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## Red Families v. Blue Families

Naomi R. Cahn

*George Washington University Law School*, [ncahn@law.gwu.edu](mailto:ncahn@law.gwu.edu)

June Carborne

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# RED FAMILIES V. BLUE FAMILIES

NAOMI CAHN AND JUNE CARBONE\*

## I. INTRODUCTION

American family law has fractured. Prior waves of family law reform – no fault divorce, marital property regimes, the dismantling of distinctions associated with illegitimacy, child support enforcement -- have swept through the country, and over time (and often a not very long time) produced a remarkable degree of consensus about the core of family law.<sup>1</sup> Continued consensus, however, appears to be at an end. Central issues on the regulation of sexuality, exemplified by abortion, control of teen sexuality, and federal and state governments’ “marriage promotion” efforts have split the country,<sup>2</sup> raising anew the question of what federalism means in the context of family law.

This article shows that the current family values debate is particularly intractable not just because the different family law regimes rest on different paradigms, but because what we identify as “blue families” and “red families” are living different lives, with different moral imperatives. While legal scholars acknowledge the intractability of the values debate, they have not acknowledged the central role of family law – and of the divergent family paradigms underlying it.<sup>3</sup> These unacknowledged differences contribute to a sense of

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\* Naomi Cahn is the John Theodore Fey Research Professor of Law, George Washington University Law School. June Carbone is the Edward A. Smith-Missouri Professor of Law, the Constitution and Society at the University of Missouri-Kansas City. The authors thank Jane Curry, Bradley Joondeph, Nancy Levit, and Carol Sanger for their generous comments on the manuscript

<sup>1</sup> During a twenty-year period from 1965 to 1985, for example, every state in the country adopted some method for dissolving a marriage without a showing of fault. See Herma Hill Kay, *From the Second Sex to the Joint Venture: An Overview of Women's Rights and Family Law in the United States During the Twentieth Century*, 88 CALIF. L. REV. 2017, 2064 (2000).

<sup>2</sup> The majority opinion by Justice Kennedy and the dissenting opinion by Justice Ginsburg in the Supreme Court’s partial-birth abortion case dramatically illustrate these divisions. See *Gonzales v. Carhart*, 127 S. Ct. 1610 (2007).

<sup>3</sup> Robert Post and Reva Siegal, for example, acknowledge the connection between Protestant Fundamentalist opposition to abortion and changing gender roles, and demonstrate that abortion did not become a rallying cry for the Protestant right until it became part of broader-based values movement in the eighties. Robert Post and Reva Siegal, *Roe Rage: Democratic Constitutionalism and Backlash*, HARV. C.R.-C.L. REV. (forthcoming 2007) [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=990968](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=990968). William Eskridge further explores the polarizing effect of same-sex marriage, and its particular divisiveness in more religious parts of the country. William N. Eskridge, *Body Politics: Lawrence v. Texas and the Constitution of Disgust and Contagion*, 57 FLA. L. REV. 1011 (2005). While these scholars acknowledge different family *values* behind the political differences, they do not explore the role of different family systems in either producing different values or different legal imperatives.

“moral panic” that increases support for uncompromising positions and threatens to undermine the perceived legitimacy of the judiciary itself.<sup>4</sup> We believe that the first step in preserving the integrity of family law decision-making is recognition that two different legal regimes exist.

“Blue states,” that is, the states that voted Democratic in the 2004 presidential election,<sup>5</sup> have moved toward a new family model. Blue families are characterized by greater wealth, higher average levels of education, greater urbanization, lower fertility levels, and lower levels of church attendance.<sup>6</sup> They have been among the first to embrace a new family model, which we term “the new middle class morality,” that responds to the post-industrial economy by delaying childbearing and investing in the educational and workplace opportunities of both men and women.<sup>7</sup>

To realize the advantages that have come with increased specialization among women, the new model involves less control of sexuality, celebrates more egalitarian gender roles, and promotes financial independence and emotional maturity as the sine qua non of responsible parenthood. The hallmarks of the new system’s success are lower rates of divorce and teen births; its weaknesses may ultimately be falling fertility and high percentages of the population living alone. In this new model, abstinence is unrealistic, contraception is not only permissible, but morally compelled, and abortion is the necessary (and responsible) fallback. Non-marital cohabitation is irrelevant to child custody determinations absent an immediate impact on the child, but domestic violence is a serious threat to family integrity that requires state intervention. Recognition of same-sex relationships is a matter of basic equality.<sup>8</sup>

The “red states,” that is, the states that voted Republican in the last presidential election, have not just lagged in adjusting to the new model, but they are increasingly saying “no” to its imperatives. Most prominently in the mountain west, the rural plains, and the South, these states continue to emphasize a more traditional family system that celebrates marriage as the institution ordained to promote the unity of sex, procreation and childrearing. This traditional system, in tandem with religious teachings about sin and guilt,

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<sup>4</sup> See Carol Sanger, *Infant Safe Haven Laws: Legislating in the Culture Of Life*, 106 COLUM. L. REV. 753, 789 (2006) (defining “moral panic”).

<sup>5</sup> In using the “red state,” “blue state” terminology, we are not taking a position on the debate ranging in political science as to whether or not the culture wars are a myth. Compare MORRIS P. FIORINA, SAMUEL J. ABRAMS & JEREMY C. POPE, *CULTURE WAR? THE MYTH OF A POLARIZED AMERICA* (2004) with Alan Abramowitz and Kyle Saunders, *Why Can’t We All Just Get Along? The Reality of a Polarized America*, 3 THE FORUM 1 (2005), <http://www.bepress.com/forum/vol3/iss2/art1>.

<sup>6</sup> See *infra* Section \_\_\_ for further discussion of blue families.

<sup>7</sup> For a fuller account of these changes, see JUNE CARBONE, *FROM PARTNERS TO PARENTS: THE SECOND REVOLUTION IN FAMILY LAW* (2000).

<sup>8</sup> We comprehensively develop this model at notes \_\_\_, *infra*.

places a premium on the control of sexuality.<sup>9</sup> As a result, it encourages marriage relatively soon after (if not before) the beginning of sexual activity, identifies responsible childbearing with family form rather than economic self-sufficiency or emotional maturity, and embraces more authoritarian models of parenting and the state -- both should be able and willing to intervene to promote the “right” moral values. Within red families, abstinence outside of marriage is a moral imperative, the shotgun marriage is the preferred solution to an improvident pregnancy, and socialization into traditional gender roles is critical to marital stability.<sup>10</sup> Abortion is an abomination not only because it violates religious teachings about the beginning of life, but also because it represents a determination to evade the consequences of immoral conduct. And gay marriage is, if anything, worse than abortion – the symbol of at the ability to flout moral teachings in the name of individualism and choice.<sup>11</sup>

Both family models have problems. The blue states have unprecedented numbers who will never marry, falling fertility rates and considerable concern about the lack of commitment within intimate relationships.<sup>12</sup> Moreover, their largest challenge may be the inequality the system produces between the children who enjoy the advantages of intact, two income families and those of the increasingly marginalized poor.<sup>13</sup> Red state families, however, are in crisis on their own terms. Although voters in red states care profoundly about morality and marriage, red states have the highest divorce rates in the country.<sup>14</sup> Although red states have the lowest abortion rates, their teens are also more likely to become pregnant and to give birth to children the parents are ill-equipped to raise.<sup>15</sup> Red states are poorer and the resources available to cushion the consequences of family fragility may be dramatically less.<sup>16</sup> Given the

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<sup>9</sup> Attitudes toward premarital sexuality differ considerably. While 93% of all Americans, accordingly to a 2003 Gallup poll, believe that extramarital sex is morally wrong, with little variation among political groups, there are dramatic differences with respect to premarital sex: only 42% of self-identified conservatives compared to 80% of self-identified liberals believe that premarital sex is morally acceptable. George H. Gallup, Jr., *Current Views on Premarital, Extramarital Sex*, GALLUP POLL, June 24, 2003. There is similar variation on the importance of marriage. In a 2006 poll, almost twice as many conservatives (85%) as liberals (43%) believe that marriage is extremely important if the couple plans to stay together for life. Lydia Saad, *Americans Have Complex Relationship with Marriage*, GALLUP POLL, May 30, 2006.

<sup>10</sup> See W. Bradford Wilcox and Steven L. Nock, *What’s Love Got To Do With It? Equality, Equity, Commitment and Women’s Marital Quality*, 84 SOC. FORCES 1321 (2006), <http://www.virginia.edu/sociology/peopleofsociology/wilcoxpapers/Wilcox%20Nock%20marriage.pdf>

<sup>11</sup> For a comprehensive examination of the red state position, see notes *infra*.

<sup>12</sup> In Europe, which has largely adopted a blue state model, fertility is a much bigger source of concern than divorce or non-marital sexuality. See e.g., Simona Bignami-Van Assche and Francesco C. Billari, *Pathways to Adulthood and Fertility: A Comparative Analysis of Italy and Québec* (2006), <http://paa2006.princeton.edu/download.aspx?submissionId=60342>.

