the government attempts to defend marriage, private employers more frequently provide benefits to non-marital spouses).

7. See *id.* at 1270-71 (arguing that the United States has never achieved the status of a fully developed welfare state because it has never committed itself to doing so).

8. See *id.* at 1307 (suggesting that part of the explanation lies in the invisibility of the public welfare function of the family).

Although the family plays a greater role in the well-being of its members in the United States than it does in nations that have a more highly developed and transparent public welfare system, the American state’s relatively weak and cloaked role as a provider of social welfare seems to obscure the welfare function of the American family.

Id. According to Blumberg, more fully developed welfare states tend to be more self conscious about the welfare role of the family, and in moments of welfare retrenchment, have shown a greater willingness to expand the realm of private obligations. *Id.*

Unlike most other Western countries, the United States has never committed itself to the comprehensive goals of a fully developed welfare state. Consequently, it is not ordinarily thought to be the role of the government to guarantee the social welfare of its citizenry. This perspective may have affected the way the United States has conceptualized and rationalized family law obligations, as compared to countries that have experienced the content and ethos of a more fully realized welfare state. Specifically, American family law does not recognize or acknowledge the extent to which the law of private family obligations serves a public function.

Id. at 1308.

of the family.

In this Article, I seek to supplement Blumberg's analysis, arguing that there are other important factors at play in the partial privatization of American family law. Public policy debates around the family are characterized by a number of very different visions of the family; different *conservative* visions of the family with very different ideas about privatization. Privatization as the transfer of public goods and services to the private sphere of the family is one of at least three distinct visions of privatization of the family. A second understanding of privatization of the legal regulation of the family involves the shift from public norms to private choice. American family law has been said to be characterized by an increased individualization of the family and a heightened emphasis on private decision-making.⁹ Within this private choice vision of privatization, individuals should be able to decide for themselves how to structure their intimate relationships, and how to restructure them if and when these relationships break down. A third understanding of privatization of the family involves a return to the 'traditional family' and the sanctity of marriage. In this social conservative vision, the family with its highly gendered roles is envisioned as the natural site for a range of care-giving responsibilities. This family needs to be restored to its once privileged position.

In this article, I argue that these divergent visions of family and privatization, their convergences and contradictions, are factors animating the public policy debates over the legal regulation of the family. The three visions of privatization can each be associated with political positions often labeled 'conservative': the fiscal conservatism of privatization as transferring once public goods to the private sphere; the libertarian conservatism of privatization as private choice, and the social conservatism of privatization as the traditional family.¹⁰ In my view, it is important to pay closer attention to these gaps and fissures within "conservative" political discourse. The conflations and conflicts between these three visions of privatization hold key insights into the family and welfare public policy debates and help explain the partial privatization of American family law. Privatization as the

9. 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 (1992).

10. See *infra* notes 11-52 and accompanying text (explaining that two of these three visions of privatization, although associated with conservative thought, actually derive from classical liberalism). Further, the vision of privatization as private choice is a position that many progressive thinkers adhere to as well. *Id.* My point is that these three visions of privatization can be associated with positions often identified with conservative politics.

transfer of once public goods and services to the family is sometimes supported by and other times constrained by privatization as private choice and privatization as the restoration of the traditional family. The privatization of support obligations has occurred only to the extent that it can be made consistent with the social conservative vision of the family. Where these visions of privatization converge (child support), the scope and content of family law obligations have been expanded. But, where these visions diverge (same-sex marriage), the continuing discursive power of the social conservative vision of privatization has precluded any such expansion. The story of public policy reform is then as much a story of the conflicts between and among conservatives, as it is a conflict between liberals and conservatives.

The paper begins with an exploration of the theoretical differences between these different visions of the family and the contradictory implications for the regulation of the family. It illustrates the extent to which these divergent approaches to family and privatization correspond to fiscal and social conservative political philosophies, and their fundamental differences in assumptions about family, gender and dependency. The paper then turns to consider three issues in the federal legal regulation of the family as concrete instantiations of the contradictions: child support, welfare reform, and marriage. First, it examines federal legislative efforts to strengthen child support obligations and enforcement. The paper argues that initial efforts were primarily motivated by a fiscal impulse of privatizing the costs of supporting families by shifting responsibility from the state to individual families—specifically, to fathers. However, more recent public policy initiatives have begun to place greater emphasis on promoting “responsible fatherhood,” a vision more consistent with the social conservative restoration of the traditional family. Secondly, the paper analyses the restructuring of welfare eligibility and entitlements for single mothers. It traces a similar shift from fiscal conservative emphasis on reconstituting dependent single mothers into self-reliant workers to a social conservative emphasis on promoting marriage and the traditional family as a solution of welfare dependency. Thirdly, it explores federal initiatives to defend the traditional definition of marriage from the challenges by same-sex couples. In contrast to both child support and welfare entitlements, public policy debates regarding marriage are overwhelmingly dominated by social conservatives, and there is virtually no discussion of the potential fiscal advantages of broadening the scope and content of family obligations in the context of same-sex relationships. Although no one model of the family has emerged as dominant, the

analysis of each of the three areas suggests that the social conservative model appears to be in ascendance. The paper argues that it is the discursive power of this social conservative vision that has to a large extent precluded broader definitions of family and a more robust privatization of support obligations in accordance with the goals of fiscal conservatism or the promotion of private choice in accordance with the goals of libertarianism.

I. CONTESTING VISIONS OF PRIVATIZATION

A. Privatization as Transfer of Public Goods and Services to the Private Sector

The privatization literature in the United States defines privatization, at its most general, as the transfer of public goods and services to the private sector.¹¹ It is described as including a broad array of policies. Jody Freeman, for example, suggests “a broad range of arrangements that may constitute privatization, including: “the complete or partial sell-off (through asset or share sales) of major public enterprises; (2) the deregulation of a particular industry; (3) the commercialization of a government department; (4) the removal of subsidies to producers; and (5) the assumption by private operators of what were formerly exclusively public services through, for example, contracting out.”¹² For the most part, the literature has

11. See JOHN D. DONAHUE, *THE PRIVATIZATION DECISION: PUBLIC ENDS, PRIVATE MEANS* 5-12 (1989) (explaining that the definition of privatization in the United States is quite different than privatization in the rest of the world); E.S. SAVAS, *PRIVATIZATION: THE KEY TO BETTER GOVERNMENT* 3 (1987) (terming privatization “the act of reducing the role of government, or increasing the role of the private sector, in an activity or in the ownership of assets”); Nancy Ehrenreich, *The Progressive Potential in Privatization*, 73 *DENV. U. L. REV.* 1235, 1236 (1996) (describing privatization as “returning traditional government functions to the private sphere”); Minow, *supra* note 4, at 1230 (defining privatization as “the range of efforts by governments to move public functions into private hands and to use market-style competition”); Julie A. Nice, *The New Private Law: An Introduction*, 73 *DENV. U. L. REV.* 993, 995 (1996) (terming privatization “New Private Law” and describing it as deregulation, decentralization, privatization, and contractualization); Paul Starr, *The Meaning of Privatization*, 6 *YALE L. & POL’Y REV.* 6, 14 (1988) (suggesting that “privatization has come primarily to mean two things: (1) any shift of activities or functions from the state to the private sector; and, more specifically, (2) any shift of the production of goods and services from public to private”).

12. Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 *HARV. L. REV.* 1285, 1287 (2003) (noting that the last arrangement constituting privatization is the most commonly used in the United States); *see also* Cass, *supra* note 4, at 456-62 (describing privatization as consisting of four basic types of policies: divestiture, contracting out, deregulation and vouchers and tax reductions/user fees); Matthew Diller, *Form and Substance in the Privatization of Poverty Programs*, 49 *UCLA L. REV.* 1739, 1741 (2002) (describing privatization). This concept is:

[A] cluster of related developments and proposals. The term ‘privatization’ encompasses such diverse policies as creating school voucher programs,

focused on the transfer of once public goods and services to the private sphere of the market, increasing the role of private enterprise.¹³ It generally involves a marked preference for market ordering and private choice over government regulation and public norms. More recently, the literature has also included considerable attention to the transfer of public goods and services to the voluntary or charitable sector.¹⁴ But little attention has been directed to a third sector within the private sphere, namely, the family. While some of the privatization literature mentions this sector in passing,¹⁵ there has been very little analysis of the transfer of once public goods and services to the family.

To the extent that the family has been discussed at all in the privatization literature, it has generally been in relation to the deregulation of intimate relationships. A number of writers have attempted to reveal the progressive potential of privatization through the deregulation of personal relationships.¹⁶ But, the idea of privatization operating in these works is somewhat different from the more general emphasis on the transfer of once public goods and services to the private sphere. Rather, in this context, privatization

contracting out the delivery of services, selling off governmental assets such as public housing and hospitals, replacing the Social Security system with individual retirement accounts, and creating private entities, such as homeowners' associations or business improvement districts, endowed with powers traditionally associated with local government.

Id.

13. *But see, e.g.,* MARTHA MINOW, PARTNERS, NOT RIVALS: PRIVATIZATION AND THE PUBLIC GOOD 1-5 (2002) (demonstrating that not all of this literature depicts the public/private distinction as unproblematic). Rather, many writers recognize the constructed and shifting nature of the distinction. *Id.*

14. *See* Panel Discussion, *Living with Privatization: At Work and in the Community*, 28 FORDHAM. URB. L.J. 1397, 1412-13 (2001) (explaining that the role of charitable organizations in privatization has continued to intensify with the establishment of the White House Office of Faith-Based and Community Initiatives by the Bush Administration in 2001, which is intended to further promote the provision of social services by faith-based organizations).

15. *See* Panel Discussion, *supra* note 1, at 1324. Privatization is defined as meaning:

[R]elying more on the private institutions of society and less on government to satisfy public needs. Society's private institutions include: (1) the marketplace and organizations operating therein; (2) voluntary associations of all kinds; and (3) the family, which is, after all, the Original Department of Health, Department of Education, Department of Housing, and Department of Social Services.

Id. His subsequent, admittedly brief, discussion, however, focuses exclusively on markets and private enterprise. *Id.* at 1324-25.

16. *See* Ehrenreich, *supra* note 11, at 1242-43; *see also* Beermann, *supra* note 4, at 1530-31 (commenting on the deregulation of intimate relationships through the shift to no fault divorce and an increased willingness of the courts to enforce private contracts); Martha M. Ertman, *Contractual Purgatory for Sexual Minorities: Not Heaven, but Not Hell Either*, 73 DENV. U. L. REV. 1107 (1996).

denotes a shift in government regulation to encourage private choice. It is an understanding of privatization that draws more heavily on a very different understanding of privatization found in the family law literature, discussed in the next section below.

This conflation of privatization and deregulation is also somewhat problematic in so far as the transfer of public goods and services to the private sector is not always commensurate with deregulation. While some of the literature emphasizes the idea of deregulation as an important component of privatization,¹⁷ others have suggested that privatization often involves an increase or shift in modes of regulation. Some commentators have suggested that privatization is better characterized as “re-regulation.”¹⁸ As Daniel Farber has observed, “privatization, after all, is another form of regulation.”¹⁹ This observation is particularly salient in the context of the legal regulation of the family where the transfer of once public goods and services to the private sphere involves a shift rather than a decrease in regulation. For example, the increase in child support obligations and enforcement that has accompanied the retraction of social welfare has involved intensification in the regulation of individual family members. Drawing parallels between the deregulation of certain sectors of the economy and the transformations in the legal regulation of the family fails to capture the ways in which privatization as the transfer of public responsibility to the private sphere has been operating within the family.

While the idea of privatization as reconstituting once public goods and services as more appropriately provided by the family remains under theorized in general discussions of privatization, it does appear in some feminist work, as well as in the literature on the expansion of

17. See, e.g., Cass, *supra* note 4, at 459-60 (identifying deregulation as one of the four categories of privatization). Deregulation is defined as reducing or eliminating the public regulation of private actors. *Id.* It often involves an effort to increase competition in once heavily regulated sectors of the economy. *Id.*; see also Beermann, *supra* note 4, at 1528-35.

18. See PRIVATIZATION, *supra* note 1, at 20; Sol Picciotto, *Liberalization and Democratization: The Forum and the Hearth in the Era of Cosmopolitan Post-Industrial Capitalism*, 63 LAW & CONTEMP. PROBS. 157 (2000); see also Freeman, *supra* note 12, at 1285.

Instead of seeing privatization as a means of shrinking government, I imagine it as a mechanism for expanding government's reach into realms traditionally thought private. In other words, privatization can be a means of 'publicization,' through which private actors increasingly commit themselves to traditionally public goals as the price of access to lucrative opportunities to deliver goods and services that might otherwise be provided directly by the state.

Id.

19. See Daniel A. Farber, *Whither Socialism?*, 73 DENV. U. L. REV. 1011 (1996).

child support obligations and the dismantling of social welfare. For example, Martha Fineman's work on the legal regulation of family has highlighted the role of family law in privatizing dependency,²⁰ as well as the extent to which "privatization is increasingly seen as the solution to complicated social problems reflecting persistent inequality and poverty."²¹ Similarly, the discourse of public policy reform has identified the privatization of support obligations as an explicit objective of welfare reform, and many commentators have observed the extent to which this reform constitutes a privatization of public responsibility.²² Anna Marie Smith, for example, has detailed the ways in which recent welfare reform has both "expanded governmental presence into the private sphere" while sharply reducing "the sphere of public responsibility."²³ According to Smith, "[t]he collective obligation to support poor mothers and their children is being transformed into a private familial debt"²⁴ Laura Morgan has similarly argued that the child support provisions of welfare reform have sought to privatize the once public responsibility of supporting poor families.²⁵

20. See, e.g., Martha L.A. Fineman, *Masking Dependency: The Political Role of Family Rhetoric*, 81 VA. L. REV. 2181, 2205 (1995) ("In the societal division of labor among institutions, the private family bears the burden of dependency, not the public state. Resort to the state is considered a failure. By according to the private family responsibility for inevitable dependency, society directs dependency away from the state and privatizes it."); see also Martha Albertson Fineman, *The Inevitability of Dependency and the Politics of Subsidy*, 9 STAN. L. & POL'Y REV. 89 (1998).

21. Martha Albertson Fineman, *Contract and Core*, 76 CHI.-KENT L. REV. 1403, 1405 (2001).

The rhetoric surrounding many current policy debates urges previously public concerns to be transferred to the magic realm of the private solution. From welfare reform to the construction of ideal educational or prison systems, the assertion is that the private market can better address historically public issues than can the public government.

Id. However, Fineman notes the unique position of the family within those debates about privatization, since dependency is already seen as the responsibility of the family. *Id.* "Therefore, the public nature of dependency is hidden, privatized within the family, rendering decisions about public responsibility unnecessary, except for those stigmatized families that 'fail' in meeting their responsibilities." *Id.* at 1405-06.

22. See generally Tonya L. Brito, *The Welfarization of Family Law*, 48 U. KAN. L. REV. 229 (2000); David L. Chambers, *Fathers, the Welfare System, and the Virtues and Perils of Child-Support Enforcement*, 81 VA. L. REV. 2575 (1995); Deborah Harris, *Child Support for Welfare Families: Family Policy Trapped in Its Own Rhetoric*, 16 N.Y.U. REV. L. & SOC. CHANGE 619 (1987/1988); Roger J.R. Levesque, *Targeting "Deadbeat" Dads: The Problem with the Direction of Welfare Reform*, 15 HAMLINE J. PUB. L. & POL'Y 1 (1994); Laura W. Morgan, *Family Law at 2000: Private and Public Support of the Family: From Welfare State to Poor Law*, 33 FAM. L.Q. 705 (1999); Anna Marie Smith, *The Sexual Regulation Dimension of Contemporary Welfare Law: A Fifty State Overview*, 8 MICH. J. GENDER & L. 121 (2002).

23. Smith, *supra* note 22, at 211.

24. *Id.* at 212.

25. See Morgan, *supra* note 22, at 708-09 (noting that the government more

B. Privatization as Private Choice in Intimate Relationships

In the context of family law, the dominant conception of privatization is one of the increasing emphasis on private decision-making over public norms. As Jana Singer argued in her influential article aptly entitled *The Privatization of Family Law*, “[o]ver the past twenty five years, family law has become increasingly privatized. In virtually all doctrinal areas, private norm creation and private decision making have supplanted state-imposed rules and structures for governing family-related behavior.”²⁶ In her view, this “preference for private over public ordering” has included both the substantive and procedural dimensions of the legal regulation of the family.²⁷ In terms of substantive law, the once sharp line between marriage and non-marital cohabitation has been blurred; illegitimacy has been largely abolished, unmarried cohabitants have been provided with some remedies on the breakdown of their relationships through the use of express and implied contract doctrine, and there has been an increasing recognition of domestic partnership regimes. The consequences of marital breakdown have similarly seen an increase in the ability of spouses to define their own relationships with the shift from fault to no-fault divorce and the ability to alter the obligations of marriage by contract.

Singer suggests that this increasing preference for private over public ordering reflects a number of broader social trends in the legal regulation of the family including an increase in notions of individual privacy and autonomy.²⁸ She notes that while individual privacy has long been important in American legal thought, in the context of the legal regulation of the family, the idea of privacy was generally ascribed to the family as a unit, rather than to its individual members.²⁹ This idea began to change in the 1970s, as the Supreme

stringently enforces child support awards in order to shift the cost of raising children from the federal government back to parents).

26. Singer, *supra* note 9, at 1444.

27. *Id.*

28. See *id.* at 1446 (noting that the other factors include an emphasis on gender equality, the increasing influence of law and economics, and the dissociation of law and morality).

29. See *id.* at 1509.

While this notion of family privacy insulated from public oversight certain sorts of decisions and activities that took place within families, it did not support private choices regarding the formation or dissolution of family relationships. Indeed, the traditional notion of family privacy may have reinforced public control over the definition and composition of families, since only certain sorts of intimate groupings were considered worthy of the degree of autonomy that the tradition provided In this sense, the traditional notion of family privacy represented not a commitment to private

Court “transformed the traditional notion of family privacy into a doctrine that focused directly on individual choice and that elevated to constitutionally protected status a wide range of individual decisions regarding marriage, parenthood and procreation.”³⁰ Marriage came increasingly to be viewed as a private relationship intended to promote individual happiness, which in turn supported an approach to legal regulation that emphasized privacy and decisional autonomy: individuals should decide for themselves when and how to enter into and exit from relationships.

This privatization is part of a more general transition of family law from status to contract, and the increasing emphasis on individualism in the legal regulation of the family.³¹ The formal status of marriage has become less important in determining individual rights and responsibilities within the family, as greater latitude is given to individual choices. Yet, it is a process that remains incomplete.³² Singer, amongst others, has observed that this privatization of the family, with its emphasis on the private contractual nature of marriage, has been uneven, citing, for example, the increased government involvement in the legal regulation of domestic violence and child support.³³ The law continues to impose limits on how far spouses can contract out of the rights and responsibilities once associated with the status of marriage.

The normative evaluation of this privatization of the family is

ordering of family behavior, but rather the substitution of the family for the state as the relevant source of public norms.

Id.

30. *Id.* at 1510.

31. See, e.g., SIR HENRY SUMNER MAINE, *ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY, AND ITS RELATION TO MODERN IDEAS* 165 (Ashley Montagu ed., 1986) (originating the idea of the transformation of marriage from status to contract); see also MARY ANN GLENDON, *THE NEW FAMILY AND THE NEW PROPERTY* 43 (1981) [hereinafter GLENDON, *THE NEW FAMILY*] (“Maine was more right than he knew. . . . [S]ince the 1960s, the law in the countries discussed here has come increasingly to emphasize the individuality of the members of the conjugal family as well as to facilitate their independence from it and each other.”). See generally MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA* (1985); MILTON C. REGAN, JR., *FAMILY LAW AND THE PURSUIT OF INTIMACY* (1993); Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803 (1985); Singer, *supra* note 9.

32. See REGAN, *supra* note 31, at 39-41 (explaining that formal recognition of relationships has become less important, and the law increasingly recognizes individuals); see also JEAN L. COHEN, *REGULATING INTIMACY: A NEW LEGAL PARADIGM* (2002).

33. See Singer, *supra* note 9, at 1555 (observing that “although the law today generally accords spouses great latitude in structuring their post-divorce financial affairs, this latitude does not extend to agreements regarding child support or child custody.”); see also Theodora Ooms, *The Role of the Federal Government in Strengthening Marriage*, 9 VA. J. SOC. POL’Y & L. 163 (2001).

divided. Some commentators have argued strongly for the progressive potential of this privatization.³⁴ Both Martha Ertman and Nancy Ehrenreich, for example, have suggested that the increasing emphasis on private choice through the privatization of marriage might have positive effects for gays and lesbians.³⁵ Jack Beerman has similarly commented on the deregulation of intimate relationships through the shift to no-fault divorce and a greater willingness on the part of the courts to enforce intimate contracts, as well as the potential for the further deregulation of marriage as part of the process of privatization.³⁶ Others have argued against this privatization. Communitarians, for example, have been highly critical of the increased emphasis on individualism and private choice law.³⁷ Some of these critics argue for a reversal of this process of privatization and a return to status.³⁸ Others, including Singer, take the position that this privatization of the family is ambivalent, producing both advantages and disadvantages.³⁹ But, the idea of the privatization of the family as a preference for private over public ordering is a theme that runs throughout this literature.

C. Privatization as the Re-articulation of the Traditional Family

A third vision of privatization of the family that underlies contemporary public policy debates involves a return to the "traditional family" and the sanctity of marriage.⁴⁰ In this social

34. See Martha Ertman, *Marriage as a Trade: Bridging the Private/Private Distinction*, 36 HARV. C.R.-C.L. L. REV. 79 (2001) (arguing that the privatization of family law helps undermine traditional sex, gender, race and class hierarchies that marginalize a range of intimate relationships); See generally Ehrenreich, *supra* note 11; Eric Rasmusen & Jeffrey Evans Stake, *Lifting the Veil of Ignorance: Personalizing the Marriage Contract*, 73 IND. L.J. 453 (1998) (arguing for more private choice in the structuring of marital relationships); Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 VA. L. REV. 1225 (1998).

35. See Ertman, *supra* note 34; Ehrenreich, *supra* note 11.

36. See Beermann, *supra* note 4, at 1530-31 (noting that the deregulation of marriage may expand the possibilities for the meaning of marriage and increase individuals' privacy rights).

37. See, e.g., Bruce Hafen, *Individualism and Autonomy in Family Law: The Waning of Belonging*, 1991 BYU L. REV. 1 (1991) (arguing that the increased emphasis on private choice and autonomy in family law undermines the family as a site of community, relationship and belonging). "In family law, as in family life, the individualistic cultural currents of the past quarter century have eroded the mortar of personal commitment that traditionally held the building blocks of family life—people—together in intimate relationships." *Id.* at 2; see also REGAN, *supra* note 31, at 89-117; Laura Weinrib, *Reconstructing Family: Constructive Trust at Relational Dissolution*, 37 HARV. C.R.-C.L. L. REV. 207 (2002).

38. See REGAN, *supra* note 31, at 89-117.

39. See Singer, *supra* note 9, at 1531-67.

40. Admittedly, the proponents of this view do not generally describe their position in the language of privatization. However, I believe that it is possible to cast

conservative vision, the family with its highly gendered roles is envisioned as the natural site for a range of care giving responsibilities.⁴¹ This family needs to be restored to its once privileged position. A host of social problems—rising crime rates, domestic violence, abortion, welfarism, child poverty, high risk behaviors—are ascribed to the decline of the traditional family.⁴² Social conservatives seek to reverse this decline by promoting marriage and traditional family forms.⁴³ Their many strategies include an effort to reduce single motherhood by reducing both non-marital births and high divorce rates. Non-marital births can be reduced by promoting abstinence and, if that fails, marriage. High divorce rates can be countered by reforming no-fault divorce laws, replacing them, for example, with covenant marriage laws that impose more onerous conditions for divorce.⁴⁴ The trend toward

this social conservative attempt to resurrect the traditional family as a position on privatization, returning the family to its purportedly natural and private form.

41. See Lynn Wardle, *Relationships Between Family and Government*, 31 CAL. W. INT'L L.J. 1, 21 (2000) [hereinafter Wardle, *Relationships*] ("Fathers must selflessly return to their role as providers and protectors of their families, and mothers must return lovingly to nurture their children."); see also Bruce C. Hafen, *The Touch of Human Kindness: Motherhood and the Moral Influence of Women*, 67 VITAL SPEECHES 1, (2001), 2001 WL 12792028 (urging women to return to their roles as nurturers within the family).

42. See Lynn Wardle, *Is Preference for Marriage in the Law Justified?*, 1999 WORLD FAM. POL'Y FORUM 44, at <http://www.worldfamilypolicy.org/New%20Page/Forum/1999/Wardle.pdf> (last visited July 31, 2005); Wardle, *Relationships*, *supra* note 41 (describing the breakdown of marriage as leading to poverty, high risk behaviors such as teenage pregnancy and drug abuse by children, increased crime and broader social instability); see also DAVID BLANKENHORN, FATHERLESS AMERICA: CONFRONTING OUR MOST URGENT SOCIAL PROBLEM 25-48 (1995) [hereinafter BLANKENHORN, FATHERLESS AMERICA] (insisting that separating children from their fathers is a major cause of crime, emotional problems, teenage pregnancy, child sexual abuse, and domestic violence towards women). See generally MAGGIE GALLAGHER, THE ABOLITION OF MARRIAGE: HOW WE DESTROY LASTING LOVE (1996); REBUILDING THE NEST: A NEW COMMITMENT TO THE AMERICAN FAMILY (David Blankenhorn et al. eds., 1990); BARBARA DAFOE WHITEHEAD, THE DIVORCE CULTURE (1996).

43. See David Blankenhorn, *The State of the Family and the Family Policy Debate*, 36 SANTA CLARA L. REV. 431, 436 (1996) (noting that conservatives may be divided between those who seek to address the consequences of the decline of the family by building more prisons, urban boarding schools, and orphanages and those who seek to reverse the trend by "strengthening the institution of marriage and seeking to create cultural change in favor of the idea that unwed childbearing is wrong, that our divorce rate is too high, and that every child deserves a father"). See generally PROMISES TO KEEP: DECLINE AND RENEWAL OF MARRIAGE IN AMERICA (David Popenoe et al. eds., 1996); REVITALIZING THE INSTITUTION OF MARRIAGE FOR THE TWENTY-FIRST CENTURY: AN AGENDA FOR STRENGTHENING MARRIAGE (Alan J. Hawkins et al. eds., 2002).

44. See, e.g., Margaret Brinig & Steven Nock, *Covenant and Contract*, 12 REGENT U. L. REV. 9, 24-26 (1999/2000); Katherine Shaw Spaht, *For the Sake of the Children: Recapturing the Meaning of Marriage*, 73 NOTRE DAME L. REV. 1547 (1998); Katherine Shaw Spaht, *Louisiana's Covenant Marriage: Social Analysis and Legal Implications*, 59 LA. L. REV. 63, 74-75 (1998); Lynn Wardle, *Divorce Reform at the*

cohabitation can be reversed by greater support for and promotion of marriage. Through the 1990s, the discourse of this social conservative position has also been articulated more explicitly in terms of children's need for a two-parent family, and the problem of "fatherless" children.⁴⁵ The solution, then, is seen in terms of promoting this two-parent family, and 'responsible fatherhood'. Moreover, in this social conservative vision, the traditional two parent heterosexual nuclear marital family is to be supported to the exclusion of all other family forms. Social conservatives thus oppose any movement toward same sex relationship recognition as representing a fundamental threat to the traditional family.

In this vision of privatization there continues to be a strong role for government regulation. David Blankenhorn, a leading conservative family policy critic has, for example, noted the distinction between laissez faire approaches that identify government as the problem and seek to dismantle the welfare state "so that families can form and thrive on their own and in local communities, unharmed by the policies of the welfare state," and a more welfare state approach which seeks to use the "instruments of government to meet human needs."⁴⁶ He explicitly rejects the laissez faire approach, arguing instead that "society needs to use the tools of government and other tools at its disposal to strengthen the basic institution of the civil society, especially the institution of marriage, and to promote a cultural shift an attitudinal changes toward the view that every child deserves a father and that more children ought to be growing up with their two married parents."⁴⁷

Similar themes are developed by Lawrence Mead, an influential conservative critic, who advocates in favor of a "new paternalism" in social welfare policy as a solution to the problems of poverty, welfare

Turn of the Millennium: Certainties and Possibilities, 33 FAM. L.Q. 783, 790-91 (1999) (arguing in favor of divorce reform and covenant marriage); see also Katharine T. Bartlett, *Saving the Family from the Reformers*, 31 U.C. DAVIS L. REV. 809 n. 7 (1998) (observing that the divorce reform and the reintroduction of fault is also supported "by some commentators representing a more progressive legal tradition"). The author cited, among others, Margaret Brinig & Steven Crafton, *Marriage and Opportunism*, 23 J. LEGAL STUD. 869 (1994), and also those from a more liberal tradition, such as Elizabeth S. Scott, *Rational Decisionmaking About Marriage and Divorce*, 76 VA. L. REV. 9, 80-91 (1990), who urged enforcement of pre-commitment contracts to limit the availability of divorce. *Id.*

45. See, e.g., BLANKENHORN, FATHERLESS AMERICA, *supra* note 42; DAVID POPENOE, LIFE WITHOUT FATHER: COMPELLING NEW EVIDENCE THAT FATHERHOOD AND MARRIAGE ARE INDISPENSABLE FOR THE GOOD OF CHILDREN AND SOCIETY (1996).

