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OUT OF THE CHANNEL AND INTO THE SWAMP: HOW FAMILY LAW FAILS IN A NEW ERA OF CLASS DIVISION

*June Carbone**

I. INTRODUCTION

Carl Schneider's 1992 article in the *Hofstra Law Review*, *The Channelling Function in Family Law*, is part of the canon of family law.¹ It has earned a lasting place in the family law constellation, at least in part, because it stakes out a distinctive claim for the role of law in family governance. The article identifies the role of family law as an intermediate one that falls short of the coercion of criminal sanctions but is more directive than the voluntary obligations taken on in contractual regimes.² The channelling function allies family law with public purposes, implemented through private associations.³ It recognizes understandings that protect the vulnerable without undermining the authority of the powerful or negating the possibility of individual choice.⁴ Above all, Schneider made the case for the role of law in channelling the behavior necessary to build, shape, sustain, and promote social institutions.⁵

Schneider maintained that a culture survives through "the power of its institutions to bind and loose men in the conduct of their affairs with reasons which sink so deep into the self that they become common and

* Edward A. Smith/Missouri Professor of Law, the Constitution and Society, University of Missouri-Kansas City. I would like to thank Naomi Cahn, Nancy Levit, and Joanna Grossman for their comments on an earlier draft of this Article. I would also like to acknowledge John Gregory's graciousness and inspiration over the course of my career. I would also like to thank Anika Hickman for her research support.

1. Carl E. Schneider, *The Channelling Function in Family Law*, 20 HOFSTRA L. REV. 495 (1992).

2. *Id.* at 504 (describing the channelling function of family law as a means for promoting social institutions that does not primarily use legal coercion).

3. *See id.* at 507.

4. *See id.* at 497-98, 502-03, 513.

5. *See id.* at 498, 503.

implicitly understood.”⁶ These institutions help create a sense of “commonality”; that is, “some sense that their fellow citizens are people like themselves, whose experiences, concerns, and interests they can at least understand and to some degree share.”⁷ Institutions promote this sense of commonality by expressing shared norms, articulating public purposes, shaping behavior and making it more predictable, guiding changes that reconcile older institutions with new realities or convictions, resolving disputes, and reconciling individual cases with broader notions of justice.⁸ Underlying the channelling function and central to its success is the link between institutions and *shared* understandings, expectations, and purposes.⁹

In this Article, I plan to challenge whether the channelling function of family law is still possible; that is, whether it is possible today to create shared meanings able to serve as the foundation for institutions constitutive of community in the United States as a whole. In making this claim, I will argue that three factors have effectively dismantled the channelling function of family law as Schneider defined it in 1992. The first is family change. Change, as Schneider noted, need not inevitably undermine the channelling function; indeed, it arguably makes it more important as legal decisions reconcile new developments with old institutions, expressing changed norms that permit institutions to retain their vitality.¹⁰ Family law has often played such a role. The change from a maternal preference in custody decision-making to norms of shared custody provides a prime example.¹¹ Although the change was controversial, it took place through a long series of judicial decisions and

6. *Id.* at 505 (quoting PHILIP RIEFF, *THE TRIUMPH OF THE THERAPEUTIC: USES OF FAITH AFTER FREUD* 2 (1968)).

7. *Id.* at 511.

8. *See generally id.* *See also id.* at 521, 523, 531 (discussing the role of the channelling function in reform and stating that channelling institutions “make it easier for people to predict the consequences of their acts”).

9. *See id.* at 511.

10. *Id.* at 515; *cf.* Neil S. Siegel, *The Virtue of Judicial Statesmanship*, 86 TEX. L. REV. 959, 960, 981 (2008) (arguing that judicial statesmanship “charges judges with approaching cases so as to facilitate the capacity of the legal system to legitimate itself—over the long run and with respect to the nation as a whole—by accomplishing two paradoxically related preconditions and purposes of law: expressing social values as social circumstances change and sustaining social solidarity amidst reasonable, irreconcilable disagreement”).

11. MARTHA ALBERTSON FINEMAN, *THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM* 84, 87-88 (1991) [hereinafter FINEMAN, *THE ILLUSION OF EQUALITY*]; MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* 83 (1995) [hereinafter FINEMAN, *THE NEUTERED MOTHER*]. Much earlier, of course, Robert H. Mnookin and Lewis Kornhauser also observed that any change to gender neutral custody rules would weaken women’s bargaining power at divorce. *See* Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 978 (1979).

legislative innovations that adjusted custody law to reflect the changing roles of men and women in childrearing.¹² These changes occurred throughout the country—sometimes through legislation though often without.¹³ And although the decisions sometimes reflected regional differences, they effected a transformation that produced shared national understandings.¹⁴ In contrast, I will argue that the new round of changes has been more destructive of the channelling function not because it has transformed families, institutions, or cultural meanings, but because it does so in multi-directional ways for different people in different places at different times.¹⁵

Second, I will argue that one of the most critical changes affecting the family and challenging the role of the courts is the emergence of marriage as a marker of class. Again, the mere fact that family change plays out along class lines does not itself undermine the channelling function. The seminal work on class and family law is Jacobus tenBroek's description from the sixties of a dual system of family law.¹⁶ In an era in which marriage determined family regularity, the law recognized two family types: a privileged marital family of husband and wife and the children born into the union, and a much smaller group of single parent families produced by death, divorce or "illegitimate" births.¹⁷ tenBroek observed that the law for the former arose overwhelmingly from private actions arising at divorce, while the law for the latter reflected to a much greater degree state-initiated actions to

12. For a description of these changes, see JUNE CARBONE, *FROM PARTNERS TO PARENTS: THE SECOND REVOLUTION IN FAMILY LAW* 180-94 (2000) [hereinafter *FROM PARTNERS TO PARENTS*].

13. *Id.* at 191-92.

14. *See id.* at 189, 191.

15. Indeed, as Justice Sandra Day O'Connor observed: "The demographic changes of the past century make it difficult to speak of an average American family. The composition of families varies greatly from household to household." *Troxel v. Granville*, 530 U.S. 57, 63 (2000). Nonetheless, as I will argue, it is not merely the fact of family change but the fact that these changes have different *meanings* that most affects the channelling function. For example, both a middle class and a working class mother may choose to have a child outside of marriage. The middle class mother is more likely to do so with using sperm from an anonymous donor or friend who agrees to sever his parental rights. The working class mother is more likely to do so because she became accidentally pregnant, wants the child, and does not want to marry the father. Both the significance of these decisions and the likely impact of the law on the involvement of the biological father in the child's life are quite different in both their symbolic and practical efforts. For an exploration of the different contexts, see generally ROSANNA HERTZ, *SINGLE BY CHANCE, MOTHERS BY CHOICE: HOW WOMEN ARE CHOOSING PARENTHOOD WITHOUT MARRIAGE AND CREATING THE NEW AMERICAN FAMILY* 57-103 (2006) (comparing donor dads with unmarried romantic partners).

16. *See generally* Jacobus tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status* (pts. I, II, & II), 16 *STAN. L. REV.* 257 (1964), 16 *STAN. L. REV.* 900 (1964), 17 *STAN. L. REV.* 614 (1965) [hereinafter *California's Dual System of Family Law*].

17. *Id.* (pt. II) at 907.

protect the public fisc.¹⁸ The very existence of two systems served to channel the respectable into the first and to stigmatize the second with society imposing the norms of the first system on those in the second—reaffirming their validity.¹⁹ The changes currently affecting the family are different, at least in part, because they do not involve a privileged group and a stigmatized group capable of marginalization. Instead, they involve a broader set of changes along a class continuum that includes a privileged middle class that continues to embrace somewhat traditional marital norms, an increasingly separate working class cycling in and out of marriage, and an underclass for whom marriage has effectively disappeared.²⁰ The class changes in turn interact with racial, ethical, regional, and especially gender differences to defeat shared meanings not only about institutions such as marriage, but about the pressure points that produce predictable behavior.²¹

Finally, I will argue that different patterns of change for different groups at different times and places are insufficient in itself to derail the channelling function without the complicity of the courts themselves. Driving that complicity is the courts' difficulty in dealing with the issue of female choice. The channelling function exists on a continuum bracketed by Justice Antonin Scalia's insistence on freezing constitutional meaning in terms of the circumstances (and patriarchy) of 1787, on the one hand, and Justice William Brennan's equation of liberty with state neutrality toward family form (and women's choices),

18. *Id.* (pt. I) at 257-58. These divisions between the family law of rich and poor, private and public, voluntary and involuntary family associations have been the subject of extensive commentary. See, e.g., Tonya L. Brito, *The Welfarization of Family Law*, 48 U. KAN. L. REV. 229, 238-50 (2000); Naomi R. Cahn, *Children's Interests in a Familial Context: Poverty, Foster Care, and Adoption*, 60 OHIO ST. L.J. 1189, 1211-15 (1999); Deborah Harris, *Child Support for Welfare Families: Family Policy Trapped in its Own Rhetoric*, 16 N.Y.U. REV. L. & SOC. CHANGE 619, 621-29 (1988) [hereinafter *Child Support for Welfare Families*]; Leslie Joan Harris, *The Basis for Legal Parentage and the Clash Between Custody and Child Support*, 42 IND. L. REV. 611, 612-14 (2009) [hereinafter *The Basis for Legal Parentage*]; Jill Elaine Hasday, *Parenthood Divided: A Legal History of the Bifurcated Law of Parental Relations*, 90 GEO. L.J. 299, 368-71 (2002); Daniel L. Hatcher, *Child Support Harming Children: Subordinating the Best Interests of Children to the Fiscal Interests of the State*, 42 WAKE FOREST L. REV. 1029, 1043-44 (2007); Amy E. Hirsch, *Income Deeming in the AFDC Program: Using Dual Track Family Law to Make Poor Women Poorer*, 16 N.Y.U. REV. L. & SOC. CHANGE 713, 715-16 (1988).

19. See Schneider, *supra* note 1, at 506. Schneider acknowledged that one of the "troubling" aspects of the channelling function was "its technique of promoting one institution by disadvantaging the alternatives" and in some cases those who suffer most from the channelling function are blameless, such as illegitimate children. *Id.* at 519-20. He nonetheless argued that the channelling function was less coercive than many of the alternatives and that any costs had to be weighed against the benefits to children who, for example, might be born into marital rather than unmarital families because of the success of the channelling function. See *id.* at 520.

20. For a description of the changes, see *infra* Part II.

21. See *infra* Part V.A.

on the other.²² In between, the courts might articulate new understandings; ruling, for example, either that a biological father's parental rights depend on the strength of his relationship with the child,²³ or that a woman who invites a man to parent her children cannot later deny his parental standing.²⁴ Yet, to deal with these issues directly means getting past monolithic views of marriage and gender. While some courts in some states on some issues have been willing to address these issues, many do not; they either withdraw from the channelling function altogether, eschewing the articulation of their decisions in normative terms,²⁵ or issue conflicting or incoherent decisions that have minimal impact on norms or behavior.²⁶ What has sped their departure is ideological division—many judges either value ideological purity more than the forging of consensus-based norms, or seek to avoid controversial decisions altogether for fear of partisan attack.²⁷

22. Compare *Michael H. v. Gerald D.*, 491 U.S. 110, 126, 127-28 n.6 (1989), *with id.* at 141 (Brennan, J., dissenting).

23. For a man to develop a relationship with a child ordinarily requires the mother's consent. See E. Gary Spitko, *The Constitutional Function of Biological Paternity: Evidence of the Biological Mother's Consent to the Biological Father's Co-Parenting of Her Child*, 48 ARIZ. L. REV. 97, 104 (2006). For an argument that such consent should be constitutionally mandated, see generally *id.*

24. For an example of the use of estoppel principles in parental standing cases, see UNIF. PARENTAGE ACT § 608 cmt. (2002).

25. See Katharine K. Baker, *Homogenous Rules for Heterogeneous Families: The Standardization of Family Law When There Is No Standard Family* 4 (Mar. 9, 2011) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1782051 ("Because reformers cannot agree on principles that will lead to fair outcomes in the majority of cases, they have settled for rules that can lead to consistent and efficient outcomes in the majority of cases.").

26. See, e.g., June Carbone, *The Legal Definition of Parenthood: Uncertainty at the Core of Family Identity*, 65 LA. L. REV. 1295, 1295 (2005) [hereinafter *The Legal Definition of Parenthood*] ("The definition of parentage—and with it the determination of which adults receive legal recognition in children's lives—has become the most contentious issue in family law. Not only are jurisdictions irreconcilably divided in their approach to parentage, decisions under settled law in a given county may not necessarily come out the same way.").