<sup>13</sup> See discussion *infra* at \_\_\_\_.

<sup>14</sup> See the chart in Appendix B.

<sup>15</sup> See discussion *infra* at notes \_\_\_\_.

<sup>16</sup> See Naomi Cahn and June Carbone, *Deep Purple: Religious Shades of Family Law*, \_\_ W. VA. L. REV. \_\_ (forthcoming 2008)(manuscript on file with authors).

inherent difficulties of controlling sexual behavior and the atrophy of the social forces that historically stigmatized non-marital births and coerced unhappy couples to stay together, the red states must either increase their efforts to reinstall the right values or give up the fight.<sup>17</sup> They have accordingly sounded a call to arms.

A large component of the determination to affirm the “right” values is symbolic. Despite the continued existence of laws making fornication and adultery crimes, prosecutions are rare.<sup>18</sup> And the Supreme Court has invalidated the laws in the one arena most likely to receive prosecutorial attention – consensual sodomy between same-sex partners.<sup>19</sup> The more intense fights come over the extension of state approval to traditionally “sinful” acts: abstinence education in public schools (with education about contraception implying acceptance of non-marital sexuality), abortion and same-sex marriage, and non-marital cohabitation in custody conflicts.<sup>20</sup> These issues go to the core of the values divide.

We believe that the social and legal conflicts over these issues are so intense, not just because the opposing views are on a collision course, but because the lives of red families and blue families intersect their respective family systems at different stages in the life cycle with different symbolic and practical needs. Two primary demographic factors distinguish red families from blue ones. The first is age. The average age of marriage in the United States as a whole is now 25 for women and near 27 for men. In Massachusetts, among the bluest of blue states, it is 27 for women and 29 for men. In Utah, the average woman marries before she turns 22, the average man before 24.<sup>21</sup> Yet, full physical and mental maturity does not take place until the mid-twenties, and marriage before the age of twenty-five is a significant risk factor for divorce. Testosterone levels peak around age 25, and the impulsive behavior and risk-taking associated with late adolescence does not begin to stabilize until the mid-

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<sup>17</sup> See, e.g., JAMES Q. WILSON, *THE MARRIAGE PROBLEM* (2003) (documenting the decline in stigma associated with non-marital births and divorce and calling for the revitalization of the commitment to marriage).

<sup>18</sup> The Court in *Lawrence v. Texas* noted that, historically, the states outlawed non-procreative sex even between married couples. *Lawrence v. Texas*, 539 U.S. 558, 569 (2003). Prosecutors, however, generally chose not to prosecute private acts between consenting adults, and the law treated the testimony of a consenting adult partner as the testimony of an accomplice, and therefore inadmissible. *Id.* (“Under then-prevailing standards, a man could not be convicted of sodomy upon testimony of a consenting partner, because the partner was considered an accomplice. A partner’s testimony, however, was admissible if he or she had not consented to the act or was a minor, and therefore incapable of consent”).

<sup>19</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>20</sup> See, e.g., KRISTIN LUKER, *WHEN SEX GOES TO SCHOOL: WARRING VIEWS ON SEX -- AND SEX EDUCATION -- SINCE THE SIXTIES* 156 (2006).

<sup>21</sup> Infoplease, *Median Age at First Marriage*, INFORMATION PLEASE DATABASE (2007), <http://www.infoplease.com/ipa/A0005061.html>.

twenties.<sup>22</sup> Delayed marriage, however, requires addressing sexuality on terms other than abstinence, and marriage before full emotional and financial maturity requires a level of support no longer available for large parts of the population.<sup>23</sup>

The second demographic factor exacerbating values conflicts is church attendance. Religious differences such as the historic divisions between Catholics and Protestants are less a factor in family law than the intensity of religious practices.<sup>24</sup> Moreover, church attendance correlates not just with different views about sexual morality, but also with a different orientation toward authority. Regular church-goers appear to be more comfortable, for example, with the use of force over diplomacy, authoritarian leadership styles, state intervention in family life, and stricter parenting styles. As a result, they do not just hold different views on issues such as the acceptability of non-marital cohabitation or homosexuality; they also respond to different arguments and start with different assumptions about the role of the state. These views, which once may have commanded consensus support in the United States as a whole, may no longer do so even within conservative, if not evangelical, communities.<sup>25</sup>

These differences in worldviews, beliefs, and lived experiences pose particularly sharp challenges for family law. Scholars debate the level of political polarization in the United States, and all scholars acknowledge that

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<sup>22</sup> See Craig M. Bennett and Abigail A. Baird, Anatomical Changes in the Emerging Adult Brain: A Voxel-Based Morphometry Study, *\_\_ HUMAN BRAIN MAPPING \_\_* (forthcoming 2007), <http://theteenbrain.com/about/publications/pdfs/2005-Bennett-VBM.pdf>; Elizabeth Scott and Laurence Steinberg, Blaming Youth, 81 *TEX. L. REV.* 799 (2003). For an examination of the relationship between complex legal issues and teen-agers' rights, see Laura Rosenbury, Between Home and School, 155 *PA. L. REV.* 833 (2007); Catherine J. Ross, Anything Goes: Examining the State's Interest in Protecting Children from Controversial Speech, 53 *VAND. L. REV.* 427 (2000).

<sup>23</sup> This means that the paradigm red state couple enters marriage not long after the woman becomes sexually active, has two children by her mid-twenties, and reaches the critical period of marriage at the high point in the life cycle for risk taking and experimentation. The paradigmatic blue state couple is more likely to experiment with multiple partners, postpone marriage until after they reach emotional and financial maturity, and have their children (if they have them at all) as their lives are stabilizing. If the parents do separate, they are better prepared to deal with the consequences. If nothing else, they may be too exhausted to seek new partners if they still have young children as they approach forty. For the full development of this model, see notes *\_\_* *infra* and accompanying text.

<sup>24</sup> Nonetheless, sectarian differences have not disappeared as Catholics sermons continue to emphasize the immorality of abortion while Protestant churches place greater emphasis on the evils of homosexuality. See *infra* at *\_\_\_\_\_*.

<sup>25</sup> Sociologist Kristin Luker, for example, in her in-depth study of sex education observes that conservatives view sex as sacred, while liberals view it as natural; conservatives view non-marital sex as wrong "because the Bible says it is," while liberals view reach normative conclusions more instrumentally; and, unsurprisingly, conservative religious membership correlates with support for abstinence education while the less observant are more likely to reach decisions on the content of sex education based on its perceived effectiveness. LUKER, *supra* note *\_\_*, at 156.

states vary politically and demographically within their borders.<sup>26</sup> Yet, issues of family cut much closer to core constituents of identity than economic or philosophical issues.<sup>27</sup> Professors Robert Post and Reva Siegel have recently argued, in their reinterpretation of the opposition to *Roe v. Wade*,<sup>28</sup> that the perceived threat to the traditional family has been a primary concern motivating the activists of the new era – and those activists have staked out more extreme positions in the values debate.<sup>29</sup> What Post and Siegel do not address is that the more radical positions, to the extent they define moderates as partisans, have the potential to undermine the integrity of the courts in the most profound and prosaic of family issues. The Supreme Court may chose not to grant certiorari in the most difficult of abortion cases, family courts have much more difficulty finessing issues such as non-marital cohabitation.

This article examines the role of family law within a federal system at a time of cultural conflict. Family law is, of course, primarily state law; it does not need to be uniform across the many states. Nonetheless, state family law is also mediated by constitutional decisions, federal legislation, uniform acts and interstate transactions that transcend state boundaries. The role of these bridging devices changes dramatically in an area in which the states are in fundamental disagreement on the purposes of family regulation.<sup>30</sup>

This Article first documents the divergence between the two family systems. Second, it examines the demographic differences between red states and blue states. Third, it considers the extent to which state laws differ,

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<sup>26</sup> For a summary of the extensive political science literature on these issues, see DELIA BALDASSARRI AND ANDREW GELMAN, PARTISANS WITHOUT CONSTRAINT: POLITICAL POLARIZATION AND TRENDS IN AMERICAN PUBLIC OPINION, June 13, 2007, <http://www.stat.columbia.edu/~gelman/research/unpublished/BGpolarization4.pdf> (finding polarization on moral issues largely non-existent forty years ago, greater polarization today on moral issues among the better educated and more politically active, and polarization on moral issues increasing much more dramatically in since the mid-eighties) and EDWARD L. GLAESER AND BRYCE A. WARD, MYTHS AND REALITIES OF AMERICAN POLITICAL GEOGRAPHY, HARVARD INSTITUTE ON ECONOMIC RESEARCH, Discussion Paper No. 2100, January 2006 (concluding that American political divisions have reverted to their pre-New Deal form, and have become increasingly religious and cultural). See also John W. Evans, Have Americans' Attitudes Become More Polarized?—An Update, 84 SOC. SCI. Q. 71 (2004); MORRIS P. FIORINA, SAMUEL J. ABRAMS & JEREMY C. POPE, CULTURE WAR? THE MYTH OF A POLARIZED AMERICA. (2004).