46. Blankenhorn, *supra* note 43, at 436-37.

47. *Id.* at 437; see also Hafen, *supra* note 37.

dependency and the decline of the family.⁴⁸ As Mead describes, this paternalism is “pro-government. Far from reducing the welfare state, as conservatives usually ask, paternalism expands it.”⁴⁹ Mead contrasts the new paternalism with traditional Republican or conservative approaches: “The traditional Republic approach to poverty was simply to cut back government programs and benefits and rely more on the private sector to generate opportunities for the downtrodden. Paternalism is a big-government form of conservatism, and this has caused some in the GOP to reject it.”⁵⁰ Mead notes that conservative advocates of paternalism do not necessarily favor the privatization of welfare, as understood as the transfer of government goods and services to the private market or charitable actors:

Most of us think . . . it unlikely and undesirable that antipoverty policy should be privatized. After all, one reason that public social policies arose in the Progressive and New Deal Eras was that private charity could not cope with the scale of urban poverty. The public now expects that the most destitute will be cared for, whether or not private aid is available, and for this a welfare state is indispensable.⁵¹

Mead further argues that the private sector—particularly the charitable sector—will be unlikely to provide the kind of supervision required to change the behavior of the poor.⁵²

D. Contradictory Relationships and Contesting Political Visions

These different visions of family and the contradictory pressures on the legal regulation of the family reflect three very different political normative visions: fiscal conservatism, libertarianism and social conservatism.⁵³ At times, analysts interchangeably use these terms to

48. See Lawrence Mead, *The Rise of Paternalism*, in *THE NEW PATERNALISM: SUPERVISORY APPROACHES TO POVERTY* 1, 2 (Lawrence Mead ed., 1997); see also Rebecca Maynard, *Paternalism, Teenage Pregnancy Prevention, and Teenage Parent Services*, in *THE NEW PATERNALISM: SUPERVISORY APPROACHES TO POVERTY* 89, 90 (advocating paternalism as the best approach to reducing illegitimacy: “Not only are more paternalistic policies crucial to maintaining public support for social programs such as welfare, but they also offer the most promise for preventing teenage pregnancy and mitigating adverse consequences when it does occur”).

49. Mead, *supra* note 48, at 11.

50. *Id.* at 12-13.

51. *Id.* at 10.

52. *Id.* (“Community organizations outside government cannot do much to force the poor to follow a better lifestyle as long as public aid programs demand little.”).

53. MELVIN THORNE, *AMERICAN CONSERVATIVE THOUGHT SINCE WORLD WAR II: THE CORE IDEAS* 97 n.28 (Bernard K. Johnpoll ed., Greenwood Press 1990) (noting, “it should be remembered that these labels, libertarian conservative and traditionalist conservative, fit arguments and positions better than they fit people.”). The distinctions set out here serve to provide an analytical model, rather than a

refer to the conservative policies of privatization, the dismantling of the welfare state and the promotion of traditional (often family) values, collapsed under the rubric of the "New Right." This conflation, however, obscures important differences between these political philosophies and their respective adherents.⁵⁴ Although often cast within the language of conservatism (i.e. social conservatives versus fiscal conservatives⁵⁵) the divide is actually one between conservatism and liberalism. Social or moral conservatives are the true inheritors of a conservative political philosophy with its emphasis on community, authority, social order and tradition.⁵⁶ In this philosophy, individuals are first and foremost members of

description of the views of particular individuals or groups. In practice, a particular individual, organization or political party may (and often does) adopt a social conservative position on one issue, and a fiscal conservative view on another. Many Republicans, for example, may adopt a fiscal conservative stance on child support (in favor of tougher laws cracking down on deadbeat parents), while adopting a resolutely anti-gay position in terms of same sex marriage. Similarly, the Heritage Foundation, a 'conservative' think tank committed to promoting the public policies based on the principles of free enterprise, individual freedom and limited government, also supports the promotion of 'traditional American values', which includes the promotion of marriage and the traditional family. See About the Heritage Foundation, *available at* <http://www.heritage.org/about/> (last visited July 9, 2005). Nor are these positions exclusively adopted by Republicans. As the review of Congressional debates below reveals, Democrats may similarly adopt fiscal and/or social conservative positions. The analytical distinctions set out here help illuminate the internal contradictions animating public policy debates, as well as the contradictions that may inhere within individual actors, groups or parties.

54. See, e.g., Ernest Young, *Judicial Activism and Conservative Politics*, 73 U. COLO. L. REV. 1139, 1142, 1181-1202 (2002) [hereinafter Young, *Judicial Activism*] (distinguishing between three categories of conservative politics: "situational or 'Burkean,' political, and institutional"); Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619, 661 (1994) [hereinafter Young, *Rediscovering Conservatism*] (explaining that "American conservatism is highly splintered," such that the various factions cannot agree on one direction for conservative constitutionalism); see also Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429, 447-51 (2002) (distinguishing between substantial, methodological and institutional conservatism); Robin West, *Progressive and Conservative Constitutionalism*, 88 MICH. L. REV. 641, 654-59 (1990) (distinguishing between social conservatives, legal conservatives and libertarian conservatives).

55. See, e.g., CHARLES DUNN & DAVID WOODARD, *AMERICAN CONSERVATISM FROM BURKE TO BUSH: AN INTRODUCTION* 173 (1991).

An economic conservative, especially one with libertarian tendencies, wants to have a very small government that interferes as little as possible in the lives of Americans. A traditional or religious conservative, on the other hand, may appreciate a larger government in order to protect its moral values as the norms of society's behavior.

Id.; see also THORNE, *supra* note 53 at 83-91 (discussing the distinction between libertarian and traditional conservatism).

56. See Robert Nisbet, *Uneasy Cousins*, in *FREEDOM AND VIRTUE: THE CONSERVATIVE/LIBERTARIAN DEBATE* 38-39 (George Carey ed., 1998) (explaining that modern conservatism stems from Burkean ideals of rights of society and historical groups [like families and churches] as a barrier to government control over the individual).

communities, united by common morals values and traditions.⁵⁷ While conservatives are wary of arbitrary state power, they are not adverse to the state but rather see it as a necessary component of social order and the promotion of virtue.⁵⁸ Within this vision, the family is a basic unit of society, forging individuals together through its moral authority, instilling children with moral values and traditions.⁵⁹

By way of contrast, both fiscal conservatism and libertarianism derives from classic liberal theory.⁶⁰ Within classical liberalism, the individual is an autonomous, rational, self-interested actor, endowed with free will, whose liberty to pursue his own interest merits protection above all else.⁶¹ Individuals must be free to make their own choices, and pursue their own conception of the good.⁶² According to classical liberal theory, this liberty thrives on the economic liberty of a free market, and the political liberty of a minimal state.⁶³

These tensions between conservative and liberal political philosophies have long been visible in American conservative politics. Lipset and Raab's study of the American Right, for example, found an on-going alliance between these two groups – one drawn primarily from lower income brackets, who follow the religious, non-economic

57. See *id.* at 45-46 (recounting that conservatives, from Burke forward, view individuals as inseparable members of natural groups and associations with which they live: "family, locality, church, region, social class, nation, and so on").

58. See Russell Kirk, *A Dispassionate Assessment of Libertarians*, in FREEDOM AND VIRTUE: THE CONSERVATIVE/LIBERTARIAN DEBATE 183-84 (George Carey ed., 1998).

[T]he conservative finds that the state is natural and necessary for the fulfillment of human nature and the growth of civilization In Burke's phrases, "He who gave us our nature to be perfected by our virtue, willed also the necessary means of its perfection—He willed therefore the state."

Id.

59. See, e.g., DUNN & WOODARDS, *supra* note 55, at 170 ("The basic ties of the family are the heart of society . . . and the very nursery of civic virtue.").

60. See Nisbet, *supra* note 56, at 40 (tracing the "foundations of contemporary liberalism, of classical liberalism" to the work of Locke, Smith, and J.S. Mill's *On Liberty*).

61. See C.B. MACPHERSON, *THE REAL WORLD OF DEMOCRACY* 6-7 (1965) (finding that in a classic liberal democracy, individuals become free to choose religions, occupations, family arrangements, and economic strategies).

62. See *id.* at 7 (reporting that new liberalized democracies in fact forced freedom on individuals).

63. See Nisbet, *supra* note 56, at 42-43 (providing that freedom from intrusive government intervention and individual economic freedom are the anchors of classic liberal theory). See generally MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 7-21 (1962) (analyzing the relationship between economic and political freedom in the liberal context); FRIEDRICH A. HAYEK, *THE CONSTITUTION OF LIBERTY* (1960) (examining the history and institutions of liberty through the lens of political philosophy and application in modern economic society).

issues of conservative politics, and the other drawn from higher income brackets, a highly educated group, attracted primarily to the economic issues of conservative politics.⁶⁴ Conservative political theorists have themselves long debated the relative merits of freedom and authority, with more libertarian conservatives emphasizing the primacy of freedom, and more social or traditional conservatives emphasizing the primacy of authority and social order.⁶⁵ These tensions continue to be visible in the rise of the New Right in America since the 1970s, and the resurgence of a number of different conservative political philosophies.⁶⁶ Ernest Young has observed, "American conservatism is highly splintered," encompassing a very broad array of philosophical positions not easily united.⁶⁷ Young identifies six different strands of conservatism: economic conservatives,⁶⁸ libertarians,⁶⁹ traditionalists,⁷⁰ social/religious conservatives,⁷¹ neo-conservatives⁷² and anti-communists,⁷³ and

64. See SEYMOUR MARTIN LIPSET & EARL RAAB, *THE POLITICS OF UNREASON: RIGHT-WING EXTREMISM IN AMERICA, 1790-1970* 449-56 (1970) (parceling the extreme right into two factions: one consisting of low status, under-educated, religious and provincial peoples who espouse intolerance of minorities and diversity; the other consisting of wealthier, privileged peoples who focus on economic conservatism). Underlying both groups is a common thread of opposition to the welfare state and state power. *Id.* at 449.

65. See DESMOND S. KING, *THE NEW RIGHT: POLITICS MARKETS AND CITIZENSHIP* 2 (1987) (defining two strands of thought within the New Right: "liberalism, which comprises the restoration of the traditional liberal values of individualism, limited government and free market forces; and conservatism, which consists of claims about government being used to establish societal order and authority based on social, religious and moral conservatism"). See generally *FREEDOM AND VIRTUE: THE CONSERVATIVE/ LIBERTARIAN DEBATE* (George W. Carey ed., 1998) (contrasting libertarian and social conservatives in order to discern their common ground).

66. See generally KING, *supra* note 65 (examining the contradictions and accommodations between liberalism, libertarianism and conservatism in the rise of the New Right in the United States and England in the 1970s and 1980s).

67. Young, *Rediscovering Conservatism*, *supra* note 54, at 661.

68. See Young, *Judicial Activism*, *supra* note 54, at 1192 (defining, in self-admitted thumbnail sketches of complicated philosophies, economic conservatives as those who emphasize individualism and private property, and are highly skeptical of "government regulation and redistribution of wealth").

69. See *id.* ("Libertarians take the economic conservative's aversion to government intervention in economic affairs and universalize it, advocating '[t]he maximum reduction of social and government action . . . so that the greatest possible room is left for each individual to act.'").

70. See *id.* at 1193 (defining traditionalists as those who look back to Burke's emphasis on community and virtue, and who "typically combine the situational conservative's critique of rationalism and respect for prescriptive wisdom with more substantive or ideational elements such as a belief in community and a religious moral order.").

71. See *id.* (defining social and religious conservatives of the 1980s New Right as those who "shared the traditionalists' concern for a religious moral order, although they tended to be uninterested in the particular intellectual traditions espoused by the traditionalists.").

argues that “[f]ew, if any, underlying themes unify these diverse groups; indeed their basic assumptions tend to be more contradictory than their surface policy prescriptions. Economic conservatives and libertarians are highly individualistic, while traditionalists, neo-conservatives and New Righters emphasize communities and families.”⁷⁴ Conservative critiques continue to disagree with one another along this social/ fiscal, conservative/ libertarian axis.⁷⁵

These differences are particularly salient in the context of family and social welfare policy. Social conservatives see the welfare state as responsible for breaking down the moral basis of society.⁷⁶ These conservatives hold the decline of the traditional family through welfarism, day-care, divorce, affirmative action, abortion, and gay rights, to name but a few of their favorite targets, responsible for the political, economic and moral decay of society.⁷⁷ Social conservatives

72. See *id.* at 1194 (describing neo-conservatives as “a loosely-affiliated group of intellectuals who became an important ideological force in the aftermath of the 1960s”). Young describes them as particularly difficult to define because they started out as liberals, accepting “in principle of the modern welfare state,” although they are critical of particular liberal policies. *Id.*

73. See *id.*

Hostility to communism has been a critical unifying force among the otherwise diverse strands of American conservatives, and for many conservatives it was long the essential characteristic of conservative ideology. The particular reason for opposing communism naturally varied according to one’s affinities with the various sorts of conservatism already listed—that is, an economic conservative might oppose the nationalization of industry, while a traditionalist would abhor the destruction of traditional religions.

Id.

74. *Id.* at 1194-95; see also KING, *supra* note 65, at 160-61 (analyzing some of the ways in which these contradictions have informed the public policy of the Reagan administration, pursuing liberal economic policies and conservative social policies). “Liberalism and conservatism . . . contradict one another on a number of important issues including the role allocated to the state; the role of the individual; the nature and scope of freedom; and the importance of religious and familial values in society.” *Id.* at 24. “Implementing these liberal minimal state objectives has required an activist government This paradox is especially apparent in the Reagan Administration’s support for conservative issues: school prayer and anti-abortion, for example, and opposition to affirmative action or the rights of minorities.” *Id.* at 161.

75. See, e.g., DUNN & WOODARD, *supra* note 55, at 173 (illustrating the divergences between economic and social conservatives in the different positions of William Buckley and William Bennett on the solution to American’s drug crisis). While Buckley favors a libertarians’ approach of legalization, Bennett advocates a social conservative approach of tougher sentences and more stringent enforcement. *Id.* at 173-74.

76. See, e.g., GEORGE GILDER, SEXUAL SUICIDE 138 (1973) (“Our welfare program . . . is tragic because, as currently designed, it promotes social disintegration”). See generally PAMELA ABBOTT & CLAIRE WALLACE, THE FAMILY AND THE NEW RIGHT 22-36 (1992); BLANKENHORN, FATHERLESS AMERICA, *supra* note 42; Wardle, *Relationships*, *supra* note 41.

77. See BLANKENHORN, FATHERLESS AMERICA, *supra* note 42, at 25-48; Wardle, *Relationships*, *supra* note 41, at 10-14.

believe that family breakdown and its resulting moral decay has been caused by the nature of the extensive state intervention in the private spheres of the family and the economy.⁷⁸ Accordingly, the answer for social conservatives is simple: strengthen the traditional family, and its traditional, hierarchical gender roles. An explicitly religious dimension sometimes informs this social conservative vision. According to this Religious or Christian Right, religious belief dictates the privatization of the family with a need to restore the sacred nature of marriage as a unity of man and woman in the eyes of the God.⁷⁹

Fiscal conservatism (sometimes referred to in the literature as neo-liberalism,⁸⁰ thus making visible its historical antecedents) and libertarianism identify the basic problem of modern society as the “erosion of liberty” that has accompanied the growth of the Keynesian welfare state.⁸¹ Individuals have lost their sense of economic initiative and enterprise by over-reliance on the state. The answer for both fiscal conservatives and libertarians is also simple—restore the economic and political liberty of the individual through the promotion of the free market and the radical reduction of the state. The family does not feature as prominently as it does within the social conservative vision. Its primary focus is on restoring the individual to his (and now her) place as autonomous, industrious market actors. But, against the backdrop of its concern with the impact of welfare dependency, fiscal conservatism and libertarianism “promises to restore the State’s distance from the family. In short, neo-liberalism suggests and needs the family to take some responsibility for itself.”⁸²

Fiscal conservatives and libertarians at times diverge, however, in how to best accomplish this goal. One way of restoring the family to the private sphere is through an increasing emphasis on private choice, placing the family beyond the realm of appropriate state regulation (corresponding to the privatization as private choice approach).⁸³ A second way is to transfer the public responsibility for the meeting the needs of individual family members back to the family (corresponding to the privatization as transfer of public goods

78. See generally ABBOTT & WALLACE, *supra* note 76; Rebecca Klatch, *Coalition and Conflict Among Women of the New Right*, 13 SIGNS 671 (1988).

79. See DIDI HERMAN, *THE ANTI-GAY AGENDA: ORTHODOX VISION AND THE CHRISTIAN RIGHT* (1997).

80. See generally McCluskey, *supra* note 1 (providing a discussion of neo-liberalism).

81. Klatch, *supra* note 78, at 676.

82. Vikki Bell, *Governing Childhood: Neo-liberalism and the Law*, 22 ECON. & SOC’Y 390, 395 (1993).

83. See generally Rasmusen & Stake, *supra* note 34.

and services to the private sector).⁸⁴ Both of these approaches are consistent with the tenets of classic liberalism – of reducing the role of government in meeting the needs of individuals.⁸⁵ The approaches diverge, however, over the relative importance of individual choice versus individual responsibility, with the former giving primacy to choice, while the latter is sometimes prepared to override it in the interests of reducing government spending and promoting responsibility.⁸⁶ It is important then to distinguish these two approaches, with the private choice approach more closely approximating a libertarian strand of liberalism, and the transfer of public goods and services approach corresponding to the fiscal conservative, deregulatory or neo-liberal strand of liberalism.

There is certainly some overlap between these three visions. For example, social conservatives, fiscal conservatives and libertarians share contempt for the welfare state agreeing that it is responsible for a range of social and economic problems. All three agree that the solutions to these problems lie in reducing and eliminating welfare dependency. Further, while fiscal conservatism is itself morally agnostic on the family, there is much in the social conservative strategy of rearticulating familial ideology that supports the fiscal conservative privatization project. The idea of the family as a natural and timeless institution, responsible for the welfare of its members, could provide ideological support for the renegotiation of the public/private spheres of responsibility. The highly gendered roles and responsibilities within the family could also help legitimate the transfer of social and economic responsibilities from the public to the private.

But, there are many ways in which the normative visions and strategies of the social conservatives, fiscal conservatives and libertarians diverge. Despite their mutual condemnation of welfarism, their diagnoses of the particular ills of the welfare state diverge, as do their prescriptions. Fiscal conservatives and libertarians emphasize the way in which the welfare state has undermined individual initiative and enterprise, while social conservatives emphasize moral decay and

84. See generally Fineman, *supra* note 21.

85. See FRIEDMAN, *supra* note 63; HAYEK, *supra* note 63; Nisbet, *supra* note 56.

86. This conflict does not arise as explicitly in the context of privatization as the transfer of public goods and services to the private realm of the market, where it is believed that individual private choice will then structure the distribution of goods and services. However, as with the transfer of public goods and services to the family, there remains significant albeit shifting forms of state regulation in the context of market privatization, through a range of both public and private law. See PRIVATIZATION, *supra* note 1, at 19-22.

the undermining of the traditional family.⁸⁷ Social conservatives are not adverse to a continuing role for the state in promoting the family,⁸⁸ whereas libertarians deplore state intervention in the “private” sphere.⁸⁹ Social conservatives strive to reinscribe a highly gendered world, in which women and men are naturally different, and therefore perform naturally different roles and responsibilities.⁹⁰ Fiscal conservatives and libertarians, by contrast, reject the relevance of gender, and seek to promote an abstracted individual, a disembodied market citizen. Both fiscal conservatives and libertarians can support a broader definition of family, with fiscal conservatives doing so on the basis of broadening the web of private responsibilities, while libertarians would do so on the basis of respecting private choice and individual autonomy. Social conservatives, by contrast, would categorically oppose any departure from the traditional family.⁹¹

These very different underlying political philosophies thus produce three very different privatization projects. Fiscal conservatism’s project is primarily an economic one of reducing the role of the state, and transferring public responsibilities to the private sphere (Privatization I). Libertarianism’s project is to reduce the role of the state by promoting private choice (Privatization II). Social conservatism’s project is one of reinscribing traditional familial ideology, and with it, a traditional, hierarchical family structure (Privatization III). These three versions of privatization align differently, depending on the particular public policy issue and the nature of the regulation. For example, expanding the scope and content of family law in conjunction with the retraction of public responsibility for financial need (Privatization I) is consistent with the emphasis on private decision-making (Privatization II) to the extent that both of these approaches would recognize the *voluntary* assumption of private responsibility beyond the traditional family. Both of these approaches to privatization would recognize the voluntary assumption of mutual responsibility within same sex

87. See generally BLANKENHORN, FATHERLESS AMERICA, *supra* note 42 (discussing how welfare undermines the family); MICHAEL TANNER, CATO INSTITUTE, THE END OF WELFARE: FIGHTING POVERTY IN THE CIVIL SOCIETY (1996) (discussing how welfare undermines individual enterprise).

88. See HERMAN, *supra* note 79.

89. See CHARLES A. MURRAY, LOSING GROUND: AMERICAN SOCIAL POLICY, 1950-1980 (1984) (arguing for the abolition of welfare); see also MICHAEL TANNER, CATO INSTITUTE, WELFARE REFORM: LESS THAN MEETS THE EYE 1, Policy Analysis No. 473 (Apr. 1, 2003).

90. See generally Klatch, *supra* note 78.

91. See generally BLANKENHORN, FATHERLESS AMERICA, *supra* note 42.

relationships. But, expanding the scope and content of family law beyond such voluntary arrangements would run counter to the latter's emphasis on private decision making in family law. According to privatization as private choice, private rights and responsibilities can only be imposed if individuals have expressly chosen to assume them. As a result, this vision of privatization would oppose the imposition of rights and responsibilities on unmarried cohabitants, in the absence of a contract in which the individual cohabitants expressly assumed them.

The relationship between privatization as transfer of once public goods (Privatization I) and privatization as the rearticulation of the traditional family (Privatization III) is similarly contradictory. The transfer of public goods and services to the family might be consistent with social conservative emphasis on renaturalizing the family, transferring responsibility for the financial welfare of family members from the state to the family. However, this social conservative vision would insist that private rights and responsibilities only fall on married, heterosexual couples, and not unmarried cohabitants or same sex couples. Thus, privatization as restoring the traditional family would oppose any effort by privatization as the transfer of once public goods to the family to expand the scope and content of family law to non-marital, non-heterosexual couples as a way of broadening private responsibility and reducing government responsibility. These three versions of privatization of the family, their convergences and contradictions, animate much of the public policy debate over the legal regulation of the family. Their confluences and conflicts help to explain the successes and failures, political stalemates and compromises, shifting alliances and strategies that characterize a range of public policy initiatives on the legal regulation of the family.

II. PRIVATIZING PROJECTS IN FAMILY/SOCIAL WELFARE LAW

In this section, this article examines the ways in which the tensions and conflicts between these three visions play out in concrete instantiations of public law and policy. These contradictions in the privatization project surface in the context of three areas: (1) legislative reforms to strengthen child support obligations and enforcement, and the recent shift in public policy to promoting 'responsible fatherhood;' (2) the federal restructuring of social welfare entitlements, particularly in relation to single mothers; and (3) same-sex couples and the politics of marriage. By examining each of these different issues, the goal is to highlight the very particular ways in which fiscal conservative, libertarian and social conservative

approaches to privatization diverge, and explore the how these divergent discourses materialize in law.

A. Privatizing Public Costs in Welfare Reform: Child Support and Social Welfare

In the last three decades, welfare dependency has occupied center stage as a shared demon of fiscal conservatives, libertarians and social conservatives alike. As part of more general attack on dependency, each tells a tale of the need to reverse the demise of personal responsibility.⁹² The story of welfare reform features two protagonists—the single welfare mom and the deadbeat dad—both cast as irresponsible citizens, culpable for spiraling welfare costs, chronic welfare dependency and a host of related social problems. While welfare reform has, each step of the way, developed policies directed at both welfare moms and deadbeat dads with the shared goal of reducing welfare dependency, it is useful to separate these two sets of policies. Child support laws have targeted deadbeat dads, while a host of eligibility and entitlement rules for welfare assistance target welfare moms.⁹³ This welfare reform has been an area where privatization as the transfer of once public responsibilities to the private sphere of the family has been most explicit. Both child support and welfare eligibility reform share a basic objective of

92. See KATZ, *supra* note 1, at 26 (“In the brave new market-governed world, dependence—reliance for support on someone else—signifies failure and the receipt of unearned benefits.”); Nancy Fraser & Linda Gordon, *A Genealogy of ‘Dependency’: Tracing a Keyword of the U.S. Welfare State*, 19 SIGNS 309, 324 (1994) (illustrating the extent to which dependency has been pathologized in social policy debates: “With all legal and political dependency now illegitimate, and with wives’ economic dependency now contested, there is no longer any self-evidently good adult dependency in postindustrial society. Rather, all dependency is suspect, and independence is enjoined upon everyone.”). Fraser and Gordon examine the way in which the pathologization of dependency has played out in the context of welfare reform, undermining the legitimacy of single mother’s claim to social support. *Id.*; see also Sanford Schram & Joe Soss, *Success Stories: Welfare Reform, Policy Discourse and the Politics of Research*, in LOST GROUND: WELFARE REFORM, POVERTY AND BEYOND 64 (Randy Albelda & Ann. Withorn eds., 2002) (discussing the centrality of the discourse and dependency on constructing a welfare crisis). “Gradually, permissiveness and dependency displaced poverty and structural barriers to advancement as the central problems drawing attention from those who designed welfare policy.” *Id.* According to Schram and Soss, dependency became a “synecdoche for diverse social ills,” for “underclass pathology,” and a “basis for a powerful crisis narrative in the 1980s and 1990s.” *Id.* at 64-65.

93. Yet, the two sets of policies intricately intertwine, in so far as child support enforcement has become part of the eligibility rules. Welfare reform has increasingly required that women participate in establishing paternity and child support enforcement in order to qualify for welfare assistance. See Personal Responsibility and Work Reconciliation Act of 1996, Pub. L. No. 104-193, § 333, 110 Stat. 2105 (codified as amended in scattered sections of 42 U.S.C.) (requiring applications for assistance to cooperate with paternity establishment). The distinction is, therefore, somewhat artificial.

privatizing the costs of raising families, by transferring responsibility from the state to the family.⁹⁴ But, as the following sections reveals, both sets of policies are also characterized by a range of internal tensions and contradictions, as different normative visions of the family and the privatization project contend for dominance in public policy debates.

1. *Toughening Child Support Laws*

Beginning in the 1970s, and continuing through the 1980s, an apparent consensus emerged on the issue of child support: parents should be responsible for supporting their children.⁹⁵ Liberals and conservatives alike agreed that it was time to get tough on those parents who attempted to evade their obligations.⁹⁶ While the differences between liberal and conservatives have been recognized,⁹⁷ rather less attention has been directed to the differences between and amongst conservatives. Yet, the conservative side of this apparent consensus has been characterized by two divergent normative visions of the family: a fiscal conservative vision that dominated the first rounds of reform and a social conservative vision that has begun to dominate more recent public policy debates. The private choice emphasis of a libertarian position has had rather less resonance within child support debates; the idea that individuals should be able to structure their intimate relationships as they see fit simply does not extend to child support obligations. Rather, there appears to be a widespread belief in public policy debates that “people who bring

94. See generally Brito, *supra* note 22; Morgan, *supra* note 22, at 708-09; Smith, *supra* note 22, at 210-211.

95. See Chambers, *supra* note 22, at 2588 (describing the bipartisan support for toughening child support obligations).

96. See *id.*

Nearly everyone on the right and left . . . accepts President Clinton's starting point: people who bring children into this world must not walk away from them. The duty that parents have to support their children rests, in our culture, on the widely shared belief in each person's responsibility for his voluntary actions and in deeply rooted notions of what it means to be a parent.

Id.

97. See KATZ, *supra* note 1, at 68-69 (quoting Edelman and describing how child support developed bipartisan support in the 1970s).

'Liberals (liked it) because stricter child support enforcement would make mothers financially better off; conservatives because financially better-off mothers would be less dependent on welfare; both sides, but especially conservatives because unlike every other social program, child support, on balance brought more money into government coffers than it spent and helped defray welfare costs as a result.' Both sides also agreed on principle that absent fathers should support their children.

Id.

children into this world must not walk away from them.”⁹⁸ Individuals are free to choose to have children, but cannot then choose whether or not to support them.⁹⁹

This section explores these differences between fiscal and social conservative approaches to child poverty, welfare dependency and the responsibilities of fathers. It illustrates the extent to which fiscal conservatism has been the dominant voice in debates around the Child Support Act of 1974,¹⁰⁰ the Family Support Act of 1988,¹⁰¹ and the Child Support Recovery Act of 1992.¹⁰² These reforms were very much about the privatization of public responsibility, transferring responsibility for the support of children from taxpayer to parent. However, by 1996 a social conservative discourse and its emphasis on promoting the traditional family was becoming more evident in the public policy debates and the Personal Responsibility and Work Opportunity Reconciliation Act of 1996¹⁰³ represents more of a hybrid of fiscal and social conservatism. More recently, in debates about welfare reauthorization, social conservatism has emerged as a dominant voice, promoting marriage and responsible fatherhood.

a. Child Support, Welfare Reform and Divergent Visions of Fatherhood

The federal government’s efforts to reform and enforce child support obligations have for decades been associated with welfare reform.¹⁰⁴ There is, of course, nothing new about the connection between welfare and support. Many commentators have observed a

98. Chambers, *supra* note 22, at 2588. Interestingly, the idea is itself cast in the language of private choice and the autonomous actions of individuals. Individuals can ‘choose’ to have children; individuals are ‘responsible’ for their ‘voluntary actions’.