27. See Jeffrey R. Lax & Justin H. Phillips, *Gay Rights in the States: Public Opinion and Policy Responsiveness*, 103 AMER. POL. SCI. REV. 367, 370 & n.3, 382 (2009), available at http://www.columbia.edu/~jrl2124/Lax_Phillips_Gay_Policy_Responsiveness_2009.pdf (suggesting that some actors in a representative democracy, such as unelected courts, may have different incentives than representing the majority opinion). Although same-sex marriage is the issue most often described in these terms, it is a particularly complex one. Polls show public support steadily increasing for same-sex marriage and legal changes largely in sync with the public shift. See *id.* at 48 fig.6. Moreover, courts have in fact led in the creation of new norms about the acceptability of gay and lesbian relationships and parenting and continue to do so. See, e.g., Carlos A. Ball, *The Backlash Thesis and Same-Sex Marriage: Lessons from Brown v. Board of Education and Its Aftermath*, 14 WM. & MARY BILL RTS. J. 1493, 1494 (2006) (concluding that "despite the harmful backlash experienced by the gay rights movement following marriage cases such as *Goodridge v. Department of Public Health*, lesbians and gay men are nonetheless better off as a result of those cases"); Jonathan Rauch, *Red Families, Blue Families, Gay Families, and the Search for a New Normal*, 28 LAW & INEQ. 333, 343 (2010) (arguing that same-sex marriage contributes to renormalizing family values). At the same time, however, many describe the issue in terms of an all-

Ideological warfare, when combined with the already fractured meaning of class-based family change, makes agreement on the institutions to be championed and the shared meanings to be promoted a perilous enterprise.²⁸

In arguing that the channelling function in family law may be on life support, I plan to return to the site of Schneider's original article—the U.S. Supreme Court's decision in *Michael H. v. Gerald D.*²⁹ and the continued validity of the marital presumption. While Schneider cited the case as an example of judicial recognition of the importance of marriage,³⁰ there are many additional ways to read the case with the hindsight of almost twenty years of subsequent developments.

First, the effect of the decision has not been an unequivocal embrace of the importance of marriage, the institution Schneider defended in the original article. Instead, the result was to return the matter to the states where two-thirds now allow the type of challenge *Michael H.* rejected.³¹ These state decisions have been characterized more by incoherence than shared meaning—they rarely serve to channel family life into marriage in the manner Schneider advocated nor do they provide the basis for the emergence of an alternative national norm.³²

Second, among the reasons for incoherence has been disagreement on the significance of the marital presumption as a family norm. The

or-nothing clash of values. For example, Justice Scalia's dissent in *Lawrence* observes:

It is clear from this that the Court has taken sides in the culture war, departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed. Many Americans do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children's schools, or as boarders in their home. They view this as protecting themselves and their families from a lifestyle that they believe to be immoral and destructive.

Lawrence v. Texas, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting).

28. The federal system, of course, allocates primary responsibility for family law to the states precisely because this type of division has been present since the country's founding. For a more detailed discussion of this point, see NAOMI CAHN & JUNE CARBONE, *RED FAMILIES V. BLUE FAMILIES: LEGAL POLARIZATION AND THE CREATION OF CULTURE* 139-51 (2010) [hereinafter *RED FAMILIES V. BLUE FAMILIES*]. The authors argue for decentralization as a way to deal with political polarization and differences in family values. *Id.* at 208.

29. 491 U.S. 110 (1989).

30. Schneider, *supra* note 1, at 526 (stating that *Michael H.* advanced the channelling interest by (1) preserving the stability of the marriage between Gerald and Carole, and (2) securing the parenthood relationship between Victoria and her presumed parents).

31. Approximately two-thirds of the states similarly allow the non-marital father to challenge the marital presumption through either statute or case law. UNIF. PARENTAGE ACT § 607 cmt. (2002).

32. See Theresa Glennon, *Somebody's Child: Evaluating the Erosion of the Marital Presumption of Paternity*, 102 W. VA. L. REV. 547, 573-77 (2000) (analyzing the issue of marital presumption and the state courts' methods of resolving paternity disputes using genetic testing).

Texas Supreme Court, in rejecting the continued application of the presumption, observed that its principal effect is to allow the mother to decide which man she wants to be the father of her child and the Court had no interest in encouraging that development.³³ While the Court replaced its initial opinion with one eliminating any reference to gender, the two decisions underscore the lack of agreement on the reciprocities that today underlie decisions to marry and parent.³⁴

Third, the *Michael H.* decision itself demonstrates the U.S. Supreme Court's own fracture on the appropriate foundation of constitutional decision-making. Justice Scalia's plurality opinion devoted at least as much energy to his articulation of original intent as it did to principles of family regularity.³⁵ Doing so magnified the disunity of the Court making it impossible to secure a majority decision and giving the dissent further reason to disavow the result. Ideological division has only increased in the decades since,³⁶ undermining commitment to the very channelling function Schneider championed—one that links the integrity of institutions to shared understandings rather than to partisan advantage.³⁷

This Article concludes that revisiting *Michael H.* and the channelling function in light of the developments of the intervening years produces an overwhelming sense of irony: the channelling function might have been better served had the dissent prevailed. *Michael H.* was the last in a series of cases that attempted to modernize the legal definition of parenthood and articulate the obligations mothers and fathers have to each other.³⁸ With the Court's fracture in *Michael H.*, the Supreme Court has not taken another such case since and we are arguably worse for it.³⁹

This Article will first discuss the erosion of the channelling interest in family law in the context of increasing class division. Second, it will

33. See, e.g., *In re J.W.T.*, 872 S.W.2d 189, 197-98 (Tex. 1994). See also *infra* text accompanying notes 185-87.

34. *In re J.W.T.*, No. D-1742, 1993 Tex. LEXIS 101, at *31-32 (Tex. June 30, 1993), *withdrawn*, *In re J.W.T.*, 872 S.W.2d at 197-98 (treating the biological father as *the* father and objecting to the dissent's treatment of him as "a stranger to the marriage," and insisting that the father is a stranger "only in so far as the statutory law has traditionally deprived him of his rights").

35. See *Michael H. v. Gerald D.*, 491 U.S. 110, 123-24 (1989).

36. *RED FAMILIES V. BLUE FAMILIES*, *supra* note 28, at 61, 66, 71.

37. See *Schneider*, *supra* note 1, at 511.

38. See *Michael H.*, 491 U.S. at 126; see also *infra* text accompanying notes 161-70.

39. The only parental rights' case since 1989 has been *Troxel v. Granville*, 530 U.S. 57 (2000). The Court upheld the right of a fit parent to limit visitation of his or her children in the face of grandparents' requests for greater visitation. *Id.* at 63. *Troxel* did not involve, however, the definition of marriage or parenthood, and the Court split in at least as many ways as it did in *Michael H.*, bringing no greater coherence to family law decision-making. *Id.* at 59.

examine the changing role of class and gender in determining the effectiveness of channelling strategies. Third, it will revisit the Supreme Court's decision in *Michael H.* and the subsequent state cases on the marital presumption and argue that the case undermined, rather than enhanced, the prospects for shared national meaning about family institutions. Finally, it will acknowledge that the channelling interest survives in some states for some matters in ways that may lay the foundation for its eventual resurrection.

II. MISSING IN ACTION? FAMILY LAW IN AN AGE OF DIVISION

Family law has been on the frontline of domestic battles for the last fifty years, with the courts performing the often subtle updating that has kept judicial decisions in the forefront of articulating norms and reconciling evolving practices with older institutions. The judicial system has overseen divorce reform, which finally overcame decades of religious opposition to sweep the country during the sixties and seventies.⁴⁰ Custody law became "ground zero" in the gender wars as the courts remade custody presumptions to reflect new, more egalitarian attitudes toward parenting.⁴¹ And same-sex marriage and abortion have been central to what Justice Scalia termed a "Kulturkampf,"⁴² as attitudes toward social issues have become more polarized over the last thirty years.

Yet, the new issue remaking American families has not yet captured the imagination of courts or legislatures, though it lurks beneath the subjects that have. That issue involves the emergence of marriage as a marker of class—separating not just the poor from the middle class, but emerging on a continuum that makes college graduates distinct from the working class, who in turn retain different practices

40. See Doris Jonas Freed, *Grounds for Divorce in the American Jurisdictions (as of June 1, 1974)*, 8 FAM. L.Q. 401, 421-23 (1974) (listing grounds for divorce in each state and indicating that by 1974 only Illinois, Massachusetts, Mississippi, Pennsylvania, and South Dakota required "fault grounds"). See also J. HERBIE DIFONZO, *BENEATH THE FAULT LINE: THE POPULAR AND LEGAL CULTURE OF DIVORCE IN TWENTIETH-CENTURY AMERICA* 145, 167-70 (1997) (describing the evolution of no-fault divorce in California through judicial decisions and legislative action).

41. FROM PARTNERS TO PARENTS, *supra* note 12, at 180, 191.

42. Marc R. Poirier, *Same-Sex Marriage, Identity Processes, and the Kulturkampf: Why Federalism Is Not the Main Event*, 17 TEMP. POL. & CIV. RTS. L. REV. 387, 387-88 & n.3 (2008) (defining "Kulturkampf" as a culture war in which "two strongly and bitterly opposed views of culture have sought to win over whatever jurisdictions they can, establishing beachheads"). For Justice Scalia's references to "Kulturkampf" and culture wars, see *Romer v. Evans*, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting) and *Lawrence v. Texas*, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting). "It is clear . . . that the Court has taken sides in the culture war . . ." *Lawrence*, 539 U.S. at 602.

from the poor.⁴³ Sociologists began to chart the divergence in the family practices between college graduates and the rest of the population roughly a decade ago.⁴⁴ Since 2010, the Marriage Project and the Pew Research Center released major studies that set forth the details in unmistakable terms.⁴⁵ While a generation ago, the marital practices of college graduate men differed little from those of their high school peers—and college graduate women were less likely to marry than those with less education—today the class patterns diverge sharply.⁴⁶ The likelihood of marrying, staying married, and raising children within a stable two-parent family correlates strongly with class.⁴⁷ Family scholars celebrated the leveling off of divorce rates in the nineties,⁴⁸ but only recently noticed that the composite figures masked a sharp class divergence. For female college graduates, divorce rates have indeed improved and are back to the level of the sixties—before adoption of no-fault divorce.⁴⁹ For everyone else, divorce rates continued to rise.⁵⁰ Non-marital birth rates present an even more dramatic picture. For the country as a whole, non-marital births have approached and then exceeded those of African-Americans that had prompted the Moynihan

43. June Carbone & Naomi Cahn, *Changing Marriage Patterns Reflect Economics and Class*, NEW DEAL 2.0 (May 20, 2011, 11:01 AM), <http://www.newdeal20.org/2011/05/20/changing-marriages-patterns-reflect-economics-and-class-45726/>.

44. See Sara McLanahan, *Diverging Destinies: How Children Are Faring Under the Second Demographic Transition*, 41 DEMOGRAPHY 607, 612 (2004).

45. See generally GRETCHEN LIVINGSTON & D'VERA COHN, PEW RESEARCH CTR., THE NEW DEMOGRAPHY OF AMERICAN MOTHERHOOD (2010), available at <http://pewsocialtrends.org/files/2010/10/754-new-demography-of-motherhood.pdf> (examining the changing demographic characteristics of U.S. mothers); PEW RESEARCH CTR., THE DECLINE OF MARRIAGE AND RISE OF NEW FAMILIES (2010), available at <http://pewsocialtrends.org/files/2010/11/pew-social-trends-2010-families.pdf> (examining the decline of marriage in the United States).

46. See RICHARD FRY, PEW RESEARCH CTR., THE REVERSAL OF THE COLLEGE MARRIAGE GAP 7 (2010), available at <http://pewsocialtrends.org/files/2010/10/767-college-marriage-gap.pdf>; NAT'L MARRIAGE PROJECT, THE STATE OF OUR UNIONS 2010, WHEN MARRIAGE DISAPPEARS: THE NEW MIDDLE AMERICA 21 fig.3 (W. Bradford Wilcox & Elizabeth Marquardt eds., 2010), available at http://www.virginia.edu/marriageproject/pdfs/Union_11_12_10.pdf [hereinafter WHEN MARRIAGE DISAPPEARS] (during the seventies, highly educated and moderately educated Americans were equally likely to be married; today the highly educated are more likely to be in intact first marriages). See also KAY S. HYMOWITZ, MARRIAGE AND CASTE IN AMERICA: SEPARATE AND UNEQUAL FAMILIES IN A POST-MARITAL AGE 19 (2006).

47. See HYMOWITZ, *supra* note 46, at 19-23.

48. Chapter 4: *Underlying Population Trends*, U.S. DEP'T OF HEALTH & HUMAN SERVS., ADMIN. FOR CHILDREN & FAMILIES, <http://www.acf.hhs.gov/programs/cse/pubs/reports/projections/ch04.html> (last visited Nov. 11, 2011).

49. See generally Steven P. Martin, Growing Evidence for a "Divorce Divide"? Education and Marital Dissolution Rates in the U.S. Since the 1970s (unpublished manuscript, Russell Sage Foundation), available at http://www.russellsage.org/sites/all/files/u4/Martin_Growing%20Evidence%20for%20a%20Divorce%20Divide.pdf (last visited Nov. 11, 2011).

50. See *id.* at 20. See also RED FAMILIES V. BLUE FAMILIES, *supra* note 28, at 40 fig.2.1; WHEN MARRIAGE DISAPPEARS, *supra* note 46, at 19 fig.1.

