
Hayek Goes to Family Court

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ABSTRACT. Family law is full of hard decisions. One of the most difficult—and most fundamental—concerns whether courts should remain committed to generally applicable rules of law even when they lead to normatively ugly results. Applying Hayek’s theory of law and liberty to contemporary American family law, this Essay concludes that—despite the risk of perverse results in the short term—family lawyers faced with this decision would benefit from greater attention to the Hayekian values of predictability, adaptation, and equal application. By illuminating the structural costs posed by normatively satisfying particular judgments, Hayek’s framework offers a powerful tool for future distributional analyses of family-law decision-making.

INTRODUCTION

The Judgment of Solomon is among the most memorable moments in the Old Testament. Faced with two women claiming the same baby as their own, King Solomon offered a “compromise” judgment: half a baby each.¹ He thus identified the child’s true mother: the one who cried out. While we still refer to extraordinary verdicts as “Solomonic judgments,”² the biblical account is probably based on a much older folktale.³ No matter its origins, the tale reminds us that family law has always been full of split decisions.⁴ This Essay argues that the most fundamental “split decision” in family-law jurisprudence concerns

1. 1 *Kings* 3:16-28.

2. See, e.g., JON ELSTER, SOLOMONIC JUDGEMENTS: STUDIES IN THE LIMITATIONS OF RATIONALITY 123-74 (1989) (discussing extraordinary judgments in the context of child custody disputes).

3. JAMES A. MONTGOMERY & HENRY SNYDER GEHMAN, A CRITICAL AND EXEGETICAL COMMENTARY ON THE BOOKS OF KINGS 108-10 (1951); HERMANN GUNKEL, THE FOLKTALE IN THE OLD TESTAMENT 156 (Michael D. Rutter trans., 1987).

4. See generally JANET HALLEY, SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM (2006) (discussing distinctions between theories of sexuality and theories of power).

whether to maintain a commitment to generally applicable rules of law, even where doctrine leads to results that contravene deeply held instincts about American family life. This decision will become more difficult – and more important – as Americans continue to develop increasingly diverse preferences regarding the family’s form and function in contemporary society.⁵

This rough tradeoff between law and equity is especially pressing for the family-court judge. The heart-rending facts of family-law disputes often drive courts to rely on outcome-driven reasoning.⁶ Family courts are prone to privilege the immediate effects of their decisions over the consistency of the doctrine those decisions create. This tendency puts contemporary family-law practice in tension with liberal rule-of-law ideals, which prize the consistent and predictable application of abstract rules over socially or normatively desirable results in any particular case.

Friedrich August von Hayek’s writings on law and liberty are exemplary of the liberal tradition with which family law finds itself at odds. According to Hayek, outcome-driven reasoning reflects courts’ imposition of particular judgments, arbitrary decisions of judicial whim harkening back to the dark days of the Star Chamber.⁷ Hayek argues that judges should apply generally applicable rules dispassionately and objectively, even (in fact, especially) in cases in which they lead to normatively ugly results.⁸ But the depth and breadth of normative preferences regarding family life in contemporary America makes the dispassionate application of abstract rules especially difficult in family court. Thus,

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5. See JUDITH AREEN, MARC SPINDELMAN, PHILOMILA TSOUKALA & SOLANGEL MALDONADO, *FAMILY LAW: CASES AND MATERIALS* 1 (7th ed. 2019) (citing *Parenting in America*, PEW RSCH. CTR. 15 (Dec. 17, 2015), <https://www.pewresearch.org/social-trends/2015/12/17/parenting-in-america> [<https://perma.cc/7J88-PE5B>]) (explaining that “the nuclear family form has ceased being ‘dominant’ in the way it once was”); *id.* at 560 (citing *The Decline of Marriage and Rise of New Families*, PEW RSCH. CTR. (Nov. 18, 2010), <https://www.pewresearch.org/social-trends/2010/11/18/the-decline-of-marriage-and-rise-of-new-families> [<https://perma.cc/A8XP-8V2U>]); ERIC KLINENBERG, *GOING SOLO: THE EXTRAORDINARY RISE AND SURPRISING APPEAL OF LIVING ALONE* 13 (2012); Annie Weisberg & Ellen Galinsky, *Changing Families, Changing Work*, FAMS. & WORK INST. 2-9 (Feb. 5, 2014). This phenomenon is not unique to the United States. See generally LAW COMMISSION OF CANADA, *BEYOND CONJUGALITY: RECOGNIZING AND SUPPORTING CLOSE PERSONAL ADULT RELATIONSHIPS* (2001) (discussing the diversity of close personal relationships in Canada).
 6. Family law is not exceptional in this respect. In criminal court, for example, the tragic circumstances of an accused’s upbringing, or disturbing features of offense conduct, often shade the severity of court-imposed punishment. Thus, although this Essay is tailored to suit modern family law, the implications of arguments raised herein are applicable to other areas of scholarship.
 7. F.A. HAYEK, *THE CONSTITUTION OF LIBERTY: THE DEFINITIVE EDITION* 249 (Ronald Hamowy ed., 2011) [hereinafter HAYEK, *CONSTITUTION*].
 8. *Id.* at 254.

applying Hayek's theory of law and liberty to family-law disputes pushes Hayekian ideals to their limits, subjecting them to a kind of trial by ordeal.⁹ If Hayek's commitment to the rule of law is defensible in family court, it is probably defensible anywhere.

But just as family law tests Hayek's framework, Hayek's framework tests family law. The human costs involved in family law's "hard cases"¹⁰ are uniquely transparent and personal, and therefore political.¹¹ In such cases, the temptation to deviate from objective, dispassionate application of generally applicable laws is especially severe. But when judges bend rules to dictate normatively desirable results, they obscure defects in the law. And when judges obscure defects in the law, they stymie democratic change. By testing family-law theory against family-law practice, and family-law practice against Hayek's framework, this Essay identifies opportunities to improve the democratic accountability of American family-law doctrine.

The Essay follows in three Parts. Part I extends Hayek's framework to the family-law context by comparing core tenets of his theory of law and liberty to themes in family-law scholarship, especially the evolution of divorce and alimony regimes. Part II critiques modern family-law practice, measuring it against Hayek's exacting definition of the rule of law in case studies of child support and custody. Finally, Part III weighs Hayek's critique of outcome-driven judicial reasoning against the objectives of contemporary family law and assesses which has the better of the argument. I conclude that, despite the risk of perverse results in the short term, family-law practice would benefit in the long run from greater attention (but not slavish adherence) to Hayekian values of predictability, adaptation, and equal application.

I. HAYEK ON FAMILY LAW

The application of Hayek's legal framework to family law is undertheorized. This is probably because Hayek's writings do not include a detailed treatment of family law.¹² I do not argue that Hayek's framework is *the* "golden and streight

9. DAVID HUME, *A TREATISE OF HUMAN NATURE* 590 (Penguin Books 1969).

10. See generally Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975) (arguing that hard cases should be decided by arguments of principle rather than policy).

11. See Carol Hanisch, *The Personal Is Political*, in NOTES FROM THE SECOND YEAR: WOMEN'S LIBERATION, MAJOR WRITINGS OF THE RADICAL FEMINISTS 76 (Shulamith Firestone & Anne Koedt eds., 1970).

12. See generally HAYEK, *CONSTITUTION*, *supra* note 7 (exploring the relationship between the rule of law and liberty without singling out family law); F.A. HAYEK, *LAW, LEGISLATION, AND LIBERTY* (2013) [hereinafter HAYEK, *LAW*] (emphasizing the importance of spontaneous order and abstract rules for rule of law in general, but not family law in particular); F.A. HAYEK,

metwand”¹³ against which family-law theory and practice must be assessed. Instead, I humbly suggest that Hayek’s framework provides a fresh and productive vantage point from which to (re)consider American family law.

Despite Hayek’s silence on the topic, the dearth of scholarship applying Hayek’s insights to family law is surprising for at least three reasons. Each of these reasons justifies further exploration of the intersection between Hayek’s philosophy and family-law doctrine. The first justification for applying Hayekian thought to family law is Hayek’s occupation as an economist.¹⁴ While his books *Law, Legislation, and Liberty*, *The Fatal Conceit*, and *The Constitution of Liberty* implicate legal history and political theory, he is better-known for his economics-focused *The Road to Serfdom*.¹⁵ Hayek’s background in economics renders his absence from modern family-law scholarship especially surprising, and the invocation of his ideas especially productive. That is because much influential family-law scholarship focuses on the family as a fundamentally *economic* unit of society.¹⁶ In fact, the etymological root of “economy” is the Attic Greek *οἶκος* (“oikos”), which referred not to the market but to the household as “a site of production (including the production of human beings), of welfare provision, and of consumption.”¹⁷ It was only in the nineteenth century that “the English term ‘economic’ lost its reference to the household and became proper to the market.”¹⁸ Blackstone’s description of “oeconomical relations” included the reciprocal household obligations between master and servant, husband and wife, parent and child, and guardian and ward.¹⁹ Modern American family law

THE FATAL CONCEIT: THE ERRORS OF SOCIALISM (1991) [hereinafter HAYEK, FATAL CONCEIT] (disputing socialism’s rationalist premise without discussing family law).

13. EDWARD COKE, THE FOURTH PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 41 (1817). A met[e]wand is a measuring rod, a yardstick. In the quoted passage, Sir Coke contrasts the “golden and streight metwand” of the law against the “incertain and crooked cord” of discretion. *Id.*
14. Hayek won the 1974 Nobel Memorial Prize in Economic Sciences. Press Release, Nobel Prize, Economics Prize for Works in Economic Theory and Inter-Disciplinary Research (Oct. 9, 1974), <https://www.nobelprize.org/prizes/economic-sciences/1974/press-release> [<https://perma.cc/QRJ2-MU7Z>].
15. See generally F.A. HAYEK, THE ROAD TO SERFDOM (1944) (arguing that free market competition is superior to central planning).
16. See, e.g., Janet Halley & Kerry Rittich, *Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism*, 58 AM. J. COMP. L. 753, 756 (2010); Janet Halley, *What Is Family Law?: A Genealogy Part I*, 23 YALE J.L. & HUMAN. 1, 8-9 (2011) [hereinafter *Genealogy Part I*].
17. Halley & Rittich, *supra* note 16, at 758.
18. *Id.*
19. *Genealogy Part I, supra* note 16, at 8 (quoting SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, Table of Contents (photo. reprint 1979) (1765)).

remains fundamentally economic, in the market sense of the term. One of family law's overriding goals is minimizing state outlays by externalizing the costs of family-law problems.²⁰ It is unsurprising, then, that much of the last half-century's influential family-law scholarship has come from scholars with economics backgrounds or applying economic analyses.²¹ Hayek's ideas, among the most influential in post-World War II economics, thus deserve greater consideration in family-law debates.