99. An element of libertarianism is at times evident in the oppositional rhetoric of the father’s rights movement, which has often opposed efforts to toughen child support obligations. However, the lack of resonance about the choice to support one’s children has made the father’s rights movement more effective when it casts its rhetoric in more anti-feminist terms opposing the alleged biases in the child custody, support and access regimes in favor of mothers. Indeed, the father’s rights movement is most effective when it focuses on trying to limit the choices of mothers who are cast as unfairly denying custody and access to their children.

100. The Child Support Act, Pub.L.No. 93-647, 88 Stat. 2337 (1974) (codified as amended in 42 U.S.C. §§ 651-60 (1975)).

101. The Family Support Act of 1988, Pub. L.No. 100-485, 102 Stat. 2343 (1988).

102. The Child Support Recovery Act of 1992, 18 U.S.C. § 228 (1992).

103. See Personal Responsibility and Work Opportunity Reconciliation Act (overhauling the nation’s welfare system).

104. See Brito, *supra* note 22, at 254 (stating that the “history of child support law represent[s] a literal joining of family law and welfare law”).

similar trend going back to the Elizabethan poor laws.¹⁰⁵ Since the 1960s, Congress has expressed its concern with rising welfare dependency of women and children, and the extent to which their economic need was a result of fathers who did not support these families.¹⁰⁶ For conservatives, the apparent consensus that emerged in favor of getting tough on child support was born of a shared contempt for chronic welfare dependency.¹⁰⁷ The desire to reform welfare to reverse the demise of personal responsibility animated both fiscal and social conservatives. Both agreed that children should not be forced to rely on welfare for their support. To differing degrees, both have targeted the “deadbeat dad” as culpable for their children’s poverty and welfare dependency, and both seek to promote personal responsibility by enforcing the private support obligations of fathers.

But their normative agendas for these “deadbeat dads” diverge, as do the particular ways in which they connect welfare dependency, child support and fatherhood.

Fiscal conservative discourse aims to get tough on deadbeat dads by forcing them to take financial responsibility for their children following divorce or non-marital births. It targets these irresponsible parents as the source of the problem of child poverty and welfare

105. See Harris, *supra* note 22, at 630 (“The desire ‘to keep the bill down’ has continued to govern the dual system of family law ever since the Elizabethan Poor Law.”); see also Morgan, *supra* note 22, at 706-07 (tracing the history of private support for families to Elizabethan Poor Law). See generally LINDA GORDON, *PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE 1890-1935* (1994) (arguing that child support was a key factor in the growth of the American welfare state); WALTER TRATTNER, *FROM POOR LAW TO WELFARE STATE: A HISTORY OF SOCIAL WELFARE IN AMERICA* (2d ed. 1979) (discussing the connection between support and welfare in the history of American welfare).

106. See Brito, *supra* note 22, at 252-53 (noting that congressional concern focused on the welfare need resulting from “voluntary absence—rather than the death—of the non-custodial parent”); Harris, *supra* note 22, at 633 (reporting that in the late 1960s, Congress began to require state welfare agencies to enforce child support enforcement and to undertake paternity testing as conditions for receiving federal funding for welfare).

107. See Roger J. R. Levesque, *Looking to Unwed Dads to Fill the Public Purse: A Disturbing Wave in Welfare Reform*, 32 U. LOUISVILLE J.FAM. L. 1, 4 (1993/94) (suggesting that the aspects of welfare reform that encourage un-wed fathers to take responsibility for their children, such as providing information on how these obligations can be met and listing those who fail to pay, are generally agreed to be necessary steps in getting fathers involved with their children’s financial needs); Stephan Sugarman, *Financial Support of Children and the End of Welfare as We Know It*, 81 VA. L. REV. 2523, 2524-526 (1995) (arguing that the conservative view of child support is centered on the notion that moral obligations attach to the decision to have and raise a child); Catherine Wimberly, *Deadbeat Dads, Welfare Moms and Uncle Sam: How the Child Support Recovery Act Punishes Single-Mother Families*, 53 STAN. L. REV. 729, 736-38 (2000) (indicating that new provisions in the Child Support Recovery act are designed to impose harsher sanctions on those who fail to abide by their child support obligations, while also discouraging reliance on federal funds to meet these needs).

dependency, and emphasizes strengthening child support laws in order to get tough on the private responsibilities of these individual parents. Child poverty has been recast as an individual pathology, as a problem of fathers who refuse to take responsibility for their children. These 'deadbeat dads' are not only abdicating their moral obligations to provide for their children, but are also demonized as bad citizens for their flagrant abuse of the American taxpayer, who must subsidize the resulting welfare dependency. If individuals could be made to fulfill their responsibilities to their children, the problems would be eliminated. The focus, then, is on individualizing the problem and shifting the responsibility for this individual problem from the public to the private sphere.¹⁰⁸ Individual fathers must be made to assume their personal responsibility by financially supporting their children. And personal responsibility is cast in largely economic terms.

While social conservatives agree with the idea of promoting personal responsibility, they seek to do so by promoting the traditional family. Social conservatives aim to prevent dads from becoming dead-beat, by encouraging marriage and preventing divorce, thereby reducing the number of single parent families in need of child support.¹⁰⁹ Marriage should be encouraged to curb the increase in children born out of wedlock.¹¹⁰ Divorce, it is said, should be made more difficult, so that families—traditional families—can remain intact.¹¹¹ Fathers must become more involved in the lives of their children not after a divorce, but during the marriage.¹¹² And the nature of this involvement is as a traditional father, responsible not only for the child's financial welfare, but also for providing a

108. See Morgan, *supra* note 22, at 709-10 (discussing the process of shifting responsibility from public to private spheres by establishing firmer child support guidelines for those obligated to pay); see also Brito, *supra* note 22, at 253-56 (indicating that although state control of reproduction is beyond the realm of reason, the state should play a limited role in encouraging families to stay together and imposing financial liability).

109. See Sugarman, *supra* note 109, at 2527-30 (arguing that the prevention of the dissolution of marriage is a major theme in conservative constructions of child support policies).

110. See *id.* at 2528 (indicating that although the government should not have the right to dictate who may have children, it should provide incentives to ensure that having children in wedlock is more attractive than having children outside of wedlock).

111. See POPENOE, *supra* note 45, at 222-23 (arguing that divorce should be more difficult for marriages with minor children).

112. See generally THE FATHERHOOD MOVEMENT: A CALL TO ACTION (Wade Horn et al. eds., 1999); POPENOE, *supra* note 45 (suggesting that penalties and incentives for paternal involvement in a child's well-being would not be as effective if they only take effect once the family has dissolved); BLANKENHORN, FATHERLESS AMERICA, *supra* note 42 (advancing the argument that a sustained paternal relationship during marriage would encourage the father to assume a more supportive role in their child's life).

good, stable male role model for his children. Child poverty and welfare dependency, alongside crime and other high-risk behaviors, are seen as caused by single parent families and the solution is therefore to promote a traditional two parent, marital family.¹¹³ For social conservatives, then, personal responsibility is cast in explicitly moral terms—it is about rearticulating traditional gender roles as a way of reversing the moral decline of the family.

Since the 1990s, social conservatives have articulated an increasing compassion for the difficulties that low income fathers encounter, and sought to promote “responsible fatherhood” through a range of employment training programs that will allow fathers to assume their ‘proper’ position as breadwinner of the family.¹¹⁴ The new emphasis on responsible fatherhood is, in part, a reaction to the assault on fatherhood in child support public policy debates. For example, George Gilder writes, “[p]erhaps the most quixotic and perverse is the effort of the welfare state, after systematically destroying marriage, to replace it with so-called deadbeat dad crusades.”¹¹⁵ The crackdown is seen by some as too severe, and not sufficiently emphatic to the needs of low-income fathers. Ronald Mincy and Hillard Pouncy write that

113. See POPENOE, *supra* note 45 (discussing the link between welfare dependency and the moral deterioration associated with other high risk behavior); Blankenhorn, *supra* note 43 (arguing that the traditional family unit acts as an insulator against the increasing trend of welfare dependency); see also The Heritage Foundation Backgrounder, No. 1371, June 5, 2000 (discussing the negative effects of divorce on children, including poverty, crime, mental and physical health risks, and arguing that the federal government should therefore be promoting marriage and reducing divorce).

114. See George W. Bush, *A Blueprint for New Beginnings*, Feb. 28, 2001 (developing a Fatherhood Initiative, designed to “make committed, responsible fatherhood a national priority”), available at <http://www.whitehouse.gov/news/usbudget/blueprint/bud12.html> (last visited July 9, 2005). President Bush pledged his support for the promotion of Responsible Fatherhood. *Id.* The Blueprint states that “[w]hile fathers must fulfill their financial commitments, they must also fulfill their emotional commitments. Dads play indispensable roles that cannot be measured in dollars and cents: nurturer, mentor, disciplinarian, moral instructor, and skills coach, among other roles.” *Id.* Indicating a shift in approach to fathers, the Blueprint states “[g]overnment’s traditional answer to the absence of fathers from the lives of their children has been to focus on child support enforcement.” *Id.* While this enforcement continues to be important, “research shows that a large portion of fathers who do not pay child support are themselves poor. Many have limited education and are unemployed or underemployed.” *Id.*; see also Wade F. Horn, *Did You Say “Movement”?*, in *THE FATHERHOOD MOVEMENT* 7-9 (Horn et al. eds., 1999) (explaining the core idea of the fatherhood movement is based on three assumptions: “(1) responsible and committed fatherhood ought to be the norm of masculinity; (2) fathers are different from mothers in important ways; and (3) the father-child bond is important to the healthy development of children”).

115. George Gilder, *Sex, Families, Race, Poverty, Welfare: A Symposium ‘Revisiting the’ Moynihan Report of its Thirtieth Anniversary*, *THE AMERICAN ENTERPRISE MAGAZINE*, Jan/Feb. 1995, available at http://www.taemag.com/issues/articleID.16708/article_detail.asp (last visited June 4, 2005).

"[i]t is not enough, experience has proven, simply to crack down on 'deadbeat dads'. Disadvantaged fathers also need help to pay their judgments. And at its frontier, child support policy actually can help strengthen fragile families."¹¹⁶ They argue that "the only real solution of the child support problem is rebuilding the family. Only then do a mother and her children get secure support . . . and only then does a father get the emotional support that he needs to work steadily."¹¹⁷ Social conservatives want fathers to be responsible—to pay for their children—but they see the solution to child poverty and welfare dependency to lie in the rearticulation of the traditional family with the father at its helm.

The federal public policy initiatives to toughen child support laws in the 1980s and early 1990s, while often cast in the language of personal responsibility, were intricately tied to welfare rhetoric and informed by a fiscal conservative rhetoric of reducing government spending and the burden on the American taxpayer. Social conservative discourse, to the extent that it appeared in the public policy debates, sought to encourage traditional family values and discourage out-of-wedlock births. But, this general rhetoric did not translate into concrete public policy initiatives in the child support arena. Rather, the Child Support Enforcement Amendments Act of 1984,¹¹⁸ the Family Support Act of 1988,¹¹⁹ and the Child Support

116. See Ronald Mincy & Hillard Pouncy, *Paternalism, Child Support Enforcement, and Fragile Families*, in THE NEW PATERNALISM: SUPERVISORY APPROACHES TO POVERTY 130 (Lawrence Mead ed., 1997) (explaining a position that this assertion is consistent with the new paternalism of Lawrence Mead, and with a socially conservative agenda that supports the family). However, Mincy's work on fragile families, black fathers and social policy is more complex and nuanced, defying any simple categorization as conservative or liberal. *Id.* For example, while supportive of responsible fatherhood, Mincy is highly critical of the Bush administration's promotion of marriage, on the ground that it may actually undermine efforts to bring unmarried black fathers back into relationships with their children. *Id.*; see also Ronald Mincy, *What About Black Fathers?*, THE AMERICAN PROSPECT ONLINE, Apr. 7, 2002 (illustrating that responsible fatherhood projects may be supported by liberals and conservatives alike), available at <http://www.prospect.org/web/page.ww?section=root&name=ViewPrint&articleId=6235> (last visited June 4, 2005). The differences in family formation that occur in different cultures and races could have a negative impact on the effectiveness of the Bush administration's child care policies. *Id.* While social conservatives have relied on some of Mincy's work, it is by no means consistent with the ideology of social conservatism. It highlights again the extent to which the labels deployed in this paper describe positions better than people, and may at times, not even do justice to positions.

117. See Mincy & Pouncy, *supra* note 116, at 157 (advocating a child support regime that focuses on fragile families—that is, that treats the non-resident parent and the resident parent as a single unit of intervention, and focuses on the "inner problems of the fragile family"). "Family life among the seriously poor has deteriorated so badly that mending it must become a priority as great as finding economic support for poor families." *Id.* at 152.

118. Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, 98 Stat. 1305 (1984).

Recovery Act of 1992¹²⁰ were overwhelmingly cast in the fiscal conservative discourse of reducing welfare dependency and government spending by ensuring that parents not taxpayers assumed the financial responsibility of providing for their children.

Some commentators have suggested that a strong social conservative normative vision informed these child support initiatives.¹²¹ In my view, however, this argument obscures and flattens important normative differences and shifting alliances between competing visions of the family. While it is true that social conservatives seek to promote this vision of the family, it is not at all clear that it was an animating vision of the early child support initiatives between 1974 and 1992. However, this vision has become evident in more recent shifts in emphasis in child support initiatives. Beginning with debates around the Fathers Count Act, which was never passed by Congress, and as now incorporated in the bills before Congress reauthorizing TANF, the social conservative vision of promoting traditional families has emerged in concrete public policy terms.¹²²

b. Federal Child Support Initiatives

The initial federal efforts to strengthen child support enforcement were overwhelmingly animated by the goal of reducing federal spending of welfare.¹²³ In 1974, the federal government enacted the Child Support Act, creating Title IV-D of the Social Security Act, creating a federal Office of Child Support Enforcement and requiring states receiving AFDC funds to establish child support offices to assist

119. Family Support Act of 1988, Pub. L. No. 100-485, 102 Stat. 2343 (1988).

120. Child Support Recovery Act of 1992, 18 U.S.C. § 228 (1992).

121. See Wimberly, *supra* note 107, at 757-58 (arguing that the Child Support Recovery Act was passed with the intent to “reaffirm the favored status of the nuclear family by attaching punitive consequences to divorce” and the failure of some couples to marry at all); see also Harris, *supra* note 22, at 651-52 (discussing the purported ‘social benefits’ of fatherhood, which include a decrease in welfare dependency and crime).

122. See Fathers Count Act of 1999, H.R. 3073, 106th Cong. (1999) (indicating that the proposed legislation was designed to promote better relationship skills among fathers, curb aggressive behavior, teaching good parenting skills, building relationships between fathers and their children, and helping them avoid welfare dependency); Temporary Aid to Needy Families, 42 U.S.C. §§ 601-619 (1997) (incorporating aspects of the Fathers Count Act into law by encouraging counseling and parental responsibility over welfare dependency).

123. See Harry Krause, *Child Support Reassessed: Limits of Private Responsibility and the Public Interest*, 24 FAM. L.Q. 1, 6 (1990) (stating that Congress’s primary goal in strengthening the enforcement of child support obligations was to reduce the federal funds allocated for the AFDC program).

parents in establishing and enforcing child support obligations.¹²⁴ IV-D programs included locating absent parents, establishing paternity and obtaining and enforcing child support orders. Custodial AFDC parents were required to assign their right to collect child support payments to the state, and child support collected on behalf of AFDC families was used to reimburse governments for welfare benefits paid to the family.¹²⁵ The primary goal of the Child Support Act was to reduce the federal government's spending on AFDC: "the more child support collected, the less the cost of AFDC to the federal government."¹²⁶ This objective, and the beginnings of rhetorical attack on deadbeat dads, was made abundantly clear in the words of Senator Long, a leading sponsor of the legislation:

Should our welfare system be made to support the children whose father cavalierly abandons them—or chooses not to marry the mother in the first place? Is it fair to ask the American taxpayer—who works hard to support his own family and to carry his own burden—to carry the burden of the deserting father as well? Perhaps we cannot stop the father from abandoning his children, but we can certainly improve the system by obtaining child support from him and thereby place the burden of caring for his children on his own shoulders where it belongs. We can—and we must—take the financial reward out of desertion.¹²⁷

It was, in other words, all about the privatization of welfare costs. As Laura Morgan has observed, "[c]learly, Congress was seeking to shift the burden of support from the public to the private sphere, and would so through massive enforcement mechanisms."¹²⁸

While the original program was limited to AFDC families, in 1984 Congress expanded the program to include all families eligible for child support with the Child Support Enforcement Amendment.¹²⁹

124. See The Child Support Act, 42 U.S.C. §§ 651-660, § 651 (1975) (allocating funds on the basis of enforcing support obligations, locating non-custodial parents, establishing paternity, obtaining support, and assuring that assistance in obtaining support will be available).

125. See 42 U.S.C. § 657 (stating that the first fifty dollars of child support payments is directed to the families, but all additional child support collected is channeled directly to government).

126. See Morgan, *supra* note 22, at 708 (analyzing the historical shift from the 1970's that began to put the burden on private support rather than public assistance); see also Krause, *supra* note 123, at 6 (examining the growing emphasis on private support).

127. Harris, *supra* note 22, at 634 (quoting 118 Cong. Rec. 8291 (1972) (statement of Sen. Long)).

128. Morgan, *supra* note 22, at 708.

129. See Child Support Enforcement Amendments, Pub. L. No. 98-378 ("striking out 'and obtaining child and spousal support,' and inserting in lieu, thereof, 'obtaining child and spousal support, and assuring that assistance in obtaining

Congress also broadened the scope of the law to include automatic wage withholding for overdue child support payments, impositions of liens against property of defaulting parents, and the interception of federal and state tax refunds. The amendments further required states to develop advisory guidelines that could be used by courts in setting child support awards.

In 1988, Congress once again expanded the scope of its child support programs. The Family Support Act of 1988¹³⁰ required that all states implement mandatory presumptive child support guidelines by 1994. The legislation also created the U.S. Commission on Interstate Child Support to consider how the child support system could be further improved. The Act provided for more immediate wage withholding, as well as a new focus on establishing paternity.

The child support provisions were explicitly tied to the reduction of welfare dependency, and in turn of government spending. Representative Roukema, in the House debates on the Conference Report, stated that the child support provisions

[A]re fundamental to lifting family after family from the welfare rolls. Those states which have already enacted wage withholding have seen dramatic increases in collection. Take Virginia for example, in 1986 only 107 mothers on welfare got enough support payments to get off welfare. The first [eight] months of 1988, after wage withholding was enacted, about 3,100 have received enough support to get off welfare.¹³¹

Representative Gunderson specifically linked the child support provisions to fiscal savings, by stating, “[t]his legislation significantly improves the Child Support Enforcement Program under welfare so that within [four] years, child support collections should produce an increase of about [two-hundred] million [dollars] per year in Federal revenues and even more—about [fifty] percent more—in State revenues.”¹³² The Senate debates similarly cast the objective of the child support provisions as the reduction of welfare dependency through the promotion of parental responsibility. Senator Cochran, for example, stated:

This bill emphasizes parental support as the first line of defense against public dependency. Vigorous child support enforcement does more than simply extract financial support from absent parents. It makes a statement about what our society believes the

support will be available under this part to all children (whether or not eligible for aid under Part A) . . . for whom such assistance is requested”).

130. Family Support Act of 1988, Pub. L. No. 100-485, 102 Stat. 2343 (1988).

131. 134 Cong. Rec. H9098 (1988) (statement of Rep. Roukema).

132. *Id.* (statement of Rep. Gunderson).

role of parents to be. Parents should provide for their children, and public policy should obligate parents to provide that support . . . These and other provisions are part of a new strategy for strengthening family cohesion and responsibility and for breaking the cycle of welfare dependency.¹³³

Senator Bradley similarly stated:

[T]he Federal Government clearly has a major role in helping families escape poverty, but Federal help must supplement the primary responsibilities of families to help themselves. Parents have a responsibility to care for their children. Sadly, too often, noncustodial parents do not fulfill their responsibility. We, as a nation, have a moral obligation to provide assistance to poor families and their children—but only after parents shoulder their own responsibilities.¹³⁴

Parental responsibility is understood in these debates in fiscal terms—individual parents must be made to provide financial support for their children. The idea animating the child support provisions of the Family Support Act was that the cost of supporting children should be privatized to the fullest extent possible. Individual parents—not the state—should have the primary responsibility for supporting children. And doing so would produce significant fiscal savings for the state.

In 1992, Congress passed the Child Support Recovery Act¹³⁵ intended to address problems associated with interstate child support enforcement by imposing criminal sanctions on non-custodial parents who willfully fail to pay child support obligations owed to a child living in another state.¹³⁶ Criminalizing the evasion of child support represented a continuation of federal efforts to shift the cost of raising children from the federal government to parents.¹³⁷ Throughout the

133. 134 Cong. Rec. S13639 (1988) (statement of Sen. Cochran).

134. 134 Cong. Rec. 26597 (1988) (statement of Sen. Bradley); *see also* 134 Cong. Rec. 26578 (statement of Sen. Moynihan) (“We start out with the proposition that we cannot abandon children in this country with impunity. You have a responsibility to them and if you do not exercise it on your own, society will see to it that you do.”).

135. 18 U.S.C. § 228 (1992).

136. *See id.* (providing that the penalty for a first offense is a fine and/or imprisonment for not more than six months). Subsequent offenses carry a penalty of a fine and/or imprisonment for not more than two years. *Id.* The Act allows a court to make an order for restitution in an amount equal to the past due support obligations. *Id.* In addition, the Act gave federal courts the authority to make compliance with child support obligations a condition of probation in any federal criminal matter, and authorized ten million dollars in each of fiscal years 1994, 1995 and 1996 for grants for states and local entities for development/enforcement of criminal interstate child support legislation.

137. *See Morgan, supra* note 22, at 709-12 (explaining that PRWORA radically changed the nature of welfare, in part, because the federal government would not “provide a guaranteed safety net of cash subsistence benefits”).

Congressional debates, the objective of privatizing the costs of welfare was readily apparent. Deadbeat dads were vilified not only for failing to support their children, but also, for their abuse of the American taxpayer. Representative Schumer, Chairman of the Subcommittee on Crime and Criminal Justice, and a leading sponsor of the bill, described the failure to pay child support as “a double robbery”:

First more than a million children are robbed of a cumulative [eighteen] billion [dollars] in needed financial support Second the American taxpayer—people with good families, together families, nothing to do with child support themselves, are directly affected, because the taxpayer is robbed of billions of dollars when the children’s mothers can’t make ends meet and are forced to rely on welfare.¹³⁸

In the House of Representative debates, Schumer similarly stated:

Every year more than [five] billion [dollars] in child support goes unpaid, forcing many families onto public assistance, especially AFDC and Medicaid. And it is unfair to ask the American taxpayers, Mr. Speaker, these people, the taxpayers who work so hard to support their own families, insure their own bills, to carry the burden of a deadbeat parent as well. We must help the States to collect the support these children desperately need by taking the incentive out of moving interstate to avoid payment.¹³⁹

Senate debates similarly emphasized the need to shift the burden of supporting children from taxpayers to fathers. Senator Shelby, a leading sponsor of the Bill in the Senate, stated that child support was a federal issue because “the non-payment of child support costs the Federal Government, the taxpayer.”¹⁴⁰ Further, Senator Shelby stated, “Considering the role of poverty among families due child support, the issue is not simply one of child poverty, it is also an issue of concern to the American taxpayer.”¹⁴¹ According to Senator Shelby, government spending on child support enforcement would be offset by government savings:

[A]ny expenses incurred in enforcement and incarceration may be recouped through savings in social expenditures like AFDC

138. *Opening Statement to the Subcommittee on Crime and Criminal Justice, Committee on the Judiciary: Hearings on HR 1241 Before the House Comm. on the Judiciary*, 102d Cong. (January 15, 1992) (statement of Rep. Schumer).

139. 138 Cong. Rec. H7324 (1992) (statement of Rep. Schumer); 138 Cong. Rec. 31121 (1992) (statement of Rep. Sensenbrenner) (indicating that the passage of the Act will mean that “the deadbeat dads will end up paying the support rather than the taxpayers.”); *see also* 138 Cong. Rec. 21402 (statement of Rep. Fazio) (asserting that “[p]arents must be responsible for the financial welfare of their children”).

140. *Statement Before the Senate Comm. on the Judiciary*, 102d Cong. (July 29, 1992) (Statement of Sen. Shelby).

141. *Id.*

benefits, food stamps, and other forms of public assistance. The \$2,500 average support level added to the average income of families owed by not receiving support could offset numerous social expenses incurred by the State and Federal Government.¹⁴²

While the language of personal responsibility ran through the debates, the particular understanding of personal responsibility animating the debates was largely fiscal conservative in nature, emphasizing the privatization of financial support for children.

In 1996, Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA).¹⁴³ While the legislation is best known for its radical restructuring of welfare, eliminating AFDC entitlements and replacing it with a block grant program known as Temporary Aid to Needy Families,¹⁴⁴ it also introduced significant reforms to child support enforcement. In order to qualify for a block grant, a state must operate a Title IV-D child support enforcement program. Title III sets the new child support enforcement measures that states must implement to maintain eligibility. These include an expansion of paternity establishment, enhanced access to information and mass data collection, and increased enforcement remedies.

The paternity provisions attempt to bring a larger number of potential parents within the scope of private child support obligations, while enhanced access to information, data systems and remedies provide public mechanisms to enforce these private obligations. The debates on the child support provisions continued the theme of cracking down on “deadbeat dads,” enforcing personal responsibility and saving money. Senator DeWine stated, for example, that the bill would strengthen the ability of states

[T]o go after the delinquent and deadbeat parents. It is absolutely essential that we strengthen the ethic of personal responsibility in this way. We need to make it absolutely clear—America demands that parents be responsible for their children. Deadbeat parents cannot be allowed to walk away from their responsibilities.¹⁴⁵

This crackdown of deadbeat parents was at times in the debate expressly tied to the fiscal conservative objective of reducing the

142. *Id.*

143. See 42 U.S.C. § 1305 (1996) (demonstrating congressional intent to create the Work Opportunity Reconciliation Act under the broader Social Security Act).

144. See Block Grants to States for Temporary Aid to Needy Families, 42 U.S.C. §§ 601-19 (1997) (indicating that the substitution a block grant program for the old AFDC entitlements was intended to increase the States’ flexibility in servicing the needs of qualifying families).

145. 142 Cong. Rec. S9352 (1996) (statement of Sen. DeWine).

burden on the taxpayer.¹⁴⁶ Representative Roukema, in the House Debates on the Conference Report, noting that many mothers go on welfare because they are not receiving support payments to which they are legally entitled, stated, “[w]ith the current system spending such a large portion of funding on these mothers, children are the first victims, and the taxpayers who have to support these families are the last victims.”¹⁴⁷

The major objective of the child support provisions, as reflected in the debates, was to get single mothers and their children off welfare by enforcing outstanding child support obligations. Both critics and proponents alike have thus observed that the major animus for the reforms to child support was to reduce welfare costs.¹⁴⁸ As Laura Morgan describes, “it was the intent of Congress, by enacting PRWORA to eliminate, so far as it could, the public support of the family.”¹⁴⁹ In the context of the paternity provisions in particular, Tonya Brito has similarly observed,

The motivating factor here is simply the state’s fiscal concerns. Whereas in the past it was a private matter, now the state is much more involved in ensuring that paternity of nonmarital children is established. States want to establish paternity to identify a child support obligator so that they can collect support payments to offset the costs of welfare.¹⁵⁰

While this fiscal conservative objective of privatizing the costs of raising families was undoubtedly a dominant animating factor in the paternity provisions, and the child support provisions more generally, a social conservative rhetoric was also evident in the PRWORA debates and legislation. The stated purposes of the Act included reducing illegitimacy and promoting marriage and a traditional two-parent family; a classic social conservative vision of family. Similarly, the findings portion of the Act focused considerable attention on high rates of illegitimacy and its association with welfare dependency. The congressional debates frequently focused on the objective of reducing illegitimacy. Senator Lieberman, for example, stated, “[t]he

146. See Laura Curran & Laura Abrams, *Making Men into Dads: Fatherhood, the State and Welfare Reform*, 14 GENDER AND SOC’Y 622, 667 (2000) (analyzing the paternity provisions in PRWORA and explaining the adverse affects of the law on low-income fathers).

147. 142 Cong. Rec. H9392 (1996) (statement of Rep. Roukema).

148. See Morgan, *supra* note 22, at 712 (stating that it was Congress’ intent to eliminate public support for families through the enactment of PRWORA); see also Brito, *supra* note 22, at 259 (asserting that the motivating factor behind these welfare reforms is the state’s fiscal concerns).