<sup>27</sup> William N. Eskridge, Body Politics: Lawrence v. Texas and the Constitution of Disgust and Contagion, 57 FLA. L. REV. 1011 (2005).

<sup>28</sup> Robert Post and Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, \_\_ HARV. C.R.-C.L. REV. (forthcoming 2007) [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=990968](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=990968)

<sup>29</sup> See Evans, *supra* note \_\_ (reviewing the data and concluding that “While political scientists have recently found less polarization among elected officials on economic issues, it seems clear that members of the public who are involved in politics are becoming polarized on moral issues.”).

<sup>30</sup> For a discussion of the relationship between family law and federalism, see ( Reva B. Siegel, *She The People: The Nineteenth Amendment, Sex Equality, Federalism, And The Family*, 115 HARV. L. REV. 947 (2002); SYLVIA LAW, *FAMILIES AND FEDERALISM*, 4 WASH. U. J. L. & POL'Y, 175 (2000).

examining three areas of contention: teen abortion statutes, same-sex marriage, and the role of non-marital sexuality in child custody decisionmaking. Fourth, it discusses the legal strategies that can defuse rather than inflame these cultural differences, and evaluates the factors that might over time produce greater convergence – and the importance of courts in keeping the avenues of transformation open.

## II. CHANGING MORAL ASSUMPTION AND THE POLARIZATION OF FAMILY LAW

Family law lies at the intersection of public and private law. Family governance, like other forms of private law, creates a framework for dispute resolution by establishing bright line statutes, default terms for adult partnerships, and mandatory provisions designed to safeguard children's well-being.<sup>31</sup> Family law also serves, however, to promote societal interests by reinforcing public norms, "channeling" intimate behavior along socially approved pathways, and protecting children.<sup>32</sup>

This channeling poses a challenge for a liberal democratic state. On the one hand, the inculcation of societal norms involves the imposition of state mandated preferences on those who would choose other regimes. On the other hand, democratic societies require the expression of values "that concern us and bind us together."<sup>33</sup> The courts have historically justified the coercion intrinsic to the selection of one family regime over another on two grounds. First, they recognize what is often a high degree of societal consensus on moral values. In upholding restrictions on polygamy in the nineteenth century, for example, the Supreme Court explicitly acknowledged the shared European roots on which the United States was founded.<sup>34</sup> Second, the courts recognized the practical need to restrain sexuality in eras without effective contraception. In a world of

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<sup>31</sup> See Margaret F. Brinig, BOOK REVIEW: STATUS, CONTRACT AND COVENANT: A Review of Family Law and the Pursuit of Intimacy by Milton C. Regan, Jr., 79 CORNELL L. REV. 1573 (1994) (reviewing the importance of status as opposed to contract in family law).

<sup>32</sup> See Carl E. Schneider, The Channelling Function in Family Law, 20 HOFSTRA L. REV. 495 (1992); LinEvada C. McClain, Love, Marriage, and the Baby Carriage: Revising the Channelling Function of Family Law, 28 CARD. L. REV. 2133 (2007);

<sup>33</sup> ROBERT NOZICK, THE EXAMINED LIFE: PHILOSOPHICAL MEDITATIONS 286-87 (1989). Indeed, at the end of his life, libertarian Robert Nozick concluded that the libertarian position he had propounded was "seriously inadequate, in part because it did not fully knit the humane considerations and joint cooperative activities it left room for more closely into its fabric." He emphasized the "symbolic importance of an official political concern with issues or problems, as a way of marking their importance or urgency, and hence of expressing, intensifying, channeling, encouraging, and validating our private actions and concerns toward them." Id.

<sup>34</sup> Reynolds v. United States, 98 U.S. 145, 164 (1879) ("Polygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people.")

limited resources, notions of legitimacy and family morality served to order claims for the provision of support.<sup>35</sup>

In today's world, the sense of shared values is frayed, and the need for triage in the allocation of resources less compelling.<sup>36</sup> This in turn heightens the tension between individual expression and majoritarian norm creation. Consider, for example, the exchange between Kennedy and Scalia in *Lawrence v. Texas*.<sup>37</sup> Justice Kennedy, writing for the majority that struck down the laws criminalizing same-sex sodomy, observed that the "issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. 'Our obligation is to define the liberty of all, not to mandate our own moral code.'"<sup>38</sup> Scalia's scathing dissent accused the majority of "taking sides in the culture wars," and suggested that Kennedy's autonomy principle, applied to family creation, necessarily extends to state protection for individual choice in the constitution of marriage, parenthood, family relationships, childrearing and education.<sup>39</sup> State promotion of shared norms, and state policed family statuses would give way to autonomy, privacy, and equality before the law.<sup>40</sup>

Unlike other scholars, we believe that the real challenge confronting family law is not the stark choice between values promotion and libertarian neutrality. We suspect that Scalia is right that true neutrality is impossible, and we agree that the state benefits too greatly from shared understandings to abandon the enterprise. Instead, we see the issue as one of how to decide *which* values to promote, and how to make that choice in a time of polarization. To address that issue, however, it is first necessary to consider why the family values debate has become so intense. This section provides a concise history of the relationship between changes in family values and social and economic norms. Family values, even traditional family values, have never been static. The moral and practical reorganization of family understandings is tied to a changing society.<sup>41</sup> Family composition is as much a way of ordering societal investment as commercial organization, and societal change does not play out evenly along lines of class, race, gender – or as we will argue here – region. Instead, the middle class leads in forging new moral understandings, and often

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<sup>35</sup> See STEPHANIE COONTZ, MARRIAGE, A HISTORY: FROM OBEDIENCE TO INTIMACY OR HOW LOVE CONQUERED MARRIAGE 30-31 (2005). The appearance of shared consensus did not mean there were no contrary views, as, for example, shown by those who have rewritten gay legal history. E.g., WILLIAM N. ESKRIDGE, GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET (1999).

<sup>36</sup> COONTZ, *supra* note \_\_; McClain, *supra* note \_\_, at 2139; Barbara Stark, Marriage Proposals: From One-Size-Fits-All to Postmodern Marriage Law, 89 CALIF. L. REV. 1479 (2001).

<sup>37</sup> 539 U.S. 558 (2003).

<sup>38</sup> *Id.* at 571.

<sup>39</sup> *Id.* at 604 (emphasis in original).

<sup>40</sup> See, e.g., Naomi Cahn, Models of Family Privacy, 67 GEO. WASH. L. REV. 1225 (1999); Jill Elaine Hasday, The Canon of Family Law, 57 STAN. L. REV. 825 (2004).

<sup>41</sup> For a much fuller account, see CARBONE, *supra* note \_\_, at 48-49; 63-66; 108-09.

the terms by which other groups are to be judged.<sup>42</sup>

*A. Economic Transformation and the Renegotiation of Family Values*

Two large scale economic transformations underlie the contemporary, and differing, approaches to family values: the nineteenth century change from a rural agricultural economy to a more urban industrial one, and the late twentieth century shift from the industrial era to an information economy.<sup>43</sup>

Both transformations redefined the relationship between home and market, and produced greater investment in children by delaying childbearing and reducing overall fertility.<sup>44</sup> Both did so, at least in part, by redefining gender roles and by moving to counter overreliance on the shotgun marriage. Moreover, in both transformations, at least in the short term, changes in family organization exacerbated societal inequality as the wealthier middle class used the benefits of the new system to enhance its class standing. The first transformation created a new middle class to staff the professions and managerial ranks of the industrial economy. Critical to its success was greater investment in boys' formal education, which required in turn postponing marriage and entry into the labor force.<sup>45</sup> An important vehicle in producing that result was an emphasis on women's purity and their greater agency in forging the new moral code.<sup>46</sup> As women become more able and willing to say "no,"<sup>47</sup> the number of brides who gave birth within eight and a half months of their wedding declined from 30% in 1800 to 10% by 1860, the average number

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<sup>42</sup> *Id.*

<sup>43</sup> Some scholars refer to this as the "first demographic transformation." See, e.g., Sara McLanahan, *Diverging Destinies: How Children are Faring After the Second Demographic Transformation*, 41 *J. MARRIAGE & FAM.* 607 (2004). For a discussion of the contemporary need for two-earners per family, see ELIZABETH WARREN AND AMELIA WARREN TYAGI, *THE TWO-INCOME TRAP: WHY MIDDLE-CLASS AMERICANS ARE GOING BROKE* (2004).

<sup>44</sup> CARBONE, *supra* note \_\_, at 62-63.

<sup>45</sup> *Id.* at 107-110.

<sup>46</sup> The economic changes have been accompanied by what Joan Williams has termed the ideology of domesticity, which focused on the "separate spheres" of home and market and produced the "cult of true womanhood." JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* (2000).