Second, Hayek and contemporary family lawyers draw on the same core sources. The most obvious example is Henry Sumner Maine, a nineteenth-century legal historian whose theory of evolution "from status to contract"²² influenced both Hayek²³ and modern family-law scholarship.²⁴ More generally, contractarian ideals were imparted to American family lawyers through Scottish intellectuals,²⁵ just as Hayek's emphasis on customary law emerged from David Hume's writings.²⁶ Hayek's shared intellectual heritage with contemporary family lawyers calls for scholarship on the implications of Hayekian thought for family law and vice versa.

Third and finally, applying Hayek's rule-of-law framework to American family-law theory and practice exposes contradictions between Hayekian ideals and those of his putative intellectual heirs. This justification for importing Hayekian

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20. Judith C. Areen, *Intervention Between Parent and Child*, 63 GEO. L.J. 887, 895-96 (1975); Jacobus tenBroek, *California's Dual System of Family Law (Part I)*, 16 STAN. L. REV. 257, 315 (1964); *Genealogy Part I*, *supra* note 16, at 5-6 (describing family law as a "legally regulated private welfare system"); Janet Halley, *What Is Family Law?: A Genealogy Part II*, 23 YALE J.L. & HUMAN. 189, 259 (2011) [hereinafter *Genealogy Part II*]; Laura A. Rosenbury, *Federal Visions of Private Family Support*, 67 VAND. L. REV. 1835, 1866-67, 1869 (2014).
21. See Halley & Rittich, *supra* note 16, at 758-60 (citing Chantal Thomas, *The Economic Family in a Global Context: A Case Study of Migrant Domestic Workers in Egypt*, 58 AM. J. COMP. L. 987 (2010); Bina Agarwal, "Bargaining" and Gender Relations: Within and Beyond the Household, 3 FEMINIST ECON. 1 (1997); Mary Joe Frug, *A Postmodern Feminist Legal Manifesto (An Unfinished Draft)*, 105 HARV. L. REV. 1045 (1992); KERRY RITTICH, *The Gender of Restructuring, in RECHARACTERIZING RESTRUCTURING: LAW, GENDER AND DISTRIBUTION IN MARKET REFORM* 173 (2002); Philomila Tsoukala, *Gary Becker, Legal Feminism, and the Costs of Moralizing Care*, 16 COLUM. J. GENDER & L. 357 (2007); MARGARET F. BRINIG, *ECONOMICS OF FAMILY LAW* (2007); Belinda Bennett, *The Economics of Wifing Services: Law and Economics on the Family*, 18 J.L. & SOC'Y 206 (1991); and Douglas W. Allen, *The Institutional Economics of Marriage: A Reinterpretation of Margaret Brinig's Contribution to Family Law*, 95 NOTRE DAME L. REV. 1537 (2020)).
22. HENRY SUMNER MAINE, *ANCIENT LAW* 200 (Henry Holt & Co. 10th ed. 1906) (1861).
23. HAYEK, *CONSTITUTION*, *supra* note 7, at 222 n.11.
24. *Genealogy Part I*, *supra* note 16, at 71-74.
25. *Id.* at 21-33.
26. HAYEK, *CONSTITUTION*, *supra* note 7, at 88-89, 107, 124 n.39 & 226 n.18; HUME *supra* note 9, at 549, 542, 587-88.

analysis into family law is largely beyond the scope of this Essay and will be the subject of future research. In brief, the argument goes like this: Despite Hayek's explicit dissociation from conservative politics,²⁷ many modern claimants to his intellectual legacy are neo-Burkean cultural conservatives.²⁸ These same cultural conservatives have hammered "family values" and lamented the decline of the "traditional" family since at least the Reagan Administration.²⁹ The contradiction between Burkean conservatism's emphasis on preserving tradition at all costs and Hayek's commitment to socio-legal evolution through the general application of unpopular laws has gone unremarked upon by family-law commentators. Contrasting modern conservatives' attempts to legalize their policy preferences against Hayekian theory is an important step towards revealing the slippage between culture war "conservatism" and its purported intellectual roots.³⁰

My comparison of Hayek's theory to family-law scholarship organizes Hayek's insights into three categories: predictability, evolution, and equal application.

A. *Law and Predictability*

The first of Hayek's insights—predictability—is evident in his use of Maine's "status to contract" framework to support his theory of evolution from "a state in which the rules . . . single out particular persons or groups and confer upon them special rights and duties" to "a system in which all coercive action of government is confined to the execution of general abstract rules."³¹ This latter form of government embodies key principles of contract law: rules are universally

27. HAYEK, CONSTITUTION, *supra* note 7, at 519. The postscript to *The Constitution of Liberty* is entitled "Why I Am Not a Conservative."

28. ALAN O. EBENSTEIN, FRIEDRICH HAYEK: A BIOGRAPHY 207 (2001) ("[Barry] Goldwater occasionally quoted Hayek in speeches, and wrote in his 1988 autobiography that during his early years in the Senate he was 'much influenced by the work of Professor F.A. Hayek.'" (quoting BARRY GOLDWATER, GOLDWATER 110 (1988))); *id.* at 208-09 (noting that Hayek likewise influenced Ronald Reagan, William F. Buckley, Ron Paul, Dana Rohrbacher, Thomas Sowell, and Margaret Thatcher).

29. See, e.g., Jennifer Somerville, *The New Right and Family Politics*, 21 *ECON. & SOC'Y* 93, 96-115 (1992); Roger Scruton, *Identity, Family, Marriage: Our Core Conservative Values Have Been Betrayed*, *GUARDIAN* (May 11, 2013), <https://www.theguardian.com/commentisfree/2013/may/11/identity-family-marriage-conservative-values-betrayed> [<https://perma.cc/C5KC-TPXF>]; RUSSELL KIRK, RUSSELL KIRK'S CONCISE GUIDE TO CONSERVATISM 33-38 (2019).

30. See Halley, *supra* note 24, at 6 ("Many of the 'culture wars' fights that now occupy the field obscure these distributional consequences and make it impossible to have descriptively adequate discussions of the stakes of various policy choices.").

31. HAYEK, CONSTITUTION, *supra* note 7, at 222.

applicable, produce highly predictable results, and thus facilitate productive long-term investment.³² Particular judgments, on the other hand, are frequently based on status. The *bête noire* of Hayek's framework, such status-based judgments undermine the predictability of court decisions and thus stymie efficient private ordering.³³

Family lawyers also value predictability. In fact, Professors Robert H. Mnookin and Lewis Kornhauser understand the "primary function" of family law "not as imposing order from above, but rather as providing a framework within which divorcing couples can themselves determine their postdissolution rights and responsibilities."³⁴ Consistent enforcement of broadly applicable family-law rules facilitates private ordering. If divorcees-to-be can reliably predict litigated outcomes based on known facts, then rational couples will spare themselves the delay and expense of trial in favor of settlement on the courthouse steps.³⁵

32. Karl Lewellyn, principal drafter of the Uniform Commercial Code, was concerned largely with enhancing predictability. See James J. White, *Promise Fulfilled and Principle Betrayed*, 1988 ANN. SURV. AM. L. 7, 16-17; see also HAYEK, LAW, *supra* note 12, at 94 ("The aim of the rules must be to facilitate that matching or tallying of the expectations on which the plans of the individuals depend for their success.").

33. HAYEK, CONSTITUTION, *supra* note 7, at 217-19.

34. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law*, 88 YALE L.J. 950, 950 (1979).

35. *Id.* Law-and-economics literature recognizes the net social benefit of predictability. See Jan Broulík, *Predictability: A Mistreated Virtue of Competition Law*, 00 J. ANTITRUST ENF. 1, 3-4 (2023). Even in contested divorce proceedings, spouses can enhance the predictability of litigated outcomes using prenuptial or marital agreements. See *Long v. Long*, 413 P.3d 117, 117-18 (Wyo. 2018) (enforcing a prenuptial and marital contract); *Simeone v. Simeone*, 581 A.2d 162, 162 (Pa. 1990) (same); *Massar v. Massar*, 652 A.2d 219, 219-20 (N.J. 1995) (same); *Edwardson v. Edwardson*, 798 S.W.2d 941, 941-42 (Ky. 1990) (same). Such contracts, however, are not ironclad guarantees of predictability. See *In re Marriage of Cooper*, 769 N.W.2d 582 (Iowa 2009) (declaring certain agreements made by spouses during marriage void as against public policy); *Borelli v. Brusseau*, 12 Cal. App. 4th 647 (Cal. 1993) (same). Even some cases enforcing marital contracts (e.g., *Simeone*, 581 A.2d, and *Edwardson*, 798 S.W.2d) require more full-some disclosure than an arms-length commercial transaction, illustrating courts' recalcitrance to completely "commodify" the spousal relationship. See also Rachel Rebouché, *Contracting Pregnancy*, 105 IOWA L. REV. 1591, 1593 (2020) (quoting *P.M. v. T.B.*, 907 N.W.2d 522, 535-39 (Iowa 2018)) (illustrating how the unpredictable enforceability of surrogacy agreements leads to litigation); Rebouché, *supra*, at 1621 (citing *Cook v. Harding*, 190 F. Supp. 3d 921, 928-29 (C.D. Cal. 2016)) (same). True, "there are scarce examples of litigation concerning the breach of contract terms governing prenatal care." Rebouché, *supra*, at 1613. But Rebouché notes that "[t]he fact that disputes are not resolved through court decisions or litigation does not necessarily indicate the frequency with which conflict arises." Rebouché, *supra*, at 1636.

In Hayek's framework, as in family court, the predictability of litigated outcomes facilitates what some call the "channeling function."³⁶ From this perspective, foreseeable legal proscriptions articulate the outer boundaries of a "protected sphere": actions within the sphere are permissible according to law, and not subject to redress by state coercion.³⁷ When family law is enforced generally and predictably (i.e., not enforced to direct normatively desirable results based on the unique facts of individual cases), the boundaries of the protected family sphere are clear. Consequently, rational actors will "channel" family relationships, and the terms of those relationships' demise, into the protected sphere to avoid state coercion.³⁸ Much family-law scholarship concerns the ideal size and shape of this protected sphere,³⁹ which Hayek would probably prefer to maximize.⁴⁰ Within Hayek's social-evolutionary framework, however, substantive concerns regarding the protected sphere's contents take a back seat to structural imperatives. This is the second Hayekian insight for modern family law.