149. Morgan, *supra* note 22, at 712.

150. Brito, *supra* note 22, at 259.

conference bill also holds the hope of protecting children and reducing welfare spending by attacking the problem of unmarried teen parenthood. Welfare will no longer encourage the proliferation of single and uneducated parents by automatically and unconditionally underwriting the mothers who bear children out of wedlock.”¹⁵¹

While this concern with high rates of illegitimacy can be seen to inform the provisions on establishing paternity, it is not clear that the social conservatives’ objectives were very effectively translated into concrete public policy. The paternity provisions do not expressly promote marriage. Rather, they are intended to make women “appropriately” dependent on the biological fathers of their children, whether married or not, rather than the state.¹⁵² Like child support following marital breakdown, the paternity provisions are a second best solution for social conservatives, who as David Blankenhorn explained above, are at times divided over recognizing the reality of contemporary family formations and promoting a particular vision of the family. The paternity provisions recognize the reality of the high rates of illegitimacy and attempt to privatize the costs of this illegitimacy. While forcing women to rely on the biological father is better than relying on the state, it falls considerably short of actually promoting marital families, thereby creating a tension for a social conservative vision of the family.¹⁵³ This tension characterizes the hybrid nature of the PRWORA, which seeks to promote both a fiscal conservative privatization of the once public costs of supporting families and a social conservative vision of the traditional family by reducing the number of births outside of marriage and promoting marriage. Both agreed on the objective of promoting personal responsibility, but their respective visions of that personal responsibility were markedly divergent. For fiscal conservatives, personal responsibility was cast in primarily financial terms, while for social conservatives, it was also cast in moral terms. Yet, these very different visions of fatherhood and family were submerged by the

151. 142 Cong.Rec. S9387-01 (1996) (statement of Sen. Lieberman).

152. See Ronald B. Mincy & Hillard Pouncy, *There Must Be 50 Ways to Start a Family*, in THE FATHERHOOD MOVEMENT 97-98 (Horn et al. eds., 1999) (explaining that one provision of PRWORA requires states to reduce a mother’s benefits if she does not identify the father of her child as a means of establishing paternity and thereby potentially collecting child support).

153. See 142 Cong. Rec. H9392 (1996) (statement of Rep. Meyers) (criticizing PRWORA for failing to go far enough to reverse the rate of illegitimacy and promote the two parent traditional family). “The link between our ever-increasing illegitimacy rates and the growth in AFDC rolls are not casual. They are cause and effect. Why is it too much to ask that children have two responsible adults or parents? Sadly we continue to encourage the opposite.” *Id.*

shared discourse of personal responsibility.

A stronger social conservative approach to child support, fatherhood and family became evident in the debates surrounding the introduction of the Fathers Count Act in 1999.¹⁵⁴ The Fathers Count Act, passed by the House, but not the Senate, would have provided one-hundred and fifty-five million dollars in grants for programs that promote marriage and 'responsible fatherhood'. The objective of the Act was, like the previous child support initiatives, to reduce welfare dependency by privatizing the costs of supporting families. However, the Act took a very different approach to realizing this objective. Retreating from the demonizing rhetoric of deadbeat dads, the Act sought to encourage fathers to become responsible for their children. Funding would be available for programs to teach parenting skills as well as enhance employability through job training to allow fathers to fulfill their child support obligations.

The Fathers Count Act represents a significant normative shift in the approach to child support, fatherhood and family. The approach is one that seeks to assist fathers meet their responsibilities rather than simply penalize them for failing to do so. Through the 1990s, the responsible fatherhood movement successfully promoted its vision of fatherhood, family and welfare dependency, resulting in an easing of the demonization of fathers in federal public policy debates.¹⁵⁵ The new approach emphasized the importance of fathers in their children's lives, and the problem of welfare dependency was recast as a social epidemic of illegitimacy and single-parent families. Women and children on welfare did not just need money or jobs; they needed fathers. The responsible fatherhood movement sought to restore fathers to their rightful place at the helm of the family, and thereby remedy the broad range of social problems that resulted from

154. H.R. 3073, 106th Cong. (1999).

155. See Mincy & Pouncy, *supra* note 152, at 96-101 (arguing that the success of the responsible fatherhood movement was attributable, in part, to its strong roots in the social conservative movement). This social conservative position has been buttressed by the many studies and commentaries that have pointed out the limits of federal child support enforcement as a solution to child poverty and welfare dependency. The fiscal conservative approach of penalizing fathers has been extensively criticized as failing to recognize the limits of these fathers. Many are themselves poor, and do not have the financial resources to pay child support. The limited amount that they can pay does not go very far in reimbursing the public purse, particularly when the costs of the child support enforcement regime is taken into account. Social conservatives have been able to align with these critics, as well as fathers' rights advocates who seek to minimize what they perceive to be the excessive demands being made on fathers. The resulting vision of fatherhood is one that is more sympathetic to the plight of unemployed and low-income fathers who do not have the skills, financial or otherwise, to fulfill their responsibilities—sympathy that in turn extends to the challenges facing all fathers.

fatherless families. The discourse is one of promoting responsibility and it is a decidedly gendered responsibility. Fathers are responsible for financial support, and federal funding is to be made available to assist fathers assume their rightful place as the breadwinners of the family. In conjunction with the provisions promoting marriage, the Fathers Count Act represented an attempt to rearticulate the traditional family, with the father at its helm.¹⁵⁶ Moreover, while there remains a fiscal conservative concern with privatizing the costs of supporting families, the Act would have involved significant government spending and an expansion of government programs. The Fathers Count Act represented a social conservative approach to family that does not recoil from fairly extensive regulation in order to promote a particular substantive vision of family.

While the Fathers Count Act was not passed into law, much of its substance has been incorporated into the Personal Responsibility, Work and Family Promotion Act of 2003.¹⁵⁷ The bill would authorize federal spending on state and local programs designed to promote responsible fatherhood. The purposes of the program, as outlined in the congressional findings, include promoting responsible parenting,¹⁵⁸ enhancing the financial ability of fathers to provide for their children,¹⁵⁹ improving fathers abilities to manage family business affairs¹⁶⁰ and encouraging healthy marriages and married

156. See Wimberly, *supra* note 107, at 747-48 (stating that services under this Act promoted marriage “as an end in itself and the best way to keep women and children off welfare”).

157. See Personal Responsibility, Work, and Family Promotion Act of 2003, H.R. 4, 108th Cong. (1st Sess. 2003) (re-authorizing of the TANF bill, which was passed by the House on February 13, 2003 by a vote of 230 to 192, and is currently before the Senate).

158. See H.R. 4 § 441 (stating that one of the purposes of the bill is “[p]romoting responsible, caring and effective parenting through counseling, mentoring and parenting education, dissemination of educational materials and information on parenting skills, encouragement of positive father involvement, including the positive involvement on non-residential fathers”).

159. See *id.* The purpose of the bill is to:

[E]nhanc[e] the abilities and commitment of unemployed or low-income fathers to provide material support for their families and to avoid or leave welfare programs by assisting them to take full advantage of education, job training, and job search programs, to improve work habits and work skills, to secure career advancement by activities such as outreach and information dissemination, coordination, as appropriate with employment services and job training programs . . . encouragement and support of timely payment of current child support and regular payment toward past due child support obligations in appropriate cases.

Id.

160. See *id.* (stating that a third purpose for the bill is to “[i]mprov[e] fathers’ ability to effectively manage family business affairs by means such as education, counseling, and mentoring in matters including household management, budgeting,

fatherhood.¹⁶¹ The responsible fatherhood provisions of the TANF reauthorization bill represent a fiscal and social conservative hybrid, promoting both the ability of low-income fathers to pay child support and promoting a two parent family thereby avoiding the need for child support in the first place, both of which are seen to reduce welfare costs to the state. But, unlike previous federal child support initiatives, the emphasis is clearly on the latter. Most of the provisions, and the programs they would authorize, emphasize helping fathers become responsible parents, which within the framework of the bill means married, employed and financially supporting their family.

The shift in the discourse around child support initiatives should thus be apparent. While the early reforms focused almost exclusively on reducing welfare dependency by getting tough on deadbeat fathers, the more recent debates have increasingly taken on the promotion of traditional families by preventing the situations that give rise to the need for child support—children born outside of marriage and divorce. The fiscal conservative emphasis on reducing costs by paying support, while still allowing individuals the choice to exit relationships, has given way to an approach that seeks to reduce costs by promoting the traditional two-parent family. The federal child support initiatives illustrate the extent to which fiscal and social conservatives agree on the overarching problem of welfare dependency and the need to promote personal responsibility, but diverge in their strategies and solutions. Fiscal conservatives seek simply to privatize the costs. Social conservatives, by contrast, seek to privatize the costs but only within the confines of the traditional family. The two-parent, marital family with a breadwinner father is cast as the appropriate solution to welfare dependency. Similarly, while fiscal conservatives have few qualms about getting tough on fathers—or anyone else defaulting on a private support obligation—social conservatives, by contrast, have a very different vision of fatherhood. They seek to empower fathers to assume their rightful

banking, and handling of financial transactions, time management and home maintenance.”).

161. *See id.* A fourth purpose for the bill is to:

[E]ncourag[e] and support[] healthy marriages and married fatherhood through such activities as premarital education, including the use of premarital inventories, marriage preparation programs, skills-based marriage education programs, marital therapy, couples counseling, divorce education and reduction programs, divorce mediation and counseling, relationship skills advancement programs, including those designed to reduce child abuse and domestic violence, and dissemination of information about benefits of marriage for both parents and children.

Id.

position as the head of the family—a position that includes financial support, but not exclusively so. Rather, fatherhood also includes other dimensions of parenting—fatherly involvement in the lives of their children, fatherly leadership of the family as a whole. For social conservatives, financial support is but one of the many social benefits of two-parent, marital families.

The policies may not appear to be entirely inconsistent. Fiscal conservatism is not opposed to a two-parent, opposite-sex family; it is simply agnostic. It seeks to reduce welfare dependency by increasing the responsibility of fathers to support their children—either inside or outside of marriage. The social conservative vision of responsible fatherhood could be embraced by fiscal conservatism as one amongst a number of viable strategies for achieving the objective of reduced government spending. Indeed, the responsible fatherhood programs are not replacing the child-support enforcement programs that have been put in place at the state and federal levels, but are envisioned as a supplement to these programs.

There are, however, some levels on which the visions of fiscal and social conservatives are contradictory. The fiscal conservative vision of the family is a highly individualized and degendered one. It largely rejects the significance of gender, and seeks to promote an abstract individual, a disembodied market citizen, who should be made to be responsible for their individual children. While a claim is being made on the family, it is a claim that is not invested in either gender or marital status. Social conservatives, by contrast, are committed to reinscribing a highly gendered world, in which women and men are constituted as naturally different and therefore naturally assigned to different roles and responsibilities.¹⁶² Social conservatives are making a claim on—and seeking to reinscribe—a very particular, very traditional conception of the family. The visions of family are thus quite different, and arguably, inconsistent: individual versus collective, hierarchical versus formally equal, gendered versus non-gendered. While the child support strategies may have been pursued in a conservative alliance, with different emphasizes at different moments, the alliance is, at best, a precarious one, given their fundamentally different visions of family.

2. Welfare Eligibility and Entitlements

The efforts to reform welfare eligibility and entitlements have focused on the other irresponsible citizen in fiscal, libertarian and

162. See generally Klatch, *supra* note 78.

social conservative stories of welfare: the single mother. This welfare mother is cast as responsible for both a chronic drain on public resources and the American taxpayer, and a national epidemic of illegitimacy and all of its associated social evils. Fiscal conservatives, libertarians and social conservatives have sought to demonize the 'welfare mother' to justify their assault on the welfare system. But, as this section will explore, their prescriptions for the welfare mother are somewhat different. Social conservatives want to eliminate the phenomenon of illegitimacy and single motherhood, by reducing the number of children born outside of marriage, and by making welfare mothers 'properly' dependent on the father of their children. Mothers are expected to find a father, marry him and make him responsible for the financial wellbeing of his family. By contrast, both fiscal and libertarian conservatives want to put the welfare mother to work, redefining "single mother" as a potentially employable worker. However, they have slightly different strategies for doing so. The fiscal conservative will consider restoring the market through a range of public and private regulation. The libertarian, by contrast, places greater emphasis on the market and its mode of private regulation by simply abolishing welfare. Social, fiscal and libertarian conservatives each seek an end to the welfare mothers' reliance on the state, but their vision of her fate is radically different. This section will explore these subtle differences between fiscal conservative, libertarian and social conservative approaches to welfare mothers. It argues that while fiscal conservatism dominated welfare reform in the 1970s and 1980s, social conservatism made considerable inroads in welfare reform in the 1990s, and has become increasingly influential in the current debates over TANF reauthorization currently before Congress. Libertarian conservatism, although present in the public policy debates, seems to have had rather less concrete impact in the development of public policy.

The story of welfare reform is further complicated by the underlying racialization of the public policy debates. As many have argued, welfare reform in America has long been a racialized subject.¹⁶³ Many have sought to demonstrate the extent to which

163. See, e.g., Theda Skocpol, *African Americans in U.S. Social Policy*, in *CLASSIFYING BY RACE* (Paul E. Pierson ed., 1995) (exploring the extent to which race has played a crucial role in welfare reform in the Progressive Era, the New Deal, and the War on Poverty). See generally MICHAEL BROWN, *RACE, MONEY AND THE AMERICAN WELFARE STATE* (1999); KENNETH J. NEUBECK & NOEL CAZENAVE, *WELFARE RACISM: PLAYING THE RACE CARD AGAINST AMERICA'S POOR* (2001); ROBERT LIEBERMAN, *SHIFTING THE COLOUR LINE: RACE AND THE AMERICAN WELFARE STATE* (1998); FRANCIS FOX PIVEN & RICHARD A. CLOWARD, *REGULATING THE POOR: THE FUNCTIONS OF PUBLIC WELFARE* (1993); JILL QUADAGNO, *THE COLOR OF WELFARE: HOW RACISM UNDERMINED THE WAR ON POVERTY* (1994).

welfare reform since the 1960s, the period under analysis in this paper, has been informed and animated by racialized assumptions, images and inequalities.¹⁶⁴ Yet, as Soss has observed, this period of welfare reform has been “marked by a racial discourse that is truncated and skewed.”¹⁶⁵ The Author further explained that “we inhabit a discursive moment defined by a mixture of corrosive racial sentiments, fears of being labeled ‘racist’, and uncertainties about whether it is wise to speak of race at all. Too often, race now operates by stealth, embedded in ostensibly neutral language.”¹⁶⁶ Race all but disappears in contemporary public policy debates over welfare reform. The discourse of fiscal conservatives, libertarians and social conservatives is, to a large extent facially neutral; it does not speak of race in general nor of African Americans in particular. As such, a discursive analysis of these public policy debates runs the risk of collaborating in the erasure of race, and further obscuring the extent to which contemporary welfare reform is very much about race in America. The difficulty lies in attempting to decipher the underlying differences between and among conservative discourses on the question of race and the racialized subject of welfare reform, when the discourses themselves no longer explicitly speak in the language of race.

a. The Welfare Crisis and its Solutions

Since the 1970s, fiscal, libertarian and social conservatives have waged a war on chronic ‘welfare dependency’, casting it as a chronic problem in need of a radically new solution.¹⁶⁷ In the 1960s, the size

164. See Michael K. Brown, *Ghettos, Fiscal Federalism, and Welfare Reform*, in RACE AND THE POLITICS OF WELFARE REFORM 58-61 (Sanford F. Schram et al. eds., 2003) (explaining that, historically, racial policies surrounding public assistance have shaped modern welfare reform). See generally BROWN, *supra* note 163; MARTIN GILENS, WHY AMERICANS HATE WELFARE: RACE, MEDIA AND THE POLITICS OF ANTIPOVERTY POLICY (1999); LIEBERMAN, *supra* note 163; QUADAGNO, *supra* note 163.

165. *Introduction* to RACE AND THE POLITICS OF WELFARE REFORM 12 (Sanford F. Schram et al. eds., 2003).

166. See *id.* (noting that “[m]any conversations take on a ‘we know what we’re talking about feel, trading on race-coded euphemisms regarding ‘urban’ and ‘inner-city’ problems, ‘cultural backgrounds,’ the need for ‘personal responsibility,’ the troubles of the ‘underclass’”); see also Lisa Crooms, *Don’t Believe the Hype: Black Women, Patriarchy, and the New Welfarism*, 38 HOW. L.J. 611, 613 (1995) (quoting Lucie E. White, *No Exit: Rethinking “Welfare Dependency” from a Different Ground*, 81 GEO. L.J. 1961, 1966 (1993)) (“The racial sub-text of the rhetoric simply makes use of the explicit rhetoric unnecessary. If ‘welfare is a fourth generation code word for [black],’ then there is no need to differentiate between welfare recipients and blacks.”).

167. See *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969) (striking down AFDC residency requirements), *overruled in part by* *Edelman v. Jordan*, 415 U.S. 651 (1974); see also *King v. Smith*, 392 U.S. 309, 333-34 (1968) (striking down a state

and cost of AFDC soared. The program grew from 3.5 recipients in 1961 to 11 million in 1971.¹⁶⁸ Moreover, the composition of welfare recipients changed significantly, as previously excluded single mothers, particularly, African American and never-married women, became entitled to AFDC.¹⁶⁹ Congress attempted to tighten eligibility and reduce benefits, but the costs and numbers continued to rise.¹⁷⁰ “Welfare was now in ‘crisis.’”¹⁷¹

A consensus emerged between fiscal conservatives, libertarians and social conservatives that it was time to break the cycle of welfare dependency, and get welfare mothers off welfare. All three shared a concern about moral hazard, that is, the idea that the availability of AFDC to poor single mothers reduced their incentives to avoid the costs of single motherhood and thereby created more dependents.¹⁷² Indeed, it was the attack on welfare as undermining personal responsibility that helped to unite these divergent conservative factions.¹⁷³ But, a closer look at the discourses of family and privatization reveal that fiscal, libertarian and social conservatives often diverge in their prescriptions for the ills of welfare dependency.

Charles Murray, in his highly influential book *Losing Ground*,

substitute father provision that denied AFDC benefits to families on the grounds that the mother had a sexual relationship with a man).

168. See GWENDOLYN MINK, *WELFARE’S END* 51-52 (1998) (explaining that the continued growth of the welfare base will eventually make the program too costly to support).

169. See Joel F. Handler, *Transformation of the Aid to Families with Dependent Children: The Family Support Act in Historical Context*, 16 N.Y.U. REV. L. & SOC. CHANGE 457, 488 (1987/88) [hereinafter Handler, *Transformation*] (explaining the racial discrimination in obtaining AFDC benefits prior to the 1960s, and stating that in many parts of the country AFDC rolls would close down when crops had to be harvested, thus forcing entire families, including children, into the fields); see also Tonya Brito, *From Madonna to Proletariat: Constructing a New Ideology of Motherhood in Welfare Discourse*, 44 VILL. L. REV. 415, 424 (1999) (stating that “court decisions, civil rights lawyers, and welfare rights activists” in the 1960s led to the end of arbitrary eligibility restrictions).

170. See Joel F. Handler, “*Ending Welfare as We Know it: The Win/Win Split or the Stench of Victory*,” 5 J. GENDER RACE & JUST. 131, 136 (2001) [hereinafter Handler, *Ending Welfare*] (arguing that congressional efforts to reform welfare have addressed the underlying social issues contributing to its continued growth).

171. *Id.*

172. See McCluskey, *supra* note 1, at 807-808 (defining “moral hazard” in economic terms and stating that those who are “insured” have no incentive to reduce costs). In the welfare context, providing economic support to people in need encourages fewer individuals to take action to avoid poverty. *Id.*

173. See Lucy Williams, *The Right’s Attack on Aid to Families with Dependent Children*, 10 PUBLIC EYE 1, *7-8, 12-14 (1996) (tracing the emergence of this coalition, noting its underlying ideological tensions and conflicts and stating that “[t]he majority of New Right groups coalesced around this ideological formulation that welfare causes the breakup of the American family, and decreases individual initiative and personal responsibility”).

argued that the welfare state actually created an underclass of chronic welfare dependency. The availability of welfare created perverse short term economic incentives. Young women no longer have to bear the real economic costs of bearing children out of wedlock. Rather, they might actually be financially better off having the children and going on welfare than not having children and remaining in low paying employment. Murray's analysis was economic in nature, and his proscription libertarian. The problem of welfare dependency could only be solved by abolishing welfare altogether.

Fiscal conservatives shared the libertarian concern with reversing escalating costs of social welfare, and reconstituting welfare dependants into self sufficient individuals. The solution is an economic one of reversing moral hazard through marketized incentives. However, fiscal conservatives stopped short of proscribing the complete elimination of welfare. For fiscal conservatives, welfare recipients must be transformed into workers, and in particular, single mothers dependent on welfare must be transformed into employable individuals, self reliant within the paid labor force.¹⁷⁴ The strategy is an individualizing and degendering one—emphasis is placed on individual self-reliance. Single mothers are thus being redefined as employable individuals, and their dependency on welfare is no longer a 'natural' feature of their status as mothers, but rather, a pathological dependency that needs to be fixed.¹⁷⁵ Their familial roles are being rendered all but invisible, as single mothers are being reconstituted as abstract, disembodied market citizens. Welfare dependency more generally is recast as a temporary problem that can be fixed through a restructured welfare system that provides appropriate work incentives, training and employment opportunities.¹⁷⁶ Thus, unlike libertarian

174. See DAVID T. ELLWOOD, *POOR SUPPORT: POVERTY IN THE AMERICAN FAMILY* 128-155 (1988) (explaining that the expectation that single mothers on welfare can work part-time jobs is problematic). Ellwood states that "mixing work and welfare is not the answer" because of expenses such as child care. *Id.* at 155; see also IRWIN GARFINKEL & SARAH McLANAHAN, *SINGLE MOTHERS AND THEIR CHILDREN: A NEW AMERICAN DILEMMA* 174-175 (1986) (stating that although work requirements will reduce the amount of government support provided, some of the reduction will come not from the success of the program, but from single mothers who do not want the "hassles that accompany fulfilling the work requirement").

175. See Fraser & Gordon, *supra* note 92 (discussing the transformation of the meaning of dependency from legitimate social condition to pathological personality disorder).

176. See *id.*; Patricia M. Evans, *Gender, Income Security, and the Welfare State*, in *WOMEN AND THE CANADIAN WELFARE STATE* (Patricia M. Evans and Gerda Wekerle eds., 1997); Patricia Evans, *Single Mothers and Ontario's Welfare Policy: Restructuring the Debate*, in *WOMEN AND PUBLIC POLICY* (Janine Brodie ed., 1995); Martha Minow, *The Welfare of Single Mothers and their Children*, 26 *CONN. L. REV.* 817 (1994); Fineman, *supra* note 20.

solutions, a fiscal conservative approach to welfare reform does not eschew continued government regulation.

Social conservatives have a different emphasis and analysis of the problems of welfare dependency. For social conservatives, single mothers on welfare are responsible for spiraling rates of illegitimacy, which is in turn cast as America's single most devastating social problem. The central goal of welfare reform is accordingly the reduction of illegitimacy by preventing non-marital (particularly teenage) births and promoting marriage. Rather than transforming single mothers into employable individuals, social conservatives seek to prevent single motherhood in the first place.¹⁷⁷ Women should be encouraged not to have children outside of marriage. If the emphasis on abstinence fails, then women should be encouraged to marry the fathers of their children. Any and all incentives to the contrary must be removed. Social conservative discourse, in accordance with its emphasis on rearticulating the traditional family and traditional gender norms therein, thus seeks to strengthen marriage and the two-parent family. The solution to moral hazard thus lies not in economic incentives, but in moral regulation.¹⁷⁸ In marked contrast to fiscal conservatives, the social conservative strategy is a familializing and gendering one. Whereas fiscal conservatives see the market as the ultimate solution for single women's poverty and chronic welfare dependency, social conservatives see the solution in marriage and the traditional family.

Once again, social conservative approach to welfare reform does not shy away from government intervention in the intimate lives of its

177. See STUART BUTLER & ANNA KUNDRATAS, *OUT OF THE POVERTY TRAP: A CONSERVATIVE STRATEGY* 146 (1987) (arguing that although promoting work and responsibility is important, "work requirements within the welfare system do not improve work incentives or opportunities for absent fathers; their effect is to transform mothers into primary earners Thus, long-term welfare reform has to focus on strengthening the two-parent family"); see also BLANKENHORN, *FATHERLESS AMERICA*, *supra* note 42 (explaining the differences between those conservatives who seek to address the consequences of the breakdown of the family and those who seek to reverse the trend by restoring the traditional family). Social conservatives do not oppose the workfare approach. Rather, they agree with the underlying emphasis on personal responsibility, and have supported welfare reforms that have encouraged and/or mandated work. BUTLER & KUNDRATAS, *supra* at 177. However, work appears to be a secondary to their emphasis on the traditional family as the solution to welfare dependency and poverty. *Id.* For social conservatives, transforming single women into workers is an inadequate solution, in so far as it addresses the problem after the fact. *Id.* Although it would reduce state expenditures on welfare, it would fail to reverse the problem of illegitimacy and all its attendant social costs. *Id.*

178. See McCluskey, *supra* note 1, at 823-25 (describing the moral regulation rationale as 'communitarian', which includes both progressive and conservative critics, and the social conservative approach as corresponding to McCluskey's conservative communitarians).

citizens. For example, Mead's 'new paternalism' in social welfare policy argues that the poor require not only financial assistance, but also direction and close supervision.¹⁷⁹ Individuals cannot be assumed to maximize their own self-interest or that of society; they must be made to do so through government intervention. Rather than a change in the scale of government, this paternalism represents a change in "the character of government," whereby benefits are linked to behavior.¹⁸⁰

There are many ways in which these conservative politics appear to coalesce. Fiscal conservatives, libertarians and social conservatives sought to change the behavior of welfare recipients, and specifically, of poor single women. Each sought to reverse the problem of moral hazard created by AFDC. These women needed to be encouraged to avoid the behavior that resulted in their welfare dependency, namely, single motherhood. Each relied on the same underlying, racialized image of this single mother—the poor unmarried black woman—yet rarely spoke her name explicitly.¹⁸¹ Each sought to promote personal responsibility.¹⁸² But, their understanding of personal responsibility diverged. For fiscal and libertarian conservatives, personal responsibility was primarily economic in nature—these women should work.¹⁸³ For social conservatives, personal responsibility is primarily

179. See Mead, *supra* note 48, at 2.

180. *Id.* (emphasizing on a paternalist approach to promote work over the traditional family values that are supported by social conservatives). Workfare is an important part of Mead's vision for reforming welfare. *Id.* This is yet another example of individual positions not mapping perfectly onto the three conservative positions, and of the "labels fitting arguments better than people." *Id.*

181. See Crooms, *supra* note 166, at 622.

The image of the welfare queen was that of a poor black mother who first became pregnant as a teenager. Her sexual irresponsibility resulted in her dropping out of high school and joining AFDC rolls. Rather than marry the child's father and make the best of the situation, she chose to remain single, to collect AFDC and to have more children by different fathers.

Id. This powerful image remains largely unspoken in welfare debates. *Id.*

182. Similarly, fiscal conservatism is not so much *opposed* to shifting dependency from the state to the family as it is agnostic. The ultimate fiscal conservative goal is to reduce welfare dependency. Although it pursues this goal with its normative vision of the market as the primary mechanism for allocating wealth, it can accommodate other strategies provided that these strategies help reduce welfare dependency. In the context of child support, fiscal conservatism supported the individualization and familiarization of support obligations in order to reduce welfare dependency. At this level, however, fiscal and social conservative approaches to welfare reform may be viewed as mutually reinforcing. However, at a deeper level, these distinct privatizing strategies have contradictory implications.

183. While fiscal conservatives sought to achieve this reconstitution of single mothers through government regulation and spending (for example, job training), libertarians sought to accomplish this goal simply by eliminating welfare, and allowing the market to restructure women's choices.

moral—these women should avoid pre-marital sex or marry the fathers of their children. These differences in turn reflect a much deeper ideological divide. Both fiscal conservative and libertarian approaches to reforming welfare are eroding the significance of gender and family, while social conservative approaches are intensifying gender and family.

These distinctive approaches to welfare reform are evident in federal welfare reform. On one hand, the federal government has sought to redefine single mothers as employable through increasingly strict workfare requirements. On the other hand, the federal government has increasingly also sought to reduce the rates of single motherhood by reducing out-of-wedlock births and promoting marriage. Both policies share the objective of reducing welfare dependency. But, beyond this shared objective, the political imaginary and concrete strategies of these policies diverge.

b. Federal Initiatives

A dominant theme in welfare reform since the advent of the ‘welfare crisis’ in the 1970s has been to eliminate welfare dependency by reintegrating welfare recipients into the labor market.¹⁸⁴ This emphasis on work represented a shift in official welfare policy. From its inception in 1935 until the late 1960s, AFDC expected eligible single mothers with young children to stay home to provide child care.¹⁸⁵ Women who engaged in paid employment had their

184. See Handler, *supra* note 169, at 467-70 (arguing that there is nothing new in welfare policy’s emphasis on work since welfare and work have been intricately connected since the formative period of welfare policy in the 1900s).