Report's cries of alarm during the sixties⁵¹ and now account for 41% of the national total.⁵² Yet, for college graduates, non-marital birth rates, which never exceeded 10%, declined in the nineties.⁵³ White college graduates, in particular, have held the line on non-marital births and the most recent figures put the number at 2% of births for that group—the same percentage of a generation earlier.⁵⁴

The class-based nature of these changes has generated remarkably little commentary in family law. To be sure, political scientists have pointed out that the culture wars over high profile issues such as same-sex marriage reflect class-based anxieties over family change, but the number of people directly affected by the ability of gays and lesbians to marry pales in comparison with those affected by divorce and non-marital births.⁵⁵ And while the increases in divorce and non-marital births have certainly drawn notice—and much hand-wringing by judges and legislatures—the *class*-based nature of the changes has generated much less attention.⁵⁶

To the extent that class has been an issue at all, it has been an issue defined in the sixties by tenBroek's classic work on the dual nature of family law.⁵⁷ tenBroek identified two different strands of family law: one for the middle class, initiated by private parties and focused on the governance of voluntary transactions, and a second for the poor, more commonly initiated by the state to impose obligations designed to protect the public fisc.⁵⁸ While tenBroek's commentary retains much of

51. In their introduction, Douglas S. Massey and Robert J. Sampson observe that "Moynihan's core argument was really rather simple: whenever males in any population subgroup lack widespread access to reliable jobs, decent earnings, and key forms of socially rewarded status, single parenthood will increase, with negative side effects on women and children." Douglas S. Massey & Robert J. Sampson, *Moynihan Redux: Legacies and Lessons*, ANNALS AM. ACAD. POL. & SOC. SCI., Jan. 2009, at 6, 13. For a retrospective on the Moynihan Report, see Symposium, *The Moynihan Report Revisited: Lessons and Reflections After Four Decades*, ANNALS AM. ACAD. POL. & SOC. SCI., Jan. 2009.

52. LIVINGSTON & COHN, *supra* note 45, at 13.

53. McLanahan, *supra* note 44, at 612 fig.3. *But see* WHEN MARRIAGE DISAPPEARS, *supra* note 46, at 23 fig.5 (showing a small increase between 1982 and 2006-2008).

54. WHEN MARRIAGE DISAPPEARS, *supra* note 46, at 23 fig.5, 56 fig.S2 (showing white non-marital births for college graduates holding steady at 2%, but increasing to 6% for college graduates as a whole).

55. *See* LIVINGSTON & COHN, *supra* note 45, at 13 (finding non-marital births are now 41% of all American births); June Carbone, *What Does Bristol Palin Have to Do with Same-Sex Marriage*, 45 U.S.F. L. REV. 313, 341 (2010).

56. *See* McLanahan, *supra* note 44, at 607-08 (suggesting that the conventional wisdom has been that changes to the family were "all of one piece" led by the most advantaged women).

57. *See generally* California's Dual System of Family Law (pts. I, II, & III), *supra* note 16.

58. *See id.* (pt. I) at 257-58. tenBroek maintained that the two strands were:

[D]ifferent in origin, different in history, different in substantive provisions, different in administration, different in orientation and outlook. One is public, the other private. One

its force in describing the continuing differences between the family law of the college-educated middle class and that of the poor,⁵⁹ it misses the emergence of a third strand of family law that applies to the increasingly unstable families of the working class.⁶⁰ This group is less likely than the poor to receive public benefits and less likely than the middle class to plan their relationships in ways that make the law that governs dissolution predictable.⁶¹ Their interactions with the legal system in actions involving divorce, custody, and support do not necessarily look all that different from the divorce, custody, and support actions of other groups.⁶² Instead, the factor that distinguishes the emerging law of the working class is the underlying assumptions about gender—the courts just do not know what to do with women who sleep with one man, marry another, and raise their children with a third.⁶³

The channelling function Schneider identified has often taken the form of courts expressing disapproval of the underclass and imposing punitive measures on welfare recipients and prison inmates who fail to conform to middle class standards—stigmatization of those outside mainstream norms has been critical to the effect.⁶⁴ It is harder to insist on a single channel when the group operating outside of approved pathways becomes large enough to defy marginalization. Both

deals with expenditure and conservation of public funds and is heavily political and measurably penal. The other deals with the distribution of family funds, focuses on the rights and responsibilities of family members, and is civil, nonpolitical, and less penal. One is for underprivileged and deprived families; the other for the more comfortable and fortunate.

Id.

59. See *supra* note 18.

60. Hatcher, *supra* note 18, at 1043 (“However, given the historical development and converging interests within the various forms of child support, the ‘dual system’ description is somewhat oversimplified.”).

61. The increase in state-initiated child support actions, which are primarily targeted at securing support for children whose custodians receive state benefits, leveled off after 2000. The only increase for women not on welfare after 1990 has come through more efficient paternity establishment systems. See Elaine Sorensen & Ariel Hill, *Single Mothers and Their Child-Support Receipt: How Well Is Child-Support Enforcement Doing?*, 39 J. HUM. RESOURCES 135, 136, 140, 152 (2004); *The Basis for Legal Parentage*, *supra* note 18, at 619-20 (describing genetic testing as a cheap “norm for resolving parentage disputes”).

62. The markers of class occasionally show up in gendered terms, such as when the dissent points out that the custodial mother may have had multiple partners, in part because without the delinquent father’s support payments, she had difficulty making ends meet. See, e.g., *Alphin v. Alphin*, 219 S.W.3d 160, 167-68 (Ark. 2005) (Dickey, J., dissenting).

63. See, e.g., *Librers v. Black*, 28 Cal. Rptr. 3d 188, 190, 197 (Ct. App. 2005).

64. See, e.g., MARY P. RYAN, *CRADLE OF THE MIDDLE CLASS: THE FAMILY IN ONEIDA COUNTY, NEW YORK, 1790-1865*, at 184-85 (1981) (emphasizing the asserted moral superiority of the Protestant middle classes over the Catholic working class because of their ability to keep their children out of the factories); Hatcher, *supra* note 18, at 1065 (describing punitive child support actions against those with child support debts).

tenBroek's dual system and Schneider's channelling function involved clear distinctions between the evolving middle class norms that govern divorce cases and the punitive terms that emerged as conditions for government support.⁶⁵ These distinctions, however, have become harder to maintain as women have become independent enough to be able to make choices without government assistance and to do so outside of the family structure that some of the men in their lives would like to impose on them. Moreover, while the courts have proven eager to reward men who step to the plate and volunteer to assume responsibility for children,⁶⁶ they have much more difficulty with cases where more than one man has come forward and the mother has chosen one to the exclusion of the other.⁶⁷ The courts have also become accustomed to presiding over a family court system that requires formal action to dissolve a relationship, establish paternity, or award support.⁶⁸ The law has greater difficulties managing a family system where increasing numbers of families may resolve their relationships by never marrying, applying for assistance, or coming to court—making the more visible system of laws and mores increasingly at odds with the lived experiences of much of the public.

In the social transformations of previous eras, the law, as Schneider emphasized, may not necessarily have directly influenced the results, but it often gave voice to emergent norms and reconciled new practices with public sensibilities.⁶⁹ In the current era, family law has become a cacophony of voices—judges in different regions, counties, and sometimes even courtrooms within the same building disagree on the values family law should promote.⁷⁰ The disagreement starts with the fact that American families are no longer changing in the same direction in response to shared experiences.

65. See *California's Dual System of Family Law* (pt. I), *supra* note 16, at 257-58; Schneider, *supra* note 1, at 519.

66. See *Pearson v. Pearson*, 182 P.3d 353, 357-58 (Utah 2008) (finding challenges to paternity "disruptive and unnecessary" for non-biological father who volunteered to assume responsibility for child).

67. Compare *id.* at 354, 357-58 (upholding marital presumption at divorce even though mother and biological father were marrying and child was still under two), with *Wiese v. Wiese*, 699 P.2d 700, 701, 703 (Utah 1985) (treating husband as a stepparent and refusing to award child support to the mother, even though husband knew from the beginning of the marriage that the child was not his, secured custody of the child in the period immediately after the divorce, and did not contest paternity until the mother sought support four years after the divorce decree had become final).

68. See, e.g., *California's Dual System of Family Law* (pt. III), *supra* note 16, at 617, 620, 623.

69. See Schneider, *supra* note 1, at 497.

70. See, e.g., *supra* notes 25-26 and accompanying text.

III. THE OLD FAMILY BARGAIN: “GOOD GIRLS DON’T,” GIVES WAY TO THE NEW, “GIRLS RULE”

The traditional family bargain rested on the presumed inequality of the sexes and women’s practical dependence on men. William Kristol, for example, wrote that women, who were unlikely to come to these conclusions on their own, must be taught “to grasp the following three points: the necessity of marriage, the importance of good morals, and the necessity of inequality within marriage.”⁷¹ Adrienne Rich, though certainly disagreeing with Kristol on the desirability of such an approach, critiqued heterosexual unions in remarkably similar terms.⁷² She saw marriage as the product of forces that pressured women into marriage, however unsatisfying or oppressive women might find the relationship.⁷³ She explained that “[w]omen have married because it was necessary, in order to survive economically, in order to have children who would not suffer economic deprivation or social ostracism, in order to remain respectable, in order to do what was expected of women.”⁷⁴

In the family world that emerged from nineteenth century industrialism, men controlled the access to market labor and a woman who wanted children needed to marry and stay married to “survive economically” and to escape the stigma from “immorality” or divorce that would otherwise have ostracized her and her children.⁷⁵ In such a world, women were expected to say “no,” and the middle and working class women who could say “no,” often had more power when they did.⁷⁶ An unmarried woman who became pregnant, however, might be desperate—unless she arranged for a marriage, she and the child faced disgrace, and in the fifties, as non-marital pregnancies increased, the stigma associated with non-marital births prompted the huge increase in adoptions and often dangerous back alley abortion.⁷⁷ For those able to secure a marriage, whether before or after the pregnancy, the wife’s

71. William Kristol, *Women’s Liberation: The Relevance of Tocqueville*, in INTERPRETING TOCQUEVILLE’S DEMOCRACY IN AMERICA 480, 491 (Ken Masugi ed., 1991).

72. Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, 5 SIGNS 631, 654 (1980).

73. *Id.*

74. *Id.*

75. *Id.* at 641-42, 654 (internal quotation marks omitted).

76. On the implicit bargains underlying sex, see LINDA R. HIRSHMAN & JANE E. LARSON, *HARD BARGAINS: THE POLITICS OF SEX* 141-42 (1998) (arguing that an emphasis on sexual restraint would enhance a woman’s bargaining power).

77. See, e.g., STEPHANIE COONTZ, *THE WAY WE NEVER WERE: AMERICAN FAMILIES AND THE NOSTALGIA TRAP* 202 (1992) (describing the increase in teen births in the fifties, but noting that they remained overwhelmingly within marriage); RICKIE SOLINGER, *WAKE UP LITTLE SUSIE: SINGLE PREGNANCY AND RACE BEFORE ROE V. WADE* 21, 149 (1992).

power reached its nadir the greater the number of young children she had.⁷⁸ Accordingly, so long as the man in her life earned enough to support her, she was better off married and practically stuck, whether or not she was happy.⁷⁹

Over the last half-century, women's position vis-à-vis men's has changed dramatically. Every group of women except for high school dropouts has seen their income improve, while every group of men except for college graduates has seen their prospects decline.⁸⁰ The gendered "wage gap," which stayed stable for decades, has narrowed for the population as a whole,⁸¹ but has done so overwhelmingly because of the degree to which poor men have lost ground—college graduate women have lost ground to the men as the income of the top earners has increased disproportionately:

**Female Median Income as a Percentage of Male Median
Income by Education⁸²**

| | No High School | High School | Some College | Bachelor Degree |
|------|----------------|-------------|--------------|-----------------|
| 1990 | 70% | 69% | 70% | 71% |
| 2008 | 76% | 73% | 71% | 66% |

While women as a whole still earn less than men, the "wage gap" has shrunk the most for the least educated, and a higher percentage of women now earn more than their male partners.⁸³

The changes in income parallel changes in employment stability. The National Marriage Project reports that during the seventies the likelihood that a man would be unemployed varied little by class, with almost identical rates for the highly educated and moderately educated, and slightly higher rates for the poorly educated.⁸⁴ The rates for the highly educated are the same today, but employment instability for other men has increased substantially:

78. See SUSAN MOLLER OKIN, *JUSTICE, GENDER, AND THE FAMILY* 157-59 (1989) (noting a loss of power and fewer opportunities for women to earn a living as they have more children).

79. See Rich, *supra* note 72, at 654.

80. RICHARD FRY & D'VERA COHN, PEW RESEARCH CTR., *WOMEN, MEN AND THE NEW ECONOMICS OF MARRIAGE* 8 (2010), available at <http://pewsocialtrends.org/files/2010/11/new-economics-of-marriage.pdf>.

81. *Id.* at 9.

82. *Median Annual Income, by Level of Education, 1990-2008*, INFOPLEASE (2007), <http://www.infoplease.com/ipa/A0883617.html#ixzz1JFxpOxL9> (last visited Nov. 11, 2011).