B. *Evolution Through Cultural Adaptation*

In Hayek's framework, the process by which norms are reached, reinforced, and contested is far more important than the substance of those norms. Indeed, Hayek's theory of law and liberty can be read as a content-neutral and fundamentally procedural proposal to ensure that norms (like the scope of the protected sphere) remain subject to perpetual contestation.⁴¹ On this read, Hayek's social-evolutionary framework is analogous to due-process fundamentalism: so long as debate on the scope of the protected sphere remains free and open, the substantive result of that debate is above reproach.

To understand Hayek's vision of evolution through cultural adaptation, one must first look to his insights about the "particular circumstances of time and space."⁴² In brief, Hayek argued that Soviet-style central planning underperformed the liberal market order because individual market participants are better

36. HAYEK, CONSTITUTION, *supra* note 7, at 217; Carl E. Schneider, *The Channeling Function in Family Law*, 20 HOFSTRA L. REV. 495 (1992).

37. HAYEK, CONSTITUTION, *supra* note 7, at 312.

38. "Channeling" could take the form of a decision to marry, so that both parents have an automatic guardianship interest over children of the marriage. See *Stanley v. Illinois*, 405 U.S. 645, 645-46 (1972); *Michael H. v. Gerald D.*, 491 U.S. 110, 119-20 (1989).

39. See, e.g., Schneider, *supra* note 36; Linda C. McClain, *Love, Marriage, and the Baby Carriage*, 28 CARDOZO L. REV. 2133 (2007).

40. HAYEK, THE FATAL CONCEIT, *supra* note 12, 63-65; HAYEK, LAW, *supra* note 12, at 97.

41. See HAYEK, CONSTITUTION, *supra* note 7, at 81; HAYEK, LAW, *supra* note 12, at 12-14.

42. F.A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519, 521 (1945) [hereinafter Hayek, *Knowledge in Society*].

suited than bureaucrats to assess and pursue their own wants and needs.⁴³ The object of Hayek's critique was not just socialism, but the premise of perfect (Cartesian) reason upon which it is based.⁴⁴ Because no central planner can fully comprehend the particular knowledge widely dispersed throughout society, Hayek argued, the state maximizes allocative efficiency only by leaving room for market participants to act in their own interests.⁴⁵

Contemporary family-law scholars share Hayek's appreciation of the particular circumstances of time and space.⁴⁶ For instance, the judicial archetype advocated by Mnookin and Kornhauser echoes Hayek's critique of Soviet central planning. Portraying law not as the embodiment of Cartesian reason, but instead as "prophecies of what the courts will do in fact,"⁴⁷ Mnookin and Kornhauser accept that judges lack the omniscience required to direct ideal results in every case. Instead, litigants themselves – who have the most accurate assessments of their own wants and needs – achieve optimally efficient outcomes when left to "bargain in the shadow of the law."⁴⁸ Thus, judges facilitate spontaneous ordering and maximize allocative efficiency by recognizing the limits of their own

43. HAYEK, *FATAL CONCEIT*, *supra* note 12, at 76-77, 85.

44. Hayek was an empiricist. He believed that spontaneous (bottom-up) evolved orders were preferable to rationalist (top-down) designed orders. See HAYEK, *LAW*, *supra* note 12, at 113. Hayek understood René Descartes's "pure reason" (and Jean-Jacques Rousseau's subsequent social contract) as the genesis of modern rationalism. HAYEK, *FATAL CONCEIT*, *supra* note 12, at 48-49. Rationalism "discards tradition" in favor of "a new world, a new morality, a new law" built on pure reason. HAYEK, *FATAL CONCEIT*, *supra* note 12, at 48-49. It is the dogma of the central planner and the social democrat. See HAYEK, *FATAL CONCEIT*, *supra* note 12, at 85; HAYEK, *CONSTITUTION*, *supra* note 7, at 113. As much as Hayek decried socialism generally, what he really opposed was its fundamental premise: that pure Cartesian reason is superior to spontaneously evolved order. Hayek, *Knowledge in Society*, *supra* note 42, at 519.

45. See HAYEK, *FATAL CONCEIT*, *supra* note 12, at 77; Hayek, *Knowledge in Society*, *supra* note 42, at 521-22.

46. See, e.g., Clare Huntington, *The Institutions of Family Law*, 102 B.U. L. REV. 393, 441 (2022) (discussing informal institutions); Jonathan Crowe, Rachel Field, Lisa Toohey, Helen Partridge & Lynn McAllister, *Bargaining in the Shadow of the Folk Law: Expanding the Concept of the Shadow of the Law in Family Dispute Resolution*, 40 SYDNEY L. REV. 319, 322 (2018) ("[W]hile parties' perceptions of the law play an important role in framing their expectations, these perceptions are primarily based on informal sources."); Jana B. Singer, *Bargaining in the Shadow of the Best-Interests Standard: The Close Connection Between Substance and Process in Resolving Divorce-Related Parenting Disputes*, 77 L. & CONTEMP. PROBS. 177, 178-79 (2014).

47. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897).

48. Mnookin & Kornhauser, *supra* note 34, at 968.

“particular knowledge”⁴⁹ and maintaining fidelity to the backdrop of generally applicable rules against which settlements are negotiated.⁵⁰

Thus, Mnookin and Kornhauser, in their analysis of family law, and Hayek, in his critique of central planning, seem to agree that informal private ordering is preferable to rationalist design. The advantage of private ordering over rationalist design is poignantly illustrated by a famous example from Professor Roger Fisher, a contemporary of Mnookin and Kornhauser’s. Fisher asks us to consider two children fighting over an orange: one wants the zest (for a cake) and the other wants the pulp (for juice).⁵¹ The children’s particular knowledge enables them to reach a more efficient settlement than the Solomonic rationalist (who would, presumably, split the orange in half).⁵²

Hayek would support Mnookin and Kornhauser’s theory of bargaining in the shadow of the law, in part on the basis that settlement on the courthouse steps creates a petri dish for spontaneous evolution of informal institutions⁵³ for family-dispute resolution. Moreover, Hayek would argue that informal settlement is facilitated not by pure reason (even that of the parties to the dispute), but instead by recourse to customary principles like fairness and reasonableness. David Hume, one of Hayek’s core influences, would suggest that this is because informal family-law rules are too inchoate to have been designed according to ideas, and are instead generated through impressions created by context and custom.⁵⁴ This “bottom-up” (empirical) rather than “top-down” (rationalist) model of family lawmaking enables society to take advantage of the “special constellations” of knowledge dispersed among diverse disputants.⁵⁵

The informal and spontaneous process of family lawmaking identified by Mnookin and Kornhauser leaves space for the gradual evolution and adaptation of family law to suit novel circumstances. Maintaining space for the spontaneous evolution of laws and norms—the antithesis of rationalist control—is Hayek’s

49. HAYEK, FATAL CONCEIT, *supra* note 12, at 43; HAYEK, LAW, *supra* note 12, at 13.

50. HAYEK, FATAL CONCEIT, *supra* note 12, at 75. Hayek’s arguments for spontaneous legal order flow from the same epistemological premises as his arguments for the market order. *Id.*

51. ROGER FISHER & WILLIAM L. URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 57 (Bruce Patton ed., 2011).

52. *Id.* Of course, the Solomonic rationalist *could* reach an efficient result by gathering information about the disputants’ preferences. Even so, this approach remains inferior to private ordering in light of the transaction cost of information gathering.

53. See DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE 8, 80–82 (1990). Informal institutions include “sanctions, taboos, customs, traditions, and codes of conduct.” Douglass C. North, *Institutions*, 5 J. ECON. PERSP. 97, 97 (1991).

54. HUME, *supra* note 9, at 548; see HAYEK, LAW, *supra* note 12, at 113; HAYEK, CONSTITUTION, *supra* note 7, at 74, 78.

55. See HAYEK, CONSTITUTION, *supra* note 7, at 81–82.

categorical imperative.⁵⁶ Recast in economic terms, such evolution is equivalent to eschewing Soviet-style central controls in favor of letting the market work. Applying Hayek's analysis to Mnookin and Kornhauser's observations demonstrates that family law's relative flexibility and informality permit disfavored subgroups—whose preferences may be overlooked or disdained by rationalist legislators—to experiment with norms drawn from their unique circumstances. This flexibility augments the entire society's knowledge base, through what amounts to informal legal pluralism: mainstream family law is, in general, well-suited to adopt alternative resolutions favored by minority groups when they prove superior to the majority's status quo. The efficiencies of legal pluralism are lost where judges direct normatively desirable results in individual cases because such cases make family law less predictable, which disincentivizes informal dispute resolution, in turn minimizing the space for the spontaneous evolution of new family norms.

In Hayek's and Mnookin and Kornhauser's views, predictability facilitates innovation. This is especially so when predictability creates space for disfavored subgroups' "special constellations" of particular knowledge to bubble up into the mainstream.⁵⁷ Two examples—the twentieth-century dawn of no-fault divorce and the modern twilight of alimony awards—illustrate how predictability promotes evolution in the family-law context.

1. *Example 1: No-Fault Divorce*

At the beginning of the nineteenth century, divorce was available only for a limited "menu" of fault grounds.⁵⁸ As social and physical mobility increased, however, so did demand for divorce. Improved mobility increased opportunities for a trailing spouse to claim *de facto* abandonment, an enumerated fault ground, and thus divorce an absentee leading spouse.⁵⁹ By the time first-wave feminism crested in the 1920s, fault-based divorce was so common that mutually dissatisfied spouses would "collude" with one another to contrive fault grounds for divorce.⁶⁰ Over the next forty years, the phenomenon of "collusive divorce" led

56. *Id.*; HAYEK, *LAW*, *supra* note 12, at 12-14.

57. See HAYEK, *CONSTITUTION*, *supra* note 7, at 81-82.

58. AREEN, *supra* note 5, at 775-76.

59. *Id.*; see also *Maynard v. Hill*, 125 U.S. 190, 209-12 (1888) (discussing the abandonment ground for dissolving a marriage).

60. Note, *Collusive and Consensual Divorce and the New York Anomaly*, 36 COLUM. L. REV. 1121, 1121-24 (1936); see Claire P. Donohue, *Fifty Ways to Leave Your Lover: Doing Away with Separation Requirements for Divorce*, 96 S. CAL. L. REV. 77, n.40 (2022) (discussing a *New York Mirror* article spotlighting a woman hired to "accompany the [husband] to some hotel room and

legislatures to approve “no-fault” divorce to stanch the deluge of sham proceedings.⁶¹

Though no-fault divorce was a radical break with prior family-law doctrine, its rise was a spontaneous reaction to lived experience, not the result of constructivist reason. Dissatisfied couples took advantage of the predictable grounds on which courts granted fault-based divorces to “bargain in the shadow of the law” over the terms of their (effectively no-fault) separation. Eventually, the family-law bar became so demoralized by the parade of sham fault divorces that lawyers and judges alike began agitating for divorce reform to prevent the legal profession from further debasing itself by abetting fraudulent fault divorce cases.⁶² If, on the other hand, courts had refused to consistently enforce fault-based divorce doctrine in favor of directing normatively “desirable” results, the social-evolutionary pressure that presaged the no-fault revolution may never have reached a critical mass sufficient to compel legislative reform. Thus, courts’ commitment to the flawed institution of no-fault divorce triggered the evolutionary cycle that ushered in our modern no-fault system. This is Hayek’s model of spontaneous legal evolution, driven by the predictable application of general rules.