185. See *id.* at 476 (noting that historians of social welfare have illustrated the extent to which the idea that single mothers should be able to stay at home to care for their children was never realized by the vast majority of poor women). “While the rhetoric of reform was the preservation of traditional patriarchy with the *wife* and mother at home caring for the family full time, the reality for the vast majority of poor women and mothers was work.” *Id.*; see also Joel Handler, *Constructing the Political Spectacle: The Interpretation of Entitlements, Legalization and Obligations in Social Welfare History*, 56 BROOK. L. REV. 899, 919 (1990) (explaining that under both the Aid to Dependent Children program enacted in 1911, and its successor, the Aid to Families with Dependent Children enacted in 1935, highly restrictive conditions disqualified many single mothers, and work remained their only option). These maternalistic programs were primarily designed to benefit a subset of single mothers, namely, widows—who were single due to no fault of their own. *Id.* “Through the use of “suitable home” and “employable mother” policies, states were able to exclude the unworthy, maintain labor markets, and reduce costs. Even under the Social Security Act, ADC remained small and primarily for white widows.” *Id.* See generally MIMI ABRAMOVITZ, *REGULATING THE LIVES OF WOMEN: SOCIAL WELFARE POLICY FROM COLONIAL TIMES TO THE PRESENT* (1988); LINDA GORDON, *PITIED, BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE* (1994); ALICE KESSLER HARRIS, *OUT TO WORK: A HISTORY OF WAGE-EARNING WOMEN IN THE UNITED STATES* (1982); Gwendolyn Mink, *The Lady and the Tramp: Gender, Race and the Origins of the American Welfare State*, in *WOMEN, THE STATE AND WELFARE* (London Gordon

earnings deducted from their assistance. In the 1960s, attitudes about women's roles began to change, with the dramatic increase in women's labor market participation. Some public policy reformers began to argue that mothers on welfare should similarly be expected to work. Work requirements were first established with the 1967 Work Incentive Program ("WIN").¹⁸⁶ In 1971, the program was replaced by WIN II, which introduced somewhat harsher work requirements and strengthened sanctions for non-compliance.¹⁸⁷ While WIN had initially been mandatory for men, but voluntary for women, WIN II required that women with children over the age of six years participate in job training or employment programs in order to qualify for AFDC.¹⁸⁸ The amendments also shifted the focus from education and training to placement in entry level programs.¹⁸⁹ Neither WIN nor WIN II was particularly successful in reducing welfare dependency.¹⁹⁰ In 1981, the Reagan administration introduced the Omnibus Budget Reconciliation Act of 1981. The amendments allowed the states to require welfare recipients to participate in Community Work Experience ("CWEP"), effectively a workfare program that would require recipients to work for public agencies in order to qualify for assistance.¹⁹¹ The amendments also allowed a number of states to experiment with work-relief programs.

These work requirements reflected an emerging fiscal conservative vision of welfare reform that came to inform federal initiatives. The objective of each of these programs was to transform AFDC into a temporary assistance program that focused on rehabilitation through job training and employment. Welfare mothers whose dependency was once seen as a natural product of their roles as childcare providers were being reconstituted as employable individuals.¹⁹² Despite the influence of Charles Murray in popularizing the attack on welfare, the policy reforms owed more to fiscal than libertarian conservatism. This fiscal conservative impulse culminated in the Family Support Act of 1988, the first major welfare reform legislation

ed., 1990) (illustrating that social welfare programs were often highly racialized).

186. Social Security Amendments of 1967, Pub. L. 90-248, Title II, 81 (Stat. 821).

187. Pub. L. No. 92-223, 1971 U.S.C.A.N. 2435-39.

188. See Handler, *Ending Welfare*, *supra* note 170, at 188.

189. Handler, *Transformation*, *supra* note 169, at 490.

190. *Id.* at 491.

191. See generally Matthew Diller, *Working without a Job: The Social Messages of the New Workfare*, 9 STAN. L. & POL'Y REV. 19 (1998).

192. See I. GARFINKEL & S. McLANAHAN, SINGLE MOTHERS AND THE CHILDREN 181 (1986) (arguing that the AFDC should be transformed into a work-relief program for single mothers that emphasized the values of work and independence).

in decades.¹⁹³ The primary objective of the Family Support Act was to integrate welfare recipients into the workforce, by mandating that single mothers work or train for work as a condition of eligibility. The central plank of this strategy was the Job Opportunities and Basic Skills ("JOBS"), a program that required welfare recipients to work, while also offering opportunities for education, job training, skills development and childcare.¹⁹⁴ Recipients with children under the age of three were exempt from participation in JOBS.¹⁹⁵ In order to maintain funding, the states had to enroll fifteen percent of their AFDC caseload in a JOBS program by 1995.

Throughout the Congressional debate, the emphasis was on breaking welfare dependency through work. Senator Armstrong, a sponsor of the bill, highlighted the extent to which the Family Support Act embraced two different approaches to the question of work: "For many, education and training is the only way out of poverty. For still many others, welfare ought to be conditioned on an obligation to work. This bill is historic because these two philosophies of welfare reform are brought together."¹⁹⁶ The Family Support Act included provisions to promote work through both training and education and workfare.¹⁹⁷ While the emphasis is quite different—government spending on training programs versus work as a condition of eligibility—these different visions were united through a shared objective of transforming welfare dependents into workers.¹⁹⁸ Many, including Senator Armstrong, emphasized the normative value of work:

[T]o me, the single most important reform in this bill is the work requirement. It is, for the first time ever, conditioning the receipt of welfare assistance with a requirement to work [I]nstalling this principle in our welfare system is a historic step. Here is why I believe that is so. First, I think it is simple justice. Most people fully

193. Pub. L. No. 100-485, 102 Stat. 2343.

194. See Williams, *supra* note 173, at *3 (arguing that many conservative think tanks such as the Heritage Foundation and the Free Congress Foundation did not support the job training programs of the Family Support Act, but rather were advocating for mandatory workfare and stronger behavior modification programs); see also Katz, *supra* note 1 (observing that some fiscal conservatives disliked job training because they distorted labor markets and inflated wages); *id.* at 65-66 (discussing cuts to job training programs through the 1980s). See generally Diller, *supra* note 191 (discussing general JOBS recipient requirements).

195. See 42 U.S.C. § 602(a)(19)(C)(iii). The states, however, had the option of limiting the exemption to parents of children under the age of one.

196. 134 CONG. REC. S13639 (statement of Sen. Armstrong).

197. See The Family Support Act of 1988, Pub. L. No. 100-485, 102 Stat. 2343; see also Diller, *supra* note 191, at 20-23.

198. See The Family Support Act of 1988.

share the view that those on welfare who are able to do so should work in return for the subsistence and support society is providing them. That is simple fairness, equity, and common sense. Second, work is good in and of itself. By working, we gain dignity, a sense of purpose and self-respect. We develop skills, become responsible, and are able to advance in life to better serve our fellow man.¹⁹⁹

The emphasis on work at times was linked explicitly with the fiscal conservative objective of reducing government spending. Senator Kerry, for example, speaking of the experience of welfare reform in Massachusetts, stated: "In short, by offering people a hand up and a way out. [sic] We can certainly expect to translate that experience to commensurate savings for the U.S. Treasury and in all of our States."²⁰⁰ The link to the fiscal conservative objective of reducing government spending was sometimes made in more subtle ways. Representative Slattery stated: "The American taxpayer should be proud of this welfare reform legislation. It makes use of Federal funds by providing welfare recipients with the incentive to work and the education, training and support services needed to help them regain their place in society as productive, taxpaying citizens."²⁰¹ Rather than claiming that the welfare reform would result in immediate fiscal savings, the discourse advocated spending money to produce fiscally responsible, tax-paying citizens, a goal which presumably, in the long run, will reduce government spending.

In 1996, Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA").²⁰² The legislation, famously described by President Clinton as "ending welfare as we know it" ended the federal entitlement to AFDC and replaced it with

199. See 134 CONG. REC. S13639 (statement of Sen. Armstrong); see also *id.* (statement of Sen. Packwood) ("The bill requires that certain of those recipients work. That is a good four-letter word, Mr. President—work. We will try to educate them so that they can work in today's society at a job at which they, hopefully, can work for the remainder of their life.").

200. See 134 CONG. REC. S13639 (daily ed. Sept. 29, 1988) (statement of Sen. Kerry). But see 134 CONG. REC. H9098 (daily ed. Sept. 30, 1988) (statement of Rep. Archer) (asserting that the bill did not deliver sufficient savings to the taxpayer).

We should be able to say to taxpayers of this country that we have been able to encourage and to remove welfare recipients from the roles so that it results in a program which has fewer welfare recipients We should be able to say to the working people of this country that the costs of this program will result after [five] years in reduced taxes to pay for welfare. This bill fails on both accounts . . . the CBO projections . . . are that the cost of the bill will approach [one] billion [dollars] a year in extra spending at the conclusion of a [five]-year transition implementation period.

Id.

201. 134 CONG. REC. 27180 (daily ed. Sept. 30, 1988) (statement of Rep. Slattery).

202. See Personal Responsibility and Work Opportunity Reconciliation Act (implementing an overhaul of the nation's cash welfare system).

block grants to the states known as Temporary Assistance to Needy Families ("TANF").²⁰³ TANF established a five-year lifetime limit on welfare assistance and significantly toughened work requirements.²⁰⁴ Parents receiving assistance must have engaged in work after receiving benefits for no more than 24 months.²⁰⁵ The legislation gave states broad discretion in deciding how to spend the block grant, provided that the expenditures promoted any of the four purposes of the law.²⁰⁶ States became free to establish their own eligibility rules for assistance.²⁰⁷ While federal law prohibits states from using TANF funds to assist certain categories of people, a family no longer has an entitlement to federal assistance, and, therefore, a state has no requirement assist any family.²⁰⁸ A state must spend a certain percentage of state money for benefits and services for "needy families" with children.²⁰⁹ States also must meet a set of work and participation rate requirements to avoid fiscal penalties.²¹⁰ Most states developed time-limited assistance programs with an emphasis on work-related requirements.²¹¹ Congress eliminated many educational opportunities under the FSA, as TANF came to emphasize work over training.²¹²

203. *Id.* at § 103.

204. *See id.* at § 103; *see also* Diller, *supra* note 191, at 23-25.

205. *See* Personal Responsibility and Work Opportunity Reconciliation Act § 103.

206. *See id.*

207. *See id.*; *see also* Diller, *supra* note 191, at 24-25.

208. *See* MARK GREENBERG, CTR. FOR LAW & SOC. POLICY, BEYOND WELFARE: NEW OPPORTUNITIES TO USE TANF TO HELP LOW INCOME WORKING FAMILIES, 1-2 (July 1999).

209. *See* MARK GREENBERG ET AL., CTR. FOR LAW & SOC. POLICY, WELFARE REAUTHORIZATION: AN EARLY GUIDE TO THE ISSUES 6 (July 2000) [hereinafter GREENBERG, WELFARE REAUTHORIZATION] (noting a state's maintenance of effort ("MOE") is eighty percent of the amount that the state spent in 1994 for a set of federal programs, or seventy-five percent if the state meets TANF participation rates), *available at* http://www.clasp.org/publications/welfare_reauthorization_early_guide.pdf (last visited July 20, 2005); *see also* MARK GREENBERG, CTR. FOR LAW & SOC. POLICY, THE TANF MAINTENANCE OF EFFORT REQUIREMENT 2 (2002) (describing possible ways for a state to support families in need by using MOE money as part of a cash assistance program or for programs of providing assistance for child care, education, job training, or paying administrative costs), *available at* www.clasp.org/TANF/moerev.htm (last revised Apr. 5, 2002).

210. *See* Personal Responsibility and Work Opportunity Reconciliation Act § 103; *see also* Diller, *supra* note 191, at 24-25.

211. *See* GREENBERG, WELFARE REAUTHORIZATION, *supra* note 209, at 6; *see also* Jared Bernstein & Mark Greenberg, *Reforming Welfare Reform*, THE AM. PROSPECT, Vol. 12, Jan. 1-15, 2001, at 10-16, (noting that most states elected a five year limit while other opted for shorter limits), *available at* <http://www.clasp.org/publications/bernstein-j.html> (last visited July 17, 2005).

212. *See* KATZ, *supra* note 1, at 326 (explaining that while unwed teen parents are required to attend school to receive benefits, for adult recipients, education does not fulfill work activity requirements, as the goal is quick entry into the labor force); *see also* Diller, *supra* note 12, at 1755 (noting that welfare no longer has the purpose of

Throughout the Congressional debates, legislators saw PRWORA as a way to correct welfare dependency by making people work.²¹³ The discourse of the debates highlighted breaking dependency by promoting work and personal responsibility.²¹⁴ Many emphasized the way in which welfare has undermined self sufficiency. Senator Shelby, for example, stated:

The welfare system today encourages dependency, facilitates the breakdown of the family, demoralizes the human spirit, and undermines the work ethic that built our nation People have become dependent on welfare because it completely destroys the need to work and the natural incentive to become self-sufficient.²¹⁵

PRWORA was then seen as reintroducing work incentives. As Senator DeWine stated, “[t]his bill reestablishes the connection between work and income, the time-honored idea that people should work to get income.”²¹⁶ Senator Burns similarly stated:

And it pleases me to no end that the tough and real work requirements contained in this bill will get folks off the welfare rolls and into a productive job, job training program or community service. There is no doubt there will be exceptions, but the goal of welfare reform is independence, not government reliance.²¹⁷

The emphasis on work and individual self sufficiency was at times expressly tied to the fiscal conservative objective of reducing government spending. Senator Helms stated:

The welfare reform bill proposes to set welfare policy on the right course. It requires welfare recipients to work; It promotes family and the work ethic; and [i]t exercises sound fiscal responsibility [T]his legislation is fair to taxpayers because it saves [fifty-five] billion [dollars] of taxpayers’ money Taxpayers are sick and tired of working hard, paying taxes and watching folks on welfare get a free ride.²¹⁸

The work-first emphasis of PRWORA further reinforced the individualizing and degendering strategy of fiscal conservatism. Congress removed government incentives that undermined individual self-sufficiency, reconstituted single mothers as employable citizens

providing ongoing support for families but, rather, attempts to accomplish specific outcomes related to work and self-sufficiency); ABRAMOVITZ, *supra* note 185, at 338 (noting the 1967 amendments made a dramatic shift by requiring women on welfare to work rather than stay at home to care for children).

213. 142 CONG. REC. S9352 (daily ed. Aug. 1, 1996).

214. *See id.*

215. *Id.* (statement of Sen. Shelby).

216. *Id.* (statement of Sen. DeWine).

217. 142 CONG. REC. S9387 (daily ed. Aug. 1, 1996) (statement of Sen. Burns).

218. *Id.* (statement of Sen. Helms).

like any other, and cast the job market as the solution to welfare dependency.²¹⁹ However, much of the political rhetoric around PRWORA—the stated objectives, the Congressional findings, and the Congressional debates—simultaneously reflected a social conservative shift.²²⁰ Three of the four main objectives of TANF involve the promotion of traditional families:

- (1) provide assistance to needy families so that children may be cared for in their own homes or in the homes of relatives; (2) end the dependence of needy parents on government benefits by promoting job preparation, work and marriage; (3) prevent and reduce the incidence of out-of-wedlock pregnancies and establish annual numerical goals for preventing and reducing the incidence of pregnancies; and (4) encourage the formation of two-parent families.²²¹

The Congressional findings similarly emphasized the importance of the traditional family and focused on the increase in illegitimacy and the resulting social harms. The Act states, “(1) Marriage is the foundation of a successful society; (2) Marriage is an essential institution of a successful society which promotes the interests of children; [and] (3) Promotion of responsible fatherhood and motherhood is integral to successful child rearing and the well-being of children.”²²²

PRWORA included a number of provisions designed to promote this social conservative vision of the traditional family. In terms of reducing illegitimacy, the Act included an illegitimacy bonus of twenty million dollars to states that show the greatest decline in out of wedlock births without an increase in abortion rates.²²³ It allocated fifty million dollars a year for five years in block grants to states for

219. See KATZ, *supra* note 1, at 324-25 (discussing the extent to which PRWORA reflected a market model by focusing on work and eliminating the moral hazard created by welfare entitlement).

220. See MARY PARKE, CTR. FOR LAW & SOC. POLICY, MARRIAGE-RELATED PROVISIONS IN RECENT WELFARE REAUTHORIZATION PROPOSALS: A SUMMARY 2 (2004) (noting that while Congress designed some substantive provisions with the objective of reducing illegitimacy and directed a few substantive provisions specifically towards the objective of promoting marriage, the shift was a result of increased flexibility given to states to spend their TANF block grants in accordance with the purposes of the legislation). Thirty-five states, however, used the increased flexibility they received to determine TANF eligibility to enable two-parent families to qualify for assistance more easily. *Id.* States such as Oklahoma and Michigan have chosen to spend TANF funds on activities intended to strengthen marriages. *Id.*

221. Personal Responsibility and Work Opportunity Reconciliation Act § 103.

222. *Id.* (including in the note section Congressional findings demonstrating a detailed discussion of the alleged harms of illegitimacy by comparing the experiences of illegitimate children with the well-being of children raised in two-parent families).

223. See *id.* at § 403(a) (2).

abstinence only education programs.²²⁴ The programs had to adhere to specific guidelines advocating sexual abstinence outside of marriage and delineate harms to individuals, society, and children.²²⁵ PRWORA denied federal assistance to some minor parents.²²⁶ PRWORA effectively precludes states from spending TANF funds to assist unmarried, minor, custodial parents who do not participate in school or training rules, and who do not live with a parent, guardian or other relatives.²²⁷ While Congress ultimately rejected proposals to prohibit states from providing additional assistance for children born in welfare families, the block grant structure nevertheless permitted states to implement programs or related practices.²²⁸ The states that had established a family cap under an AFDC waiver prior to 1996 were now free to implement a cap without seeking waivers.²²⁹

During the congressional debates senators, more often than not the same individuals who applauded the welfare to work strategies of fiscal conservatism, repeatedly stressed the objective of reducing illegitimacy. Senator Burns, for example, stated in classic social conservative terms:

224. *See id.* at § 912.

225. *See id.* (defining sexual abstinence education). It is an educational program or motivational program that:

(A) has as its exclusive purpose, teaching the social, psychological, and health gains to be realized by abstaining from sexual activity; (B) teaches abstinence from sexual activity outside marriage as the expected standard for all school age children; (C) teaches that abstinence from sexual activity is the only certain way to avoid out-of-wedlock pregnancy, sexually transmitted diseases, and other associated health problems; (D) teaches that a mutually faithful monogamous relationship in context of marriage is the expected standard of human sexual activity; (E) teaches that sexual activity outside of the context of marriage is likely to have harmful psychological and physical effects; (F) teaches that bearing children out-of-wedlock is likely to have harmful consequences for the child, the child's parents, and society; (G) teaches young people how to reject sexual advances and how alcohol and drug use increases vulnerability to sexual advances; and (H) teaches the importance of attaining self-sufficiency before engaging in sexual activity.

Id.

226. *See id.* at § 103.

227. *See id.* (allowing for some limited exceptions in which a parent, legal guardian, or other adult relative is not available, or when such a placement could result in harm to the minor and/or her child). In these circumstances, a minor may be required to live in an adult-supervised living arrangement. *Id.* While it is the duty of the state to assist the individual in locating an appropriate adult supervised setting, a state could determine that a minor's independent living arrangement is appropriate, and that it is in the best interest of the minor to make an exception. *Id.*

228. *See* GREENBERG, WELFARE REAUTHORIZATION, *supra* note 209, at 13.

229. *See generally* JODIE LEVIN-EPSTEIN & SHELLEY STARK, CTR. FOR LAW & SOC. POLICY, EXCLUDED CHILDREN: FAMILY CAP IN A NEW ERA (Feb. 1999) (noting that approximately twenty states established a family cap under an AFDC waiver prior to 1996, three more did so by 2000), *available at* http://www.clasp.org/publications/excluded_children.pdf (last visited July 20, 2005).

The bill also contains provisions to strengthen families and personal responsibility, something I think is essential to getting at the root of our welfare problems. In a scant few decades, we have seen the demise of families and family values in our country. And illegitimacy rates are rising to almost dangerous levels. These are the things that are contributing most to the decline in our society. More and more children are growing up without a father, without a solid family to support them, and crime statistics show that kids who are raised without a father commit more crimes It is clear that our present welfare system encourages young mothers to have children, and many of these children are not being cared for.²³⁰

Senator Helms similarly stated:

[T]he human devastation caused by rising illegitimacy rates and the breakdown of the family is even more troubling than the cost of welfare programs For [thirty] years, the welfare system rewarded idleness and illegitimacy and there has been a marked increase in both [T]his bill takes a step in the right direction in helping reduce the rising illegitimacy rates by providing funds for abstinence education, and by allowing States the option of denying benefits to welfare recipients who already have children living on the public dole.²³¹

PRWORA thus represents a hybrid between fiscal conservatism's emphasis on work, libertarianism's emphasis on eliminating welfare ('the end of welfare as we know it') and social conservatism's emphasis on family as the solution to welfare dependency.²³²

Fiscal and social conservatives were able to unite, again under the sign of personal responsibility, yet their respective visions of this personal responsibility was measurably different. The fiscal conservative vision cast personal responsibility in economic terms.²³³ Welfare mothers were expected to transcend their economic dependency by becoming self-reliant market citizens.²³⁴ Libertarians

230. 142 CONG. REC. S9387 (statement of Sen. Burns).

231. *Id.* (statement of Sen. Helms).

232. See Ann Marie Smith, *The Politicization of Marriage in Contemporary American Public Policy: The Defense of Marriage Act and the Personal Responsibility Act*, 5 CITIZENSHIP STUDIES 303, 315 (2001) (describing PRWORA as a hybrid between the religious right (social conservatives) and neo-conservative (fiscal conservative) discourse). "The PRA expresses a remarkable hybrid discourse: it appropriates both the religious rights' moralistic emphasis on patriarchal and heterosexist 'family' values and the neo-conservative emphasis on downsizing government and exposing the impoverished individual to the corrective rigors of the market." *Id.*; see also KATZ, *supra* note 1, at 326 (observing similarly the potential conflict between the visions of the religious right and neo-conservativists). "Whether the two policy objectives—reversing out-of-wedlock births and supporting single mothers in their transition to work—would co-exist or collide no one yet knew, or had asked." *Id.*

233. See generally Crooms, *supra* note 166.

234. See *id.* at 623-26 (relating that according to the social sub-text of the welfare

similarly cast personal responsibility in marketized terms of restoring individual initiative.²³⁵ But, in the social conservative vision, personal responsibility was cast in moral terms. The vision expected welfare mothers to modify their sexual and familial behavior.²³⁶ They were to avoid out-of-wedlock pregnancies, preferably by avoiding pre-marital sex and choosing marriage. For both fiscal conservatives and libertarians, the problem was one of the welfare state having undermined individual initiative and self-reliance.²³⁷ The solution, then, lay in restoring that initiative, and allowing women to become completely self-sufficient. But for social conservatives, the problem was that the welfare state had undermined the traditional family; the solution, then, lay in its restoration.²³⁸

The social conservative vision of welfare reform has become more evident in the recent debates surrounding the reauthorization of TANF currently before Congress.²³⁹ Many believed that the family

reform rhetoric, this claim is about changing the behavior of black women by making them work; thus playing on the stereotype of the black single mother on welfare as lazy and lacking in work ethic, and its strategy as one of forcing her to work).

235. See MURRAY, *supra* note 89; see also TANNER, *supra* note 89.

236. See Crooms, *supra* note 166, at 612-13 (discussing the efforts of welfare reform to make mothers more responsible and the racialized stereotyping that welfare recipients are black, single, urban mothers). Welfare reform punishes the black single mother on welfare because of her sexual promiscuity, her fertility and her moral failure for not marrying the father of her child. *Id.* at 625. Crooms wrote,

Like the matriarch, who does not submit to her man's authority the welfare dependent single mother is a 'bad' woman whose dominance wrecks the natural order of things within the family and is responsible for the lack of values within her dysfunctional community. Like Jezebel who is overtly sexual and lascivious, the welfare dependent single mother's hyper-sexuality is responsible for her anti-patriarchal child bearing. Like the breeder, whose owner imposed on her a duty to procreate, the welfare dependent single mother's extramarital childbearing is a learned response to the financial incentive provided by AFDC. The welfare dependent single mother represents the point of which promiscuity and fecundity meet, and her childbearing is pathological compared to that of those 'true' women to whom proper motherhood within the traditional two-parent family is essential.

Id. at 626.

237. See Charles Murray, *Family Formation*, in THE NEW WORLD OF WELFARE 159-160 (Rebecca Blank & Ron Haskins eds, 2001) (arguing that for libertarians, the AFDC's restructuring was little more than homage to the idea of ending welfare). Libertarians, like Murray, wanted the total elimination of AFDC and other welfare benefits. *Id.*

238. See, e.g., Robert Rector, *How Poor are America's Poor?* (Heritage Foundation, Background No. 791, 1990) (describing the 'destruction of families' as a major consequence of welfare spending), available at <http://www.heritage.org/Research/PoliticalPhilosophy/BG791.cfm> (last visited July 20, 2005); see also Patrick F. Fagan et al., *Marriage and Welfare Reform: The Overwhelming Evidence that Marriage Education Works?* (Heritage Foundation, Background No. 1606, 2002), available at <http://www.heritage.org/Research/Welfare/bg1606.cfm> (last visited July 20, 2005).

239. According to PRWORA, the TANF program required Congressional

formation objectives of PRWORA had not been realized, and that it was time to put the promotion of marriage at the top of the reauthorization agenda.²⁴⁰ In February 2002, the Bush Administration put forward its vision of the reauthorization plan, and declared that promoting healthy marriages would be one of its top priorities, committing up to three-hundred million dollars to “strong marriages and stable families,” which “are incredibly good for children.”²⁴¹ The Bush Administration proposal also sought to dramatically increase work requirements and limit state flexibility.²⁴² On May 16, 2002 the House of Representatives passed H.R. 4737, the Personal Responsibility, Work and Family Promotion Act, which closely followed the Bush administration vision, and included among others, substantial funds for the promotion of marriage. The Bill included three substantive programs for the promotion of

reauthorization by September 2002. Congress has approved several temporary extensions of TANF, while they debate the substance of the reauthorization. On September 30, 2004, President Bush signed H.R. 5149 into law as Pub. L. 108-308, which was another six-month TANF extension. This most recent enactment was the eighth extension since the authorization for the TANF program was originally to expire. Several TANF reauthorization bills have been drafted and debated in Congress, but Congress has not supported any bill yet. See SHAWN FREMSTAD ET AL., CTR. ON BUDGET & POLICY PRIORITIES, SUMMARY COMPARISON OF TANF REAUTHORIZATION PROVISIONS: BILLS PASSED BY SENATE FINANCE COMMITTEE AND THE HOUSE OF REPRESENTATIVES AND RELATED PROPOSALS (noting that several TANF reauthorization proposals have come before Congress, including the following: H.R. 4737 that the House passed on May 16, 2002, a Democratic substitute for H.R. 4737 that Rep. Cardin offered on the House floor, a list of provisions that a bipartisan group of Senate Finance committee members agreed to, a bill that Senator Rockefeller introduced [S. 2052], a bill that Senators Baucus and Carper introduced [S. 2524] and H.R. 4, passed by the House in 2003), available at <http://www.cbpp.org/7-2-02tanf.pdf> (last visited July 17, 2005); see also SHAWN FREMSTAD ET AL., CTR. ON BUDGET & POLICY PRIORITIES, REVISED SIDE-BY-SIDE COMPARISON OF FAMILY FORMATION PROVISIONS IN TANF REAUTHORIZATION LEGISLATION (comparing the current law to the various proposals Congress has considered), at <http://clasp.org/publications/6-5-02tanf3.pdf> (last visited July 17, 2005).

240. See generally SHAWN FREMSTAD & WENDELL PRIMUS, CTR. ON BUDGET & POLICY PRIORITIES, STRENGTHENING FAMILIES: IDEAS FOR TANF REAUTHORIZATION (2002) (quoting Rep. Wally Herger, chairman of the House Ways and Means Committee's Human Resources Subcommittee as stating, “During the first phase of welfare reform, we made sure we were putting people to work. I believe that now is the time to stress the importance of marriage.”); Wade Horn, *Wedding Bell Blues: Marriage and Welfare Reform*, BROOKINGS REV., Summer 2001; Robert Rector, *Using Welfare Reform to Strengthen Marriage*, AM. EXPERIMENT QUARTERLY, Summer 2001.

241. See News Release, The White House, President Announces Welfare Reform Agenda (Feb. 26 2002) [hereinafter *President Announces*], available at <http://www.whitehouse.gov/news/releases/2002/02/20020226-11.html> (last visited July 31, 2005); see also Liz Schott, *The Congressional Divide Over TANF Reauthorization*, 1 SEATTLE J. SOC. JUST. 427, 428-29; Mark Greenberg, *Bush's Blunder*, THE AM. PROSPECT, July 15, 2002.