83. FRY & COHN, *supra* note 80, at 2 (reporting that the percentage of wives who earn more than their husbands increased from 4% in 1970 to 22% in 2007).

84. WHEN MARRIAGE DISAPPEARS, *supra* note 46, at 43 fig.17.

**Percentage of Twenty-Five to Sixty Year-Old Men Unemployed at
Some Point Over the Preceding Ten Years⁸⁵**

| | Least Educated | Moderately Educated | Highly Educated |
|-------|----------------|------------------------|--------------------|
| 1970s | 33% | 30% | 29% |
| 2000s | 44% | 39% | 29% |

These factors make working class men less attractive partners. Women who can earn as much or more than the fathers of their children are much less dependent, and women married to abusive or unreliable mates have less reason to stay in a relationship than the women of earlier eras.⁸⁶ The male breadwinner role, in turn, continues to define male success, and the loss of both status and income that comes with less stable employment causes many men who cannot meet the expectations associated with the breadwinner role “to be deemed as failures by society, themselves, and their partners.”⁸⁷ *Newsweek* reported in 2009 that the American Time Use Survey shows that “laid-off men tend to do less—not more—housework, eating up their extra hours snacking, sleeping and channel surfing (which might be why the Cartoon Network, whose audience has grown by 10 percent during the downturn, is now running more ads for refrigerator repair school).”⁸⁸ According to the same study, unemployed women spend twice as much time taking care of children and doing chores as the men.⁸⁹ Moreover, unemployed men are right behind alcoholics and drug addicts as the group most likely to beat their female partners.⁹⁰

Sociologist Paul Amato puts this picture together in a different way. When he looked at data from 1980, he found that those experiencing

85. *Id.* Male employment stability, measured by changes in jobs, has steadily declined for most of the period since World War II while female employment stability has increased through much of that period. See Henry S. Farber, *Is the Company Man an Anachronism? Trends in Long-Term Employment in the United States, 1973-2006*, in *THE PRICE OF INDEPENDENCE: THE ECONOMICS OF EARLY ADULTHOOD* 56, 62-63, 63 fig.3.2 (Sheldon Danziger & Cecilia Elena Rouse eds., 2007).

86. See, e.g., Sara McLanahan & Christine Percheski, *Family Structure and the Reproduction of Inequalities*, 34 ANN. REV. SOC. 257, 261 (2008) (“Wage inequality may also make men in the bottom half of the income distribution less attractive as marriage partners.”).

87. *Id.*

88. Tony Dokoupil, *Men Will Be Men: When Guys Lose Jobs, the TV, Den and Gym Win. Women? Sex? Not So Much*, NEWSWEEK, Mar. 2, 2009, at 50, 50.

89. *Id.*

90. *Id.* For a more comprehensive review of these changes, see June Carbone, *Unpacking Inequality and Class: Family, Gender and the Reconstruction of Class Barriers*, 45 NEW ENG. L. REV. 527, 556-58 (2011) [hereinafter *Unpacking Inequality and Class*].

financial distress were more divorce prone than those who did not experience financial distress.⁹¹ No surprise there. By 2000, however, the effect had been magnified—those experiencing financial distress were at twice the risk for divorce than those who were financially stressed in 1980, and those who were not financially stressed became even less likely to divorce.⁹²

Amato explains that one of the factors that exacerbated the relationship between financial distress and divorce was women's employment.⁹³ Among the least happy couples he found were those where the wife preferred to work outside the home part-time or not at all, but needed to work full-time because her husband could not support the family without her income.⁹⁴ Amato concludes:

[D]ual-earner arrangements are linked with positive marital quality among middle-class couples and with negative marital quality among working-class couples. Although the additional income provided by working-class wives helps . . . their families, these financial benefits come with a steep price in the form of greater marital tension, low job satisfaction, and a desire to . . . decrease their hours of employment or return to . . . homemaking.⁹⁵

In comparison with better educated women, less educated women were both more likely to prefer a traditional division of family responsibilities and less likely to be married to men who could earn enough to make it possible for them to cut back on outside employment.⁹⁶

These changes affect not only divorce rates, but the exercise of power within intact marriages. The Pew Research Center study of the effect of increases in women's earnings shows that where a husband earns more than a wife, the couple is about equally as likely to say that the husband (35%) or the wife (36%) makes the financial decisions for

91. PAUL R. AMATO ET AL., *ALONE TOGETHER: HOW MARRIAGE IN AMERICA IS CHANGING* 132 fig.4.8 (2007).

92. *Id.* Amato et al. also indicated that almost all of those marrying in their twenties reported financial distress, even though overall fewer couples were in financial distress during the relatively prosperous period at the end of the nineties than in 1980. *Id.* at 135. One notable change from 1980 to 2000 is that college educated women began to marry and have children at substantially later ages, while the age of family formation increased substantially less for others. *See* McLanahan, *supra* note 44, at 610 fig.1.

93. AMATO ET AL., *supra* note 91, at 137-38 (distinguishing between college graduate women in the professional and managerial ranks and less educated women).

94. *Id.* at 138 (concluding that the labor force participation of working class wives, without college degrees, adds to marital stress).

95. *Id.* at 139.

96. *Id.* at 138. Amato et al. also found that holding conservative views about gender roles was associated generally with "less marital happiness, less marital interaction, and more conflict." *Id.* at 167.

the household.⁹⁷ When the wife earns more on the other hand, 46% say the wife makes the decisions, in comparison with 21% indicating that the husband makes decisions.⁹⁸ Both results suggest that a change in the relative financial position of husband and wife has an impact on family relationships, and particularly an effect on the power dynamic within the marriage.⁹⁹

The change in bargaining power fundamentally remakes intimate bargains. Women are no longer dependent on men. They may choose to marry or have a child without marrying.¹⁰⁰ They may decide whether to stay or leave an unhappy relationship.¹⁰¹ They may accordingly expect more from marriage¹⁰² and become more hesitant to enter into a relationship when they doubt they can realize the benefits that make marriage worthwhile.¹⁰³ These changes affect all women, but they disproportionately affect the marriage choices of working class and poor women because these women find it more difficult to find a man who constitutes a “good deal.”¹⁰⁴ Sara McLanahan and Christine Percheski, for example, explain that if we assume that the standard of living a couple is expected to obtain before they marry “is a function of the

97. FRY & COHN, *supra* note 80, at 18.

98. *Id.*

99. *Unpacking Inequalities and Class*, *supra* note 90, at 560. The question of whether women’s economic independence relates to greater divorce rates is a complex one. See generally Jay Teachman, *Wives’ Economic Resources and Risk of Divorce*, 31 J. FAM. ISSUES 1305 (2010) (concluding that wives’ economic resources are linked to divorce rates for whites, but not Blacks). But see Liana C. Sayer & Suzanne M. Bianchi, *Women’s Economic Independence and the Probability of Divorce*, 21 J. FAM. ISSUES 906, 914, 918 (2000) (concluding that a wife’s economic circumstances have a weak effect on divorce rates and that marital quality is a better predictor).

100. For a discussion of the change in marital bargaining undermining the shot gun marriage, see generally George A. Akerlof et al., *An Analysis of Out-of-Wedlock Childbearing in the United States*, 111 Q.J. ECON. 277 (1996).

101. For a discussion of bargaining over custody and support, see generally Paula England and Nancy Folbre, *Involving Dads: Parental Bargaining and Family Well-Being*, in HANDBOOK OF FATHER INVOLVEMENT: MULTIDISCIPLINARY PERSPECTIVES 387 (Catherine S. Tamis-LeMonda & Natasha Cabrera eds., 2002).

102. McLanahan and Percheski refer to these greater expectations as a “marriage bar, defined as the standard of living a couple is expected to obtain before they marry.” McLanahan & Percheski, *supra* note 86, at 261.

103. For a discussion of the role of uncertainty on the attitudes of African-American women, see generally Linda M. Burton & M. Belinda Tucker, *Romantic Unions in an Era of Uncertainty: A Post-Moynihan Perspective on African American Women and Marriage*, 621 ANNALS AM. ACAD. POL. & SOC. SCI. 132 (2009). Burton and Tucker observe, for example, that African-American women identified the following risks from romantic involvement: “financial (many had finally obtained some degree of financial stability and were concerned that monetary entanglements with another would deplete their resources), physical (older men were more likely to become infirm, require care, and become dependent), and psychological (they preferred a life of independence, finally free from the demands of others—something they had been denied).” *Id.* at 135-36.

104. *Id.* at 135.

median income of married couples, the distance becomes even greater as marriage becomes increasingly concentrated among high-income couples. Thus, the decline in marriage among low-income populations likely has a negative feedback effect by raising the bar even further.”¹⁰⁵

The National Marriage Project finds that the working class, which used to marry more than other groups, has been particularly affected—expressing greater skepticism about the likelihood of making marriage work and reporting fewer successful marriage models in the community around them.¹⁰⁶ The college-educated middle class, in contrast, expresses a more favorable attitude toward marriage than it did a generation ago and reports greater marital quality and greater male participation in childrearing.¹⁰⁷ A new set of family law norms, indeed, a more finely attuned set of channelling practices, cannot occur therefore in the absence of sensitivity to the effect of class.

IV. GENDER, CUSTODY, AND SUPPORT

The effects of class on family law require reconsideration of the issue of gender. To the extent that women’s bargaining power has increased, most observers predict less marriage.¹⁰⁸ Less marriage, however, affects children’s welfare and raises the question of who will decide what becomes of the children.¹⁰⁹ Resolving disputes about parenthood, custody, and support in an era of less stable family

105. McLanahan & Percheski, *supra* note 86, at 261.

106. WHEN MARRIAGE DISAPPEARS, *supra* note 46, at 39-41. The survey reflected that the percentage of participants agreeing that “marriage has not worked out for most people they know” varies from 53% of the least educated to 43% of the moderately educated to 17% of the most educated. *Id.* at 40.

107. AMATO ET AL., *supra* note 91, at 137-38; WHEN MARRIAGE DISAPPEARS, *supra* note 46, at 27-33 (showing that attitudes toward sex, fidelity, and divorce have become more “conservative” among the highly educated and more “liberal” among the less and moderately educated); McLanahan, *supra* note 44, at 613 fig.5 (finding that married middle class men’s domestic contributions have increased more than those of other groups).

108. Gould and Paserman, for example, found:

[M]arriage rates decline with higher education, higher wages for women, and demand shifts in favor of women; marriage rates increase with age, higher wages for men and a higher ratio of men to women. Overall, the results show that women get married less when their labor market prospects improve (relative to men), and they get married more when marriage market conditions improve and when labor market prospects for men are relatively better.

Eric D. Gould & M. Daniele Paserman, *Waiting for Mr. Right: Rising Inequality and Declining Marriage Rates*, 53 J. URBAN ECON. 257, 269 (2003). See also David S. Loughran, *The Effect of Male Wage Inequality on Female Age at First Marriage*, 84 REV. ECON. & STAT. 237, 249 (2002) (concluding that “increasing male wage inequality lowered the propensity to marry”).

109. For a discussion of the effect of changing family patterns on children, see Ron Haskins, *Moynihan Was Right: Now What?*, 621 ANNALS AM. ACAD. POL. & SOC. SCI. 281, 284-86 (2009) (summarizing the negative effects of family instability on children).

relationships is a major undertaking. Marriage, after all, resolved the issue by channelling parents into marriage and keeping them there; an era of marital instability requires redirecting the relationship between men, women, and children.

While the changing relationship between class and family structure has generated relatively little discussion of family law bargaining, gender relationships have prompted considerably more. Almost a decade ago, I described custody battles as “ground zero in the gender wars.”¹¹⁰ Martha Fineman has devoted more than one volume to the change in the law that has weakened women’s bargaining position at divorce, particularly through the change from a maternal presumption to more facially neutral rules.¹¹¹ Margaret Brinig showed in an empirical study that women are more likely to file for divorce than men and their ability to secure custody of the children affects their willingness to do so.¹¹² With child support replacing spousal support as the most common financial obligation surviving divorce, perhaps the largest impact on bargaining power has been the increasing support for shared custody.¹¹³

The idea of shared custody involves a move away from an award of physical or legal custody to a single parent and toward the goal of encouraging “frequent and continuing contact with both parents.”¹¹⁴ With most states factoring time spent with children into child support awards, one of the most effective ways of reducing child support has become seeking additional time with the children.¹¹⁵ These changes in

110. FROM PARTNERS TO PARENTS, *supra* note 12, at 180.

111. FINEMAN, THE ILLUSION OF EQUALITY, *supra* note 11, at ch. 5; FINEMAN, THE NEUTERED MOTHER, *supra* note 11, at 82-83. Much earlier, of course, Mnookin and Kornhauser also observed that any change to gender neutral custody rules would weaken women’s bargaining power at divorce. Mnookin & Kornhauser, *supra* note 11, at 978.

112. Margaret F. Brinig & Douglas W. Allen, “These Boots Are Made for Walking”: Why Most Divorce Filers Are Women, 2 AM. L. & ECON. REV. 126, 128 tbl.1, 136-37 (2000) (stating that two-thirds of those filing for divorce are women and custody laws affect willingness to file).