2. *Example 2: Alimony’s Decline and Reform*

A second evolutionary episode, precipitated by the “specific constellation” of circumstances present during early feminist movements, is the decline and subsequent reform of alimony awards. Until the late-nineteenth century, the traditional common-law rule of coverture prevented married women from holding property separately from their husbands. Under such conditions, alimony awards were necessary to support dispossessed women in the event of divorce.⁶³ Even after coverture was abolished, alimony continued to serve a compensatory function in fault-only divorce regimes. Awards were typically available only to the “innocent” spouse, and “damages often approximated the standard of living the wife would have enjoyed but for her husband’s breach.”⁶⁴

Following the widespread adoption of equitable-distribution principles and the advent of no-fault divorce, alimony lost both its doctrinal rationales.⁶⁵ First,

remove a few outer garments” so that a complicit party could “catch” the husband in flagrante delicto).

61. AREEN, *supra* note 5, at 775-76.

62. *Id.* at 775.

63. Mary K. Kisthardt, *Re-thinking Alimony: The AAML’s Considerations for Calculating Alimony, Spousal Support or Maintenance*, 21 J. AM. ACAD. MATRIM. L. 61, 66 (2008).

64. *Id.* at 67.

65. *Id.* at 67-68.

women's ability to hold property separately from their husbands, and the background principle of equitable distribution of marital property upon divorce, extinguished alimony's welfarist justification.⁶⁶ Simply put, women were no longer sure to be penniless upon divorce. Second, the rise of no-fault divorce (and consequent decline of less-accessible fault-based divorce) weakened alimony's punitive and compensatory rationales.⁶⁷ As doctrinal support dwindled, justifications for alimony awards became increasingly inconsistent, and the incidence of such awards declined.⁶⁸

With alimony unmoored from its historical and doctrinal foundations, its application became increasingly unpredictable.⁶⁹ Alimony became a source of "play" in the joints of a divorce settlement, tempting willful tribunals to smuggle normative preferences into the divorce decree. Consequently, litigated divorce settlements became more difficult to forecast, which in turn stymied private ordering by obfuscating couples' best alternative to an informally negotiated settlement. In response, many states have enacted alimony reforms that make the amount and duration of awards more predictable for divorcees-to-be.⁷⁰ This is exactly the response Hayek would prescribe: by requiring greater consistency among litigated alimony settlements, the legislature encourages private ordering and sets the stage for another cycle of spontaneous legal evolution. Early results of this new evolutionary cycle include novel "right to retire" statutes adopted in several states.⁷¹ Florida's recent alimony overhaul, for example, eliminates permanent alimony awards, limits the duration of alimony payments based on the length of the marriage, and permits obligors to petition for modification in anticipation of retirement.⁷²

In Hayekian terms, alimony's decline offers a counternarrative to the emergence of no-fault divorce. The public pressure that presaged the no-fault revolution stemmed from judges' stolid, predictable application of a fault-based

66. *Id.* at 67.

67. *Id.* at 68.

68. AREEN, *supra* note 5, at 1166-67; Charles P. Kindregan, Jr., *Reforming Alimony: Massachusetts Reconsiders Postdivorce Spousal Support*, 46 SUFFOLK U. L. REV. 13, 21 (2013) ("One of the difficulties in any 'reform' of long-term alimony is lack of any consistent theory for the reasons that spousal support is justified after divorce.").

69. AREEN, *supra* note 5, at 1191-92 (citing J. Thomas Oldham, *A Survey of Lawyers' Observations About the Principles Governing the Award of Spousal Support Throughout the United States*, 51 FAM. L.Q. 1 (2017)).

70. *Id.* at 1191 (citing Laura W. Morgan, *A Nationwide Review of Alimony Legislation 2007-2016*, 51 FAM. L.Q. 39, 40-41 (2017)).

71. See MASS. GEN. LAWS. ch. 208 § 49(a), (d) (2012); N.J. STAT. ANN. § 2A:34-23(j)(1) (West 2015); S.C. CODE ANN. § 20-3-170 (2022).

72. FLA. STAT. § 61.08 (2023).

regime that no longer reflected mainstream social consensus. Alimony reform, by contrast, was largely spurred by legislative reaction to courts' unpredictable application of a regime that slipped its doctrinal moorings.⁷³ The alimony counternarrative poses an important question: If legislative reform occurs even where courts apply the law unpredictably, what's the value of Hayek's framework? If consistent application of outmoded doctrine isn't a necessary condition for legal evolution, why is the practice justified?

The answer is simple. Even if consistent application of outmoded doctrine isn't a necessary condition for evolution, it is an undeniably important one. For every instance where constituents and legislators notice and address courts' unpredictable application of law to suit normative ends, many such instances will go unaddressed.⁷⁴ Unpredictable application of outmoded doctrine is especially likely to remain unchallenged where it favors dominant interests at the expense of subaltern groups.⁷⁵ Alimony presents the rare case where courts' inconsistent

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73. The divorce and alimony examples can arguably be reconciled by comparing modern courts' use of alimony awards (to essentially equitable ends) with early twentieth-century courts' blessing of sham "fault" divorces. In both circumstances, judges eschew the historical or doctrinal function of the regime (which has fallen out of favor) and use it to reach results that align with contemporary social consensus. But this narrative ultimately falls short. In the divorce example, courts' *consistent* application of fault doctrine created public pressure that led to the adoption of the no-fault regime. In the alimony example, however, courts' *inconsistent* application of alimony doctrine created public pressure that led legislatures to cabin courts' discretion. This contradiction poses an important question: Given the examples' different inputs (consistent vs. inconsistent application of doctrine), what explains the common output (legislative reform)?
74. Consider, for example, states' adoption of rape shield laws throughout the 1970s and 1980s. See Catherine L. Kello, *Rape Shield Laws—Is It Time for Reinforcement?*, 21 U. MICH. J.L. REFORM 317, 317 (1988). At common law, juries were free to consider the complaining witness' sexual history in evaluating the credibility of their rape claim. In a male-dominated society, this practice permitted courts to direct normatively desirable results, i.e., acquittals. The admissibility of sexual history evidence also fostered unpredictable outcomes: the jury was permitted, but not required, to credit such evidence. Only after social norms began to change did citizens and their elected representatives begin to complain of the unpredictability and unfairness engendered by sexual history evidence's admissibility. Even then, courts continued to permit certain unpredictable uses of sexual history evidence, which remained unaddressed by legislatures. See *People v. Jovanovic*, 263 A.D.2d 182 (1999) (reversing the trial court's ruling that evidence of the victim's interest in sadomasochism was inadmissible under the rape shield law).
75. The rape shield example is, again, instructive. Legislators declined to address the unpredictable implications of admitting sexual history evidence for several centuries because that rule rarely disadvantaged the dominant (male) group. It is no coincidence that rape shield laws were only enacted after women, as a class, attained greater social and political capital. Even today, less-powerful groups—such as children—do not always enjoy the benefits of rape shield laws. See *State v. Rorie*, 776, S.E.2d 338 (2015) (reversing the trial court's exclusion of evidence that a six-year-old rape victim had viewed pornography); *Jovanovic*, 263 A.D.2d 182. But see *Minter v. Commonwealth of Kentucky*, 415 S.W.3d 614 (2013) (affirming the trial

application of the law – and the corresponding unpredictability of litigated outcomes diminishing incentives to settle disputes – has negative implications for anyone who is married, plans to marry, or is a dependent of a marital relationship, which is to say most of us.⁷⁶ Absent such conditions – that is, almost always – courts’ attempts to self-remedy perceived shortcomings of outdated doctrine are more likely to stunt than to foster meaningful law reform. On the other hand, consistent judicial implementation of generally applicable rules, including outmoded ones, will encourage private ordering and foster evolution through cultural adaptation.

C. *Law’s Equal Application*

Hayek’s third insight for family law is that, in addition to being abstract and general, the laws of a society that has evolved from status to contract must be *equal*.⁷⁷ Ever the empiricist, Hayek partially justifies this position on efficiency (as opposed to normative) grounds: discriminatory rules inhibit competition, limit individuals’ opportunity to take advantage of their particular knowledge, and undermine predictability. Thus, Hayek argues, societies without discriminatory rules have historically fared better than those with discriminatory rules.⁷⁸

Hayek’s definition of “freedom” also demands law’s equal application. Hayek defines freedom as the absence of coercion.⁷⁹ He accepts that some coercion, by generally applicable norms that proscribe certain courses of conduct, is unavoidable.⁸⁰ But where coercion takes the form of arbitrary will exercised by another –

court’s ruling that evidence of a male-on-male rape victim’s sexual identity was inadmissible under rape shield laws).

76. Most obvious, alimony’s unpredictability disincentivizes informal settlement of marital disputes. If a divorcing couple can predict whether and in what amount a court is likely to award alimony, an alimony award is a known bargaining endowment around which the parties can negotiate on the courthouse steps. But when courts award alimony unpredictably, spouses may be incentivized to “gamble” (or even play “chicken”) by litigating the divorce. Even assuming alimony has net social benefit, the litigation incentive created by its unpredictable application diverts resources from actually paying alimony to paying lawyers to fight over whether and to what extent it is necessary in a particular case. Regardless of the court’s alimony decision, both spouses will end up splitting relatively less marital property than they would if they could have informally resolved their dispute. Children of the marriage are not spared: a smaller share of marital property awarded to the noncustodial spouse could leave them with less money available to pay child support. And so on.

77. HAYEK, CONSTITUTION, *supra* note 7, at 222.

78. *Id.* at 219–23; HAYEK, LAW, *supra* note 12, at 82.