<sup>47</sup> See Jane E. Larson, "Women Understand So Little, They Call My Good Nature 'Deceit'": A Feminist Rethinking Of Seduction, 93 *COLUM. L. REV.* 374, 388 (1993) ("Victorian culture exalted sexual restraint and designated women as caretakers of society's sexual virtue."). Larson also notes, however, that: "Although the Victorian convention of female sexual modesty repressed women's sexuality, it also strengthened women's social authority and dignity, empowering women to resist male sexual demands and thus shifting the balance of power between men and women in the private sphere." *Id.* at 389-90. See also CARL N. DEGLER, *AT ODDS: WOMEN AND THE FAMILY IN AMERICA FROM THE REVOLUTION TO THE PRESENT, 180-83* (1980) (describing declining birth rates that followed women's greater ability to decline sexual intercourse).

of children per family fell from eight in 1800 to four by centuries' end, and the average age of marriage rose.<sup>48</sup>

These changes affected the moral understandings of the country as a whole in spite of the fact that the urban middle class, the driving force behind the changes, constituted a tiny part of the population. Innovative research details the transmission of these values through newly created women's magazines that influenced the farm wives who would constitute the majority of women until the much greater urbanization of the twentieth century.<sup>49</sup> But class divisions ironically served to reinforce, rather than undermine, the new order. Mary Ryan emphasizes that the cultural divide in upstate New York involved the often-pejorative comparison of native-born Protestants with newly arriving Catholic immigrants. The Protestant middle class identified moral superiority with their emphasis on their daughters' chastity, their determination to keep their children away from the temptations of either employment or romance at too young an age, and their restriction of family size.<sup>50</sup> The opinion leaders in newspapers, legislatures, courts and many pulpits heralded the new middle class standards as the moral order of the day, and the standard by which other classes might be found wanting.<sup>51</sup>

The second, twentieth century transformation began in similar fashion. The "post-industrial economy" has moved away from heavy manufacturing to

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<sup>48</sup>LINDA HIRSHMAN & JANE LARSON, *HARD BARGAINS: THE POLITICS OF SEX* (1998). Professor Larson further observes that: "A modest girl's shyness and innocence were her excuses for sexual delay, allowing her a leisurely period of courtship during which she could observe her lover and judge his qualities as a future husband. Female sexual modesty came to represent a strategic advantage in the competitive "marriage market." According to the conventional wisdom of Victorian advice manuals, men might dally with permissive women, but they married only modest ones. Both by threats and incentives, sexual modesty was thus inculcated in young women to protect them against the genuine threat that sexuality presented to their future welfare." Larson, "Women Understand so Little," *supra* note \_\_, at 392.

<sup>49</sup> For a thoughtful and comprehensive discussion of the changes, see Joan Williams, *Toward a Reconstructive Feminism: Reconstructing the Relationship of Market Work and Family Work*, 19 N. ILL. U. L. REV. 89 (1998).

<sup>50</sup> MARY P. RYAN, *CRADLE OF THE MIDDLE CLASS: THE FAMILY IN ONEIDA COUNTY, NEW YORK, 1790-1865* 184-85 (1981). The Catholic working classes, in contrast, often depended on their children's labor for their families' survival, creating incentives for larger families that transcended religious differences. Moreover, factory employment, which for working class families could start even before the teen years, made parental supervision that much more difficult and further encouraged younger marriages. See Elizabeth Pleck, *A Mother's Wages: Income Earning Among Married Italian and Black Women, 1896-1911*, in *THE AMERICAN FAMILY IN SOCIO-HISTORICAL PERSPECTIVE* 490-515 (ed. Michael Cordon 1983)(3d ed.).

<sup>51</sup> See, e.g., ELIZABETH FOX-GENOVESE, *WITHIN THE PLANTATION HOUSEHOLD: BLACK AND WHITE WOMEN OF THE OLD SOUTH* 192-241 (1988) (describing gulf between slaveholding and enslaved women in the antebellum American South); JACQUELINE JONES, *LABOR OF LOVE, LABOR OF SORROW: BLACK WOMEN, WORK, AND THE FAMILY FROM SLAVERY TO THE PRESENT* 1-151 (1985) (comparing experience of free and enslaved black women in southern United States); see also Linda K. Kerber, *Separate Spheres, Female Worlds, Woman's Place: The Rhetoric of Women's History*, 75 J. AM. HIST. 9, 10 (1988).

greater emphasis on the “information economy” and the service sector.<sup>52</sup> The result is even greater returns to education, this time for both men and women as the new economy has created greater demand for the types of services women historically performed.<sup>53</sup> Just as the nineteenth century changes brought greater specialization among men, the twentieth century changes involve greater specialization among women, as the new class of working mothers hires other women to care for their children (and frozen food diners and McDonald’s) to perform what were once viewed as mothers’ domestic responsibilities.<sup>54</sup>

Moreover, just as the nineteenth century required a family reorganization and a new moral code for the middle class to reap the benefits of the new order, so too have the twentieth century changes required moral understandings that facilitate this greater investment in women -- and even later childbearing and smaller family size. These new moral understandings, however, were unlikely to rest on increased parental vigilance and celebration of women’s virtue.

While conservatives continue to decry the sexual revolution of the sixties, the sixties followed from the demographic changes of the fifties, which sounded the death knell of the old moral order.<sup>55</sup> Indeed, as historian Stephanie Coontz argues, the “traditional” family of the fifties was in fact a qualitatively new phenomenon that reversed the trends of the rest of the century.<sup>56</sup> By 1960, the number of pregnant brides rose to almost a third, a level not seen since 1800.<sup>57</sup> The average age of marriage fell to the lowest levels in the twentieth century.<sup>58</sup> And, of course, the post-war era produced the “baby boom” —and dramatic rises in fertility.<sup>59</sup> Dating had become an exercise in sexual brinkmanship, with marriage or adoption as the fallbacks for sexual experimentation.<sup>60</sup> The changing mores of the postwar era and the needs of the new economy were on a collision course and something had to give way.

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<sup>52</sup> See, e.g., Richard G Harris, *The knowledge-based economy: intellectual origins and new economic perspectives*, 3 *INTL. J. MAN. REV.* 21 (2001)

<sup>53</sup> See CARBONE, *supra* note \_\_, at 48-49 summarizing these developments

<sup>54</sup> See Betsey Stevenson and Justin Wolfers, *Marriage and Divorce: Changes and their Driving Forces*, 21 *J. ECON. PERSP.* 27 (2007), [http://bpp.wharton.upenn.edu/jwolfers/Papers/MarriageandDivorce\(JEP\).pdf](http://bpp.wharton.upenn.edu/jwolfers/Papers/MarriageandDivorce(JEP).pdf).

<sup>55</sup> Carol Sanger brilliantly describes the role of cars and suburbanization in allowing teens to escape parental restraints. Carol Sanger, *Girls and the Getaway: Cars, Culture, and the Predicament of Gendered Space*, 144 *U. PA. L. REV.* 705 (1995); see more generally BETH L. BAILEY, *FROM FRONT PORCH TO BACK SEAT: COURTSHIP IN TWENTIETH-CENTURY AMERICA* 19 (1988) (explaining how the invention of the automobile contributed to the rise of dating by giving young people both privacy and mobility).

<sup>56</sup> STEPHANIE COONTZ, *THE WAY WE NEVER WERE: AMERICAN FAMILIES AND THE NOSTALGIA TRAP* 25-26 (1992).

<sup>57</sup> LINDA HIRSHMAN & JANE LARSON, *HARD BARGAINS: THE POLITICS OF SEX* 92 (1998).

<sup>58</sup> Andrew J. Cherlin, *American Marriage in the Early Twenty-First Century*, 15 *THE FUTURE OF CHILDREN* 33, 35 (2005).

<sup>59</sup> COONTZ, *NOSTALGIA TRAP*, *supra* note \_\_, at 202-03.

<sup>60</sup> *Id.* at 39.

*B. The New Middle Class Morality and Cultural Backlash*

What gave way first was the old moral code. The sexual revolution and women's movements now identified with the sixties remade middle class morality from an emphasis on woman's virtue to concern for equality and responsibility.<sup>61</sup> The transformation began as the baby boomers reached their college years. The new demographic bridled at college parietal rules and sexual double standards. The "pill" galvanized the shift from abstinence to contraception as the hallmark of responsible behavior.<sup>62</sup> The emotionally agonizing choice of abortion also reinforced the conviction that childbearing should be reserved for the right partner at the right time in life.<sup>63</sup> The media celebrated the new sexual freedom,<sup>64</sup> and by the eighties, the majority of the Americans no longer condemned pre-marital sexuality.<sup>65</sup>

The remaking of moral understandings produced a cycle of reinforcing shifts in attitudes. As women gained greater ability to avoid unplanned pregnancies, men felt less obligation to marry the women they impregnated.<sup>66</sup> As non-marital sexuality became more acceptable, so too did the children who resulted, making their mothers more willing to raise them without marrying.<sup>67</sup> In a parallel fashion, the shotgun marriages of the fifties produced the divorces

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<sup>61</sup> See LINDA C. MCCLAIN, *THE PLACE OF FAMILIES: FOSTERING CAPACITY, EQUALITY, AND RESPONSIBILITY* (2006).