113. See, e.g., Margaret F. Brinig, *Does Parental Autonomy Require Equal Custody at Divorce?*, 65 LA. L. REV. 1345, 1367-68 (2005) (finding a decrease in child support after statutory changes in custody provisions took effect); Margaret F. Brinig, *Penalty Defaults in Family Law: The Case of Child Custody*, 33 FLA. ST. U. L. REV. 779, 806 (2006) [hereinafter Brinig, *Penalty Defaults*] (noting that there was an increase in joint custody where couples separated after the statute took effect).

114. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS & RECOMMENDATIONS § 2.08 cmt. a (2000) (noting that while almost all states seek to encourage the involvement of both parents, few mandate “joint custody” or an equal sharing of the child’s time (internal quotation marks omitted)).

115. See ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, *DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY* 117 (1992) (indicating that joint physical custody awards resulted in less child support, but finding no evidence that child support was affected by negotiated settlements where mother received sole physical custody); MARY ANN MASON, *THE CUSTODY WARS: WHY CHILDREN ARE LOSING THE LEGAL BATTLE, AND WHAT WE CAN DO ABOUT IT* 22-23

the law of custody and support introduce new incentives into divorce bargains—a powerful incentive to learn the truth about paternity. As long as an intimate relationship that may produce more children lasts, neither the man nor the woman in a relationship may wish to inquire too closely into paternity of existing children.¹¹⁶ When that relationship ends, the easiest way for the man to end the possibility of support may be to determine that he has no biological relationship to the child, and the easiest way for the mother to oppose his requests for custody and visitation may be to introduce DNA samples that show that he is not the father.¹¹⁷

Moreover, the class-based nature of intimate bargains may further skew the results. All men today spend on average more time on childcare than they did fifty years ago.¹¹⁸ The increases have been greater, however, for married men than unmarried men and for better educated than less educated men.¹¹⁹ Middle class women are more likely to defer childbearing until marriage, less likely to have an unintended pregnancy, and more likely to either encourage the father's participation or arrange or provide for the termination of his parental status.¹²⁰ As a result, a married middle class father is more likely to have spent time with his children during a relationship and to want to continue to do so after the split.¹²¹ For the working class, both the relationships between the parents, and between father and child, may be more fragile.¹²² The

(1999) (discussing that judges' willingness to award joint custody has changed the nature of divorce bargaining); Brinig, *Penalty Defaults*, *supra* note 113, at 799, 811-12 (observing that after Oregon changed its custody statute to favor more time with both parents, the decline in value of child support awards provided evidence of 'bargaining around' the support guidelines).

116. See June Carbone & Naomi Cahn, *Which Ties Bind? Redefining the Parent-Child Relationship in an Age of Genetic Certainty*, 11 WM. & MARY BILL RTS. J. 1011, 1066 (2003) [hereinafter *Which Ties Bind?*].

117. The Supreme Court's decision in *Troxel v. Granville* complicates things further as it grants those defined as "parents" greater rights, making it more difficult for the states to choose to recognize "stepparents." 530 U.S. 57, 72-73 (2000). Compare Emily Buss, "Parental" Rights, 88 VA. L. REV. 635, 657-58 (2002) (arguing that *Troxel* depends on the legal definition of parenthood provided by the states and imposes no constitutional limits on how the states choose to define parenthood), with David D. Meyer, *Constitutional Pragmatism for a Changing American Family*, 32 RUTGERS L.J. 711, 714, 718 (2001) (asserting that the *Troxel* plurality's approach amounted "to an implicit rejection of strict scrutiny," but read in light of other Supreme Court decisions on parental rights, does not give the states unlimited discretion in defining parents).

118. McLanahan, *supra* note 44, at 613 fig.5.

119. *Id.*

120. HERTZ, *supra* note 15, at 84 (noting that middle class heterosexual women are more likely to "protect the boundaries" between social and genetic kinship); McLanahan & Percheski, *supra* note 86, at 262 ("[M]ore advantaged women delay both marriage and children.").

121. McLanahan, *supra* note 44, at 612, 613 fig.5.

122. See *id.* at 612-14 (showing that fathers' involvement correlates with marital status and class).

state has insisted on pursuing child support for mothers who receive state aid, but it is less likely to do so for others.¹²³ Given fathers' greater ability to seek custody or visitation and their economic incentive to do so, more mothers in the middle class may forego child support altogether.¹²⁴

How have the courts responded to these patterns? While class remains largely invisible in judicial decisions, attitudes toward gender periodically surface. The far more pervasive issue, however, involves the question of meaning. Can the courts channel family behavior in an era of division? The answer is that they have very little idea how to do so and the marital presumption that Schneider defended has changed from a symbol of the effectiveness of the channelling function to a symbol of its decay.

V. THE MARITAL PRESUMPTION AND THE INTERSECTION OF CLASS AND GENDER

A. *The Meaning of the Marital Presumption*

In the era in which marriage determined legal parenthood, the law connected fathers to children largely through marriage.¹²⁵ Outside of marriage, the law generally recognized a single legal parent, even if the second biological parent was alive, well, and participated in the life of the family.¹²⁶ In this setting, a responsible man who wished to accept parental responsibilities married the mother of his children. If he failed to do so, he might not be recognized as a legal parent at all, and if he obtained a court order establishing paternity, he was unlikely to receive custody or visitation.¹²⁷

123. See Leslie Joan Harris, *Questioning Child Support Enforcement Policy for Poor Families*, 45 FAM. L.Q. 157, 161 (2001); *Single Mothers Since 2000 Falling Farther Down*, LEGAL MOMENTUM, <http://www.legalmomentum.org/our-work/women-and-poverty/resources--publications/single-mothers-since-2000.pdf> (last visited Nov. 11, 2011) ("Despite rising joblessness and poverty, the percentage of single mother families receiving welfare benefits fell from 16% in 2001 to 11% in 2007, and to 10% in 2010.").

124. See HERTZ, *supra* note 15, at 103 (stating that economically self-sufficient women view the amount of child support likely to be ordered as too small to be worth pursuing in comparison with the risks involved).

125. For a description of the law that applied to unmarried fathers, see HARRY D. KRAUSE, ILLEGITIMACY: LAW AND SOCIAL POLICY 28-36 (1971) (explaining that unmarried fathers had limited status as parents with respect to their children).

126. *Stanley v. Illinois*, 405 U.S. 645, 650 & n.4 (1972). Indeed, in the seminal *Stanley* case, the unmarried mother and father lived in the same household on and off for eighteen years. *Id.* at 646.

127. In addition, he was often not liable for support. The West Virginia Supreme Court of Appeals observed that "[t]he harsh reality was that illegitimate children often had to rely on the

With the disappearance of marriage as the dividing line between trustworthy and irresponsible men, the law has struggled to determine which men to recognize.¹²⁸ The key to understanding the struggle is to recognize that the *reciprocities* underlying the marital presumption no longer exist.¹²⁹ In the older era, the stigmatization a woman faced if she gave birth outside of marriage meant that the pregnancy would make it more difficult for her to marry another man; a responsible man could be expected to propose to his pregnant partner, and she would have little choice but to accept if he did.¹³⁰ Moreover, if a man married a woman to “give the child a name,” the law often used estoppel principles to prevent him from later denying paternity.¹³¹ More importantly, marriage, whatever the motives that prompted it, could be expected to last, protecting the child’s interest in legitimacy and financial support.¹³²

Today, women have access to reliable contraception and abortion,¹³³ and the better educated the woman, the less likely she is to have an unplanned birth.¹³⁴ Moreover, with less stigma associated with non-marital sexuality, women are freer to choose to raise the child on their own, reconcile with husbands who know that the woman is about to give birth to another man’s child, or marry or cohabit with someone else.¹³⁵ Indeed, traditional nuclear families, defined as heterosexual married couples living with their own children, make up less than a

government to care for their needs because there were no remedies at common law to compel a putative biological father to care for any illegitimate children he may have sired.” State *ex rel.* Roy Allen S. v. Stone, 474 S.E.2d 554, 564 (W. Va. 1996) (citations omitted).

128. See, e.g., Glennon, *supra* note 32, at 568 (observing that the states vary widely in their interpretation of the statutes adopting the marital presumption and appear to do so in accordance with different notions of fatherhood).

129. Compare *id.* at 562-63, with David D. Meyer, *Parenthood in a Time of Transition: Tensions Between Legal, Biological, and Social Conceptions of Parenthood*, 54 AM. J. COMP. L. 125, 132-33 (2006) [hereinafter *Parenthood in a Time of Transition*].

130. See Akerlof et al., *supra* note 100, at 279. For a discussion of the change in implicit bargains, see *id.* at 290-97.

131. See, e.g., W. v. W., 728 A.2d 1076, 1079, 1086 (Conn. 1999); Pietros v. Pietros, 638 A.2d 545, 545, 548 (R.I. 1994). Indeed, even today a man who knows he is not the father and assumes a paternal role may be estopped from denying paternity in some jurisdictions. See, e.g., Lee v. Lee, 12 So.3d 548, 551 (Miss. Ct. App. 2009); Godin v. Godin, 725 A.2d 904, 910 (Vt. 1998); Marriage/Children of Betty L.W. v. William E.W., 569 S.E.2d 77, 86 (W. Va. 2002).

132. See McLanahan, *supra* note 44, at 613 fig.4 (showing dramatic increases in divorce after the mid-sixties).

133. Akerlof et al., *supra* note 100, at 307.

134. Rachel Benson Gold, *Rekindling Efforts to Prevent Unplanned Pregnancy: A Matter of Equity and Common Sense*, GUTTMACHER POL’Y REV., Summer 2006, at 2, 7, available at <http://www.guttmacher.org/pubs/gpr/09/3/gpr090302.pdf>.

135. See, e.g., HERTZ, *supra* note 15, at 102-03 (observing the effect of the decline of the stigma against single parenthood in creating more varied family structures).

quarter of all households in the United States today.¹³⁶ In these circumstances, the law might reasonably choose to advance three competing objectives:

- continue to promote marriage, with the recognition that marriage is less secure than in earlier eras;
- affirm the right of the biological father to establish paternity and a relationship with the child, with the expectation that biology is permanent even if marriage is not; or
- choose the father to recognize based on the circumstances of individual cases, in accordance with the best interest of the child and the behavior of the parents.¹³⁷

Choosing among these competing approaches—privileging marriage, biological paternity, or functional parenthood—requires not just an initial choice but working through the norms that channel behavior into each alternative institution and managing the consequences of doing so. Since Schneider wrote his article two decades ago, the courts have split in addressing these potential objectives and they have done so without any overarching agreement about the possible purposes—or consequences—of their choices.¹³⁸ At least part of the reason is that they have been unable to grapple consistently with the notion of female choice.¹³⁹ After all, the principal impact of the marital presumption today is that it allows the mother to determine which man to recognize as the legal father; the principal impact of a biology-based determination is that it gives the biological father significant rights in the child whether or not he has established a relationship with the mother or a willingness to contribute to the child's well-being.¹⁴⁰ Yet, the decisions

136. JASON FIELDS, U.S. CENSUS BUREAU, P20-553, AMERICA'S FAMILIES AND LIVING ARRANGEMENTS: 2003, at 2 (2004), available at <http://www.census.gov/prod/2004pubs/p20-553.pdf> (noting that the percentage of traditional nuclear families was down from 40% in 1970 to 23% in 2003); *Parenthood in a Time of Transition*, *supra* note 129, at 132.

137. See *Parenthood in a Time of Transition*, *supra* note 129, at 132, 138-40.

138. See generally *The Legal Definition of Parenthood*, *supra* note 26.

139. See *id.* at 1323.

140. See Mary L. Shanley, *Unwed Fathers' Rights, Adoption, and Sex Equality: Gender-Neutrality and the Perpetuation of Patriarchy*, 95 COLUM. L. REV. 60, 74 (1995) (discussing the parental rights of the biological father); *The Legal Definition of Parenthood*, *supra* note 26, at 1341 (stating the presumption that the mother's husband is the legal father). Decisions to recognize functional relationships also vary in their willingness to articulate norms capable of shaping behavior. Compare *Hardy v. Hardy*, No. 10-698, 2011 WL 661692, at *3, *8 (Ark. Feb. 24, 2011) (denying paternity testing on a best interest basis where the boy was eight at the time of the divorce and the husband was the only child the father had known), with *Wiese v. Wiese*, 699 P.2d 700, 703 (Utah 1985) (treating the husband as a stepfather rather than maintaining the fiction of biological parentage). See also *Hammack v. Hammack*, 737 N.Y.S.2d 702, 703-04 (App. Div. 2002) (applying the best interest test in accordance with the child's needs).

are rarely articulated in such terms.¹⁴¹ The success of the channelling function in earlier eras depended on the reciprocities implicit in social norms, for example, if a man got a woman pregnant, he was expected to marry her and she was expected to say yes.¹⁴² The failure to make the changed understandings underlying these institutions explicit undermines the shared meaning Schneider described as the core of the channelling function.¹⁴³

In this context, it is hard to say whether the continued affirmation of the marital presumption in fact contributes to shared understandings of marriage.¹⁴⁴ Instead, the lack of recognition of the changing terms of men and women's relationships guarantees the marginalization of the leading opinions, starting with the opinion Schneider championed—the Supreme Court's decision to uphold the constitutionality of the marital presumption in *Michael H. v. Gerald D.*¹⁴⁵

B. *Michael H. Revisited*

Schneider referred to *Michael H.* as an example of a decision upholding the importance of marriage.¹⁴⁶ To the extent, however, that channelling as a judicial function involves modernizing and reinforcing shared norms,¹⁴⁷ *Michael H.* may have sounded its death knell, undermining—rather than enhancing—the role of the courts in burnishing shared understandings at the national level. It did so for at least three reasons. First, the effect of the decision was to return the matter to the states.¹⁴⁸ Second, Justice Scalia's defense of marriage in

141. Indeed, when the Texas Supreme Court did acknowledge the gendered nature of the decision, the Court replaced its opinion with one withdrawing the reference. *In re J.W.T.*, No. D-1742, 1993 Tex. LEXIS 101, at *31-32 (Tex. June 30, 1993), *withdrawn*, *In re J.W.T.*, 872 S.W.2d 189, 197-98 (Tex. 1994).