79. HAYEK, CONSTITUTION, *supra* note 7, at 11, 221–22.

80. *Id.* at 13 n.36.

as it does in the case of discriminatory rules—freedom is offended.⁸¹ Discriminatory rules are not generally applicable, and thus not “laws,” but rather coercive commands.⁸²

Hayek’s disdain is not limited to facially unequal laws. He likewise deplores the unequal application of general rules by willful tribunals to dictate particular results. Hayek’s framework of law and liberty requires judges to subordinate their own normative preferences to a single overriding end: maintaining the legal order itself.⁸³ While spontaneous ordering through the evolution of customary rules is indispensable, *enacting* these changes is the province of politically accountable legislators.⁸⁴ Judicial coercion through unpredictable particular judgments must be avoided. As Hayek artfully put it, “the judge cannot be the vanguard.”⁸⁵

Hayek’s call for the equal application of general laws brings us back to Maine. Discriminatory rules are often status-based, whereas rules of conduct apply on equal, contract-like terms. Maine’s “status to contract” narrative is a key theme of family law’s equality revolution in the late nineteenth and early twentieth centuries: examples include the abolition of coverture and the promulgation of Married Women’s Property Acts, which together ended a regime of status-based legal incapacity and protected married women’s rights to contract.⁸⁶ Unlike Hayek, however, family-law scholars justify the contractarian turn of the equality revolution in *both* normative and allocative terms.⁸⁷ Whereas Hayek would highlight

81. *Id.* at 221-22; HAYEK, *LAW*, *supra* note 12, at 351.

82. HAYEK, *CONSTITUTION*, *supra* note 7, at 224; CHARLES HOWARD MCLWAIN, *CONSTITUTIONALISM AND THE CHANGING WORLD* 128 (1939); *see* HAYEK, *LAW*, *supra* note 12, at 82.

83. HAYEK, *FATAL CONCEIT*, *supra* note 12, at 63-64, 81; HAYEK, *LAW*, *supra* note 12, at 351.

84. HAYEK, *CONSTITUTION*, *supra* note 7, at 251; JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* §§ 137, 141-43, *in* *TWO TREATISES OF GOVERNMENT* (Peter Laslett ed., Cambridge Univ. Press 1988) (1689).

85. *See* HAYEK, *CONSTITUTION*, *supra* note 7, at 249.

86. *See Genealogy Part I*, *supra* note 16, at 73. Note, however, that Maine himself “never said that marriage itself was shifting to contract: rather, he ignored marriage altogether, arguing instead that the replacement of the patriarchal family as the basic unit of social life and of economic production by contract was definitive of modernity.” *Id.* at 74.

87. Hayek found discriminatory rules undesirable because they generate allocatively inefficient outcomes. This finding supports Hayek’s empirical conclusion that societies with equally applicable rules fare better in the long term than those with discriminatory rules. HAYEK, *CONSTITUTION*, *supra* note 7, at 219-23; HAYEK, *LAW*, *supra* note 12, at 82. While Hayek might have understood freedom from coercion as a secular good, he ultimately cached freedom’s boons in allocative terms. In Hayek’s view, legal equality is a means (albeit a necessary means) to the greater end of fostering the efficient distribution of resources throughout society based on individual citizens’ particular knowledge of time and space. While family lawyers may not disagree with Hayek’s efficiency argument, they also tend to view equality as an end unto

the efficiencies unlocked by women's participation in the market, family lawyers view equality as good (or bad), and an end unto itself.⁸⁸ This normative streak sometimes leads family-law judges to inject status concepts into the marriage regime when contractarian (i.e., procedural) equality does not lead to the substantive outcome the court desires.⁸⁹ To Hayek, these particular judgments are an affront to equality.

II. MODERN FAMILY LAW IN HAYEKIAN PERSPECTIVE

The foregoing comparison of Hayek's framework and family-law theory suggests that the two share meaningful similarities, even if family lawyers are more willing to consider normative or subjective priorities than Hayek would prefer. Family-law theory and family-law practice, however, are two different kettles of fish. Take child support as an example. In theory, it is simple for a court to calculate child support according to statutory guidelines and enter a judgment requiring the obligor to pay. In practice, however, courts themselves are powerless to enforce child-support awards, and must rely on tools created by the legislature and wielded by the executive to secure compliance.

In this Part, I apply Hayek's framework to family law in action in two domains: child support and custody. I focus on these two areas of family law because they best illustrate the stark distinctions between Hayekian ideals and family-law practice. In child-support and custody cases, judges seem especially eager to substitute their own normative preferences for those of the legislature. The result is decreased predictability and, in turn, stunted legislative innovation.

itself—not just a means. This is a fundamentally normative perspective: equality is good (or bad), therefore we should strive towards (or against) egalitarian family-law doctrines.

88. See, e.g., R.A. Lenhardt, *Race, Dignity, and the Right to Marry*, 84 *FORDHAM L. REV.* 53 (2015); Phyllis Schlafly, *How the Feminists Want to Change Our Laws*, 5 *STAN. L. & POL'Y REV.* 65 (1994); Wendy W. Williams, *Ruth Bader Ginsburg's Equal Protection Clause*, 25 *COLUM. J. GENDER & L.* 41 (2013); Cynthia Grant Bowman, *Recovering Socialism for Feminist Legal Theory in the 21st Century*, 49 *CONN. L. REV.* 117 (2016).
89. See *Borelli v. Brusseau*, 12 Cal. App. 4th 647 (1993). In this hornbook example, a very ill husband promised to will certain property to his wife in exchange for her agreement to provide round-the-clock care, "thereby avoiding the need for him to move to a rest home or convalescent hospital as his doctors recommended." *Id.* at 651. The wife kept her promise, but the decedent husband willed the promised property to his daughter. *Id.* When the wife sued for the benefit of her bargain, the Court refused to honor their contract, holding "such negotiations" "antithetical to the institution of marriage." *Id.* at 655. Thus, the Court disrupted the parties' contract relationship by imputing status principles to reach its preferred result.

A. Child Support: The Family Administrative State

U.S. child support is coercive, administrative, and federalized. What makes child-support law problematic in Hayekian terms is not its coerciveness alone,⁹⁰ but also the administrative – and thus unavoidably federalized – character of its coercion. The bureaucratic flavor of American child support also raises democratic accountability concerns familiar to administrative-law scholars: victims of administrative coercion have little recourse through democratic processes. Even if administrators are appointed by elected officials, they remain relatively insulated from electoral pressure, diminishing their incentive to avoid particular judgments that satisfy the administrator’s normative preferences.

Child support’s coerciveness has deep historical roots. For over 400 years, the Anglo-American child-support regime has required noncustodial parents to seek private employment to support custodial parents or face criminal and civil sanctions.⁹¹ This regime has two goals: to support children and indigent custodial parents while minimizing cost to the state.⁹²

Modern child-support, however, hardly resembles its British origins. The “child support” provisions of the 1601 Elizabethan Poor Law forced the children of welfare recipients into apprenticeships to minimize the costs of this proto-welfare scheme.⁹³ While the law surely constrained individual liberty,⁹⁴ it was

90. HAYEK, CONSTITUTION, *supra* note 7.

91. Areen, *supra* note 20, at 895-96; tenBroek, *supra* note 20, at 315 (“Once the public agreed to pay the bill, it acquired a pressing concern about the size of the bill and an active interest in finding methods for reducing it.”).

92. *Genealogy Part I*, *supra* note 16, at 5-6 (describing family law as a “legally regulated private welfare system”); *Genealogy Part II*, *supra* note 20, at 259; Rosenbury, *supra* note 20, at 1866-67 (“The government affirmatively recognizes certain intimate relationships, to the exclusion of others, in order to incentivize individuals to privately address the dependencies that often arise when adults care for children and for one another . . . [E]ven as our understandings of family roles and composition have changed, legal recognition of family status remains rooted in the privatization of dependency. The government therefore recognizes and bestows benefits on families so that they will serve a private welfare function, minimizing reliance on state and federal coffers.”); Rosenbury, *supra* note 20, at 1866 n.184 (quoting *Baskin v. Bogan*, 766 F.3d 648, 661 (7th Cir. 2014); and then *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 961 (N.D. Cal. 2010)); Anne Fleming, *The Public Interest in the Private Law of the Poor*, 14 HARV. L. & POL’Y REV. 159, 170 (2019) (citing Laura W. Morgan, *Supervising and Administering the Family, Family Law at 2000: Private and Public Support of the Family: From Welfare State to Poor Law*, 33 FAM. L.Q. 705, 705-07 (1999)). See generally, Tonya L. Brito, *The Welfarization of Family Law*, 48 KAN. L. REV. 229 (2000) (examining the relationship between family law and welfare law).

93. 43 Eliz. 1, c.2, § I, V (1601). For a predecessor to the Elizabethan Poor Law with a similar apprenticeship provision, see 23 Hen. 8, c.23 (1535).

94. Areen, *supra* note 20, at 895-96.

nonetheless generally applicable, approved by a democratically accountable legislature, and subject to binding judicial interpretation.⁹⁵ Not so today.⁹⁶

Child support is nominally handled under state law. State courts enter child-support awards according to the state's statutory guidelines. Where payment is not forthcoming, the custodial parent may bring a civil action to enforce the child-support award. Payment in full is the exception, not the norm.⁹⁷ This is a policy failure: where child support goes unpaid, but the custodial parent's need remains, the federal or state government is left holding the bag. To avoid this result, the Social Security Act of 1935 granted the federal executive branch enormous discretion over child support enforcement.⁹⁸ Federal funding for state welfare programs was conditioned on changes to state child-support law and policy,⁹⁹ adding a federalism dimension¹⁰⁰ to the accountability concerns¹⁰¹ posed by child support's administrative turn.

First, states were required to award child support according to guidelines consistent with Department of Health and Human Services regulations.¹⁰² Further, states were required to establish "IV-D agencies," named for Title IV-D of the Social Security Act, to administer child-support enforcement.¹⁰³ IV-D agencies are federal-state partnerships, supervised by the federal Office of Child Support Enforcement. They are interoperable with other federal and state agencies, giving IV-D agencies broad access to information like obligors' bank accounts and tax filings.¹⁰⁴ Using this information, the agencies can effect automated asset seizures to satisfy child-support arrears, such as by rerouting the delinquent obligor's tax refund to the custodial parent.¹⁰⁵ Some enforcement action is completely removed from the state's or obligee's discretion: for example, wherever

95. tenBroek, *supra* note 20, at 315.

96. See Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1150 (10th Cir. 2016) (Gorsuch, J. concurring).

97. TIMOTHY GRALL, U.S. CENSUS BUREAU, P60-262, CUSTODIAL MOTHERS AND FATHERS AND THEIR CHILD SUPPORT: 2015, at 2 (2020).

98. 42 U.S.C. § 651 (2018).

99. 45 C.F.R. § 302.56(c) (2019) ("The [state] guidelines . . . must at a minimum . . .").

100. Compare South Dakota v. Dole, 483 U.S. 203, 211 (1987) (upholding a statute that tied a state's receipt of federal funds to the states adoption of minimum drinking age), with Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 581 (2012) (finding the requirements of the Medicaid expansion provision of the Affordable Care Act unconstitutionally burdensome on states).

101. PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 364 (2014).

102. *Id.*; 42 U.S.C. § 651 (2018).

103. 42 U.S.C. § 654 (2018).

104. Elizabeth G. Patterson, *Civil Contempt and the Indigent Child Support Obligor: The Silent Return of Debtor's Prison*, 18 CORNELL J.L. & PUB. POL'Y 95, 99-100 (2008).

105. *Id.*

an IV-D agency is assisting in child-support enforcement, wage withholding is mandatory under federal law.¹⁰⁶

Where wage withholding and asset seizure prove insufficient, the Social Security Act's child-support enforcement apparatus can levy additional sanctions through its interoperable network of federal and state agencies. Nonpayment can be addressed by cutting welfare benefits, suspending driver's and professional licenses, and state or federal criminal contempt orders.¹⁰⁷ Custodial parents are not immune from the coercion of contemporary child-support enforcement: custodial parents receiving certain welfare benefits are *required* to seek child support, including by providing identifying information about the non-custodial parent and submitting to compulsory genetic testing.¹⁰⁸

Hayek was no fan of the administrative state, and his gripes have special force in the context of child-support enforcement. Hayek identified administrative rules—in contrast to generally applicable legislation derived from spontaneous evolution—as prescriptive, *ex post*, and potentially self-serving sovereign commands.¹⁰⁹ Hayek's critique of the administrative state implicates both accountability and separation-of-powers concerns. Unlike the objects of legislative coercion, victims of administrative coercion have little recourse through democratic processes. Bureaucrats, though sometimes appointed by elected officials, are not directly accountable to the people through elections. Insulated from democratic accountability, administrators thus have little reason to avoid particular judgments—especially as compared to legislators or the executive. When it comes to federalized child-support enforcement, the threat of unaccountable lawmaking is even more severe: in addition to broad judicial deference,¹¹⁰ administrators

^{106.} *Id.*

^{107.} See *id.*; Courtney E. Lollar, *Criminalizing (Poor) Fatherhood*, 70 ALA. L. REV. 125 (2018); Ann Cammett, *Deadbeats, Deadbrokes, and Prisoners*, 18 GEO. J. POVERTY L. & POL'Y 127, 141-45 (2011).

^{108.} Brito, *supra* note 91, at 266-67.

^{109.} HAYEK, CONSTITUTION, *supra* note 7, at 223-24. Hayek's disdain for administrative commands emanates from his emphasis on predictability. Prescriptive commands are inherently unpredictable because they are based not on criteria established *ex ante* but on the whim of the sovereign, which may only become clear after a decision issues. Whereas proscriptive laws define the boundaries of the protected sphere, prescriptive commands invade that sphere—and stymie spontaneous evolution—by imposing unpredictable judgments that prescribe conduct *ex post*.

^{110.} See *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984) (articulating a two-step approach requiring federal courts to defer to agency interpretation of ambiguous legislation); Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833 (2001) (acknowledging *Chevron's* expansion of the sphere of mandatory deference). *But see* Benjamin M. Barczewski, *Chevron Deference in the Courts of Appeals*, CONG. RSCH. SERVS. (July 8, 2023) (noting that lower courts apply *Chevron* more frequently than the Supreme Court, often with different results); Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 116 MICH. L.

benefit from a federalism “shell game” that obfuscates the source (federal or state) of administrative coercion.¹¹¹

By delegating broad rule-making authority to agencies, legislators not only empower unaccountable administrators to pursue legislative ends through potentially arbitrary commands,¹¹² but also subvert one of our most important informally generated orders: the separation of powers.¹¹³ Administrative rulemaking and adjudication combine the legislative and judicial powers—that is, the power to both write the rules and to enforce them.¹¹⁴ Combining rule-making and rule-enforcing powers sets the table for a feast of particular judgments: where an administrative rule leads to a normatively (to the bureaucrat) undesirable result, administrators can simply (and unpredictably) decline to apply the rule. The separation-of-powers concerns posed by administrative child-support enforcement are exacerbated by federal preemption doctrines, which guarantee

REV. 1 (2017) (same). *Chevron* is under siege by critics of the administrative state and may soon be overruled. In the latest attack on *Chevron*, argued January 2024, a group of commercial fishermen contend that the Magnuson-Stevens Fishery Conservation and Management Act of 1976 does not authorize the National Marine Fisheries Service to require fishermen to pay for at-sea monitoring programs. See *Loper Bright Enters. v. Raimondo*, 143 S. Ct. 2429 (2023) (mem.) (granting certiorari “limited to Question 2 presented by the petition”). Question 2 of *Loper Bright*’s petition asks “[w]hether the Court should overrule *Chevron* or at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency.” Petition for Writ of Certiorari at i-ii, *Loper Bright*, 143 S. Ct. 2429 (No. 22-451). But see Jack M. Beermann, *Loper Bright and the Future of Chevron Deference*, 65 WM. & MARY L. REV. (forthcoming 2024) (manuscript at 5-6), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4584525 [<https://perma.cc/58J8-UZ3J>] (noting that the Court seemed poised to overturn *Chevron* but failed to follow through in *American Hospital Ass’n v. Becerra*, 142 S. Ct. 1896 (2022)).

111. *Printz v. United States*, 521 U.S. 898, 929-30 (1997) (striking down provisions of the Brady Act commanding state and local law enforcement to conduct background checks in part because it would force state lawmakers to take the blame for the actions of federal legislators, creating accountability concerns); see also *New York v. United States*, 505 U.S. 144, 174-75 (1992) (holding that where Congress “incentivizes” state compliance with federal radioactive waste disposal regulations by requiring non-compliant states to take title to all radioactive waste generated within the state’s borders, “Congress has crossed the line distinguishing encouragement from coercion”); Deborah Jones Merritt, *Three Faces of Federalism: Finding a Formula for the Future*, 47 VAND. L. REV. 1563, 1580 n.65 (1994) (outlining three “accountability issues” identified by the Court in *Printz*).

112. See HAMBURGER, *supra* note 101, at 182-83.

113. See HAYEK, CONSTITUTION, *supra* note 7, at 236, 247-51; McILWAIN, *supra* note 82, at 143, 165, 176-77; *The Case of Proclamations* (1610) 77 Eng. Rep. 1352 (KB). According to Hayek’s reading of the historian Charles Howard McIlwain, a spontaneous quasi-constitutional order evolved as early as the seventeenth century whereby an independent judiciary held the sovereign (executive) to account when royal prerogatives transgressed customary boundaries of the protected sphere.

114. HAYEK, CONSTITUTION, *supra* note 7, at 258.

that the normatively charged particular judgments of administrators crowd out state legislatures' attempts to take advantage of their particular knowledge by experimenting with alternative child-support regimes.¹¹⁵

The hornbook child-support enforcement case *Eunique v. Powell* illustrates Hayek's critique of administrative law, especially as it interacts with cooperative federalism. In *Eunique*, a parent with child-support arrearages was denied a passport pursuant to a State Department regulation.¹¹⁶ The parent challenged the regulation as a violation of her Fifth Amendment freedom to travel abroad.¹¹⁷ The Ninth Circuit upheld the regulation, concluding that the State Department had not violated the parent's Fifth Amendment rights, but simply "ordered her priorities for her."¹¹⁸ Ms. Eunique and other dissatisfied voters would have been hard-pressed to make their displeasure heard through democratic means, because the decision makers accountable for the result are far from obvious. Are California lawmakers responsible because they agreed to certify child-support arrearages to the Secretary of Health and Human Services?¹¹⁹ Or are federal lawmakers responsible because they condition funding for state child-support collection on reporting efforts?¹²⁰ What about the State Department, who issued the regulation in question?¹²¹

Accountability concerns posed by child-support enforcement are exacerbated by the powerful sanctions courts have upheld against delinquent obligors. In *State v. Oakley*, for example, the Wisconsin Supreme Court upheld a probation condition prohibiting an obligor from having more children while his child

115. See *Rose ex rel. Clancy v. Moody*, 629 N.E.2d 378, 379 (N.Y. 1993) (striking down a provision of state child-support law as federally preempted).

116. 302 F.3d 971 (9th Cir. 2002).

117. *Id.* at 972-73 (quoting 22 C.F.R. § 51.70(a)(8) (2018)).

118. *Id.* at 976. Judge Kleinfeld's impassioned dissent cited the Magna Carta no less than four times. *Id.* at 979-85 (Kleinfeld, J., dissenting).

119. See Cal. Dep't of Child Support Servs., Letter 07-20: Administration of the Passport Denial Program (Dec. 31, 2007), https://childsupport.ca.gov/wp-content/uploads/sites/252/Policy/CSS-07-20-Administration-Of-The-Passport-Denial-Program_ADA.pdf <https://perma.cc/5SQV-GYKH>].

120. 42 U.S.C. § 654(31) (2018).

121. 22 C.F.R. § 51.70(a)(8) (2018). More sophisticated voters may recognize that the State Department's hands are tied by the mandatory language of the federal enabling legislation. See 42 U.S.C. § 652(k)(2) (2018) ("The Secretary of State *shall*, upon certification . . . , refuse to issue a passport") (emphasis added). Even so, it remains unclear whether disgruntled voters should hold federal officials accountable for passing the legislation, or state officials accountable for opting into the scheme. Similar accountability concerns arose in *Rose ex rel. Clancy v. Moody*, when New York's highest court struck down a provision of the state's child-support law because it conflicted with federal enabling legislation. 629 N.E.2d 378, 379 (N.Y. 1993).

support remained in arrears.¹²² To make matters worse, the Supreme Court in *Turner v. Rogers* held that the Sixth Amendment right to counsel does not extend to civil contempt proceedings for child-support enforcement, even where the obligor faces prison time for failure to pay.¹²³

Some might object that child-support doctrine can actually be reconciled with Hayekian principles. On this narrow view of child-support law – one that considers rules of decision but not remedies – child-support doctrine is independent from the evils of administrative enforcement. Put simply, accountability concerns imbricated in the administrative character of child-support enforcement are not chargeable to courts. Courts merely issue child-support awards, and the unaccountable coercion with which those awards are enforced is a problem for the political branches. Moreover, courts ultimately decide whether the delegation of legislative or executive power to administrative agencies accords with the Constitution. But this counterargument fails for at least two reasons.

First, court-issued child-support awards are a necessary predicate for administrative enforcement. Courts are at least complicit in the unaccountable coercion that flows from their pronouncements. More important, hornbook cases suggest that courts are not only complicit but in fact eager to vindicate the concrete ends of the administrative enforcement apparatus (supporting custodial parents at minimal cost to the state), even where this requires them to ignore customary rules. In *Miller v. Miller*, for example, the New Jersey Supreme Court held (with, it admitted, no statutory or common-law basis) that especially loving stepparents could be equitably estopped from denying child support to their stepchildren,¹²⁴ but warned that this newly invented doctrine should be “applied with caution” so as not to discourage stepparent-stepchild bonds.¹²⁵ This is the definition of a particular judgment: directing a normatively desirable result in one case, while attempting to limit the rule’s prospective general applicability.