<sup>62</sup> See George A. Akerloff, Janet L. Yellin, and Michael L. Katz, *An Analysis of Out-of Wedlock Childbearing in the United States*, 111 Q. J. ECONOMICS 277-303 (1996) (arguing that availability of contraception and abortion ironically contributed to the increase in non-marital births as women assumed responsibility for avoiding pregnancy, and men no longer felt obligated to marry unintentionally pregnant partners).

<sup>63</sup> CARBONE, *supra* note \_\_, at 203-04.

<sup>64</sup> Barbara Whitehead notes that ninety percent of women born between 1933 and 1942 were either virgins when they married or had engaged in their first intercourse with the man they subsequently married. Today, in contrast, the average age of first intercourse for women is 17 while the average age of first marriage is twenty-five. Barbara Dafoe Whitehead, *The Changing Pathway to Marriage: Trends in Dating, First Unions, and Marriage among Young Adults*, in *FAMILY TRANSFORMED: RELIGION, VALUES, AND SOCIETY IN AMERICAN LIFE* 168, 170 (Steven M. Tipton and John Witte Jr. eds., 2005).

<sup>65</sup> By 1997, the Gallup poll found that fifty-five percent of American adults say that premarital sex is not wrong, and among the most directly affected, *viz.*, the younger crowd aged 18-29, 75% agreed that "pre-marital sexual relations are not wrong." Frank Newport, *Gallup Poll Review From The Poll Editors: Sexual Norms: Where Does America Stand Today?*, *THE GALLUP POLL*, December 1997, <http://www.hi-ho.ne.jp/taku77/refer/sexnorm.htm>. Moreover, 2002 data indicate that by age 20, 77% of respondents had had sex, and 75% had premarital sex. By age 44, 95% of respondents (94% of women, 96% of men, and 97% of those who had ever had sex) had had premarital sex. Even among those who abstained until at least age 20, 81% had had premarital sex by age 44. Finer concludes that "[a]lmost all Americans have sex before marrying." Lawrence B. Finer, *Trends in Premarital Sex in the United States, 1954-2003*, 122 *PUB. HEALTH REPS.* 73 (2007).

<sup>66</sup> Akerloff, Yellin, and Katz, *supra* note \_\_.

<sup>67</sup> *Id.* at 308 (noting also that agency adoptions fell by one-half in the five years following the legalization of abortion).

of the seventies, and less reliable marriages created greater incentives for women to invest in their own earning potential.<sup>68</sup> As women attained greater independence, the consequences of divorce became less catastrophic, and unhappy partners felt less pressure to stay together. Increasing divorces made single parents more visible, which weakened even further the stigma associated with non-marital births. Taken together, these changes undermined the economic and social coercion that had promoted family stability whatever the quality of the enduring unions.

Conservative writers decry these changes as signs of moral decay. Indeed, the shift away from marriage and two-parent families has undeniably had negative consequences for children.<sup>69</sup> It is a mistake, however, to see the transformation only in terms of family disintegration. Underlying the changes and less visible than the Playboy centerfolds that merit denunciation from the pulpit is a new middle class ethic – with handsome rewards for those able to reap its benefits. The college educated, who postpone childrearing until the parents achieve a measure of financial self-sufficiency and emotional maturity, have become more likely to marry and less likely to divorce than the rest of the population, with two-parent families that remain intact, replicating the statistics that existed before no-fault divorce, the pill and legalized abortion.<sup>70</sup> The rest of the country has seen skyrocketing rates of non-marital births, divorce, and single-parent families, magnifying the effects of income inequality on children.<sup>71</sup> The hallmark of this new middle-class ethic is later ages of family formation,

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<sup>68</sup> As women gained experience and self-confidence, they won benefits that made work more attractive and rewarding; with longer work experience and greater educational equalization, they became freer to leave an unhappy marriage; and as divorce became more of a possibility, women tended to hedge their bets by insisting on the right to work. Although very few researchers believe that women's employment has been a direct cause of the rising divorce rate, most agree that women's new employment options have made it easier for couples to separate if they are dissatisfied for other reasons. In turn, the fragility of marriage has joined economic pressures, income incentives, educational preparation, and dissatisfaction with domestic isolation as one of the reasons that modern women choose to work. See COONTZ, *NOSTALGIA TRAP*, supra note \_\_, at 166.

<sup>69</sup> SARA S. MCLANAHAN AND GARY SANDAFUR, *GROWING UP WITH A SINGLE PARENT: WHAT HELPS, WHAT HURTS* 109-10 (1994).

<sup>70</sup> For example, Sara McLanahan observes that "Children who were born to mothers from the most advantaged backgrounds are making substantial gains in resources. Relative to their counterparts 40 years ago, their mothers are more mature and more likely to be working at well-paying jobs. These children were born into stable unions and are spending more time with their fathers. McLanahan, supra note \_\_, at 608.

<sup>71</sup> *Id.* at 611. In the top quartile, only seven percent of children resided in single parent families; in the bottom educated quartile, 43% did. Moreover, for the best educated, rates of single parenthood peaked in 1970, and have declined since then. For the least educated, the rates rose sharply until 1990, and declined only in the last ten years. *Id.* McLanahan finds further that college educated women have now become more likely to marry than other women and less likely to divorce. For couples with a four-year degree, divorce rates peaked in the late seventies with roughly a quarter of marriages ending within ten years. The rates then fell to 17% by the late eighties. For couples without college degrees, divorce rates reached their height with 35% divorcing within ten years, and declined only slightly (to about 32%) by the late eighties. *Id.*

when adult behavior has stabilized. Sara McLanahan shows that for the best-educated quartile of American women, mothers' median age rose from 26 in 1970 to 32 in 2000.<sup>72</sup> For mothers in the bottom quartile, it remained relatively flat.<sup>73</sup> For those who avoid early child-bearing, conventional families with two married parents and a high degree of stability follow to a remarkable degree with a minimum of external coercion.

This new middle class ethic, unlike its nineteenth century counterpart, is a direct affront to those who do not accept its premises. The nineteenth century emphasis on purity, with its condemnation of those who could not live up to its principles, may have been hypocritical (and often racist), but it reaffirmed consensus-based standards of morality. The new version, in contrast, is disdainful of traditional moral restraints, insistent on the rights of women and increasingly same-sex couples, and skeptical of once venerated institutions such as marriage.<sup>74</sup>

Traditionalists have responded to the changes in family form, the negative consequences for children, and the class-based nature of the transformation with a sense of moral panic.<sup>75</sup> If advocates of the new order are right that a promising future is the best contraceptive, this is disturbing news for poorer men and women who face less hopeful prospects for either marriage or employment. The welfare reform legislation enacted in the mid-nineties, for example, was intended to address "the crisis of out-of-wedlock childbearing."<sup>76</sup> The first three legislative findings state that: "(1) Marriage is the foundation of a successful society. (2) Marriage is an essential institution of a successful society which promotes the interests of children. (3) Promotion of responsible fatherhood and motherhood is integral to successful child rearing and the well-being of children."<sup>77</sup>

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<sup>72</sup> Id. at 609.

<sup>73</sup> It should be noted, however, that fertility rates have also dropped, especially for teens. Between 1960 and 2000, for example, births to 15 to 19 year old women fell by more than half. The composition of the remaining births nonetheless varies by race and class. White women, for example, have higher birth rates in every age group above twenty-five, while African-Americans have higher birth rates in every cohort under twenty-five, even though both races report substantial declines in teen childbearing. See Child Trends Data Bank, Percentage of Births to Unmarried Women, <http://www.childtrendsdatbank.org/indicators/75UnmarriedBirths.cfm>.

<sup>74</sup> See, e.g., MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* (1995).

<sup>75</sup> See Sanger, *Infant Safe Haven Laws*, supra note \_\_ (discussing the role of moral panic in generating support for little needed or punitive policies); see also Amy L. Wax, *Engine of Inequality: Race, Class, and Families by Choice*, *RUTGERS L. REV.* (2007)(forthcoming).

<sup>76</sup> Amy L. Wax, *The Two-Parent Family in the Liberal State: The Case for Selective Subsidies*, 1 *MICH. J. RACE & L.* 491 (1996).