142. See, e.g., Akerlof et al., *supra* note 100, at 279.

143. See Schneider, *supra* note 1, at 511.

144. See Shanley, *supra* note 140, at 74 (discussing the marital presumption).

145. 491 U.S. 110 (1989).

146. Schneider, *supra* note 1, at 526 (describing *Michael H.* as serving two “institutional” interests: an interest in the stability of marriage and in interest in the stability of Victoria's relationship with her presumed parents (internal quotation marks omitted)).

147. Schneider's emphasis, like mine, is on the creation of *shared* meanings associated with an institution. See *id.* at 505, 511 (referring to “reasons which sink so deep into the self that they become common and implicitly understood” (internal quotation marks omitted)). He also refers, however, to the notion that institutions change and develop over time, and distinguishes between the continued evolution of the norms associated with marriage versus deinstitutionalization of intimate behavior or legal neutrality between different forms of family organization. *Id.* at 519.

148. The decision, after all, upheld the constitutionality of the marital presumption—it did not require the states to apply it. *Michael H.*, 491 U.S. at 129-30. Today, approximately two-thirds of the states allow the non-marital father to challenge the marital presumption through either statute or case law. UNIF. PARENTAGE ACT § 607 cmt. (2002).

accordance with a constitutional methodology of original intent eschewed the modernizing function that might have linked the continued vitality of marriage to emerging, rather than outdated, norms.¹⁴⁹ Third, Justice Scalia's denigration of Michael's relationship with Carole and Victoria, rather than lock in consensus norms, fractured the Court, leaving dissenters—and the portion of the public who agree with them—free to reject the validity of the Court's approach.¹⁵⁰ Each of these points requires consideration in light of changing family norms.

To be sure, Justice Scalia's plurality opinion and Justice Brennan's dissent captured the opposite sides of the issue *Schneider* posed. Justice Scalia's plurality opinion referred to parents' constitutional rights as rooted in "the historic respect—indeed, sanctity would not be too strong a term—traditionally accorded to the relationships that develop within the unitary family,"¹⁵¹ and he privileged the marital family over other "unitary families" that might receive constitutional protection.¹⁵² The opinion thus involved the unequivocal embrace of the importance of marriage as an institution.¹⁵³

In addition, as *Schneider* noted, the case presented a particularly strong factual context for the reaffirmation of marriage. By the time the Supreme Court decided the issue, five years had passed, and the mother, Carole, had cut off the biological father Michael's contact with the child, and Carole and her husband Gerald had managed to stay married, move from California to New York, and have two additional children.¹⁵⁴ Whatever the relationship Michael had with the child Victoria during her toddlerhood, she was unlikely to remember him five years later, and recognizing Michael's paternity would have in fact constituted a potentially disruptive interference in an ongoing family.

Moreover, as *Schneider* also emphasized, Justice Brennan's dissent did not so much offer an alternative "channel" for family understandings, as it emphasized the need to recognize a variety of family forms, and to protect the underlying functional relationships that had been established in the case.¹⁵⁵ The opinion therefore did not try to

149. See *infra* notes 177-80 and accompanying text.

150. For a more extensive discussion of the subsequent polarization over the meaning of marriage, see *RED FAMILIES V. BLUE FAMILIES*, *supra* note 28, at 155-61, 164-65.

151. *Michael H.*, 491 U.S. at 123.

152. *Id.* at 123-24. Justice Scalia describes the rights of the biological father versus the husband as a choice between ruling that "Michael . . . [is] unable to act as father of the child he has adulterously begotten, or Gerald . . . [is] unable to preserve the integrity of the traditional family unit he and Victoria have established." *Id.* at 130.

153. *Id.* at 124, 131.

154. See *Which Ties Bind?*, *supra* note 116, at 1045.

155. See *Michael H.*, 491 U.S. at 145 (Brennan, J., dissenting). Justice Brennan referenced

modernize marriage or parenthood; instead, it insisted on a definition of “liberty” that included “the freedom not to conform.”¹⁵⁶

Schneider’s channelling function article thus corresponded to the split between the plurality and the Brennan dissent when it cast the choice between an effort to channel family behavior into marriage versus a determined neutrality that took no position on the acceptability of the behavior.¹⁵⁷ Yet, the analysis did not discuss a third possibility, which Schneider had linked to the channelling function, namely, the updating of the meaning of marriage to reforge the connections between the institution and changing behavior. It did not do so in part because it never acknowledged the issue of *female* choice and the limitations on it.

Michael H. represented the final case in the line of Supreme Court decisions forcing the states to modernize the legal recognition of paternity. The cases began with *Stanley v. Illinois*.¹⁵⁸ Until *Stanley*, the privileging of marriage had been so absolute that the state of Illinois treated Stanley’s biological children as parentless rather than recognize an unmarried man as a father, despite the fact that the mother had died and Stanley had lived with the mother and children on and off for eighteen years.¹⁵⁹ The subsequent cases—*Quilloin v. Walcott*,¹⁶⁰ *Caban v. Mohammed*,¹⁶¹ and *Lehr v. Robertson*¹⁶²—involved disputes between mothers and unmarried fathers—disputes often prompted by the mother’s decision to break up with the father or to marry someone else.¹⁶³ The Court’s evolving paternity jurisprudence was moving toward

Justice Scalia’s “pinched conception of ‘the family.’” *Id.* Justice Brennan regarded the “rhapsody on the ‘unitary family’” as “out of tune” with prior decisions. *Id.* He concluded:

We are not an assimilative, homogenous society, but a facilitative, pluralistic one, in which we must be willing to abide someone else’s unfamiliar or even repellent practice because the same tolerant impulse protects our own idiosyncracies [sic]. Even if we can agree, therefore, that “family” and “parenthood” are part of the good life, it is absurd to assume that we can agree on the content of those terms and destructive to pretend that we do. In a community such as ours, “liberty” must include the freedom not to conform. The plurality today squashes this freedom by requiring specific approval from history before protecting anything in the name of liberty.

Id. at 141.

156. *Id.* (internal quotation marks omitted).

157. See Schneider, *supra* note 1, at 531 (arguing that the state cannot avoid the choice of encouraging existing institutions or embracing other ones, such as turning family law into contract law).

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

159. *Id.* at 646-47, 651 (recognizing deference to an unmarried father’s private interest “in the children he has sired and raised”).

160. 434 U.S. 246 (1978).

161. 441 U.S. 380 (1979).

162. 463 U.S. 248 (1983).

163. For a discussion of these cases, see FROM PARTNERS TO PARENTS, *supra* note 12, at 166-70.

a conclusion that biological fathers who stepped forward to accept responsibility for the child merited protection, but it had not resolved the issue of whether the mother had an obligation to allow the biological father—or any other man—the opportunity to do so.¹⁶⁴ The earlier cases had held, however, that once the biological father did establish a relationship with the child, the mother could no longer block recognition of the father's paternity merely by marrying someone else.¹⁶⁵

Michael H. raised the issue of whether these changing norms applied to women who conceived a child with another man during marriage and allowed the biological father to establish a relationship with her and the child.¹⁶⁶ The case offered a variety of intermediate positions that could have affirmed the importance of marriage, while still recognizing the impact of women's greater independence in family decision-making.¹⁶⁷ No justice, after all, thought that the biological father had a constitutional right to recognition on the basis of biology alone.¹⁶⁸ And eight of the justices recognized the importance of protecting extant family relationships; they just differed on the issue of whether Michael, Carole, and Victoria had ever established enough of a "unitary family"¹⁶⁹ to bar the states from recognizing Gerald, Carole,

164. *Id.* at 169; Janet L. Dolgin, *Just A Gene: Judicial Assumptions About Parenthood*, 40 UCLA L. REV. 637, 671 (1993) ("A biological father does protect his paternity by developing a social relationship with his child, but this step demands the creation of a family, a step itself depending upon an appropriate relationship between the man and his child's mother.").

165. *See, e.g., Caban*, 441 U.S. at 389 (finding unconstitutional the statute that allowed the stepfather to adopt the unmarried father's children where the biological father had established a relationship with the children).

166. *Michael H. v. Gerald D.*, 491 U.S. 110, 113-14 (1989). The dissent contended that "[t]he evidence is undisputed that Michael, Victoria, and Carole did live together as a family; that is, they shared the same household, Victoria called Michael 'Daddy,' Michael contributed to Victoria's support, and he is eager to continue his relationship with her." *Id.* at 143-44 (Brennan, J., dissenting).

167. *See id.* at 124-25, 129 (majority opinion); *id.* at 136 (Stevens, J., concurring).

168. Justice Byron White made the strongest case for the identification of fatherhood with biology, but still limited constitutional recognition to men who stepped forward to seize the parental role. *See id.* at 157-60 (White, J., dissenting).

169. *See id.* at 142 (Brennan, J., dissenting) (framing the issue of the case as whether Michael and Victoria had a protected family unit relationship). Indeed, even Justice Scalia did not limit constitutional recognition to the marital family. He observed in a footnote:

The family unit accorded traditional respect in our society, which we have referred to as the "unitary family," is typified, of course, by the marital family, but also includes the household of unmarried parents and their children. Perhaps the concept can be expanded even beyond this, but it will bear no resemblance to traditionally respected relationships—and will thus cease to have any constitutional significance—if it is stretched so far as to include the relationship established between a married woman, her lover, and their child, during a 3-month sojourn in St. Thomas, or during a subsequent 8-month period when, if he happened to be in Los Angeles, he stayed with her and the child.

and Victoria's family instead.¹⁷⁰ Had the Court focused on that question, that is, whether Michael had ever established enough of a functional family with Carole and Victoria to pass constitutional muster, it might have established guidelines for subsequent decisions.¹⁷¹ The guidelines could have reaffirmed the importance of marriage, upheld the constitutionality of the California law, *and* reconciled the marital presumption with emerging understandings about acceptable choices with respect to paternity. The actual decision not only did not do so; it resolved the case in ways that removed the Court from the channelling process altogether.

First, the core of Justice Scalia's plurality opinion upheld the constitutionality of the marital family on the basis of the historic respect accorded marriage, and remanded the case to the states with no suggestion that the Constitution imposed any limits on the states' refusal to recognize the biological father.¹⁷² The Supreme Court has thus been out of the business of reviewing state paternity determinations since 1989 and, as the next section of this Article will demonstrate, the states replicate the divisions that fractured the Supreme Court. The result undermines even the pretense of shared meanings about marriage, at least at the national level.

Second, Justice Scalia's invocation of original intent as constitutional methodology is inconsistent with critical parts of the channelling function Schneider identified, such as the expression of shared norms, the articulation of public purposes, or the reconciliation of

Id. at 123 n.3 (majority opinion).

170. Compare *id.* at 124, with *id.* at 157 (White, J., dissenting). Justice Scalia explained:

Justice Brennan insists that in determining whether a liberty interest exists we must look at Michael's relationship with Victoria in isolation, without reference to the circumstance that Victoria's mother was married to someone else when the child was conceived, and that that woman and her husband wish to raise the child as their own. We cannot imagine what compels this strange procedure of looking at the act which is assertedly the subject of a liberty interest in isolation from its effect upon other people—rather like inquiring whether there is a liberty interest in firing a gun where the case at hand happens to involve its discharge into another person's body. The logic of Justice Brennan's position leads to the conclusion that if Michael had begotten Victoria by rape, that fact would in no way affect his possession of a liberty interest in his relationship with her.

Id. at 124 n.4 (majority opinion) (footnote omitted). The analysis is particularly pointed in this case as a factual matter because by the time the case reached the Supreme Court, five years had passed, Gerald and Carole remained together, moved from California to New York, and had two additional children within the marriage. See *Which Ties Bind?*, *supra* note 116, at 1045.

171. Justice Scalia, for example, noted that one of the purposes of the marital presumption was to preclude "inquiries into the child's paternity that would be destructive of family integrity and privacy." *Michael H.*, 491 U.S. at 120.