Thus, even a charitable assessment of administrative child-support enforcement is inconsistent with Hayek’s framework of law and liberty. First, all states have accepted funds conditioned on the application of child-support guidelines approved by federal regulators. Even if child-support awards were predictable – and cases like *Miller* suggest they are not – the spontaneous evolution of child-support doctrine is stunted by federal regulators’ insulation from democratic accountability. What’s more, the administrative character of child-support

122. 629 N.W.2d 200, 201-02 (Wis. 2001).

123. 564 U.S. 431 (2011). Three decades earlier, the Court reached a similar result with respect to proceedings brought by state administrative agencies for the termination of parental rights. *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18 (1981).

124. 478 A.2d 351, 355 (N.J. 1984).

125. *Id.* at 357-58.

enforcement – often compelled by federal law regardless of the custodial parent’s preference – reduces space for informal ordering, further inhibiting healthy, organic change in our child-support regime based on parties’ particular knowledge of time and space.

*B. Custody and the “Mother of All Standards”*¹²⁶

Custody is a remarkably standard-laden area of family law.¹²⁷ Standards confer discretion on judges and thus, as Hayek argues, empower them to make willful judgements. The custody decisions reviewed below support Hayek’s contention that such willful judgments – even if temporarily satisfying – may do more harm than good in the long run.

At the beginning of the nineteenth century, the law awarded fathers custody upon divorce, incident to their presumed property right in their offspring’s labor.¹²⁸ After the Fair Labor Standards Act made children a financial liability rather than an asset, the common-law rule was replaced with a presumption of maternal preference.¹²⁹ Following the equality revolution of the mid-to-late nineteenth century, maternal preference eventually gave way to the status-neutral (i.e., sex-neutral) “best interest of the child” standard.¹³⁰

Determining the “best interest of the child” is, as one family-law expert colorfully puts it, the “Mother of All Standards.”¹³¹ The Uniform Marriage and Divorce Act, “a representative example of the considerations that courts take into account when deciding custody,”¹³² requires judges to consider five unweighted factors in assessing the best interest of the child.¹³³ State practice is even more complicated: Mississippi has a thirteen-factor test, concluding with “other factors relevant to the parent-child relationship.”¹³⁴ In practice, the best-interest

^{126.} *Genealogy Part II*, *supra* note 20, at 274.

^{127.} Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 L. & CONTEMP. PROBS. 226, 249-55 (1975).

^{128.} Richard Neely, *The Primary Caretaker Parent Rule: Child Custody and the Dynamics of Greed*, 3 YALE L. & POL’Y REV. 168, 169-70 (1984).

^{129.} *Id.*

^{130.} *State ex rel. Watts v. Watts*, 350 N.Y.S.2d 285, 290 (N.Y. Fam. Ct. 1973); *see also Pusey v. Pusey*, 728 P.2d 117, 120 (Utah 1986) (employing “function-related factors” to decide “competing child custody claims”).

^{131.} *Genealogy Part II*, *supra* note 20, at 274.

^{132.} AREEN, *supra* note 5, at 940.

^{133.} UNIF. MARRIAGE & DIVORCE ACT § 402 (UNIF. L. COMM’N 1973).

^{134.} *Albright v. Albright*, 437 So.2d 1003, 1005 (Miss. 1983). Mississippi’s test is thirteen factors if you include age and “other factors relevant.” *Id.*

standard is so flexible that it rarely constrains judicial decision-making.¹³⁵ This flexibility is unsurprising, given that the standard attempts to assess the interests of a nonparty to the litigation (the child) based on contingent future interests instead of empirical facts.¹³⁶

Doctrinal custody cases illustrate that the best-interest standard fails to meaningfully constrain judicial discretion, and thus facilitates courts' imposition of particular judgments to satisfy concrete ends. The best-known custody case is probably *Palmore v. Sidoti*.¹³⁷ In that case, a white divorcee was attempting to obtain custody of his child from his white ex-wife because she had recently remarried a Black man. The Court accepted the premise of the ex-husband's argument, agreeing that "a child living with a stepparent of a different race may be subject to a variety of pressures and stresses not present if the child were living with parents of the same racial or ethnic origin."¹³⁸ Nevertheless, the Court rejected the ex-husband's claim, holding that "the reality of private biases and the possible injury they might inflict" are not "permissible considerations" in the best-interest inquiry.¹³⁹ The Court thus refashioned the best-interest standard to maintain the appearance of colorblindness.¹⁴⁰

Palmore is a laudable decision in that the Court reached the correct outcome. But the decision's rationale has had disastrous ramifications for the predictability of custody decisions. The Court assumed that the best interest of the child would have been served by "living with parents of the same racial or ethnic origin"¹⁴¹ (a dubious proposition), but then carved out an exception from the best-interest

135. *In re Marriage of Hansen*, 733 N.W.2d 683, 696 (Iowa 2007) (acknowledging that the best-interest standard "is no standard at all").

136. Janet Halley, Eli Goldston Professor of L., Harvard L. Sch., *Child Custody: Law in Action*, Lecture Delivered at Harvard Law School (Mar. 20, 2023). I do not argue that the best-interest standard is an unalloyed evil. My point is only that it affords judges unbridled discretion to consider a broad range of factors that may or may not be relevant in any given case. Thus, the standard gives judges ample cover to (intentionally or otherwise) smuggle normative preferences of parenting and family life into custody decisions. Consider two parents, one of whom intends to remain in the marital home while the other plans to return to their hometown to be closer to family. The stationary parent's custody claim might assert that stability is in the child's best interest: that is, the child is best served by staying in the same school district with existing friends. The relocating parent's custody claim might assert that the child's best interest would instead be served by having a deep support network of grandparents, aunts, uncles, and cousins. Faced with this conflict – and lacking a guarantee that either parent will not move again – the Court might default to normative prior biases.

137. 466 U.S. 429 (1984).

138. *Id.* at 433.

139. *Id.*

140. Halley, *supra* note 136.

141. *Id.*

inquiry to blind itself to that assumption and avoid an ugly result. Notwithstanding the validity of the Court's questionable assumptions about mixed-race parenting, is a standard that directs racist results absent extraordinary intervention really a standard worth having?¹⁴² Just as important, is a standard that the Court can change from decision to decision really a standard at all? By picking around hard questions posed by deficiencies in the best-interest standard, the Supreme Court extended the life of the standard. If the Court had engaged with those questions, perhaps the standard's fundamental inaptitude would have become clear. But by directing a particular result to maintain the appearance of colorblindness, the Court vitiated a prime opportunity for much-needed evolution in custody doctrine.

Evidently, application of the best-interest standard is influenced by courts' "attitudinal biases."¹⁴³ *Arneson v. Arneson* stands out as another example. In that case, the court awarded primary custody to an able-bodied mother over a physically disabled father, relying partially on an appointed expert's "concerns about his ability to respond in an emergency."¹⁴⁴ The fact that Mr. Arneson cohabited with his second wife before their marriage was cited by the trial court as a factor cutting *against* his custody claim, even though the second wife was a child-care worker who could assist Mr. Arneson in caring for his daughter.¹⁴⁵ Whether the court's holding was animated by the inertia of maternal preference, animus against disabled people, or disdain for premarital cohabitation, it seems unlikely that the "best interest of the child" was the rule of decision.

In light of the best-interest standard's manifest shortcomings, courts and commentators have introduced numerous alternatives, such as the primary-caretaker,¹⁴⁶ psychological-parent,¹⁴⁷ and continuity-of-care¹⁴⁸ standards. Although these tests are probably an improvement, they remain open-ended and

142. Anton Chigurh, the cold-blooded antagonist of Cormac McCarthy's *No Country for Old Men*, poignantly poses the question: "Let me ask you something. If the rule you followed brought you to this, of what use was the rule?" CORMAC MCCARTHY, *NO COUNTRY FOR OLD MEN* 174 (2005); *NO COUNTRY FOR OLD MEN* (Miramax Films 2007) (directed by Joel Cohen and Ethan Cohen).

143. Michael Lanci, Note, *In the Child's Best Interests? Rethinking Consideration of Physical Disability in Child Custody Disputes*, 118 COLUM. L. REV. 875, 890 (2018); see also Katharine T. Bartlett, *Comparing Race and Sex Discrimination in Custody Cases*, 28 HOFSTRA L. REV. 877, 883 (2000) (discussing bias in custody cases).

144. 670 N.W.2d 904, 912 (S.D. 2003).

145. *Id.* at 908, 912.

146. See *Garska v. McCoy*, 278 S.E.2d 357, 360 (W. Va. 1981).

147. JOSEPH GOLDSTEIN, ANNA FREUD, & ALBERT J. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* 98 (1978).

148. See *Young v. Hector*, 740 So. 2d 1153, 1163 (Fla. 1998).

easily manipulable by judges to satisfy concrete ends. Often, these ends accord with the social biases that animated the rule of maternal preference. As one proponent of the primary-caretaker standard put it, the standard's five criteria "usually, but not necessarily, spell[] 'mother.'"¹⁴⁹ And in a well-known case applying the continuity-of-care standard, the court invented a "breadwinning" factor to justify granting custody to a working mother once it became clear that a stay-at-home father (who might require state support to care for the children) would otherwise prevail.¹⁵⁰

The foregoing cases suggest, to me, that Hayek was right. At least in the custody context, multifactor tests unduly expand judicial discretion. Such tests also reflect rationalist hubris: they assume that human reason can fully assess the complex factual realities upon which multifactor tests are superimposed.¹⁵¹ In reality, judges do not have that kind of bandwidth—they are overwhelmingly likely to fall back on customary rules (or even rote biases) as "shorthand."¹⁵² Custody law has replaced the customary rule of maternal preference with multifactor best-interest tests. Nonetheless, courts continue to award custody to mothers at disproportionate rates.¹⁵³ One potential explanation is that, rather than earnestly applying a thirteen-factor best-interest test,¹⁵⁴ or a primary-caretaker standard that usually awards custody to the mother,¹⁵⁵ judges are simply falling back to the shorthand of maternal preference. Regardless of whether customary rules produce preferable outcomes, at least Hayek's preference for evolved norms reflects the reality of judicial analysis, instead of allowing judges to cloak their normative preferences in the nominally dispassionate rationalism of a multifactor test.