<sup>77</sup> 104 P.L. 193, 110 Stat. 2105, §101 (1996), *Personal Responsibility and Work Opportunity Conciliation Act of 1996*, codified at 42 U.S.C. 601 (2007). See also Gwendolyn Mink, *WELFARE'S END* 43 (1998) (emphasizing the legislative history referring to marriage, marital parenting and paternal involvement); Tonya L. Brito, *From Madonna To Proletariat*:

Critical to these traditionalist ideals is the reassertion of marriage as the institution that unites sex, procreation and childrearing. The Institute for American Values, in its statement on “Marriage and the Law” reasons that: “The vast majority of human children are created through acts of passion between men and women. Connecting children to their mother and father requires a social and legal institution called “marriage” with sufficient power, weight, and social support to influence the erotic behavior of young men and women.”<sup>78</sup> Rather than ground family morality in investment in higher education and disciplined childbearing, these advocates continue to celebrate the unity of sex, marriage and reproduction. The reward in this system, particularly for those who may never reach the enhanced status that comes with dual college-educated earners, is family life itself. Only if women “save themselves” for marriage, men have consistent access to women exclusively through marriage, and marriage remains a prerequisite for responsible parenthood can the traditional order maintain its moral force.<sup>79</sup> If men enjoy sex without responsibility and women can construct parenthood on terms of their choosing, why does anyone (and more particularly the eighteen and nineteen olds eager to get on with their lives) have reason to wait – or plan, invest, save and prove themselves ready for adulthood?

This clash of moral worldviews plays itself out in settings that have always involved a sizeable degree of intensity, *viz.*, the control of sexuality. It also, however, involves competing moral aspirations in the image of the good life. Setting the terms for those aspirations—and for channeling behavior accordingly—has historically been the province of family law.<sup>80</sup>

### *C. Legal Reform and the Struggle to Redefine the Moral Center*

The law rarely plays a direct role in family transformation; it more commonly crystallizes a change that has already taken root. In the nineteenth century, for example, the most visible marker of women’s greater moral standing was the Married Women’s Property Acts. Yet, the first wave of legislation, revisionists now argue, had more to do with the protection of family property from creditors than with women’s rights; and only the successive waves toward the end of the century reflected women’s greater standing.<sup>81</sup> In

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Constructing A New Ideology Of Motherhood In Welfare Discourse, 44 VILL. L. REV. 415 (1999).

<sup>78</sup> Marriage and the Law: A Statement of Principles, INSTIT. FOR AMER. VALUES, CENTER FOR MARRIAGE & FAM. (2006), [http://www.americanvalues.org/pdfs/mlawstmnt\\_exsumm.pdf](http://www.americanvalues.org/pdfs/mlawstmnt_exsumm.pdf), last visited April 9, 2007.

<sup>79</sup> Wilson, *supra* note \_\_, at 216-17.

<sup>80</sup> See Carl E. Schneider, The Channelling Function in Family Law, 20 HOFSTRA L. REV. 495 (1992); Linda C. McClain, Love, Marriage, and the Baby Carriage: Revising the Channelling Function of Family Law, 28 CARD. L. REV. 2133 (2007).

<sup>81</sup> See Richard H. Chused, Married Women's Property Law: 1800-1850, 71 GEO. L.J. 1359, 1398-1400 (1983)(arguing that first wave did not represent feminist gains); Joan Hoff, Law,

this context, the states enacted legislation, one at a time,<sup>82</sup> without the interstate differences attaining particular importance, and with most of the legal changes occurring only after the changes in social sentiment made the affected laws seem archaic.

The modern clash, in contrast, has become geographic and cultural – and it is now very much about law. Perhaps the two most polarizing issues of the day are abortion and same-sex marriage.<sup>83</sup> Both have become the subject of multiple cases in federal and state courts, where they have been framed, not as family law issues, but as constitutional mandates.<sup>84</sup> The cases are controversial, as we argue in the rest of this article, because they go to the symbolic heart of the values divide: the clash between different understandings of the normative commands of the two systems we have sketched above.

The law has accordingly become a fulcrum for the values divide. Both family law legislation and judicial decisions play out in the context of the state political systems in which they are forged. If no middle ground exists, if neutrality means taking sides, then every state has a position. We will argue below that the “blue states” have adopted one strand of the Anglo-American family system: postponing childrearing until the parents achieve a measure of financial self-sufficiency, by which time the peak periods of testosterone production have passed, and couples can be expected to form stable relationships with a minimum of societal effort.<sup>85</sup> Correspondingly, the laws of blue states guarantee access to contraception and abortion, their courts are generally less likely to consider sexual issues (such as adultery or sexual orientation) in custody decisions,<sup>86</sup> and they are less likely to rely on abstinence education. “Red states,” in contrast, continue to link family stability to the control of sexuality, and internalized values that associate sexuality exclusively

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Gender and Injustice: A Legal History of U.S. Women, 377-81 (1991) (“Women reformers were only marginally involved ... in the passage of the Married Women’s Property Acts in the 1830s and 1840s” and cataloguing passage of acts in the appendix.). See also Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives’ Rights to Earnings, 1860-1930*, 82 *GEO. L. J.* 2127, 2136 (1994) (maintaining that successive waves of reform in the middle and later parts of the nineteenth century reflected feminist lobbying and women’s changing status).

<sup>82</sup> See generally KATHLEEN S. SULLIVAN, *CONSTITUTIONAL CONTEXT: WOMEN AND RIGHTS DISCOURSE IN NINETEENTH CENTURY AMERICAN* (2007)(different years for states’ enactment of Married Women’s Property Acts).

<sup>83</sup> See Post and Siegel, *supra* note 3, on (abortion); and Eskridge, *supra* note 3 (same-sex marriage)

<sup>84</sup> MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* (1987)(comparing court mandate in the U.S. with legislative decision-making in Europe); Paul D. Carrington, *Restoring Vitality to State and Local Politics by Correcting the Excessive Independence of the Supreme Court*, 50 *ALA. L. REV.* 397 (1999).

<sup>85</sup> See LAWRENCE STONE, *THE FAMILY, SEX AND MARRIAGE IN ENGLAND, 1500-1800* 44 (1977) (characterizing delayed marriage and the emphasis on financial independence as a unique feature of the northwestern European family.)

<sup>86</sup> See generally William B. Turner, *The Lesbian De Facto Parent Standard in Holtzman v Knott: Judicial Policy Innovation and Diffusion*, 22 *BERKELEY J. GENDER L. & JUST.* 135 (2007)(Tables 2 and 3) (manuscript available through [www.ssrn.com/abstract=958648](http://www.ssrn.com/abstract=958648)).

with marriage and reproduction.<sup>87</sup> They do so in the context of more traditional, often more rural, and more working class cultures in which adults are ready to begin childbearing at younger ages, and expect to marry shortly after women become sexually active. Emphasizing abstinence education, legal control by parents of teen contraception and abortion decisions, less tolerance of gay and lesbian sexual behavior, their laws express continuing disapproval of non-marital sexuality.<sup>88</sup>

The family transformation of the later half of the twentieth century, unlike its predecessor in the nineteenth, clashes profoundly with the religious tenets held by more traditional parts of the country, and at least for the moment, the hinterlands are not willing to follow the lead of the urban middle class or the coasts. The result appears to be an irreconcilable conflict between two very different moral and family systems – producing distinctively different laws.

### III. DEMOGRAPHIC DIVERGENCE AND THE REMAKING OF FAMILY LIFE

Throughout this paper, we use the red/blue designation as a shorthand for regional variations that might underlie the development of one family model over another, recognizing that we are measuring something more than simply the size of the margin for Bush in the 2004 election.<sup>89</sup> The first part of this section explores voting patterns, ranking the states in accordance with their 2004 vote, and then explains why we use this somewhat imperfect shorthand. In doing so, we make no prediction about the 2008 election (indeed, we suspect a realignment in voting patterns may well occur); rather we identify the lifestyle models and family laws we predict will continue to diverge between the two sets of states. Next, we identify demographic variables that might distinguish one family system from the other, and rank the top five and the bottom five states for each characteristic. We then consider whether consequences such as divorce and non-marital births follow similar geographic patterns, and finally we consider whether state patterns of family regulation bear any relationship to red and blue demographic differences.

#### *A. Red v. Blue: Or the Bible Belt and Mountain West v. the Northeast and the*

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<sup>87</sup> See CARBONE, *supra* note \_\_, at 60 (discussing Northwestern Europe).

<sup>88</sup> See notes *infra*.

<sup>89</sup> There are, of course, variations within states, generally related to the urban/rural nature of the population, religious affiliation, etc. We are painting with a broad brush in noting these trends. See generally EDWARD L. GLAESER AND BRYCE A. WARD, *MYTHS AND REALITIES OF AMERICAN POLITICAL GEOGRAPHY* 33-34 (2006), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=874977](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=874977) (noting “the continuum of states ranging from the poor conservative places of the south and east to the rich, liberal places of the coasts . . . [and] that American parties are increasing[sic] oriented around religion and culture rather than economics”); STEVEN ANSOLABEHERE, JONATHAN RODDEN, AND JAMES M. SNYDER, JR., *PURPLE AMERICA* 3 (2005), [http://econ-www.mit.edu/faculty/download\\_pdf.php?id=1266](http://econ-www.mit.edu/faculty/download_pdf.php?id=1266) (challenging the culture war argument and finding that most of the population can be characterized as moderate).