172. *Id.* at 123-24, 129-30.

new practices with older institutions.¹⁷³ *Michael H.* occurred relatively early in Justice Scalia's time on the bench and he used it as a vehicle for articulation of the principles associated with original intent as much, if not more, than as a resolution of family law principles.¹⁷⁴ His methodological approach commanded only one other vote—that of Chief Justice William Rehnquist.¹⁷⁵ Yet, it staked out a position that has meant, as a practical matter, those who agreed with him would oppose updating the meaning of marriage or other family practices beyond those in existence in 1787.

Third, Justice Scalia's uncompromising defense of marriage as it existed in the eighteenth century fractured the Court and hindered, rather than facilitated, the expression of shared understandings. Indeed, the opinion did not even clearly define the nature of the differences among the justices.¹⁷⁶ Molly Shanley observed, for example, that, although Justices Scalia and White reached opposite conclusions about the statute at issue, both of their opinions "adopted male-centered models of the basis of parental rights."¹⁷⁷ In contrast, she identified both Justice Brennan's dissent and Justice John Stevens's concurrence in the result with greater deference to the mother's role in the child's life.¹⁷⁸ As a

173. See *Schneider*, *supra* note 1, at 506, 511, 519. *Schneider* observed that "social institutions link us both to the past and the future." *Id.* at 511.

174. See *Michael H.*, 491 U.S. at 141 (Brennan, J., dissenting). Justices O'Connor and Kennedy refused to join in Justice Scalia's articulation of the principles underlying original intent. See *id.* at 128 n.6 (majority opinion) (arguing for "the most specific level at which a relevant tradition . . . can be identified" and describing that tradition in *Michael H.* as "the rights of the natural father of a child adulterously conceived"). Justices O'Connor and Kennedy concurred in all but footnote six of Justice Scalia's plurality opinion, and Justice O'Connor's one paragraph concurrence objected that Justice Scalia's approach was inconsistent with prior precedent and that she "would not foreclose the unanticipated by the prior imposition of a single mode of historical analysis." *Id.* at 132 (O'Connor, J., concurring).

175. *Id.* at 113 (majority opinion) (noting the justices' opinions, with only Chief Justice Rehnquist joining Justice Scalia's judgment in full).

176. Lynne Henderson critiques Justice Scalia's opinion in terms of its emphasis on obeying the rules, punishment, and coercion. In accordance with this analysis, Justice Scalia ties his analysis of original intent to Michael's status as the father of an "adulterously conceived child," thus justifying his conclusion that Michael's relationship with Victoria did not merit constitutional protection. See Lynne Henderson, *Authoritarianism and the Rule of Law*, 66 IND. L.J. 379, 380, 444-45 & n.436 (1991) (identifying authoritarianism with inflexibility, coercion, and punishment and critiquing *Michael H.* because Justice Scalia's opinion suggested a bias "against violation of conventional norms").

177. Shanley, *supra* note 140, at 74. Justice White's dissent gave more weight than any of the other opinions to the role of biology, and he emphasized the importance of the biological tie even more in his dissent in *Lehr v. Robertson*, 463 U.S. 248, 272 (1983) (White, J., dissenting) ("The 'biological connection' is itself a relationship that creates a protected interest.").

178. Shanley, *supra* note 140, at 74 (observing that Justice Stevens's opinion acknowledged the "inherent biological and sociological differences between care of the fetus by a woman and a man" and Justice Brennan's opinion tied recognition of a father's rights to establishment of a

practical matter, the plurality opinion simultaneously disapproved of Carole's sexual behavior and upheld her decision-making authority. It did little to facilitate *shared* expectations about marriage, parenthood, or the role of law in resolving future disputes. In the meantime, the matter has become the province of the states.

C. The Marital Presumption Revisited: The States, Class, and Gender

The fractured decision in *Michael H.* returned the issue to the states with little guidance, and the states replicated the divisions on the Supreme Court. Few states adopted Justice Scalia's preference for original intent as judicial methodology, but many preferred bright line rules to case-by-case decision-making,¹⁷⁹ and those preferring bright line rules split between marriage and biology.¹⁸⁰ They have rarely, however, made explicit the normative foundation for their rulings.

Of those preferring biology to marriage, perhaps the most intriguing explanation comes from Texas. The Texas Supreme Court issued an opinion striking down the marital presumption as a violation of the state constitution, then withdrew the opinion and substituted another.¹⁸¹ The original opinion observed that perhaps the marital presumption made sense in an era in which biological parenthood could not be determined with certainty, but that today the focus should be on the child's interests:

[I]t may be in [the] best interest of the child to allow development of a relationship with the natural father and it may not. The effect of the alternative offered by the dissenting justices is to leave this determination of the child's best interest and the definition of family, itself, exclusively to the biological mother. In the name of protecting the family, the [dissent] would grant rights to putative fathers who had been permitted by the mother to develop a relationship with the child but not to those not afforded that opportunity.¹⁸²

relationship with the child that necessarily required the mother's cooperation).

179. See, e.g., *Callender v. Skiles*, 591 N.W.2d 182, 190 (Iowa 1999) ("The traditional ways to establish legal parentage have dramatically changed in recent generations, as has the traditional makeup of the family."); *State ex rel. Roy Allen S. v. Stone*, 474 S.E.2d 554, 562-63 (W. Va. 1996) ("Such a reading runs contrary to the holdings of many cases, fails to accord proper respect to diversity and individualism, and pretty much protects only those liberties that rarely need judicial protection." (footnote omitted)).

180. Compare *J.N.R. v. O'Reilly*, 264 S.W.3d 587, 596 (Ky. 2008) (Cunningham, J., concurring), with *In re J.W.T.*, 872 S.W.2d 189, 194 (Tex. 1994).

181. *In re J.W.T.*, No. D-1742, 1993 Tex. LEXIS 101, at *31-32 (Tex. June 30, 1993), *withdrawn*, *In re J.W.T.*, 872 S.W.2d at 197-98.

182. *In re J.W.T.*, 872 S.W.2d at 197 (footnote omitted).

The substituted majority opinion dropped the explicit reference to the mother's decision-making power. Instead, it treated the biological father as *the* father and objected to the dissent's treatment of him as a "stranger to the marriage," insisting that the father is a stranger "only in so far as the statutory law has traditionally deprived him of rights."¹⁸³

Whether or not the Texas decision recognized it explicitly or not, the practical effect of granting rights on the basis of biology has been to allow the biological father to establish a relationship with the child over the objection of the mother and her husband. Thus, the Iowa Supreme Court acknowledged that in finding that the biological father had "a liberty interest in challenging paternity," it also implied that he "may have a fundamental right to maintain a relationship" with the child.¹⁸⁴ David Meyer concludes that "[t]he readiness of these jurisdictions to reassign parental status on receipt of a DNA match, even when that means extinguishing a substantial pre-existing parent-child bond, reveals a reflexive commitment to biology as the essential foundation of parenthood."¹⁸⁵ More practically, it also protects a man's right of access to a child, suggesting that once a woman sleeps with a man she (and her husband) must allow him to develop a relationship with a resulting child.¹⁸⁶ If the biological father has the wherewithal to insist on a paternity test (or to secure one on his own), he merits constitutional protection in Iowa, Texas, and a number of other states. Even without a constitutional mandate, the majority of states now allow the biological father some ability to establish parenthood even over the objection of the mother and her husband.¹⁸⁷ In Missouri, for example, the courts have held that once a man is recognized as a biological father, he is entitled to

183. *Id.* at 198.

184. *Callender*, 591 N.W.2d at 190 n.5. *See also* *Courtney v. Roggy*, 302 S.W.3d 141, 151 (Mo. Ct. App. 2009) (stating that the biological father is entitled to establish a relationship with the child unless "visitation would endanger the child's physical health or impair his or her emotional development" (internal quotation marks omitted)).

185. *Parenthood in a Time of Transition*, *supra* note 129, at 138-39.

186. *See* *Schneider*, *supra* note 1, at 526-27 (justifying the marital presumption in part because of the potential disruption of the marital family).

187. *See, e.g., Courtney*, 302 S.W.3d at 149 ("[A] man *alleging himself to be a father . . . may bring an action at any time for the purpose of declaring the existence or nonexistence of the father and child relationship.*" (emphasis added) (quoting MO. ANN. STAT. § 210.826 (West 2010)); *Fisher v. Tucker*, 697 S.E.2d 548, 550 (S.C. 2010) (holding that South Carolina's statutory presumption of paternity within marriage can be rebutted by blood tests); *Watermeier v. Moss*, No. W2009-00789-COA-R3-JV, 2009 WL 3486426, at *2 (Tenn. Ct. App. Oct. 29, 2009) (holding that a Tennessee statute required that for the marital presumption to preclude paternity for the biological father, the married couple needed to have lived together at the time of conception, remained together through the filing of the petition, and the husband and mother needed to sign an affidavit attesting to biological paternity).

visitation unless “visitation would endanger the child’s physical health or impair his or her emotional development.”¹⁸⁸

A minority of states, however, continue to uphold the marital presumption as close to absolute, at least during an existing marriage.¹⁸⁹ Yet, they do not agree on what values the marital presumption is designed to promote. One opinion observed, for example, that the determination of paternity “is squarely about the legal status of marriage in the Commonwealth of Kentucky today. . . . The severely wounded institution of marriage in Kentucky surely protects the parties from unwanted interlopers claiming parenthood of a child conceived and born during their coverture.”¹⁹⁰

The Kentucky case nonetheless produced five opinions and the court quickly distanced itself from the case in subsequent cases,¹⁹¹ finding it to be of little precedential value and finally overruling it three years later.¹⁹² In between, the Kentucky Supreme Court struggled with a case where the parties divorced, remarried, and divorced again,¹⁹³ and an intermediate appellate court allowed the presumption to be rebutted where the wife tried to use her continuing marriage to a husband who had suffered brain damage in the military to block recognition of the child’s biological father.¹⁹⁴

188. *Courtney*, 302 S.W.3d at 151.

189. Approximately two-thirds of the states similarly allow the non-marital father to challenge the marital presumption through either statute or case law. UNIF. PARENTAGE ACT § 607 cmt. (2002).

190. *J.N.R. v. O'Reilly*, 264 S.W.3d 587, 596-97 (Ky. 2008) (Cunningham, J., concurring).

191. *Id.* at 588, 595-96. See, e.g., *J.A.S. v. Bushelman*, 342 S.W.3d 850, 853 (Ky. 2011) (explicitly overruling *J.N.R.*); *Bailey v. Bertram*, No. 2009-SC-000210-MR, 2010 WL 1641115, at *4 (Ky. Apr. 22, 2010) (distinguishing *J.N.R.*); *Tommy L. v. Bramlage*, No. 2010-SC-000336-MR, slip op. at 5 (Ky. Apr. 21, 2011), available at <http://opinions.kycourts.net/sc/2010-SC-000336-MR.pdf> (distinguishing *J.N.R.*).

192. *J.A.S.*, 342 S.W.3d at 853.

193. The case involved a husband and wife who acknowledged, in their first divorce petition, that they had separated in July 2003, and that the wife had become pregnant in October 2003 with a non-marital partner. Six months after the divorce was granted, but a day before the baby was born, the parties remarried—only to divorce again three years later. The divorce decree awarded joint custody. After the second divorce, the wife told the non-marital father that he was the biological father; he then filed for paternity but both of the former spouses tried to prevent the case from going forward. *Smith v. Garber*, No. 2009-SC-000738-MR, 2010 WL 6815999, at *1 (Ky. June 22, 2010).

194. See *Draper v. Heacock*, No. 2010-CA-000112-ME, slip op. at 2, 13 (Ky. Ct. App. Jan. 21, 2011), available at <http://opinions.kycourts.net/coa/2010-CA-000112.pdf>. The appellate court held that the marital presumption could be rebutted because of “the limited precedential value of *J.N.R.* and the distinguishable facts and circumstances,” including the husband’s severe physical and mental disabilities from boxing injuries. *Id.* at 2, 8. The court also held that the wife had waived any ability to question the standing of the biological father, who had been adjudicated the father. *Id.* at 13.

The facts of these cases are simply too varied (and in some cases bizarre) to be resolved under the rubric of promoting marriage, but the insistence on treating marriage as a monolithic institution stands in the way of evolving norms and sometimes cloaks unresolved differences about marital roles. A Kentucky judge, for example, commented in a law review article critiquing these cases that the rulings are unlikely to contribute to family stability: “It can be argued, however, that allowing the mother the discretion to influence the court’s determination of paternity does not preserve the nuclear family, but rather undermines the institution of marriage by sweeping under the rug fidelity issues that often result in more damage to the family unit.”¹⁹⁵

It may be a better critique to say that the pretense that the issue is about the importance of marriage makes it difficult to separate cases where the husband has assumed the parental role from those where the biological father is the only father the child is likely to know.¹⁹⁶ Both some of the cases that uphold the marital presumption,¹⁹⁷ and some that reject it,¹⁹⁸ seem to be motivated more by a desire to punish the mother than by concern for the institution or the needs of the child.¹⁹⁹

States that approach the determination of paternity on a case-by-case basis come closer to articulating principles that might influence standards of behavior, but they do not necessarily do so consistently or in a way that would command support in Kentucky or Texas. California, for example, recognizes a presumption of paternity that arises not only from marriage, but from the act of welcoming a child into one’s

195. See Judge Christopher J. Mehling & Matthew W. Swafford, *A Biological Father's Rights Extinguished*, 37 N. KY. L. REV. 343, 349-50, 359 (2010).