242. See *President Announces*, *supra* note 241 (indicating that the proposal would increase the number of hours that TANF recipients must work, and further limit the range of activities that would count towards meeting the work requirements).

marriage.²⁴³ The Health Marriage Promotion Grants would have created a program of competitive grants in the amount of two-hundred million dollars annually over five years to be used on a specified list of marriage related activities.²⁴⁴ The Marriage Research and Demonstration Funds would have allocated \$100 million annually over five years for research demonstration and technical assistance grants to be used primarily for marriage related activities.²⁴⁵ Finally, the Promotion and Support of Responsible fatherhood and Healthy Marriage Grants program would have allocated \$20 million annually over five years to fund marriage and fatherhood promotion activities.²⁴⁶ H.R. 4737 would also have amended the purpose

243. See generally PARKE, *supra* note 220, at 2. See generally JODIE EVEN-EPSTEIN ET. AL, CTR. FOR LAW & SOC. POLICY, SPENDING TOO MUCH, ACCOMPLISHING TOO LITTLE: AN ANALYSIS OF THE FAMILY FORMATION PROVISIONS OF H.R. 4737 AND RECOMMENDATIONS FOR CHANGE (2002), available at http://www.clasp.org/publications/HR_4737_family_form_analysis_061102.pdf (last visited Aug. 5, 2005).

244. H.R. 4737, 107th Cong. § 103 (2002) (providing that that funds may be used to support specified activities). The activities are:

- (1) Public advertising campaigns on the value of marriage and the skills needed to increase marital stability and health; (2) Education in high schools on the value of marriage, relationship skills, and budgeting; (3) Marriage education, marriage skills, and relationship skills programs, that may include parenting skills, financial management, conflict resolution, and job and career advancement, for non-married pregnant women and non-married expectant fathers; (4) Pre-marital education and marriage skills training for engaged couples and for couples interested in marriage; (5) Marriage enhancement and marriage skills training programs for married couples; (6) Divorce Reduction programs that teach relationship skills; (7) Marriage mentoring programs which use married couples as role models and mentors in at-risk communities; and (8) Programs to reduce the disincentives to marriage in means-tested aid programs, if offered in conjunction with any activity described in this subparagraph.

Id.

245. *Id.* at § 115.

246. *Id.* at § 441 (indicating that grants under this program must be designed to accomplish four objectives). The objectives are:

- (1) Promoting responsible, caring, and effective parenting through counseling, mentoring, and parenting education . . . information [dissemination] . . . positive involvement . . . and other methods; (2) Enhancing the abilities and commitment of unemployed or low-income fathers to provide material support for their families . . . by assisting them to take full advantage of education, job training, and job search programs; to improve work habits and work skills, to secure career advancement by activities such as outreach and information dissemination, coordination . . . with employment services and job training programs . . . encouragement and support of child support payments, and other methods . . .; (3) Improving fathers' ability to effectively manage family business affairs by means such as education, counseling, and mentoring on matters including household management, budgeting, banking, and handling of financial transactions, time management, and home maintenance; and (4) Encouraging and supporting healthy marriages and married fatherhood through such activities such as premarital education . . . inventories, marriage preparation programs

language of TANF. It would have changed the focus of the purpose to “improve child wellbeing,” replaced a reference to “parents” with a reference to “families” in purpose (2), and added a focus on healthy married families and responsible fatherhood in purpose (4).²⁴⁷ H.R. 4737 would also have required states to establish annual, specific numerical performance goals and improvement plans with respect to each of the four TANF purposes, including the promotion of healthy marriages.²⁴⁸

The Senate Finance Committee Proposed legislation with similar marriage provisions to H.R. 4737, but with lower funding levels and a broader list of allowable activities.²⁴⁹ While the Senate Finance Committee passed the legislation, it never reached the Senate floor for a vote. In 2003, the House of Representatives passed H.R. 4, the Personal Responsibility, Work and Family Promotion Act of 2003.²⁵⁰ H.R. 4 is substantially the same as H.R. 4737. It includes the same three programs for marriage promotion and responsible fatherhood.²⁵¹ H.R. 4 was referred to the Senate Finance Committee,

. . . marital therapy, couples counseling . . . [and] skills enhancement programs, including . . . reduc[tion of] child abuse and domestic violence, and dissemination of information about the benefits of marriage.

Id. Authorized projects under this program would include:

- (1) Demonstration service projects that address all four objectives, and annual limited purpose grants under [twenty-five thousand dollars] that address at least one objective; and (2) Two multi-city demonstration projects, one of which must test services delivered by married couples; and (3) Other projects such as a national information clearinghouse, a national media campaign, technical assistance, and evaluation.

MARY PARKE, CTR. FOR LAW & SOC. POLICY, MARRIAGE-RELATED PROVISIONS IN WELFARE REAUTHORIZATION PROPOSALS: A SUMMARY 8 (2004), *available at* http://www.clasp.org/publications/marr_prov_upd.pdf (last visited July 17, 2005).

247. H.R. 4737, 107th Cong. (2002) (changing the fourth purpose to read “encourage the formation and maintenance of *healthy* two-parent *married* families, and encourage *responsible fatherhood*”).

248. *Id.* at § 113.

249. See PARKE, *supra* note 220, at 1; see also SHAWN FREMSTAD ET AL., CTR. ON BUDGET & POLICY PRIORITIES, ONE STEP FORWARD OR TWO STEPS BACK? 18-20 (2002) (noting that the Senate Finance Bill would also have prevented states from discriminating against two-parent families in their TANF programs), *available at* http://www.clasp.org/publications/doc_13reasons.pdf (last visited July 17, 2005). In terms of the work requirements, the Senate Finance Bill would also have maintained the work requirement at thirty hours and had a broader list of activities that would count toward the primary twenty-four hour work requirement. *Id.* at 5-6.

250. See H.R. 4, 108th Cong. (1st Sess. 2003).

251. The primary difference between H.R. 4 and H.R. 4737 is that most of the funding in H.R. 4 is for six years instead of five years. It allocates two hundred million dollars annually for six years to the Healthy Marriage Promotion Grants, one hundred million dollars annually for six years to the Marriage Research and Demonstration Funds and twenty million dollars annually for five years to the Promotion and Support of Responsible Fatherhood and Healthy Marriage Grants. The list of allowable marriage activities is virtually the same as in H.R. 4737. See

which held hearings in February and March 2003. In its Report of October 3, 2003, the Finance Committee recommended that the bill (PRIDE) be passed, as amended.²⁵² At the time of writing, the PRIDE version of H.R.4 is under consideration by the Senate.

Thus, the current TANF reauthorization proposals place very considerable emphasis on family formation goals, with the Administration, House and Senate only disagreeing on questions of the appropriate amount of funding and the extent of state flexibility. Promoting marriage and, to a slightly lesser extent, responsible fatherhood, has become part of the mainstay of welfare reform. This recent round of reform is witnessing a further welfarization of family law, insofar as many of the programs for marriage promotion and responsible fatherhood do not require that the funds be specifically directed towards TANF recipients or low-income populations generally.²⁵³ The reform proposals thus reflect the social conservative view that the family formation purposes of TANF are its most fundamental and must be central in its reauthorization.²⁵⁴

While the social conservative critique of welfare reform appears to be emerging as dominant in current federal public policy debates around reauthorization, a libertarian critique of welfare reform remains visible. For example, Michael Tanner of the Cato Institute argues:

The long term answer to poverty and dependency does not lie with any government program, no matter how well intentioned. Congress needs to go beyond proposals that simply tinker with welfare and begin to phase out government assistance in favor of

generally, PARKE, *supra* note 220, at 3-9.

252. S. REP. NO. 108-164 (2003).

253. See H.R. 4737, 107th Cong. (2002) and H.R. 4 (mentioning low income populations in only two of the eight marriage-related activities). Similarly, the fatherhood and marriage promotion grants focus primarily on promoting married fatherhood and are not specifically directed towards low-income fathers. *Id.*; see also LEVIN-EPSTEIN & STARK, *supra* note 229, at 10-11. See *generally* Brito, *supra* note 22 (arguing that the wall separating the family law of welfare and general family law is crumbling and that welfare law is taking the dominant role).

254. See Murray, *supra* note 237 at 137-168 (arguing that emphasis on work requirements would be ineffective without first addressing the illegitimacy problem); Robert Rector, *Comment*, in THE NEW WORLD ORDER 264-69. See *generally* JANICE PETERSON, INST. FOR WOMEN'S POLICY RESEARCH, FEMINIST PERSPECTIVES ON TANF REAUTHORIZATION: AN INTRODUCTION TO KEY ISSUES FOR THE FUTURE OF WELFARE REFORM (2002) (noting that at the same time, it is important to not overstate H.R. 4 as an exclusively social conservative welfare reform), *available at* <http://www.iwpr.org/pdf/e511.html> (last visited July 17, 2005). The bill includes provisions to increase work participation rates and raise the hours for core activities, which will toughen the work requirements of TANF. *Id.* The bill also includes provisions for increased spending on child care and expanding state flexibility. *Id.*

private charity.²⁵⁵

According to Tanner, although welfare reform has had some success in reducing welfare dependency, it has been less successful in requiring welfare recipients to work, in reducing out of wedlock births, and in making individuals self-sufficient.²⁵⁶ The policy position, then, is virtually the same as Charles Murray's prescription in the 1980s: "when it comes to welfare, we should end it, not mend it."²⁵⁷

We should . . . begin to remove the incentives that contribute to out of wedlock birth. That means phasing out the availability of welfare benefits to young women who make untenable life decisions. No other reform will go as far in reducing welfare dependency or poverty. That approach will almost certainly be more effective than current proposals that the federal government spend as much as [three hundred] million [dollars] on promoting marriage.²⁵⁸

In Tanner's analysis, the problem of moral hazard—understood in decidedly economic terms—can and must be reversed by eliminating the availability of welfare. The solution lies not in more government regulation (promoting marriage), but in less (eliminating welfare).²⁵⁹

255. See TANNER, *supra* note 87 (arguing that Congress should instead focus on job creation and economic growth), available at <http://www.cato.org/pubs/pas/pa473.pdf> (last visited July 20, 2005); see also LISA OLIPHANT, CATO INSTITUTE, *FOUR YEARS OF WELFARE REFORM: A PROGRESS REPORT* (Policy Analysis No. 378, 2000), available at <http://www.cato.org/pubs/pas/pa378.pdf> (last visited Aug. 1, 2005). See generally MICHAEL TANNER, *THE END OF WELFARE: FIGHTING POVERTY IN THE CIVIL SOCIETY* (1996).

256. See TANNER, *supra* note 87 (stating that the reduction of the number of individuals receiving welfare was as much due to the impact of economic growth and job creation as it was welfare reform). Individuals who left welfare in the period after PRWORA were the individuals who were most likely to have left even if welfare had not been reformed. *Id.* at 11.

Studies of people leaving welfare since reform suggest that the majority are part of the easiest-to-place, least-dependent group of recipients. While they may have left more rapidly under reform, they were not the people most at risk for long-term dependency. As a group, the first wave of those leaving welfare has had better education, higher levels of basic skills, and more previous experience in the labor market than those remaining on the rolls . . . On the other hand, those remaining on the welfare rolls are most likely to be families headed by unmarried women under the age of [thirty] and increasingly concentrated in high poverty areas.

Id.

257. See Murray, *supra* note 237, at 159 (reiterating his argument advocating the elimination of welfare benefits for young women who have children out of wedlock).

258. See TANNER, *supra*, note 87, at 30-31, 34-35; see also OLIPHANT, *supra* note 255, at 30-35 (arguing similarly that PRWORA has failed to reduce out of wedlock births, and that the only solution lies in eliminating the availability of welfare for single mothers).

259. See, e.g., Michael Tanner, *Wedded to Poverty*, N.Y. TIMES, July 29, 2003, at A23 (criticizing the Congressional and White House marriage promotion initiatives, which is described as another example of conservatives deviating from their

While this critique remains visible in conservative public policy circles, it does not appear to have permeated the Congressional debates or hearings, and rather like Murray's critique in the 1980s, it does not seem to be having a concrete effect on public policy formation. Federal public policy initiatives on welfare reauthorization continue to be heavily influenced by social conservative visions of promoting the traditional family, not libertarian visions of limited government and private choice.

At the same time, it is important to recognize that the fiscal conservatism of earlier welfare reform has certainly not disappeared in this round of reform. The basic structure of TANF is expected to remain intact, with its bloc grants, five-year entitlement limits, and work requirements. The emphasis on transforming welfare dependents into self-employed market citizens remains a central objective of the legislation. The new social conservative emphasis on family formation goals is a supplement, rather than replacement, for the fiscal conservative goals of individual self-sufficiency. Once again, as in the area of child support, these objectives are being pursued in tandem. In some respects, the initiatives are not entirely inconsistent. Fiscal conservatism is not so much opposed to shifting dependency from state to two-parent, opposite-sex family as it is agnostic. Its primary goal is to reduce welfare dependency, and its primary strategy is to increase the self-sufficiency of welfare dependents primarily through an emphasis on market work. Similarly, social conservatism is certainly not opposed to individual self-reliance and market work. Rather, it simply seeks to address what it views to be the cause of chronic welfare dependency, namely, illegitimacy and the decline of the traditional family.

Yet, at a deeper level, there are some contradictions between the visions of fiscal and social conservatives. The strategies of fiscal conservatives are both individualizing and degendering. Single mothers are reconstituted as potentially employable market citizens. The strategies of social conservatives, by contrast, are familializing and gendering. They seek to increase the role of the family in addressing

commitment to small government). The program is unlikely to be of any assistance to poor single mothers on welfare, since there are few marriageable men, the beneficial effects of marriage on low-income women will be small—since many already live with the child's father—and women may be in fact be encouraged to have a second child, furthering their inability to become self-sufficient. *Id.*; see also KIMBLE FLETCHER AINSLIE, CATO INSTITUTE, IS THE PRESIDENT'S MARRIAGE PROPOSAL DOA? (Apr. 3, 2002) (describing President Bush's proposal as "a patchwork of poorly thought out and voluntary components begging the states to come on board" and as a "low impact fiscal effort" with little substance), available at: <http://www.cato.org/dailys/04-03-02.html> (last visited July 17, 2005).

dependency, and to reconstitute single mothers as appropriately dependents, namely, married mothers dependent on wage earning husbands. The fiscal conservative strategy is one that erodes the significance of gender and family, while the social conservative strategy is one that intensifies gender and family. Once again, although these strategies are being pursued in tandem, their alliance is a precarious one.

B. Fiscal, Libertarian and Social Conservatives on Same-sex Couples and the Politics of Marriage

While fiscal and social conservatives have been able to work towards compromise and coalition in child support and welfare reform, notwithstanding the underlying tensions and contradictions in their positions, their normative visions and privatizing projects could be expected to be more difficult to reconcile in the context of same-sex couples and the challenge to marriage. Social conservatives are unequivocally opposed to same-sex marriage on moral grounds. Libertarians should support same-sex marriage on the basis of private choice. Fiscal conservatives would engage in a cost benefit analysis to determine whether same-sex marriage is fiscally responsible. These differences might be expected to produce a serious schism on the issue of same-sex marriage, dividing libertarian, fiscal and social conservatives. In fact, such a divide has occurred between conservatives in other jurisdictions, and both fiscal conservative and libertarian arguments about fiscal responsibility and private choice have contributed to the increasing recognition of same-sex relationships.²⁶⁰ However, in public policy debates regarding same-sex marriage in the United States, these differences have largely disappeared. The debate has, until very recently, been cast almost exclusively in terms of a classic liberal/conservative divide, with

260. In Canada, fiscal conservative arguments about cost saving and fiscal responsibility have been part of the public policy discourse and have contributed to the recognition of same-sex relationships. See *M. v. H.*, [1999] S.C.R. 3 (striking down an opposite-sex definition of spouse in relation to spousal support as a violation of the equality rights of same-sex couples in Canada). The Court explicitly referred to “alleviation of the burden on the public purse by shifting the obligation to provide support for needy persons to parents and spouses who have the capacity to provide support to them” as an objective of the legislation that would be furthered if same-sex couples were included with the definition. *Id.* For a fiscal conservative and libertarian argument in favor of same-sex marriage in Canada, see Andrew Coyne, *How Far Do We Take Gay Rights*, SATURDAY NIGHT, Dec. 1995 (debating neo-conservative David Frum on same-sex relationship recognition), available at <http://www.andrewcoyne.com/Essays/index.html> (last visited July 17, 2005). For a similar argument in England, see Opinion, *Let Them Wed*, THE ECONOMIST, Jan. 4, 1996, at 13, available at http://www.economist.com/opinion/displaystory.cfm?story_id=2515389 (last visited July 17, 2005).

liberals arguing in favor of same-sex marriage and conservatives arguing against it. Fiscal conservative arguments are largely absent from the debate, and when they do appear, they are often collapsed with social conservative positions, arguing that same-sex marriage would dramatically increase government expenditures. Lone libertarian voices in favor of same-sex marriage in the academic and public policy literature have been largely drowned out by the dominance of social conservatism, particularly in the legislative forum where the latter continues to reign. However, more recently, a private choice approach has begun to make some modest inroads, primarily in the judicial forum but also in broader public policy circles.

1. Dissipating Differences: the Discursive Power of the Social Conservative Vision

Social conservatives oppose the recognition of gay and lesbian rights, in general, and same-sex spousal rights, in particular, at any cost. The rearticulation of the traditional nuclear, and above all heterosexual, family goes to the very heart of the social conservative vision. No group poses a greater threat to that traditional family for social conservatives than gays and lesbians.²⁶¹ Social conservatives are unmoved by fiscal arguments about potential cost saving by expanding the definitions of spouse to include same-sex couples. The issue is not economic, but moral, in which gay men and lesbians represent all that is wrong with the permissive culture of liberalism and the demise of the traditional moral order.²⁶² In this vision, marriage is not a private contract between private individuals, but rather, a public institution that promotes a range of public goods, including reproduction and child rearing, the stability of the family as society's most basic social unit, and democracy.²⁶³ In their view, not

261. See generally HERMAN, *supra* note 79.

262. See John M. Finnis, *Law, Morality, and "Sexual Orientation"*, 69 NOTRE DAME L. REV. 1049, 1070-73 (1994) (offering a natural law argument against homosexuality and same-sex marriage).

263. See, e.g., Lynn Wardle, *Multiply and Replenish: Considering Same-Sex Marriage in Light of State Interests in Marital Procreation*, 24 HARV. J.L. & PUB. POL'Y 771, 779-80 (2001) [hereinafter Wardle, *Multiply*] (noting that there are at least eight different societal interests for marriage).

These include: (1) safe sexual relations; (2) responsible procreation; (3) optimal child rearing; (4) healthy human development; (5) protecting those who undertake the most vulnerable family roles for the benefit of society, especially wives and mothers; (6) securing the stability and integrity of the basic unit of society; (7) fostering civic virtue, democracy, and social order; and (8) facilitating interjurisdictional compatibility.

Id.; see also George W. Dent, Jr., *The Defense of Traditional Marriage*, 15 J.L. & POL. 581, 582 (1999) (identifying the public interest in marriage as child rearing, socializing adults, and promoting individual happiness); Maggie Gallagher, *What is*

only does same-sex marriage not promote these public goods, but it threatens to undermine them.²⁶⁴

By contrast, neither fiscal conservatism nor libertarianism is in principle opposed to gay and lesbian rights. A general concern with promoting the liberty rights of individuals and a minimalist state would lead libertarians to oppose any rules and regulations that would impose special burdens on gay men and lesbians.²⁶⁵ Those who favor the shift towards private choice in family law would similarly support the state's removal of status-based prohibitions on marriage.²⁶⁶ Fiscal conservatism could support a similar conclusion on the basis of a different set of concerns. Given its general impulse towards privatizing costs of social reproduction, fiscal conservatism could be expected to support an expanded spousal definition that contributed to the privatization of these costs, while opposing any expanded definition that increased the public responsibility for these costs. The question is largely answered by a cost-benefit analysis, in which fiscal conservatives weigh the relative costs and benefits of expanding

Marriage For? The Public Purposes of Marriage Law, 62 LA. L. REV. 773 (2002) (arguing against a private choice vision of marriage and in favor of marriage as a public institution about reproduction and child rearing).

264. See Robert P. George & Gerard V. Bradley, *Marriage and the Liberal Imagination*, 84 GEO. L.J. 301, 314-18 (1995) (arguing that the sexual acts of same-sex partners can only provide mere individualized sexual gratification and, thus, are harmful to integrity). Therefore, the authors argue, the government should not institutionalize same-sex relationships. *Id.* at 320; see also Wardle, *Multiply*, *supra* note 263, at 797 (arguing that "[l]egalizing [s]ame-[s]ex [m]arriage [w]ould [u]ndermine the [s]ocial [i]nterests in [r]esponsible [p]rocreation and the [i]nstitution [t]hat [h]as [b]est [p]rotected [t]hose [i]nterests[.]"); Dent, *supra* note 263, at 628-38 (arguing that recognizing gay marriage would damage traditional marriage and would lead to other changes in the law such as the legalization of polygamy, endogamy, artificial reproduction and baby selling, child marriage, "[b]estiality, etc."). The "etc." apparently includes "necrophilia, nudity and performance of sex acts in public." *Id.* at 237.

265. See, e.g., Richard A. Epstein, *Caste and the Civil Rights Laws: From Jim Crow to Same-Sex Marriages*, 92 MICH. L. REV. 2456 (1994) [hereinafter Epstein, *Caste*]; Richard A. Epstein, *Liberty, Equality, and Privacy: Choosing a Legal Foundation for Gay Rights*, 2002 U. CHI. LEGAL F. 73 (2002) [hereinafter Epstein, *Liberty*].

266. See Ehrenreich, *supra* note 11, at 1242-43 (arguing that the extent to which the increasing emphasis on private choice through the privatization of marriage would support same-sex marriage); Ertman, *supra* note 16, at 1167-68 (asserting that progressives favor private law because it provides an avenue to legalize same-sex marriage); see also David Boaz, *Privatize Marriage: A Simple Solution to the Gay Marriage Debate*, SLATE (Apr. 25, 1997), at <http://slate.msn.com/id/2440> (last visited June 14, 2005).

'Privatizing' marriage can mean two slightly different things. One is to take the state completely out of it. If couples want to cement their relationships with a ceremony or ritual, they are free to do so. Religious institutions are free to sanction such relationships under any rules they choose. A second meaning of 'privatizing' marriage is to treat it like any other contract: The state may be called upon to enforce it, but the parties define the terms.

Id.

spousal definitions given the overall project of privatizing social costs.

While a private choice position has been articulated in the academic debates, even here sometimes otherwise fiscal conservative and libertarian voices have at times seemed to succumb to the contrary influence of social conservatism. For example, law and economics guru Richard Posner does not argue in favor of same-sex marriage.²⁶⁷ He concludes that even if “[t]he benefits of [same-sex] marriage may outweigh the costs[,] [n]onetheless . . . the public hostility to homosexuals in this country is too widespread to make homosexual marriage a feasible proposal even if it is on balance cost-justified”²⁶⁸ As some commentators have suggested, Posner effectively allows social conservative disapproval of homosexuality to infuse his analysis, and fails to consistently apply law and economics principles, with its emphasis on individual preference, private contract, rational choices, and market efficiencies.²⁶⁹ Darren Bush has argued that a law and economics analysis of same-sex marriage should exclude such moral disapprobation and, in contrast to Posner, that such a cost-benefit analysis would support same-sex marriage.²⁷⁰

Richard Epstein has made a stronger argument in favor of same-sex marriage from a libertarian perspective.²⁷¹ In his view, the fact that

267. See RICHARD A. POSNER, *SEX AND REASON* 311-13 (1992) (arguing that permitting same-sex couples to marry would impose a “stamp of approval on homosexuality” by sanctioning same-sex marriage as a desirable, even noble condition). In his view, same-sex marriage will confuse the meaning of marriage and the information it conveys, may be abused by homosexuals as a way of obtaining the benefits of marriage, and might have a detrimental effect on children. *Id.*

268. *Id.* at 313.

269. See Darren Bush, *Moving to the Left by Moving to the Right: A Law & Economics Defense of Same-Sex Marriage*, 22 *WOMEN’S RTS. L. REP.* 115, 125-34 (2001) (highlighting the inconsistencies in Posner’s analysis of same-sex marriage under the law and economics theory); see also Ryan Nishimoto, Book Note, *Marriage Makes Cents: How Law & Economics Justifies Same-Sex Marriage*, 23 *B.C. THIRD WORLD L.J.* 379, 384 (2003) (reviewing ANDREW KOPPELMAN, *THE GAY RIGHTS QUESTION IN CONTEMPORARY AMERICAN LAW* (2002), and noting that law and economics theorists have been “unjustifiably reluctant” to view same-sex marriage through an economic lens); Jordon Herman, *The Fusion of Gay Rights and Feminism: Gender Identity and Marriage After Baehr v. Lewin*, 56 *OHIO ST. L.J.* 985 (1995) (observing that “Posner’s pragmatism stops short, reincorporating moral values and sacrificing libertarian principles when they lead to unpopular results”).

270. See Bush, *supra* note 269, at 116 (describing Bush’s argument that “favoring non-intervention in marriage generally while accepting (or approving of) prohibitions on same-sex marriage is a fundamentally inconsistent position when viewed from an economic perspective”). In his view, a law and economics cost benefit analysis would reveal that same-sex marriage actually reduces externalities, and the recognition of same-sex marriage is consistent with a more general position in favor of a more contractual, non-interventionist approach to marriage. *Id.* at 137.

271. See generally Epstein, *Caste*, *supra* note 265, at 2460 (advocating a rejection of prohibitions against same-sex marriage because they contradict the basic principles of freedom of association and a liberal society); Epstein, *Liberty*, *supra* note 265 (concluding that although same-sex marriage can fit into the context of either privacy

many people find same sex-marriage offensive cannot be used to prevent same sex couples from “normalizing their relationships by contract” nor to allow the state to deny them the opportunity “to introduce into their relationships the same level of permanence and stability that state sanctions give to marriages between couples of different sexes.”²⁷² Yet, he too is prepared to stop short of using the word “marriage,” preferring, like Posner, to use the term “domestic partnership.”²⁷³ Posner’s and, to a lesser extent, Epstein’s slippage is illustrative of the influence of the social conservative vision of family. While they both seek to broaden relationship recognition in a way that respects private choice, which not incidentally would have the effect of privatizing the costs of supporting families, both do so in ways that stop short of recognizing same-sex marriage. Moral opposition to same-sex marriage operates to limit their economic and libertarian analysis.

Stronger conservative arguments have been made in favor of same-sex marriage. Andrew Sullivan, a leading “gay-con,” has argued in favor of same-sex marriage, deploying fiscal conservative, libertarian, and occasionally even more traditional social conservative arguments.²⁷⁴ Similarly, the Log Cabin Republicans, an organization of Republicans committed to the promotion of gay and lesbian rights, has made libertarian and fiscal conservative arguments in favor of same-sex marriage. Its principles are consistent with a more libertarian and fiscal conservatism, describing itself as committed to “limited government, individual liberty, individual responsibility, free

rights or equal protection, the important point is that it is constitutional).

272. Epstein, *Caste*, *supra* note 265, at 2473-74 (asserting that same-sex couples receive the same rights and benefits as heterosexual couples, from immigration to inheritance rights).

273. See Epstein, *Liberty*, *supra* note 265, at 101.

Here the issue is one of ‘confusion’ Many people may be rightly upset that the similarity in names will lead to an erosion of support for the traditional institution. So at this point, the use of the term ‘domestic partnership’ helps eliminate the confusion while allowing gay individuals to enjoy certain status benefits . . . that they could not acquire simply by a contract arrangement between themselves.

Id.

274. See JONATHAN RAUCH, GAY MARRIAGE: WHY IT IS GOOD FOR GAYS, GOOD FOR STRAIGHTS, AND GOOD FOR AMERICA 55-103 (2004) (describing how gays, straights, and the concept of marriage will benefit by legalizing same-sex marriage); see also Andrew Sullivan, *American Conservatism: The State of Our Unions*, WALL ST. J., Oct. 8, 2003, at A24 (using the fiscal argument that allowing same-sex couples to marry would relieve the state’s burden of providing welfare for single people without family support). See generally ANDREW SULLIVAN, VIRTUALLY NORMAL: AN ARGUMENT ABOUT HOMOSEXUALITY (1996) (arguing, amongst other things, that same-sex marriage would help curb promiscuity among gay men).

markets, and a strong national defense”²⁷⁵ It argues that these principles “are consistent with the equal protection of laws for gay and lesbian Americans.” The Log Cabin Republicans support the legal recognition of same-sex relationships and oppose legislative initiatives intended to block same-sex marriage.²⁷⁶ Log Cabin Republicans tend to emphasize the principles of both libertarianism (individual choice, privacy, and protection from government intervention²⁷⁷) and fiscal conservatism (the assumption of individual responsibility and gays and lesbians as responsible tax payers seeking tax fairness) in their support of the legal recognition of same-sex relationships.²⁷⁸

275. Brief of Amici Curiae Log Cabin Republicans and Liberty Education Forum at *2, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102) (stating that the moral values that underlie their principles are consistent with equal protection for gays and lesbians); see also Liberty Education Forum (describing its mandate as working “toward achieving freedom and fairness for all Americans, regardless of sexual orientation”), at <http://www.libertyeducationforum.org/lefcontents/aboutus/> (last visited July 9, 2005).