*West Coast?*

In characterizing the polarization of family law, we start with a dilemma. The “red state”/“blue state” designations correspond to the votes in the presidential election of 2004,<sup>90</sup> but the Republican/Democratic vote is only a crude marker for the cultural systems we are attempting to capture. Appendix B shows states ranked according to the percentage of voters who selected George Bush. All of the states in the Northeast and the mid-Atlantic are blue. The remaining blue states are either on the West Coast (California, Oregon, Washington, and Hawaii) or in the upper mid-west (Illinois, Michigan, Minnesota, and Wisconsin). Moreover, the Midwest states of MI, MN and WI, along with OR, PA, and NH, were so close in votes they could easily be characterized as “purple.”<sup>91</sup>

The 31 red states are more culturally diverse. The first three red states (Utah, Wyoming, and Idaho) are mountain west states with a concentration of Mormon voters in Utah and southern Idaho, but not Wyoming. The remaining red states are in the plains, the South, the border, Southwest and central mid-west. Six of these states (Colorado, Florida, Iowa, New Mexico, Nevada, and Ohio) can be characterized as purple, and they reinforce the overall sense of the southwest and Midwest as battlegrounds.<sup>92</sup> All were close in both the 2000 and 2004 elections. Some of the states, particularly Ohio and Colorado, may be characterized by urban /rural splits within the state.

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<sup>90</sup> The blue states are: California, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, and Wisconsin. The rest are red. See MICHAEL GASTNER, COSMA SHALIZI, AND MARK NEWMAN, ET AL., MAPS AND CARTOGRAMS OF THE 2004 US PRESIDENTIAL ELECTION RESULTS, <http://www-personal.umich.edu/~mejn/election>. As they emphasize, however, using a scale of percentage of voters results in a map that is more purple than red. *Id.*; see ROBERT J. VANDERBIEL, ELECTION 2004 RESULTS, <http://www.princeton.edu/~rvdb/JAVA/election2004/> Moreover, Bush or Kerry won by less than 6% in 12 of these states,

<sup>91</sup> In their study of electoral polarization, Abramowitz and Saunders excluded the 12 states in which the margin of victory was less than 6%, identifying these states as “purple, Abramowitz and Saunders, *supra* note \_\_, at 13, and we believe that such a characterization is useful for purposes of measuring the degree of national political division. These twelve states, some of which were in the Kerry column, some of which were in the Bush column, were: Colorado, Florida, Iowa, Michigan, Minnesota, Nevada, New Hampshire, New Mexico, Ohio, Oregon, Pennsylvania, and Wisconsin. The analysis in this article, however, is more focused on identifying regional patterns than on examining precise voting outcomes in specific elections, particularly as the 2008 election looms on the horizon. New Hampshire is perhaps the most complex of the “purple states” in these terms. It has historically been Republican, and, indeed, is the only state to have voted for Bush in 2000, but for Kerry in 2004. Political analysts believe a factor in the New Hampshire voting switch was the growth of the Boston suburbs, with migration from decidedly more liberal Massachusetts changing the demographics of what had once been a more rural state.

<sup>92</sup> All were decided by less than 6% points, consistent with the Abramowitz and Saunders definition. *Id.* at 13.

For our purposes, the factor that is more relevant than the total Republican vote is the intensity of voter positions on issues related to moral values – at least to the extent those views serve as cultural markers of the two family systems we describe, and we suspect that they do. That is, we suspect that the intensity of the political commitment to “moral values” indicates a willingness to support legislation that would produce different laws from those adopted in areas of the country committed to what we have called the “new middle class morality.” We will test that hypothesis in this part of the paper.

In 2004, pollsters, for the first time, included “moral values” in the list of issues they asked to voters to rank in importance.<sup>93</sup> Voters chose moral values and the economy, respectively, as their two top concerns, with roughly 22% of the electorate listing each. Terrorism, the war in Iraq, health care, education and other issues followed. For those choosing “moral values,” 78% voted for Bush, while 80% of those selecting the economy as their primary concern voted for Kerry. In Ohio, an all important bellwether state with an anti-gay marriage proposition on the ballot designed to increase turnout among evangelicals, 90% of those listing moral values as their top concern voted for Bush, according to an independent FOX News-Opinion Dynamics poll taken on election night.<sup>94</sup> Pundits disagree about the impact of the moral values issue on the election outcome, but most accept that it serves as a marker of regional differences in outlook. John Green and Mark Silk, for example, note that Bush carried every region (Southern Crossroads, Mountain West, the South and the Midwest)<sup>95</sup> in which the percentage of voters choosing moral values as the issue of greatest importance exceeded the national average, while he lost every region (New England, the Middle Atlantic, Pacific and Pacific Northwest) in which moral values voters fell below the national average.<sup>96</sup> Moreover, in the regions that Bush carried, a higher percentage of *Bush* voters (two-fifths or more) ranked moral values as their top concern, while Kerry carried the regions in which Bush voters ranked moral values as a lesser concern.<sup>97</sup> The second and third most highly rated issues (the economy and terrorism), in contrast, did not vary

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<sup>93</sup> The other issues included the economy, terrorism, Iraq, taxes, education, and health care. See CNN.com, Election Results (2005), <http://www.cnn.com/ELECTION/2004/pages/results/states/US/P/00/epolls.0.html>.

<sup>94</sup> Kelley Beaucar Vlahos, Values Help Shape Bush Re-Election, FoxNews.com, November 04, 2004, <http://www.foxnews.com/story/0,2933,137535,00.html>.

<sup>95</sup> Green and Silk’s definition of regions differs somewhat from the ones used in the census and which we use in this article. We find, for example, on values issues that Utah, Wyoming and Idaho share family characteristics that distinguish them from Colorado, which is somewhat more urban and more racially diverse, and the “Southern Crossroads” region, which combines Louisiana, with demographics more characteristic of the Deep South, with Texas, whose large Latino population makes it somewhat more characteristic of the Southwest, with Oklahoma, Arkansas and Missouri, states that we believe have more in common with the border states of Kentucky, Tennessee, and West Virginia.

<sup>96</sup> John C. Green and Mark Silk, Why Moral Values Did Count, 8 RELIGION IN THE NEWS (2005), <http://www.trincoll.edu/depts/csrpl/RINV018No1/WhyMoral%20ValuesDidCount.htm>.

<sup>97</sup> Id.

regionally to any significant degree.<sup>98</sup>

The 2004 exit polls did not ask about moral values in every state, however, and no comprehensive data exist that allow the same analysis by state.<sup>99</sup> While a state-by-state breakdown might provide greater insight, the available results suggest, in Martin and Silk's words, that: "Geography matters in American politics today above all" and ultimately, "those first-day stories about moral values—and the red-and-blue maps that went with them—conveyed something real."<sup>100</sup> That "something real" includes the use of "moral values" to signal commitment to a political approach in which opposition to abortion and same-sex marriage are organizing principles, and matters that generate voter intensity.<sup>101</sup> In the absence of comprehensive data about "moral values," we agree that the overall 2004 election outcomes provide a rough guide to regional variations in worldviews.

We recognize further that all commentators on the 2004 election emphasize that every state is "purple" to some degree, and that county breakdowns show blue and red patches within states, often corresponding to urban/rural divisions. Nonetheless, even the county breakdowns reflect regional variations. New England, for example, has now emerged as the most intensely "blue" part of the country, by county as well as by state, followed by the mid-Atlantic region and the West Coast.<sup>102</sup> The three states with the smallest percentages of Republican voters in the 2004 election were all from New England, and, as noted earlier, Kerry carried every New England and mid-Atlantic state.<sup>103</sup>

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<sup>98</sup> *Id.* The fourth issue (Iraq) did vary more, with those regions in which the war concerned a higher percentage of voters voting for Kerry.

<sup>99</sup> *Id.* Green and Silk note that "[u]nfortunately, such an analysis cannot be conducted for the 2005 election because the number of interviews per state in the national exit poll is not high enough to give meaningful results for many states—and not all state exit polls included a "moral values" option."

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* Green and Silk observe further that while moral values voters describe a block dominated by Protestant evangelicals in areas of the country in which evangelicals have organized, the evangelical discourse has selectively influenced those of other religions. They include, for example, an in depth comparison of magenta Ohio (which Bush carried) and violet Michigan (a Kerry state). Both states include significant numbers of church attending Catholics. Bush carried the Catholic vote in Ohio, however, but lost it in Michigan. See also *supra* note 28, particularly Baldassari and Gelman suggesting greater polarization on moral values than other issues.

<sup>102</sup> See MICHAEL GASTNER, COSMA SHALIZI, AND MARK NEWMAN, ET AL., MAPS AND CARTOGRAMS OF THE 2004 US PRESIDENTIAL ELECTION RESULTS, <http://www-personal.umich.edu/~mejn/election>. We adopt Green and Silk's definition of New England as Massachusetts, Connecticut, Vermont, New Hampshire, Rhode Island and Maine. On the other hand, we see the West Coast (California, Oregon and Washington) as more culturally similarly than Green and Silk's categories of Pacific (California, Hawaii and Nevada) and Northwest (Washington, Oregon and Alaska).