196. Compare *Draper*, at 2, 3 & n.1 (stating that the biological father was the father in the house around the child while the husband suffered brain damage that eventually lead to his institutionalization), with *J.N.R.*, 264 S.W.3d at 588 (upholding the marital presumption where the mother and husband reconciled).

197. See, e.g., *Pearson v. Pearson*, 182 P.3d 353, 354, 359 (Utah 2008) (continuing to recognize the husband—who was the husband at the time of the child’s birth—as the father at divorce even though by the time the case was decided the biological father and the mother had married).

198. See, e.g., *Wiese v. Wiese*, 699 P.2d 700, 701-03 (Utah 1985) (treating the husband who was excluded by paternity tests as a biological parent as a “stepparent” not liable for child support).

199. See *Pearson*, 182 P.3d at 358-59 (denying the biological father’s motion to establish paternity for the child even though the mother was married to him at the time of the decision because her ex-husband had already assumed the role of father for the child); *Wiese*, 699 P.2d at 702-03 (releasing the non-biological father from the obligation of having to pay child support after his divorce from the mother). The Kentucky opinion allowing rebuttal of the marital presumption also seemed eager to ensure that the biological father, rather than the husband, bore financial responsibility for the child. See *J.A.S. v. Bushelman*, 342 S.W.3d 850, 856-57 (Ky. 2011) (discussing the importance of allowing the mother to seek child support from the biological father in the event of divorce and the husband to challenge paternity if he chose).

household and holding out the child as one's own.²⁰⁰ Proof that the child is not the biological offspring of the putative parent does not necessarily rebut the presumption; instead, if there is more than one presumed parent, the courts choose between them on the basis of all the circumstances.²⁰¹

The doctrine reflects a determination that each child should have two legal parents and that function is more important than biology.²⁰² *Gabriel P. v. Suedi D.*²⁰³ illustrates an application of the doctrine. The mother, Suedi, was fifteen when she became pregnant.²⁰⁴ She had engaged in sexual relations with two men—twenty year-old Gabriel and twenty-nine year-old Anthony.²⁰⁵ When Gabriel declined to marry her, Suedi told him that he was not the father.²⁰⁶ A year later, Suedi and Anthony married and had a child together.²⁰⁷ Gabriel, however, insisted on his own paternity tests, and after they showed that he was the biological father, he sued to establish paternity.²⁰⁸ The trial court ruled in his favor, and set aside Anthony's declaration of paternity, but the court of appeals reversed, finding instead that both men were presumed fathers and that the trial court should choose between them in light of all the circumstances.²⁰⁹

200. See June Carbone, *From Partners to Parents Revisited: How Will Ideas of Partnership Influence the Emerging Definition of California Parenthood?*, 7 WHITTIER J. CHILD. & FAM. ADVOC. 3, 5 (2007) [hereinafter *From Partners to Parents Revisited*]. For an in depth discussion of the California cases, see generally *id.*

201. See, e.g., *In re Jesusa V.*, 85 P.3d 2, 13, 15 (Cal. 2004) (determining that conflicting presumptions of paternity are to be resolved according to weightier policy considerations).

202. *From Partners to Parents Revisited*, *supra* note 200, at 8.

203. 46 Cal. Rptr. 3d 437 (Ct. App. 2006).

204. *Id.* at 438-39.

205. *Id.* at 439.

206. *Id.* In fact, no paternity tests occurred until Anthony insisted—when the baby was ten months old—and the test indicated that Anthony was not the father. *Id.*

207. *Id.* at 440.

208. *Id.* at 439-40.

209. *Id.* at 440, 447. The court cited Section 7611 of the California Family Code as possible grounds to recognize Anthony as a presumed father. *Id.* at 446. Section 7611 provides:

(c) After the child's birth, he and the child's natural mother have married, or attempted to marry, each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and either of the following is true:

(1) With his consent, he is named as the child's father on the child's birth certificate.

(2) He is obligated to support the child under a written voluntary promise or by court order.

(d) He receives the child into his home and openly holds out the child as his natural child.

CAL. FAM. CODE § 7611(c)-(d) (West 2004). Anthony signed a voluntary declaration of paternity, married the mother, and lived with the mother and the child. *Gabriel P.*, 46 Cal. Rptr. 3d at 439-40.

The California courts, in the line of cases that started with *In re Nicholas H.*²¹⁰ and *In re Jesusa V.*,²¹¹ have done what *Michael H.* did not; they have modernized family understandings to channel family relationships into a two parent model, albeit one that relies less directly on marriage.²¹² In doing so, they implicitly recognize the mother's enhanced decision-making role—Anthony could establish a relationship with the child only because Suedi permitted it.²¹³ At the same time, the decision also recognizes the fact that Anthony, not Gabriel, is the one who stepped forward to assume the father's role.²¹⁴ In other cases, the California courts have recognized that the biological father who establishes a relationship with the child is entitled to constitutional protection, even if the mother reconciles with the husband to whom she was married at the time of conception and birth.²¹⁵ The result ratifies the parties' decisions, protecting intact relationships without denying the fact of biological paternity, and granting those who establish a relationship with the child security if the mother later changes her mind.

While, as a practical matter, these cases often protect husbands in intact relationships who have assumed a parental role, the California courts have extended recognition on a similar basis to same-sex partners and the unmarried more generally.²¹⁶ In doing so, they have articulated a

While the trial court set aside the declaration in light of the paternity tests showing Gabriel to be the biological father, the appellate court emphasized that Anthony might still be a presumed father under subsections (c) or (d) above, and if so, the court could choose between the two presumed fathers in light of all of the circumstances. *Id.* at 440, 446-47. See also *From Partners to Parents Revisited*, *supra* note 200, at 25-26 for a fuller explanation of the case.

210. 46 P.3d 932 (Cal. 2002).

211. 85 P.3d 2 (Cal. 2004).

212. See *In re Jesusa V.*, 85 P.3d at 13, 15 (stating that biological paternity does not necessarily rebut another man's presumption, depending instead on all the circumstances of the case); *In re Nicholas H.*, 46 P.3d at 933-34 (finding that the ex-husband, who was not the biological father, still established parental rights over the child because he received the child into his home and held the child out as his own). The California legislature also updated the marital presumption statute to permit the mother greater latitude in rebutting the presumption of paternity. See CAL. FAM. CODE § 7541(c) ("The notice of motion for blood tests under this section may be filed by the mother of the child not later than two years from the child's date of birth if the child's biological father has filed an affidavit with the court acknowledging paternity of the child.").

213. See *Gabriel P.*, 46 Cal. Rptr. 3d at 439 (noting that the mother, Suedi, allowed Anthony, the non-biological father, to live with her, accompany her to the hospital, and voluntarily declare paternity). See, e.g., *H.S. v. Superior Court*, 108 Cal. Rptr. 3d 723, 726 (Ct. App. 2010) (recognizing that the statute does "allow the mother and her husband to prevent the biological father from ever establishing parental rights over a child").

214. See *Gabriel P.*, 46 Cal. Rptr. 3d at 447.

215. See *Brian C. v. Ginger K.*, 92 Cal. Rptr. 2d 294, 297, 310-11 (Ct. App. 2000) (upholding the right of the biological father—who had lived with the mother and child and established a parental relationship with the child—to rebut the marital presumption).

216. See, e.g., *Elisa B. v. Superior Court*, 117 P.3d 660, 665, 670 (Cal. 2005); *In re Nicholas H.*, 46 P.3d at 934, 937.

new set of family norms, ones that connect the continued vitality of the marital presumption—which California still recognizes²¹⁷—to the assumption of the functional role of parenthood. The courts have thus given new meaning to the institutions Schneider celebrated—meanings that permit some recognition of family differences that reflect class and gender—but in terms unlikely to translate well in other parts of the country. The channelling function may be dead at the national level, but it shows occasional signs of life in the states.²¹⁸

VI. CONCLUSION

In the country as a whole, the marital presumption no longer serves as an umbrella for decisions linking marriage and parenthood because the presumption no longer has a single meaning. In *Michael H.*, the Court observed that the “facts of this case are, we must hope, extraordinary.”²¹⁹ Justice Scalia then went on to describe Gerald, Carole, and Michael’s lives—Carole, an international model, traveled back and forth to Europe, and lived at various times not only with Gerald and Michael, but Scott, who has no other relationship to the case except to allow Justice Scalia to denigrate Carole.²²⁰ Yet, by the end of the recital in the plurality opinion, the most remarkable fact may well be that at the time of Victoria’s eighth birthday, Carole and Gerald were still married, living together, and jointly caring for their children.²²¹

In contrast, in the cases that tied the Kentucky courts in knots, the parties married, separated, had affairs with others, reconciled, and ultimately divorced.²²² While these opinions provide fewer details about

217. CAL. FAM. CODE § 7611(c).

218. Naomi Cahn and I have argued elsewhere that cultural articulation in times of division needs to be decentralized and that some states have managed to articulate emergent family norms better than others. See *RED FAMILIES V. BLUE FAMILIES*, *supra* note 28, at 151-52. Among the greatest contrasts in these terms are those between Alabama and Arkansas on the issue of custody. Chief Justice Moore (the “Ten Commandments” judge who was ultimately removed from the bench) staked out such an absolutist position on sexual morality that the Alabama Supreme Court has been reluctant to address the issue ever since, deferring instead to trial court findings of fact. *Id.* at 149-50. In contrast, the Arkansas Supreme Court, while insisting that non-marital cohabitation “cannot be abided,” has guided the trial court to positions that uphold a shared sense of the importance of marriage balanced against the best interest of children in ways that promote shared sentiments. *Id.* at 146-47 (internal quotation marks omitted).

219. *Michael H. v. Gerald D.*, 491 U.S. 110, 113 (1989).

220. *Id.* at 113-14 (referring to the fact that “Carole left Michael and returned to California, where she took up residence with yet another man, Scott K.”).

221. See Schneider, *supra* note 1, at 525.

222. See, e.g., *Smith v. Garber*, No. 2009-SC-000738-MR, 2010 WL 6815999, at *1 (Ky. June 22, 2010). Indeed, the Kentucky Supreme Court finally disavowed its earlier decisions limiting rebuttal of the marital presumption. In doing so, the court observed that, historically, “paternity litigation existed almost exclusively to enable a man (or his estate) to disavow an alleged paternal

the parties' backgrounds, it seems safe to conclude that they do not involve international models, whose boyfriends travel between their homes in the United States and business interests in the Caribbean while their husbands move to New York and visit on occasional weekends. Accordingly, underlying assumptions about the stability of the relationships, the permanence of the husband's commitment to the child, the biological father's motivation in seeking recognition, and the consequences for the channelling effect of the cases vary considerably.

Yet, *Schneider* is right—the challenge for the channelling function is to retain the “normative core” that marks the continuing value of institutions such as marriage and parenthood.²²³ It is hard to imagine a couple more different from Gerald and Carole than Anthony and Suedi. Suedi was approximately fifteen when she became pregnant and she married Anthony almost a year after the birth of the child at issue in the paternity dispute.²²⁴ Yet, in both cases the mother chose one man over another and did so at least in part because the man she chose expressed a credible commitment to her and the child.²²⁵ Whatever else has changed with the passage of time, the fact that Gerald and Anthony married—and stayed married—to the mother expresses that commitment. In Texas and Iowa, in contrast, the decisions do not consider either the father's or the husband's demonstrated commitment to mother or child; the normative core of those rulings instead rests on the obligations that follow from conception and birth, and the principle obligation among them is the mother's duty to permit and perhaps encourage the biological father's relationship with the child. Taking these opinions together, it is impossible to fashion either a clear or clearly expressed normative foundation for the relationship between marriage and parenthood.

The challenge for the channelling function, if it is to remain an integral part of the family law canon, is to find ways to reaffirm the relationship between commitment and parenthood in terms that are comprehensible to each new generation. To do so, the law must engage the emergent norms that underlie the practices in these cases—the channelling function cannot survive judicial determination to fix the meaning of living institutions in 1787.

responsibility or to force him to accept paternal responsibility. Only in the last quarter of the twentieth century did we begin to see cases involving men seeking to acknowledge and accept paternal obligation.” *J.A.S. v. Bushelman*, 342 S.W.3d 850, 852-53 (Ky. 2001).

223. See *Schneider*, *supra* note 1, at 519.

224. *Gabriel P. v. Suedi D.*, 46 Cal. Rptr. 3d 437, 439-40 (Ct. App. 2006).

225. *Michael H.*, 491 U.S. at 113-15; *Gabriel P.*, 46 Cal. Rptr. 3d at 439-40. Gabriel, unlike Anthony, refused to marry Suedi. *Gabriel P.*, 46 Cal. Rptr. 3d at 439-40. We do not know whether Michael made a similar proposal to Carole.

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