276. See Sean Bugg, *Right Here, Right Now: Interview with Log Cabin Republican Executive Director Patrick Guerriero*, METROWEEKLY, July 10, 2003 (quoting Patrick Guerriero, the Executive Director of the Log Cabin Republicans), available at <http://www.metroweekly.com/feature/?ak=543> (last visited July 31, 2005). He speaks of the need to:

[C]hange the language around the so-called marriage issue. We should be talking about fairness via a civil contract, which is what marriage really is. When people use the word marriage it brings up connotations of intervening in religious ceremonies and institutions. That is not at all what gays and lesbians are asking for. We’re asking for the right to have a piece of paper that recognizes our tax-paying, loving relationships, that offers us tax fairness in America.

Id.; see also LOG CABIN REPUBLICANS, A MESSAGE FROM LOG CABIN REPUBLICANS, Aug. 6, 2003 [hereinafter Message from LCR] (declaring that Log Cabin Republicans’ efforts for civil recognition aim to obtain legal and financial responsibilities that come with establishing a life-long relationship) (on file with the *Journal of Gender, Social Policy & the Law*); Press Release, Log Cabin Republicans, Log Cabin Republicans of New York Joins National Campaign Against Constitutional Amendment Targeting Gay Families (Sept. 5, 2003) [hereinafter LCR Press Release] (attacking the proposed constitutional amendment to ban same-sex marriage as a distortion of the Constitution and the Bill of Rights) (on file with the *Journal of Gender, Social Policy & the Law*).

277. See, e.g., LCR Press Release, *supra* note 276 (sending a message against the Constitutional Amendment banning same-sex marriage, by stating, “[t]he Founders drafted the Constitution and the Bill of Rights to protect the rights of individuals from the intrusive forces of government The federal marriage amendment attacks the very premise of our founding document”). Further, the Press Release argued that the constitutional amendment “seeks to take the rights of self-government away from these families and place the power to define the institution of marriage, which the Founders prudently entrusted to the states, with a distant federal government.” *Id.*

278. See *id.* (supporting its opposition against the proposed constitutional amendment with the statistic that over 594,000 gay and lesbian couples live in each county in the U.S.); see also Message from LCR, *supra* note 276 (stressing that gays and lesbians want the same rights as other Americans, such as tax fairness and the legal structure to make their families stable and secure); News Update, Log Cabin Republicans, Log Cabin Challenges Frist (R-TN) on Anti-Gay Constitutional

Yet, as the next section illustrates, these theoretical differences have, until very recently, largely disappeared in the public policy debates surrounding same-sex marriage. In the legislative forum these libertarian and fiscal conservative voices have been overshadowed by social conservatism, which has been the dominant conservative voice in federal public policy debates about same-sex marriage. However, a more libertarian discourse has begun to emerge as a challenge to the dominance of social conservatism.

2. Federal Initiatives: From the Defense of Marriage Act to the Federal Marriage Amendment

Over the past decade, gay and lesbian rights activists have begun to challenge the exclusion of same-sex couples from the definition of marriage with some success.²⁷⁹ In May 1991, three same-sex couples filed a lawsuit against the state of Hawaii challenging the constitutionality of the opposite-sex requirement of marriage.²⁸⁰ While the trial court rejected the challenge, the Hawaii Supreme Court remanded the case to the trial court to determine whether the state had a compelling state interest that could justify discrimination against same-sex couples.²⁸¹ In 1996, the trial court found that the state had not met its burden of justifying the marriage law discrimination.²⁸² Shortly thereafter, the Hawaii legislature responded by placing a constitutional amendment on the 1998 ballot that would give the legislature the power to restrict marriage to opposite-sex couples only.²⁸³ They also passed the Reciprocal

Amendment, June 30, 2003 [hereinafter LCR Challenges Frist] (contending that the "real threat to traditional marriage" is not homosexuals but the fifty percent divorce rate in the United States) (on file with the *Journal of Gender, Social Policy & the Law*), available at <http://www.lcrga.com/archive/200306301204.shtml> (last visited July 31, 2005).

279. *But see* *Singer v. Hara*, 522 P.2d 1187 (Wash. App. 1974) (holding that the state's denial of a marriage license to a gay couple was required by state statutes and was permitted by both the state and federal constitutions); *Baker v. Nelson*, 191 N.W.2d 185, 186-87 (Minn. 1971) (holding that a Minnesota statute governing marriage did not authorize marriage between persons of the same sex and was not unconstitutional).

280. *See* *Baehr v. Lewin*, 852 P.2d 44, 48-49 (Haw. 1993) (challenging the constitutionality of § 572-1 of the Hawaii Revised Statutes, which restricted marriage to a male and a female).

281. *See id.* at 63 (presuming unconstitutional laws based on suspect classes unless the government can show a compelling interest).

282. *See* *Baehr v. Miike*, 1996 WL 694235, *21 (Haw. Cir. Ct. Dec. 3, 1996) (requiring the government to show prejudice to the public in order for the public to claim a compelling interest in withholding the marriage right from same-sex couples).

283. *See* HAW. CONST., art. I, § 23 (1998) (granting the legislature the power to restrict marriage to opposite-sex couples); *see also* 1997 Haw. Sess. Laws 2883

Beneficiaries Act, which allowed same-sex couples and others excluded from marriage to register as reciprocal beneficiaries, and thereby be subject to a limited range of the rights and responsibilities enjoyed by married couples.

But, in the aftermath of the Hawaii Supreme Court decision and the subsequent trial court ruling, many believed that Hawaii was on the cusp of recognizing same-sex marriage. Opponents feared that if Hawaii did so, other states would be forced to recognize the validity of Hawaii marriages.²⁸⁴ Beginning with Utah, states began to pass laws defining marriage as a union between opposite sexes and limiting the recognition of same-sex marriage.²⁸⁵ Over the next six years, thirty-four states followed Utah's example, legislating against the recognition of same-sex marriages.²⁸⁶

Congress also responded to the Hawaii challenge to traditional marriage. In May 1996, the Defense of Marriage Act (DOMA) was

(ratifying an amendment that permits the state to withhold marriage rights from same-sex couples in November 1998); Baehr v. Miike, 1999 Haw. LEXIS 391, *8 (1999) (holding that the marriage amendment placed Hawaii Revised Statutes § 572-1 beyond the scope of the state's equal protection clause and thereby rendered the challenge to the statute prohibiting same-sex marriage moot).

284. See ROBERT LEFLAR ET AL., AMERICAN CONFLICTS LAW § 221 (4th ed. 1986) (stating that the marriage's place of celebration ordinarily determines the validity of marriage); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283(2) (2004) (presuming that marriages valid where they were celebrated will be recognized elsewhere, unless the marriage violates public policy); Andrew Koppelman, *Dumb and DOMA: Why the Defense of Marriage Act is Unconstitutional*, 83 IOWA L. REV. 1 (1997).

In the United States, public policy has often been invoked to deny recognition to incestuous, underage, or interracial marriages. Unless a restriction violated some substantive constitutional prohibition [as, it was eventually held, the prohibition of interracial marriage did], states have never been constitutionally prevented from withholding recognition from foreign marriages where those marriages violated their own strong public policies. Whether any particular marriage need be recognized is, then, primarily a question of state rather than federal law.

Id.; see also Barbara J. Cox, *Same-Sex Marriage and Choice of Law: If We Marry in Hawaii, Are We Still Married When We Return Home?*, 1994 WIS. L. REV. 1033, 1101 (1994) (contending that states should recognize same-sex marriage because it eliminates both discrimination based on prejudice and state interference with personal relationships); Andrew Koppelman, *Same-Sex Marriage, Choice of Law, and Public Policy*, 76 TEX. L. REV. 921 (1998). But see Linda J. Silberman, *Can the Island of Hawaii Bind the World? A Comment on Same-Sex Marriage and Federalism Values*, 16 QUINNIPAC L. REV. 191, 200 (1996) (analogizing same-sex marriage to incest or polygamy to conclude that states can prohibit types of marriage based on strong public policy).

285. See WILLIAM N. ESKRIDGE, JR., EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS 27 (2002) (recounting that Utah initially amended its marriage law to declare same-sex marriages invalid and later amended it so that state courts would not recognize out-of-state same-sex marriages).

286. See *id.* at 27-28 (comparing Utah to other states' responses, which passed a variety of laws, from redefining marriage to refusing to recognize any contractual rights created by same-sex marriages).

introduced in the Senate. A parallel bill was introduced in the House by Representative Robert Barr and others. The bill passed in the House by a vote of 342-67 on July 12, 1996, and in the Senate by a vote of 85-14 on September 10, 1996.²⁸⁷ President Clinton signed DOMA just after midnight on September 21, 1996.²⁸⁸ DOMA defines marriage as “only a legal union between one man and one woman as husband and wife,” and “spouse” as “only . . . a person of the opposite sex who is a husband or a wife.”²⁸⁹ The law permits states to ignore the Full Faith and Credit Clause of the Constitution in relation to same-sex marriages by authorizing the states to refuse to recognize “any public act, record, or judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State”²⁹⁰

Congressional debates on DOMA overwhelmingly reflected a social conservative vision of family, in which same-sex marriage is seen to threaten the very fabric of American society.²⁹¹ As the following excerpts from Congressional debates illustrate, the political discourse was one that emphasized the hallmarks of social conservatism. Many defended the opposite-sex definition of marriage on the basis of tradition. Senator Don Nickles stated, “[t]he definitions of [DOMA] are based on common understanding rooted in our Nation’s history, our statutes, and our case law. They merely reaffirm what Americans have meant for 200 years when using the words marriage and

287. 142 CONG. REC. 17094 (1996) (listing the names of Representatives against the bill, for the bill, and not voting); 142 CONG. REC. S10129 (1996) (discussing whether the states should retain the exclusive right to legislate on whether to recognize same-sex marriages valid in other states).

288. See, e.g., *Clinton Campaign Pulls Ad After Outcry*, S.F. CHRONICLE, Sept. 23, 1996, at A10 (stating that the gay and lesbian community were angered when President Clinton signed DOMA and referred to him as a “fair-weather friend”).

289. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 28 U.S.C. § 1738C) (restricting the federal definition of marriage to one between a man and a woman while permitting states to develop their own definition).

290. *Id.* (adding a section to ensure that states preserved their right to legislate independently on family law and marriage).

291. See, e.g., Charles J. Butler, *The Defense of Marriage Act: Congress’s Use of Narrative in the Debate Over Same-Sex Marriage*, 73 N.Y.U. L. REV. 841 (1998) (claiming that during Congress’ debates on DOMA, it used anecdotes to reinforce the apprehensions of permitting same-sex marriages and to justify the statute); James M. Donovan, *DOMA: An Unconstitutional Establishment of Fundamental Christian Christianity*, 4 MICH. J. GENDER & L. 335, 338 (1997) (criticizing the intent of the Defense of Marriage Act for lacking secular goals and thus violating the Establishment clause of the Constitution); Alec Walen, *The “Defense of Marriage Act” and Authoritarian Morality*, 5 WM. & MARY BILL RTS. J. 619, 619 (1997) (categorizing Congressional arguments against same-sex marriages into six parts: “(1) politics and economics; (2) history and tradition; (3) religion; (4) the essential nature of marriage and the family; (5) social decay; and (6) morality”).

spouse.”²⁹²

Many also focused on the procreative nature of marriage. The House Report noted, “[s]imply defined, marriage is a relationship within which the community socially approves and encourages sexual intercourse and the birth of children. It is society’s way of signaling to would-be parents that their long-term relationship is socially important—a public concern, not simply a private affair.”²⁹³ Senator Robert Byrd stated,

The purpose of this kind of union between human beings of opposite gender is primarily for the establishment of a home atmosphere in which a man and a woman . . . bring into being children for the fulfillment of their love for one another and for the greater good of the human community at large.²⁹⁴

Some commented on the threat of social chaos that the destruction of the traditional family would produce. Representative Asa Hutchinson stated, “[O]ur country can survive many things, but one thing it cannot survive is the destruction of the family unit which forms the foundation of our society. Those among us who truly desire a strong and thriving America for our children and grandchildren will defend traditional heterosexual marriage”²⁹⁵

Senator Byrd argued, “Much of America has lost its moorings. Norms no longer exist. We have lost our way with a speed that is awesome.”²⁹⁶ Some also emphasized the religious basis of marriage. Representative Hutchinson stated, “[M]arriage is a covenant established by God wherein one man and one woman are united for the purpose of founding and maintaining a family.”²⁹⁷ Representative Charles Canady declared, “[T]he traditional family structure—centered on the lawful union between one man and one woman—comports with nature and with our Judeo-Christian moral tradition.”²⁹⁸

292. 142 CONG. REC. S10103 (1996) (statement of Sen. Nickles) (arguing that DOMA does not interfere with the States’ ability to define marriage how it chooses).

293. H.R. REP. 104-664, at 15 (1996) (justifying society’s interest in safeguarding traditional marriage on the connection between marriage and children).

294. 142 CONG. REC. S10109 (1996) (statement of Sen. Byrd) (basing his view that only the relationship between a man and a woman is worthy of legal recognition and protection on history and culture).

295. 142 CONG. REC. 16970 (1996) (statement of Rep. Hutchinson) (stating that the majority of people would reserve marriage for a man and a woman).

296. 142 CONG. REC. S10111 (1996) (statement of Sen. Byrd) (defending the traditional definition of marriage based on the institution laid out in the Bible).

297. 142 CONG. REC. 16970 (1996) (statement of Rep. Hutchinson) (contending that the bill “simply restat[es]” the traditional view of marriage as set out both by the United States and State Supreme Courts).

298. 142 CONG. REC. H7441 (1996) (statement of Rep. Canady) (restricting

Many focused on questions of morality. Representative Bob Barr noted, “The flames of hedonism, the flames of narcissism, the flames of self-centered morality are licking at the very foundations of our society: the family unit.”²⁹⁹ The House Report further stated, “Civil laws that permit only heterosexual marriage reflect and honor a collective moral judgment about human sexuality. This judgment entails both moral disapproval of homosexuality and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality.”³⁰⁰ Relatedly, a strong current of disapproval of homosexuality also ran through the debates, sometimes erupting in explicit condemnation. Representative Tom Coburn explained, “I come from a district . . . who has very profound beliefs that homosexuality is wrong.”³⁰¹

While this social conservative discourse of tradition, morality and religion dominated the Congressional debates, fiscal conservative arguments also appeared intermittently in the debate. Interestingly, however, these arguments were deployed not to expand the definition of marriage and spouse to include a broader range of individuals and thereby broaden the scope of private responsibility. Rather, the fiscal arguments were deployed by the proponents of DOMA, asserting that the expansion of marriage and spouse would increase public costs. Senator Phil Gramm, for example, argued:

A failure to pass this bill, if the Hawaii court rules in favor of same-sex marriage, will create . . . a whole group of new beneficiaries—no one knows what the number would be—tens of thousands, hundreds of thousands, potentially more—who will be beneficiaries of newly created survivor benefits under Social Security, Federal retirement plans, and military retirement plans. It will trigger a whole group of new benefits under Federal health plans. And not only will it trigger these benefits for the Federal Government, but under the full faith and credit provision of the Constitution, it will impose—through teacher retirement plans, State retirement plans, State medical plans, and even railroad retirement plans—a whole

marriage to a relationship between a man and a woman); *see also* 142 CONG. REC. H7486 (1996) (statement of Rep. Buyer) (“We as legislators and leaders for the country are in the midst of a chaos, an attack upon God’s principles. God laid down that one man and one woman is a legal union. That is marriage, known for thousands of years. That God-given principle is under attack.”).

299. 142 CONG. REC. H7480-05 (1996) (statement of Rep. Barr) (criticizing “extremists” for forcing a “tortured view of morality” on the United States people).

300. H.R. REP. 104-664, at 15-16 (defending the traditional view of marriage by asserting that approving same-sex marriage would not only be illegitimate, but also trivialize the legitimacy of traditional marriage).

301. 142 CONG. REC. H7444 (1996) (statement of Sen. Coburn) (describing his District’s view that homosexuality is based on perversion and lust).

new set of benefits and expenses which have not been planned or budgeted for under current law.³⁰²

Similarly, Representative Barr stated, “[I]f you do not believe it is fiscally responsible to throw open the doors of the U.S. Treasury to be raided by the homosexual movement, then the choice is very clear.”³⁰³ Other representatives in the House agreed with Senator Gramm. Representative Dave Weldon stated, “I think it would be wrong to take money out of the pockets of working families across America and use those tax dollars to give Federal acceptance and financial support to same-sex marriages.”³⁰⁴

These fiscal conservative arguments were made notwithstanding the fact that no study was conducted regarding the impact of the recognition of gay marriage on state and federal benefits programs.³⁰⁵ The House of Representatives turned back an amendment to DOMA that would have “commissioned a General Accounting Office study of these and related questions.”³⁰⁶ Thus, Congress failed to consider the relative costs of benefits of expanding the marriage; in fact, the idea of saving money through potential privatization of public costs did not enter the political discussion. Rather, the political discourse—overwhelmingly influenced by a social conservative vision of the family that is anything but agnostic on same-sex marriage—simply deployed the rhetoric of fiscal costs in support of its traditional family agenda.

DOMA did not put an end to the constitutional challenges to marriage by same-sex couples. The battle over same-sex marriage subsequently moved to Vermont, where the state Supreme Court of Vermont held that the opposite sex definition of marriage violated the common benefits provision of the state constitution.³⁰⁷ But, rather than redefine marriage to include same sex couples, the Court handed the issue back to the Vermont legislature to craft an

302. 142 CONG. REC. 142 Cong. Rec. S10100-02 (1996) (statement of Sen. Gramm).

303. 142 CONG. REC. H7488 (1996) (statement of Rep. Barr) (suggesting that only those who believe that the beliefs of the American public are meaningless would oppose DOMA).

304. 142 CONG. REC. H7493 (1996) (statement of Rep. Weldon) (expressing concern that a State’s recognition of same-sex marriages would affect federal policies such as Social Security benefits).

305. See Donovan, *supra* note 291, at 356-57 (describing and refuting the Senate’s concern that same-sex marriages would overtax the current programs allowing for spousal benefits).

306. See *id.* at 358 (concluding that the failure to conduct a study while debating the bill was intentional) (citing 142 CONG. REC. H7503-05 (daily ed. July 12, 1996)).

307. See *Baker v. Vermont*, 744 A.2d 864, 886 (Vt. 1999) (rejecting the State’s arguments that the State’s interest in furthering procreation and traditional child-rearing warrants a ban on same-sex marriages).

appropriate remedy.³⁰⁸ After considerable and heated debate, the Vermont legislature enacted the Civil Unions Act, which established a parallel regime whereby same sex couples could register their civil unions, and thereby be subject to the same rights and responsibilities as married couples.³⁰⁹

Same sex marriage challenges have continued apace. In November 2003, the Massachusetts Supreme Court found the opposite sex definition of marriage to be in violation of the state Constitution and, in a subsequent reference, held that a civil unions law would also be in violation of the equality rights in the state Constitution.³¹⁰ A similar same-sex marriage challenge is still pending in New Jersey.³¹¹ And same sex marriage challenges have proliferated beginning with the actions of Mayor Newsom of San Francisco who began issuing marriage licenses to same sex couples in February, 2004.³¹²

With these same-sex marriage challenges pending and the Supreme Court striking down Texas' sodomy laws in *Lawrence v. Texas*, social conservatives have once again placed their opposition to same-sex marriage squarely on the federal public agenda.³¹³ In May 2003, Representative Marilyn Musgrave proposed an amendment to the

308. See *id.* at 886-87 (imagining that the legislature could devise a system to define marriage as heterosexual marriage while still protecting the common benefits rights of same-sex couples).

309. See VT. STAT. ANN. tit. 15 §§ 1201-1207 (2004) (extending the benefits of marriage to same-sex couples).

310. See *Goodridge v. Dept. of Pub. Health*, 798 N.E.2d 941, 968 (Mass. 2003) (finding that the State's interest in creating an environment to further procreation did not constitute a rational basis for banning same-sex marriage); see also Cheryl Wetzstein, *States Lining Up to Outlaw Same-Sex 'Marriage'*, WASH. TIMES, Nov. 9, 2004, at A03 (noting that Massachusetts state legislature subsequently agreed to amend the state constitution to allow civil unions and ban same sex marriage).

311. See *Lewis v. Harris*, 2003 WL 23191114, at *7-8 (N.J. 2003) (rejecting same-sex marriage benefits as a fundamental right embedded in the Federal or State constitution).

312. See Dean E. Murphy, *California Attorney General is Pressed on Gay Marriage*, N.Y. TIMES, Feb. 25, 2004, at A19 (discussing judicial and political challenges to San Francisco Mayor Gavin Newsom's directive to allow same-sex couples to legally marry).

313. See 539 U.S. 558, 578 (2003) (striking down a Texas sodomy law that prohibited gay sex because it violated the right to privacy protected by the Due Process Clause). In his classically social conservative dissenting opinion, Justice Antonin Scalia warned of the dire consequences of the majority:

The Court today pretends that it possesses a . . . freedom of action, so that we need not fear judicial imposition of homosexual marriage, as has recently occurred in Canada. Do not believe it . . . Today's opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned.

Id. at 604 (Scalia, J. dissenting) (citations omitted).

Constitution to prohibit same-sex marriage in the United States.³¹⁴
As initially drafted, the Federal Marriage Amendment (“FMA”) read:

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 under state or federal law shall be construed to require that marital status or the legal incidents thereof be conferred upon

314. See Federal Marriage Amendment, H.R.J. RES. 56, 108th Cong. (2003) (proposing a constitutional amendment that would define and limit marriage to one between a man and a woman). The Federal Marriage Amendment is a bipartisan proposal, whose sponsors include Collin Peterson (D-MN), Mike McIntyre (D-NC), Ralph Hall (D-TX), Marilyn Musgrave (R-CO), Jo Ann Davis (R-VA) and David Vitter (R-LA). *Id.*; see also Press Release, Alliance for Marriage, Introduction of the Federal Marriage Amendment in Congress (May 15, 2002) (noting that the Alliance for Marriage, a racially diverse organization “dedicated to promoting marriage and addressing the epidemic of fatherless families in the United States,” has spearheaded the campaign for the constitutional amendment for several years), available at http://www.allianceformarriage.org/site/PageServer?pagename=mac_coalition_statement (last visited July 24, 2005). The Alliance for Marriage is committed to a range of neo-conservative public policy reforms to promote the traditional family. *Id.* On the proposed constitutional amendment, the organization states, in classically social conservative terms:

For several decades, America has been wandering in a wilderness of social problems caused by family disintegration. And an overwhelming body of social science data has established that America’s greatest social problems – violent crime, welfare dependency, and child poverty – track more closely with family disintegration than they do with any other social variable, including race and income level. Tragically, as bad as our current situation may be, it could soon become dramatically worse. This is because the courts in America are poised to erase the legal road map to marriage and the family from American law. In fact, the weakening of the legal status of marriage in America at the hands of the courts has already begun. . . . The institution of marriage is so central to the well being of both children and our society that it was, until recently, difficult to imagine that marriage itself would need explicit constitutional protection. However, our country’s time-honored understanding that the very essence of marriage is the union of male and female has come under fire in the courts.

Id. The Alliance for Marriage concludes that the only way to protect the institution of marriage from its disintegration at the hands of the courts is through a constitutional amendment. *Id.*; *Necessary Amendment: On Gay Marriage*, NAT’L REV., Aug. 11, 2003, at 15 (objecting to judges and states deciding whether or not to legalize same-sex marriage), available at <http://www.nationalreview.com/11aug03/editors/081103a.asp> (last visited July 31, 2005); Robert P. George, *The 28th Amendment*, NAT’L REV., July 23, 2001, at 3234 (concluding that because the judiciary is eroding the concept of marriage, a national campaign to preserve the institution must be mounted quickly); Robert H. Bork, *Stop Courts From Imposing Gay Marriage: Why We Need a Constitutional Amendment*, WALL ST. J., Aug. 7, 2001, at A14 (blaming the courts for leading the “radical redefinition of marriage” while the majority of Americans do not want to special rights for homosexuals); Maggie Gallagher, *Do We Need a Federal Marriage Amendment?*, TOWNHALL.COM, July 18, 2001 (arguing that the Federal Marriage Amendment would not prohibit legislatures and private corporations from extending benefits to unmarried couples), at <http://www.townhall.com/columnists/maggiegallagher/mg20010718.shtml> (last visited July 25, 2005). But see Todd Hertz, *Christian Conservatives Split on Federal Marriage Amendment*, CHRISTIANITY TODAY, June 17, 2002 (criticizing the Alliance for Marriage for not going far enough to prevent states from recognizing same-sex marriage), available at <http://www.christianitytoday.com/ct/2002/123/43.0.html> (last visited June 16, 2005).

unmarried couples or groups.³¹⁵

The proposal was referred to the House Judiciary Subcommittee on the Constitution the day before the Supreme Court ruling in *Lawrence*. The Senate debated the need for a constitutional amendment such as the FMA in subcommittee hearings in September 2003.³¹⁶ Senator Allard subsequently introduced a Senate version of the FMA and referred it to the Senate Committee on the Judiciary. A Senate version of the FMA was subsequently introduced by Senator Allard, and referred to the Senate Committee on the Judiciary.³¹⁷ On March 23, 2004—the day before the Senate Subcommittee hearings on the FMA—Senator Allard and Representative Musgrove introduced an amended text:

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, marriage 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.³¹⁸

The amendment was largely in response to the criticism that the FMA, as originally drafted was so broad that it would prohibit individual states from introducing civil union or other partnership recognition legislation. The revised text is intended to narrow the FMA to prevent a conflict with any such state legislation.

In the intervening period, same sex marriage challenges continued apace, adding further momentum to the social conservative resolve to move forward with their anti-same sex marriage agenda. In November 2003, the Massachusetts Supreme Court struck down the opposite sex definition of marriage as violating the state constitution, and held that same sex marriages would begin to be recognized in six months. On a reference from the Massachusetts legislature, the Supreme Court subsequently stated that a civil union regime would not be consistent with the state constitution. Then, in a somewhat unexpected development, in February 2004, the Mayor of San Francisco told city officials to begin issuing marriage licenses to same

315. H.R.J. Res. 56, 108th Cong. (2003) (proposing a constitutional amendment to be ratified by the States).

316. See generally *What is Needed to Defend the Bipartisan Defense of Marriage Act of 1996: Hearing Before the S. Subcomm. of the Constitution, Civil Rights and Property Rights*, 108th Cong. (2003) [hereinafter *Bipartisan Defense Hearing*] (debating whether there was a need for a constitutional amendment banning same-sex marriage).

317. See Federal Marriage Amendment, S.J. Res. 26, 108th Cong. (2003) (proposing a constitutional amendment to ban same-sex marriage throughout the United States).

318. S.J. Res. 30, 108th Cong. (2004).

sex couples. Indeed, it has been these developments that have brought the issue squarely within the federal limelight. While President Bush initially hinted at his support for the constitutional amendment,³¹⁹ in both the State of the Union 2004, and even more explicitly in a press conference on February 24, 2004, he specifically stated his support for a constitutional amendment banning same sex marriage.³²⁰

The Senate Subcommittee on the Constitution, the Senate Committee on the Judiciary, and the House Subcommittee on the Constitution each held hearings in March 2004. Those who have testified at the hearings in favor of the FMA have cast their arguments in social conservative terms. However, as an analysis of the hearings reveals there are also some marked departures from the political debate surrounding DOMA a decade earlier. Four discrete and recurrent themes are evident in the FMA hearings to date: the decline of the family,³²¹ the need to protect children within traditional

319. See Neil A. Lewis, *From the Rose Garden: Same-Sex Marriage; Bush Backs Bid to Block Gays from Marrying*, N.Y. TIMES, July 31, 2003, at A1 (quoting President Bush's appeal to social conservatives and religion in his 2004 State of the Union Address).

[W]e're all sinners. . . . On the other hand, that does not mean that somebody like me needs to compromise on issues such as marriage. And that's really where the issue is headed here in Washington, and that is the definition of marriage. I believe marriage is between a man and a woman, and I believe we ought to codify that one way or the other and we have lawyers looking at the best way to do that.

Id.; see also Robert Pear & David D. Kirkpatrick, *Bush Plans \$1.5 Billion Drive for Promotion of Marriage*, N.Y. TIMES, Jan. 14, 2004, at A1 (quoting President Bush's response to whether he would support a constitutional amendment against gay marriage and gay civil unions).

If necessary . . . I will support a constitutional amendment which would honor marriage between a man and a woman, codify that, and will—the position of this administration is that whatever legal arrangements people want to make, they're allowed to make, so long as it's embraced by the state, or does start at the state level.

Id.

320. President George W. Bush, State of the Union Address (Jan. 20, 2004) [hereinafter State of the Union Address] (reprimanding "activist judges" for creating law allowing same-sex marriages while declaring support for DOMA), available at <http://www.whitehouse.gov/news/releases/2004/01/20040120-7.html> (last visited June 17, 2005); President George W. Bush, Presidential Press Conference, President Calls for Constitutional Amendment Protecting Marriage, Feb. 24, 2004 (recommending a constitutional amendment because "activist" courts could strike down an ordinary law), available at <http://www.whitehouse.gov/news/releases/2004/02/20040224-2.html> (last visited June 17, 2005).