This is not to say that Hayek would recommend that family law bring back the doctrine of maternal preference or let customary rules control in perpetuity.¹⁵⁶ It also isn't an effort to exaggerate the indeterminacy of current doctrine in service of a campaign against the rule of law.¹⁵⁷ I merely suggest that law

149. Neely, *supra* note 128, at 180.

150. *Young*, 740 So. 2d at 1162.

151. See HAYEK, CONSTITUTION, *supra* note 7, at 73, 127, 224; HAYEK, FATAL CONCEIT, *supra* note 12, at 75.

152. HAYEK, LAW, *supra* note 12, at 73, 113.

153. TIMOTHY GRALL, U.S. CENSUS BUREAU, P60-262, CUSTODIAL MOTHERS AND FATHERS AND THEIR CHILD SUPPORT: 2015, at 3, 6 (2020).

154. See *Albright v. Albright*, 437 So. 2d 1003, 1005 (Miss. 1983); *Hollon v. Hollon*, 784 So. 2d 943, 947 (Miss. 2001).

155. Neely, *supra* note 128, at 180.

156. See HAYEK, CONSTITUTION, *supra* note 7, at 223.

157. See *id.* at 316.

should reflect widespread social assumptions, even when those assumptions make us ashamed. To progressives' complaints that this will harm disfavored groups in the short run, Hayek offers a response that sounds in progressive teleological terms: In the long run, how will those same reformers know which areas of law incorporate "backwards" customary rules—that is, how will we know which laws to change through democratic processes—unless they are plainly explicated in judicial opinions? By bending the law to obscure its reflection of outmoded or embarrassing preferences, judges prioritize alleviating symptoms over curing the underlying disease. Masking the symptoms of outmoded laws (i.e., by directing particular judgments where those laws conflict with prevailing social attitudes), judges allow the disease to metastasize by stunting opportunities for organic law reform. Managing the fever instead of allowing it to break does not prevent human suffering. It extends it.

III. COSTS AND BENEFITS: HAYEK'S PLACE IN MODERN FAMILY LAW

There are no easy answers to the questions raised by measuring family-law practice against Hayek's model of law and liberty. The frightening arsenal of coercive tools available to the administrative child-support enforcement apparatus, and the minimal accountability with which the executive wields them, is antithetical to freedom. But for the indigent custodial parent—at least in the short run—preserving separation of powers and democratic accountability through the dispassionate enforcement of generally applicable rules will not put food on the table or pay rent.¹⁵⁸ By the same token, it seems unnecessary to risk undermining the progress achieved in *Palmore* simply because the Supreme Court's result was not wholly consistent with applicable law.

Hayek's framework offers much for family lawyers to consider. While resolving "hard cases"¹⁵⁹ in favor of predictability and consistency rather than normatively desirable outcomes requires us to take a "leap of faith,"¹⁶⁰ Hayek's commitment to generally applicable rules could pay dividends in the long term. If judges apply the law neutrally—and are seen by the voting public to do so—they become our canaries in the coal mine. Where an absurd result is reached, the popular response would not be to impute policy preferences to the court, but instead

158. ANATOLE FRANCE, *THE RED LILY* 91 (Frederick Chapman ed., Winifred Stephens trans., Dodd, Mead & Co., Inc. 1925) (1894) ("[T]he majestic equality of the laws . . . forbid(s) rich and poor alike to sleep under the bridges . . .").

159. See Dworkin, *supra* note 10, at 1057.

160. See SØREN KIERKEGAARD, *FEAR AND TREMBLING* 77 (Alastair Hannay, trans., Penguin Books 1985) (1919).

to identify defects in the law applied. And where the law creates perverse results, the response should be to change the law.¹⁶¹

Modern family law operates in opposite fashion. By directing results to suit concrete ends, family-law judges treat the symptoms without addressing (in fact, by affirmatively obscuring) the underlying disease. This approach leads only in one direction: complete social and legal stagnation – in direct opposition to the perennial norm-bending and evolution that Hayek associates with a productive society. Although modern family law might sometimes achieve normatively desirable outcomes in the short-term, Hayek suggests that the long run is the only thing that matters. He would have judges sacrifice individual litigants on the altar of justice in the interest of maintaining the rule of law.¹⁶²

That all sounds straightforward in the abstract. But when theory is clouded by facts – facts about real people, many of them children – Hayek’s framework is less appealing. Many of the greatest decisions in our nation’s history privileged outcome over predictability,¹⁶³ and much of our anticanon is notable for embracing consistency over result.¹⁶⁴ True, some of the most influential legal minds of their generation rejected *Brown v. Board’s* prioritization of policy outcome over legal principle.¹⁶⁵ But their argument fails for the same reason *Palmore* was rightly decided: sometimes the difference between the right decision and the law is simply too great to bear.¹⁶⁶

161. See *Turner v. Rogers*, 564 U.S. 431, 461 (2011) (Thomas, J., dissenting) (“[R]epercussions of the shift away from the nuclear family are ultimately the business of the policymaking branches.”).

162. HAYEK, *FATAL CONCEIT*, *supra* note 12, at 63–64, 81; HAYEK, *LAW*, *supra* note 12, at 351.

163. See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); *Ex parte Young*, 209 U.S. 123 (1908); *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *Cooper v. Aaron*, 358 U.S. 1 (1958); *Griswold v. Connecticut*, 381 U.S. 479 (1965). *But see* *Lochner v. New York*, 198 U.S. 45 (1905); *Korematsu v. United States*, 323 U.S. 214 (1944).

164. See, e.g., *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857); *Plessy v. Ferguson*, 163 U.S. 537 (1896).

165. See ALEXANDER BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* (1970); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

166. Given my use of Supreme Court cases to illustrate this point, I feel compelled to address the counterargument that Hayek’s framework does not apply to the Supreme Court in the same way it does to lower courts. One might argue that principled decisions misaligned with broader rule of law values are more justifiable when articulated by the Supreme Court. For one thing, the Supreme Court’s decisions are universally binding. Thus, even an *ex ante* unpredictable Supreme Court opinion will instill predictability *ex post*, because its holding will guide all lower courts’ application of the law. This argument is vulnerable, first, to the critique that the Supreme Court itself is only bound by its prior decisions to the extent it chooses to be. Compare *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854–55 (1992) (articulating a “series of prudential and pragmatic considerations designed . . . to gauge the respective costs of reaffirming and overruling a prior case”), with *Dobbs v. Jackson Women’s Health Org.*, 597

I have tremendous admiration for Hayek's framework. I have even more admiration for judges who make the decisions required to apply it. I think it is a profoundly valuable tool that more family-law scholars should adopt. But I do not think that Hayek's concepts of law and liberty offer the only framework for resolving family-law disputes. Rather, Hayek's approach offers a uniquely powerful perspective for performing distributional analyses on difficult family-law issues.

Professor Janet Halley, among others, highlights the importance of distributional analysis for family lawyers.¹⁶⁷ I agree with Professor Halley that family-law scholarship should "expose the distributional stakes of rules that affect the family, whether [those rules] are housed in family law or elsewhere."¹⁶⁸ Hayek's framework is invaluable to distributional analysis of family-law rules because it helps us recognize the cost of doing what we think is "right" and the benefit of following legal principle even where it leads to normatively dissatisfying outcomes. Without the benefit of Hayek's perspective, I fear we fail to fully appreciate the costs that particular judgments impose upon law's consistency, predictability, and evolution. We thus fail to consider the consequences that normatively satisfying judgments have for future generations of family litigants, whose ability to bargain in the shadow of the law is diminished by inconsistent,

U.S. 215, 264 (2022) (declining to apply those "prudential and pragmatic considerations" before overruling *Roe* and *Casey*). Even if the Court were meaningfully bound by *stare decisis*, that would not prevent the Justices from issuing decisions that sometimes compound, not ameliorate, unpredictability in the lower courts. See Charles L. Black, Jr., *The Supreme Court, 1966 Term—Foreword: "State Action," Equal Protection, and California's Proposition 13*, 81 HARV. L. REV. 69, 95 (1967) (referring to the Court's state action doctrine as a "conceptual disaster area" and "a torchless search for a way out of a damp echoing cave"); compare *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016) ("Article III standing requires a concrete injury even in the context of a statutory violation."), with *Transunion, LLC v. Ramirez*, 594 U.S. 413, 425-26 (2021) (clarifying that Congress can "elevate" to legally cognizable status previously inadequate injuries so long as they "exist" in the world, without explaining what it means for an injury to exist in the world). Most importantly, even assuming that Supreme Court decisions serve Hayek's goal of predictability, pathbreaking Court decisions are fundamentally incompatible with Hayek's affinity for organic, piecemeal legal evolution. Instead, by deciding hotly contested and politically charged cases, the Justices assume a top-down, rationalist role in American government. The Court's rationalist posture is at its zenith when the Justices affirmatively strip the legislature's authority to work around the Court's decisions. See, e.g., *Spokeo, Inc.*, 136 S. Ct. 1540 (2016) (restricting Congress's ability to create private rights of action for certain statutory violations); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (holding a statute unconstitutional as exceeding Congress's Fourteenth Amendment enforcement powers); *United States v. Morrison*, 529 U.S. 598 (2000) (same); *Shelby County v. Holder*, 570 U.S. 529 (2013) (same).

167. *Genealogy Part I*, *supra* note 16, at 6; *Genealogy Part II*, *supra* note 20, at 274; see Prabha Kottiswaran, *Born unto Brothels: Toward a Legal Ethnography of Sex Work in an Indian Red-Light Area*, 33 LAW & SOC. INQUIRY 579, 625 (2008).

168. *Genealogy Part I*, *supra* note 16, at 6.

unpredictable judgements. Hayek's framework thus helps family lawyers perform a special kind of distributional analysis, weighing the costs and benefits of judgments vis-à-vis individual litigants in the short term and the entire family-law order in the long term.

CONCLUSION

The question remains: how do we know when the costs of a particular judgment are justified? I do not know. But in light of Hayek's framework, family lawyers should champion distributional rules that require judges to justify their decisions according to predetermined criteria. We should eschew flabby multi-factor standards that permit smuggled preferences in favor of objective rules that require judges to marshal factual support for their findings. In the custody context, this approach could justify a move away from the best-interest standard toward the continuity-of-care or primary-caretaker rules. It might also justify a permanent move away from alimony, which allows judges to subvert the equitable division of marital property based on normative assessments of a party's behavior during the term of the marriage or strategy during divorce litigation. Irrespective of the particular solutions, if we accept – and I do – that family judges should subvert the overriding imperatives of predictability, consistency, and organic change when litigants' humanity so requires, we should at least make judges do so explicitly. Only then can we determine whether the normative benefit of a particular judgment justifies its substantial structural cost.

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