321. See 150 Cong. Rec. H7895-02 (statement of Rev. Richard Richardson, Assistant Pastor) ("The dilution of the ideal—of procreation and child-rearing within the marriage of one man and one woman—has already had a devastating effect on our community. We need to be strengthening the institution of marriage, not diluting it."); see also 150 Cong. Rec. S7876-01 (2004) (statement of Hon. Orrin Hatch, Chairman).

marriage,³²² and the need to protect democracy from activist judges.³²³ A fourth theme evident throughout the hearings has been in response to the critics of the FMA, and argues that the FMA is not discriminatory.³²⁴

Of the six themes identified in the DOMA debates—tradition, procreative nature of marriage, destruction of the traditional family, religion, morality and condemnation of homosexuality—only the first three remain evident throughout the FMA debates. Religion is rather less in evidence in the hearing. Some of the supporters of the FMA articulated their position in more explicit religious discourse. For example, the American Center for Law and Justice submissions to the House Subcommittee on the Constitution began their discussion of marriage with a quote from Genesis.³²⁵ President Bush has at times deployed religion in his support for FMA, although most of his support is articulated in terms of tradition and the sanctity of

The bedrock of American success is the family, and it is traditional marriage that undergirds the American family. The disintegration of the family in this country correlates to the many serious social problems, including crime and poverty. We are seeing soaring divorce rates. We are seeing soaring out-of-wedlock birth rates that have resulted in far too many fatherless families. Weakening the legal status of marriage at this point will only exacerbate these problems, and we simply must act to strengthen the family.

Id.; *Bipartisan Defense Hearing*, *supra* note 316 (statement of Rev. Dr. Ray Hammond II, Pastor) (claiming that an acceptance of same-sex marriages will further exacerbate the difficulties already faced by American families); *id.* (statement of Maggie Gallagher) (contending that legalization of same-sex marriage asserts the government's belief that children no longer need mothers and fathers); *id.* (statement of Michael Farris, President, Patrick Henry College) (indicating that the potential for judge-made law to undermine the traditional definition of marriage is too great to be tolerated).

322. See 150 Cong. Rec. H7897 (2004) (statement of Rev. Richard Richardson, Assistant Pastor) ("We firmly believe that children do best when raised by a mother and a father. . . . It is not just society—it is biology, it is basic human instinct. We alter those expectations and basic human instincts at our peril, and at the peril of our communities."); see also *Oversight Hearing on the Defense of Marriage Act: Hearing Before the Subcomm. on the Const. of the House Comm. on the Judiciary*, 108th Cong. (2004) [hereinafter *Oversight Hearing*] (statement of Vincent McCarthy, Am. Ctr. for Law and Justice) (arguing that "claims that raising children within a homosexual union [are] not damaging to the children are entirely impeached by flawed constructions and conclusions").

323. See *A Proposed Constitutional Amendment to Preserve Traditional Marriage: Hearing Before the S. Comm. on the Judiciary*, 108th Cong. (2004) [hereinafter *Proposed Constitutional Amendment*] (statement of Prof. Katherine Spaht) (supporting the Federal Marriage Amendment to prevent the issue from being decided by the courts).

324. See 150 Cong. Rec. H7895-02 (statement of Rev. Richard Richardson) ("The traditional institution of marriage is not discrimination. And I find it offensive to call it that. Marriage was not created to oppress people. It was created for children.").

325. See *Oversight Hearing*, *supra* note 322 (statement of Vincent McCarthy, Am. Ctr. for Law and Justice) (quoting Genesis 1:26-27 about the creation of man, and more specifically, the creation of male and female in support of the constitutional amendment).

marriage.³²⁶ However, both the American Center for Law and Justice and President Bush have overwhelmingly cast their support in terms of the traditional family. The themes of immorality and the condemnation of homosexuality are, however, conspicuously absent in the political discourse of the hearings. Arguably, the discursive terrain has shifted sufficiently in the intervening period that the social conservatives are now forced to confront the argument that the FMA is discriminatory. The idea that discrimination against gay men and lesbians is wrong was simply not part of the social conservative conversation in the DOMA debates. Social conservative discourse simply presumed that gay men and lesbians, and same sex relationships were morally inferior—indeed defective—and deserving of condemnation, not equality. It would appear that this kind of explicit condemnation of gay men and lesbians has lost some of its political legitimacy.³²⁷ Social conservatives must instead refute the allegation of discrimination.

Yet, much of the social conservative discourse is enduring. The decline of the traditional and the resulting harm to children remains foundational to their claims, and consistent with their political discourse in other dimensions of the legal regulation of the family. Strong government intervention is required to reverse this decline. Indeed, it is a claim to the kind of government intervention that many conservatives typically oppose—federal and constitutional intervention in an issue that falls squarely within state jurisdiction. The FMA then not only runs counter to libertarian conservative claims for minimalist government, but also for local and state governance over federal. To the extent that it is even addressed, social conservative supporters of the FMA attempt to justify this intervention in terms of the importance of the interest at stake.

326. See Lewis, *supra* note 319 (indicating that Bush's statement that "we're all sinners" in his 2004 State of the Union address was mix of tolerance with his conservative policy); see also, State of the Union Address, *supra* note 320 ("The same moral tradition that defines marriage also teaches that each individual has dignity and value in God's sight.").

327. See Alan Cooperman, *Santorum Angers Gay Rights Groups*, WASH. POST, Apr. 22, 2003, at A04 (quoting Senator Rick Santorum's disparagement of homosexual acts, "If the Supreme Court says that you have the right to consensual (gay) sex within your home, then you have the right to polygamy, you have the right to incest, you have the right to adultery"). The political furor that erupted around these comments, comments which were utterly commonplace during the DOMA debates, suggests that the terrain of legitimate debate and comment around gay and lesbian issues is shifting. But see Press Release, Concerned Women for America, CWA Condemns "Gay Thought Police" Attacks on Sen. Santorum (Apr. 22, 2003) (implying that the shift must not be overstated because many individuals and organizations continue to oppose homosexual acts), available at <http://www.cultureandfamily.org/articledisplay.asp?id=3817&department=CFI&categoryid=cfrepost> (last visited June 17, 2005).

While libertarian arguments have been largely ignored, some witnesses have attempted to address and reject these concerns. For example, Katherine Shaw Spaht, a witness before the Senate Judiciary Committee hearings, attempted to justify the intrusion into states' rights on the basis of the importance of the interests at stake.³²⁸ Spaht also argued that the courts have reinterpreted (and in her view, misinterpreted) liberty rights as a "radical right of individual autonomy without the tempering language of 'the common good.'"³²⁹ It is an argument of liberty going too far; of liberty coming unhinged from its foundations in the "country's history and tradition."³³⁰ It is an argument that appeals to the social conservative emphasis on authority over freedom, social order over individual liberty. In a similar rejection of more libertarian ideas, Maggie Gallagher, a witness before the Senate Subcommittee on the Constitution Hearings in September 2004, specifically considered and rejected the private choice arguments in favor of same-sex marriage.³³¹ In her view, the interest of children in opposite-sex parents far outweighs any right of individuals to make intimate choices.

While this social conservative rhetoric remains the dominant conservative voice around same sex marriage, a more libertarian discourse has begun to emerge in federal political debates beyond the few lone voices of the Log Cabin Republicans. A private choice approach to the question of gay and lesbian rights has begun to

328. See *Proposed Constitutional Amendment*, *supra* note 323 (statement of Prof. Katherine Spaht).

State experimentation as fifty individual laboratories has not been permitted when the question is as fundamental as what is marriage We don't permit a state to experiment with socialism or printing its own currency. Denying such experimentation is especially prevalent if there is concern for the welfare of children Children's welfare is central and at stake in a common understanding of marriage.

Id.

329. *Id.* (expressing concern that the courts' interpretation of liberty has rendered the definition of marriage unpredictable in the future).

330. *Id.*

331. See *Bipartisan Defense Hearing*, *supra* note 316 (statement of Maggie Gallagher).

Two ideas are in conflict here: one is that children deserve mothers and father (sic), and that adults have an obligation to at least try to conduct their sexual lives to give children this important protection. That is the marriage idea. The other is that adult interests in sexual liberty are more important than "imposing" or preferring any one family form: all family forms must be treated identically by law if adults are to be free to make intimate choices. This is the core idea behind the drive for same-sex marriage. And it is the core idea that must be rejected if the marriage idea is to be sustained.

Id.

emerge from within the judicial forum with the United States Supreme Court decision in *Lawrence*, and a similar libertarian sensibility is beginning to make its way into the political realm as conservative opposition to the FMA. In *Lawrence*, the United States Supreme Court in striking down the Texas sodomy law, articulated a strong right to liberty that encompassed the right of gays and lesbians to enter into consensual, sexual relationships in the privacy of their homes free from government intervention. It described the sodomy laws as “touching upon the most private human conduct, sexual behavior, and in the most private of places, the home.”³³² According to the majority opinion, the State should not attempt

[T]o define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects. It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.³³³

While the significance of this passage and the decision for same-sex marriage will be debated for years to come,³³⁴ it does represent a strong statement of a right to be free from government intervention in the personal sphere of privacy. In contrast to the legislative forum, where social conservative arguments remain dominant, *Lawrence* represents a significant incursion of a private choice approach in which a libertarian sensibility trumped the social conservative argument in favor of the legal prohibition of same-sex conduct.³³⁵ While it is too early to tell, it is possible to speculate that the discursive

332. *Lawrence*, 539 U.S. at 567 (concluding that the Court failed to appreciate the liberty rights at issue in *Bowers v. Hardwick*, 478 U.S. 186 (1986), before overruling the previous decision).

333. *Id.* (counseling against the government’s attempts to limit the types of relationships a person may legally enter into).

334. Compare *id.* at 578 (“The present case . . . does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.”), with *id.* at 604 (Scalia, J., dissenting) (“Today’s opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned.”). According to Scalia, once “moral disapprobation of homosexual conduct” is removed as a justification for limiting marriage to opposite sexes, little other justification remains. *Id.* at 604-05.

335. See generally Randy Barnett, *Justice Kennedy’s libertarian Revolution: Lawrence v. Texas*, CATO SUPREME CT. REV. 21, 36 (2002-03) (arguing that Kennedy has endorsed a “presumption of liberty” that places the burden on the government to justify a restriction on freedom rather than a burden on the citizen to establish the liberty is fundamental).

power of liberty in the judicial forum may be beginning to displace, or at least challenge, the hold of social conservatism on issues of gay and lesbian rights. While the private choice arguments in relation to same-sex couples still finds little support in the legislative forum, the Supreme Court ruling in *Lawrence* is illustrative of the ways in which the law operates to mediate and select amongst competing discourses.³³⁶ In affirming this private choice approach, the Supreme Court discourse is forced onto the legislative stage of governments otherwise committed to a more social conservative vision. While there may be significant limitations on the ability of the judiciary to do so in the future, given its precarious ideological balance and the politically contested nature of judicial appointments, it is worth observing that the discursive power of liberty is powerful in law. When a social conservative vision collided with a private choice one, moderate conservatives, like Justices Kennedy and Souter, sided with the discourses of liberal legalism, allowing private choice to trump moral regulation. *Lawrence* may represent the beginning of a cleavage between libertarian and social conservative voices in judicial discussions of same-sex issues.

Quite arguably, the criminalization of gay sex represents a more egregious violation of private choice than the prohibition on same-sex marriage. While libertarians would unanimously condemn the former, they might take a different position of the latter. For example, some might be wary of the judiciary finding a constitutional right to same-sex marriage and imposing that right on a recalcitrant state. Others might be more inclined to see the state get out of marriage entirely.³³⁷ It is thus not a foregone conclusion that the private choice approach endorsed in *Lawrence* would be extended to same-sex marriage.

However, some conservative voices have increasingly articulated their discomfort with the social conservative position on same-sex marriage. Several prominent Republicans appeared before the Senate and House committee hearings to speak against the FMA. They have not cast arguments to support the concept of same-sex marriage, but because they see the marriage amendment as an undue intervention in state and individual rights.³³⁸ Former Republican

336. See HERMAN, *supra* note 79, at 137-69.

337. See David Boaz, *Privatizing Marriage*, SLATE (Apr. 25, 1997) (arguing that the legal regulation of intimate relationships should be left to the parties to structure according to their own private choices), available at <http://www.slate.com/toolbar.aspx?action=print&id=2440> (last visited June 17, 2005).

338. See *Bipartisan Defense Hearing*, *supra* note 316 (statement of Prof. Dale Carpenter) (arguing that since the Constitution, states have retained the authority to

Congressman Bob Barr, an author of the Defense of Marriage Act, has opposed the constitutional amendment stating that, "A constitutional amendment is both unnecessary and needlessly intrusive and punitive."³³⁹ In Barr's view, "marriage is a quintessential state issue."³⁴⁰ It is, in his view, a conservative vision:

As conservatives, we should be committed to the idea that people should . . . be free to govern themselves as they see fit. State and local governments provide the easiest and most representative avenue to this ideal In the best conservative tradition, each state should make its own decision without interference from Washington.³⁴¹

Barr acknowledges social conservative fears about the demise of the family, and endorses the need to return stability to the American family.³⁴² But, in his view, "homosexual couples seeking to marry did not cause this problem, and the Federal Marriage Amendment cannot be the solution."³⁴³ He thus distinguishes his position on same-sex marriage from other social conservatives.

Former Republican Senator Alan Simpson has similarly stated his opposition to the FMA in the language of state rights and individual

legislate on all matters not reserved to the federal government and have traditionally controlled the area of family law).

339. See Bob Barr, *Leave Marriage to the States*, WASH. POST, Aug. 21, 2003, at A23 (asserting that DOMA goes as far as the federal government needs to go in defining the legal parameters of marriage).

340. See *Preserving Traditional Marriage: A View From the States. Hearing Before the S. Comm. on the Judiciary* (2004) (statement of Hon. Bob Barr, Chairman) (stating that he spend efforts to ensure the traditional institution of marriage in his home state of Georgia but would not advise Alaska or California how to define marriage).

341. *Id.* (noting, cautiously, but explicitly, his opposition to same-sex marriage: "To be clear, I oppose any marriage save that between one man and one woman. And, I would do all in my power to ensure that such a formulation is the only one operative in my home state of Georgia."). However, in his view, individual states are entitled to make their own decisions. *Id.* Barr also opposes the FMA on the grounds that the Constitution should not be easily amended. *Id.* He fears that amending the Constitution for this purpose would be a dangerous precedent which could lead to liberal activists modifying the Second Amendment, or banning tax cuts. *Id.* In his view, the Constitution should not be used to promote particular political ideologies and a constitutional amendment is unnecessary in light of DOMA and the legislation in thirty-eight states prohibiting same sex marriage. *Id.*

342. See *id.*

I worry, as do many Americans, about the erosion of the nuclear family, the loosening influence of basic morality, and the ever-growing pervasiveness of overtly sexual and violent imagery in popular entertainment. Divorce is at an astronomical rate—children born out of wedlock are approaching the number born to matrimony. The family is under threat, no question.

Id.

343. *Id.* (emphasizing the need for solutions to restoring family values and stability, but refusing to endorse the constitutional amendment as an effective answer).

liberty.³⁴⁴ In his view, the FMA would undermine the basic principles of federalism.³⁴⁵ “[I]t is surely not the tradition in this country to try to amend the Constitution in ways that constrict liberty.”³⁴⁶ He further argues that the FMA would not be consistent with Republican values of “respecting the rights and dignity of the individual.”³⁴⁷

Many of the witnesses quoted with approval the words of Vice President Cheney, although the Vice President has subsequently distanced himself from this position:

The fact of the matter is we live in a free society, and freedom means freedom for everybody. That means people should be free to enter into any kind of relationship they want to enter into . . . I think we ought to do everything we can to tolerate and accommodate whatever kind of relationships people want to enter into.³⁴⁸

This statement goes farther than a mere assertion of state rights; it comes closer to a libertarian assertion of the rights of individuals, and the rights of gay men and lesbians in particular to make their own private choices about how to structure their private lives.

The conservative opposition to the FMA, while falling short of supporting same-sex marriage, reflects a libertarian sentiment about private choice and limited government. These republican voices join Log Cabin Republicans who have similarly voiced their opposition to

344. See Alan Simpson, *Missing the Point on Gays*, WASH. POST, Sept. 5, 2003, at A21 (explaining that “Republicans have always believed that government actions that affect someone’s personal life, property and liberty—including, if not especially marriage—should be made at the level of government closest to the people.”); Press Release, Republican Unity Coalition, Why RUC? (opposing the Federal Marriage Amendment based on federalism and the Republican belief in limited government), available at <http://www.republicanunity.com/background.html> (last visited June 17, 2005); see also Deb Price, *Gerald Ford: Treat Gay Couples Equally*, DETROIT NEWS, Oct. 29, 2001, at 11A (contending that former president Gerald Ford, another prominent member of the RUC, has publicly stated he is in favor of treating gay couples the same as married couples).

345. See Simpson, *supra* note 344 (suggesting that the proposed constitutional amendment would undermine federalism and achieve nothing to strengthen American families).

346. *Id.* (contrasting the proposed amendment to past constitutional amendments, which the legislature has consistently designed to expand freedom and liberty).

347. See *id.* (stressing that the real threats to American family values are “divorce, out-of-wedlock births and infidelity,” not homosexuality).

348. Vice President Dick Cheney, The Lieberman-Cheney Vice Presidential Debate (Oct. 5, 2000) (responding to the moderator’s question concerning whether homosexuals in America deserve equal rights), available at <http://www.debates.org/pages/trans2000d.html> (last visited June 17, 2005). Vice President Cheney has subsequently stated that he will support whatever decision President Bush makes on the issue. See Alan Cooperman, *Mary Cheney Urged to Fight a Ban on Same-Sex Marriage*, WASH. POST, Feb. 24, 2004, at A03. However, Cheney’s original statement has been cited with approval by many of the conservative opponents to the FMA.

the FMA,³⁴⁹ articulating their position in the language of individual autonomy, freedom from government intervention and tax fairness. These statements are indicative of the beginnings of a more libertarian inspired private choice discourse entering into public policy debates on same-sex marriage. While the social conservative position remains dominant (and the fiscal conservative lays dormant), this libertarian approach represents the emergence of a fissure within conservative politics on the question of same sex marriage, a fissure that could produce very different positions not only on the FMA, but on same sex marriage itself. While the libertarian position, as articulated within federal public policy debates, has stopped well short of supporting same-sex marriage, a position that advocates private choice and limited government could be expected to eventually endorse the Log Cabin Republican position in favor of same sex marriage.

CONCLUSION

This Article began with a question about the partial privatization of dependency in American law and policy. The analysis has sought to reveal the extent to which the conflicts and contradictions within conservative political discourse has been partially responsible for this partial privatization. While a fiscal conservatism would endorse a more robust privatization of dependency, broadening the scope and content of family support obligations with broader definitions of family, both libertarian and social conservatism place constraints on this privatization. Libertarian conservatives are concerned about the imposition of obligations in the absence of choice, and seek to maximize private choice within the legal regulation of the family. Social conservatives, by contrast, are concerned about promoting the traditional family and are opposed to broader definitions of family that would undermine this ideal. Both of these conservatisms oppose, for entirely different reasons, an expansion of support obligations and the privatization of dependency beyond the marital unit. For libertarians, support obligations outside of marriage would be to impose obligations in the absence of choice. For social conservatives, support obligations outside of marriage would be to encourage the demise of the traditional family.

Federal public policy in the legal regulation of marriage has been

349. See LCR Challenges Frist, *supra* note 278 (advocating for a type of “civil contract providing tax fairness and family stability” for same-sex couples, without infringing on religious values); LCR Press Release, *supra* note 276 (seeking rights for same-sex couples, such as the right to visit a partner in the hospital and the right to control the partner’s remains).

characterized by an ebb and flow in the relative power of fiscal and social conservatism, with libertarian conservatism making but a rare appearance in public policy debates. In the reform of child support and social welfare in the 1970s and 1980s, fiscal conservatism informed the restructuring of welfare encouraging single mothers to work and the broadening of child support obligations to include unmarried parents. As the discursive power of social conservatism grew in the 1990s, public policy initiatives promoting responsible fatherhood and marriage have increasingly sought to reverse the ways in which these earlier developments may have weakened the traditional family. While child support laws continue to impose broad support obligations on married and unmarried parents, the new initiatives seek to promote the married over the unmarried variety, and the two parent over the one parent variety.

Libertarian emphasis on private choice has had little resonance in the area which has been the most intense privatization of dependency, namely, child support. Individuals are not given a choice about whether or not to assume responsibility for their children. Similarly, in the restructuring of welfare, choice simply does not resonate. Individuals are not to be given the choice to go on public assistance. According to the critique of moral hazard, it was the existence of this choice that has resulted in women making bad choices and not assuming the costs of single motherhood. Choice is simply not extended to deadbeat dads and welfare mothers.

But the idea of private choice has begun to have some, albeit still limited, resonance in the area of same-sex marriage. While social conservatism remains the dominant conservative voice in contemporary debates about same-sex marriage, a libertarian conservatism that emphasizes the importance of the choice to marry has become audible in public policy debates. In striking contrast, fiscal conservatives are virtually absent in this arena. Unlike in other jurisdictions where fiscal conservatives have supported the expansion of definitions of family to include same-sex couples explicitly on the basis that it will help privatize dependency and relieve the burden on the public purse, federal debates about the legal regulation of same-sex couples has not included a significant fiscal conservative voice. To the extent that fiscal conservatism has even been audible in earlier debates about DOMA, these arguments were used against the recognition of same-sex marriage, rather than in support.

The continuing, indeed escalating power of social conservatism has operated to limit the privatization of dependency beyond more traditional family forms. According to social conservatives, dependency can and should be privatized, but only within the

traditional family. Social conservatism has similarly operated to preclude a more libertarian privatization of the family, in terms of the expansion of private choice. According to social conservatives, individuals are free to make choices within the family – provided they are the right individuals and they make the right choices. The continuing discursive power of the social conservative vision of the family has to a large extent precluded the emergence of a broader definition of family, and a more spirited privatization of support obligations capable of promoting the goals of either fiscal conservatives or libertarians.

At the same time, it is important to recognize that both fiscal conservatism and libertarian conservatism place constraints on social conservatism. The continuing influence of fiscal conservatism is evident in the on-going enforcement of child support obligations and workfare requirements of welfare. The promotion of responsible fatherhood and marriage by social conservatives is intended to operate to supplement the existing child support and welfare laws, not to override them. Similarly, in the area of same-sex marriage, libertarian conservatism is placing limitations on the kinds of arguments that social conservatives can make, or at a minimum, on the kinds of arguments to which they are forced to respond. Social conservatives are being forced to answer the allegation of the restriction of state rights, and to a lesser extent, the violation of individual privacy rights. The constraining influence of the clash between these contesting conservatisms thus cut in multiple directions. It is not simply a matter of the dominance of social conservatism. Rather, it is the clashes and contradictions between and amongst these divergent visions of family and privatization have been an animating force in public policy debates, initiatives, and legislation, all constraining and enabling different regulatory possibilities at different moments.

Moreover, the continuing discursive power of social conservatism has placed limitations on the frames within which the question of the privatization of dependency is debated and discussed. The focus on defending the traditional family—responsible fatherhood, marriage promotion, defending opposite-sex marriage—puts some questions on the table, while bracketing other ones. The debate is framed as one of choice versus tradition, equality versus morality, economic obligation versus gendered parental roles. While these are important issues to be resolved and the resolution will affect the future of the legal regulation of the family, the framework is one that precludes attention to a range of other potentially more far reaching issues. For example, how should we best regulate intimate relationships? Who

should be responsible for supporting persons without market income? Is marriage the most appropriate regulatory regime for the legal regulation of intimacy? If we extend the legal regulation to marriage-like relationships, namely, unmarried cohabiting relationships on the basis of their functional equivalency to marriage, why not extend legal regulation beyond conjugality? Why should we privilege conjugal over non-conjugal relationships?

One of the reasons that public policy has recognized and regulated marital relationships has to do with the unique nature of the economic and emotional dependency that characterizes these relationships. Society imposes rights and responsibilities on individuals within these relationships of economic and emotional dependency because of the unique vulnerabilities and interdependencies.³⁵⁰ Other jurisdictions have extended recognition significantly beyond marriage. Canada and Australia, for example, extensively regulate non-marital cohabitation on the basis of the functional equivalency of these relationships to marriage. What about other non-conjugal relationships that are characterized by similar economic and emotional dependency? What about the two adult sisters who have lived together for forty years, in lives that are economically and emotionally intertwined? If their relationship breaks down, should one be able to look to the other for support? Should the sister without market income be able to seek support if she performed the role of homemaker? Or if she contributed to her sister's business without compensation? Or if she maintained the home but never received legal title? These individuals were not married, nor could they ever marry. But, nor were these individuals living in a conjugal relationship. Therefore, even in jurisdictions that recognize non-marital cohabitation, there would be little to no legal interest in the dependency that might arise on the breakdown of such a relationship.³⁵¹

The example of the two sisters raises the question of whether

350. See Brenda Crossman & Bruce Ryder, *What is Marriage-Like Like? The Irregularity of Conjugality*, 18 CAN. J. FAM. L. 269, 281-82 (2001) (characterizing a conjugal relationship, the basis for a marriage-like relationship, as one founded on interdependency and equality, rather than on traditional gender roles). See generally BRENDA CROSSMAN & BRUCE RYDER, *THE LEGAL REGULATION OF ADULT PERSONAL RELATIONSHIPS: EVALUATING POLICY OBJECTIVES AND LEGAL OPTIONS IN FEDERAL LEGISLATION* (2000) (criticizing the law for identifying relationships based on blood and marriage rather than in terms of contemporary norms such as qualitative attributes), available at http://www.lcc.gc.ca/research_project/00_regulations_1-en.asp (last visited June 17, 2005).

351. See LAW COMMISSION OF CANADA, *BEYOND CONJUGALITY* 30 (2002) (recommending a fundamental rethinking of the legal regulation of adult personal relationships).

marriage and conjugality ought to be end the story for consideration of the kinds of obligations individuals owe one another. It is not an argument in favour of this recognition. Rather, it is simply an argument about the kind of questions remain submerged within contemporary public policy debates about the family. The continuing influence of social conservatism focuses attention on a much narrower set of concerns, namely, marriage. The broader questions are simply not visible. Yet, libertarian and fiscal conservatives would have very different perspectives on these broader questions of the appropriate regulation of intimacy. Libertarians would, of course, be concerned with private choice. They might support a legal regime whereby the two sisters could structure their intimate relationships by contract and have that contract enforced. They might support a legal regime whereby the two sisters could opt into a legal regime, such as a domestic partnership regime, that imposes rights and responsibilities. But, they would oppose a regime that imposes rights and responsibilities on the sisters without their consent. Fiscal conservatives, by contrast, might support such an imposition of rights and responsibilities, simply on the basis of the economic interdependency of the individuals. Fiscal conservatives, concerned first and foremost with privatizing dependency and thereby reducing the burden on the state, would be prepared to override private choice, and impose support obligations.

The conflicts, contradictions and relative discursive power of the three conservative visions thus not only impact the legal regulation of the family, but also the very terms of the public policy debate whereby some issues are kept in sharp relief, and others remain not only off the agenda, but beyond the imagination. Again, it is the continuing influence of social conservatism, and the mitigating influence of libertarian conservatism that limits a re-imagining of the legal regulation of intimacy, and not incidentally, a more extensive privatization of dependency. Once again, it is the conflict between and among conservative visions that makes some things possible, and others not.

The relationship between these three conservatisms, and their effect on the development of public policy needs further attention and analysis. Many questions remain unanswered – indeed, many remain entirely unasked. For example, is there a particular logic to the development of federal public policy on the family? Was it necessary for the fiscal conservative developments in child support and welfare to precede the social conservative developments? According to path dependency analysts of public policy, once a particular policy direction has been chosen, the costs of reversal are

high.³⁵² In the context of the legal regulation and privatization of dependency through child support and welfare, the shift from fiscal to social conservatism has not required a reversal of public policy initiatives. The institutional arrangements for the enforcement of child support, and for limiting welfare assistance remain in place. The social conservative initiatives currently under debate are intended as supplements, not reversals of these earlier policies. Thus, it may be important to further analyze not simply the shifts between the relative power of these contesting conservatisms, but also to pay greater attention to the underlying institutional structures that may enable them. Beyond the specific issue of the partial privatization of dependency within federal public policy, it would also be important to consider how these contesting conservatisms influenced the development of public policy as it affects the family in a range of other areas, from taxation to social security. To what extent are similar contestations being played out in different arenas of legal regulation? While the extraordinary influence of conservative political discourse in the last several decades has become a common place observation, its nuances, conflicts and cleavages are a rich and unexcavated resource for those interested in the development of law and public policy, of the family and beyond.

352. See, e.g., Paul Pierson, *Increasing Returns, Path Dependence and the Study of Politics*, 94 AM. POL. SCI. REV. 251, 252 (2000) (defining path dependency as “once a country or region has started down a track, the costs of reversal are very high. There will be other choice points, but the entrenchment of certain institutional arrangements obstruct an easy reversal of initial choice.”) (citing Margaret Levi, *A Model, a Method and a Map: Rationale Choice in Comparative and Historical Analysis*, in *COMPARATIVE POLITICS: RATIONALITY, CULTURE AND STRUCTURE* 28 (Mark Lichbach & Alan Zuckerman eds. 1997)).