<sup>103</sup> See the listing in Appendix A.

Nonetheless, some regional patterns are more complex. The most intensely conflicted part of the country, culturally as well politically, is almost certainly the mid-West.<sup>104</sup> These states split between Bush and Kerry and, as the Green and Silk comparison of Ohio and Michigan indicates, they often involve distinct attitudes and values even among demographically similar voters.<sup>105</sup> Moreover, it is clearly a mistake to assume that even solidly “red” parts of the country are uniform. The top three states, in terms of percentage of the population voting for Bush, were Utah (71%), Wyoming (69%) and Idaho (68%)—all three heavily rural mountain west states with influential Mormon communities, and relatively few African-Americans or Latinos. They differ significantly from other mountain west states (Montana 59%, Arizona 55%, Colorado 52%, Nevada 50% and New Mexico 50%) both in the depth of Republican support and in demographic and cultural characteristics. Moreover, the South and the border states, though more consistently “red” in terms of voting patterns, include large African-American populations, who support the moral values political agenda to a higher degree than other Democratic voters, and vote Democratic to a greater degree than other deeply religious voters. Nonetheless, the South and the border states have at least as distinctive a culture as New England or the mid-Atlantic states, and they are as solidly (if not more) Republican than the New England and mid-Atlantic states are Democratic even if their voting patterns are less monolithic than those of Utah, Idaho or Wyoming.<sup>106</sup>

### *B. Moral Values or Moral Panic?*

If any social changes have inspired widespread cultural alarm and legal responses, they are the growth in non-marital births and divorce. Both correlate with the age at which the mother marries or becomes pregnant. In turn, if any characteristic correlates with the new middle class morality, it is later age of childrearing. We therefore identify age of significant life events as an important marker of regional variation. In this section, we examine whether the regional variations that influenced election returns also affect patterns of family formation.

#### 1. Teens

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<sup>104</sup> Green and Silk, *supra* note \_\_\_, identify the Midwestern states as Indiana, Iowa, Illinois, Kansas, Michigan, Minnesota, Nebraska, North Dakota, Ohio, South Dakota, and Wisconsin.

<sup>105</sup> *Id.* Green and Silk noted that despite their demographic and economic similarities and geographic proximity, even church going evangelicals in Michigan were less likely to list moral values as a prime concern than in Ohio, and they were correspondingly less likely to vote for Bush.

<sup>106</sup> Virginia, with 54% voting for Bush, was the least Republican of Southern states, while only 49% of New Hampshire (New England) or Pennsylvania (mid-Atlantic) voted for Kerry. We define the South as North Carolina, South Carolina, Virginia, Georgia, Alabama, Mississippi, Louisiana and Florida. We define the Border states as West Virginia, Kentucky, Tennessee, Oklahoma, and Arkansas. We view Texas as part of the Southwest, given its large Latino population, and Missouri as part of the Midwest, largely because of its larger urban population.

We start with an examination of teen sexuality, evaluating the teen pregnancy, birth and abortion rates. The strongest indicators of cultural divergence involve the response to managing early sexual experience, and readiness for family formation.

a. Pregnancy rates

The highest teen pregnancy rates were in Nevada, Arizona, Mississippi, New Mexico and Texas, all red states, though New Mexico and Nevada were battleground areas.<sup>107</sup> The lowest rates were in North Dakota, Maine, Vermont, New Hampshire, Minnesota and Maine, all blue except North Dakota, with New Hampshire as contested turf.<sup>108</sup>

b. Abortion rates

Abortion ratios, defined as the number of abortions for every 1000 births, complement the picture of regional variation. The states with the five highest ratios for teens are New Jersey, New York, Massachusetts, Connecticut, and Maryland, all red states from the New England or mid-Atlantic regions.<sup>109</sup> The states with the lowest teen abortion ratios are Kentucky, Louisiana, Arkansas, South Dakota, Oklahoma and West Virginia. With the exception of South Dakota, they are all Southern or border states.<sup>110</sup>

c. Teen birth rates

Teen birth rates are measured in terms of the number of births per thousand female teens in the population. The birth rates reflect the level of sexual activity offset by access to contraception and abortion. The five states<sup>111</sup> with the lowest rates of teen births are all concentrated in the Northeast and all voted for Kerry: New Hampshire,<sup>112</sup> Vermont, Massachusetts, Connecticut, and Maine. In contrast; the five states with the highest teen birth rates are all red and are all in the South or the Southwest: Texas, New Mexico, Mississippi,

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<sup>107</sup> GUTTMACHER INSTIT., U.S. TEEN PREGNANCY STATISTICS, NATIONAL AND STATE TRENDS BY RACE AND ETHNICITY 11 (2006) (hereinafter referred to Guttmacher).

<sup>108</sup> *Id.*

<sup>109</sup> As discussed in the section on parental notification statutes, these states, other than Massachusetts, have fewer restrictions on teen abortions than do virtually all of the red states.

<sup>110</sup> Guttmacher, *supra*, at 11. If we were to measure abortion rates as opposed to ratios, New Jersey, New York and Maryland would remain in the top five, but Massachusetts and Connecticut would be replaced by Nevada and California. *Id.* The lowest abortion rates would change more with the five lowest states: Utah, South Dakota, North Dakota, Kentucky and West Virginia. Utah, North Dakota and South Dakota also have relatively low teen pregnancy rates compared with the states Kentucky and West Virginia or the states with higher abortion ratios.

<sup>111</sup> To make the analysis more cogent, we focus on the highest and lowest five states in each category

<sup>112</sup> New Hampshire, unlike the others, however, was so close that it could be more accurately described as “purple.” See note \_\_, *supra*.

Arizona, and Arkansas.<sup>113</sup> Moreover, as a general matter, while teen birth rates have declined for the country as a whole, they have fallen much more rapidly in New England than elsewhere. Whereas mid-Western states such as Iowa and Minnesota had some of the lowest teen birth rates in the country in 1988, their rates have stayed relatively stable while those in the Northeast have plunged. The high teen birth states have, in contrast, seen relatively little decline over the last twenty years.<sup>114</sup>

These figures reflect not just political patterns but also racial demographics. In Texas, Arizona and “purple” New Mexico, significantly more than half of the teen births were to Hispanics.<sup>115</sup> The majority of children born to teenagers in Arkansas and Mississippi were white, but African-Americans constitute a significant percentage of the overall totals. Taking just whites into account, the top teen birth rates would have been concentrated in the border states and the South: Arkansas, Kentucky, Mississippi, Oklahoma and Tennessee.<sup>116</sup> The lowest rates for whites were in New Jersey, Connecticut, Massachusetts, New York and Rhode Island.

The pattern for African-Americans is a little harder to gauge. The states with the lowest African-American teen birth rates are New Hampshire, Utah, New York, and Rhode Island, with California, Massachusetts, and New Mexico tied for fifth. New Hampshire (under 1%), New Mexico (under 2%), and Utah (2%) have such small African-American populations as to make analysis difficult. The states with the highest rates of African-American births are not concentrated by region, and include Wisconsin, Arkansas, Illinois, Mississippi and Ohio. Accordingly, the low overall state teen birth rates for the states in the upper part of New England may reflect a lack of diversity,<sup>117</sup> and the high rates in the Southwest may reflect the percentage of Latinos.<sup>118</sup> Nonetheless, the teen

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<sup>113</sup> CHILD TRENDS DATABANK, TEEN BIRTH RATES RANKED LOWEST TO HIGHEST (2003) [http://www.childtrendsdatabank.org/pdf/13\\_PDF.pdf](http://www.childtrendsdatabank.org/pdf/13_PDF.pdf). In 1988, by contrast, the lowest teen birth rates would have in Minnesota, North Dakota, Massachusetts, Iowa, New Hampshire and Vermont while the highest rates would have been in Mississippi, New Mexico, Arkansas, Texas and Arizona. The relative changes involve a steady decline in teen birth rates in New England compared to stable rates in the upper Midwest.

<sup>114</sup> *Id.* at 13.

<sup>115</sup> See Guttmacher. *supra* note \_\_\_. Hispanic voters are relatively conservative on values issues, but more likely to vote Democratic than whites with similar concerns.

<sup>116</sup> *Id.*

<sup>117</sup> Whites who are not of Hispanic or Latino origin constitute 69% of the U.S. total, but 96.5% of the population of Maine, 96.2% in Vermont, and 95.1% of New Hampshire. These rates fall to 81.9% in Mass., and 77.4% in Connecticut. In the core mid-Atlantic states of New York and New Jersey, in contrast, whites constitute 62% and 66% of the population respectively. Mapping Census 2000: The Geography of U.S. Diversity, U.S. Census Bureau, December 7, 2001, last revised 2/27/02.

<sup>118</sup> Latinos constitute 42% of the population of New Mexico, 32.4% of California, 32% of Texas, and 25% of Arizona. Moreover, since the Latino population in these states is substantially younger than the white population, and fertility rates are higher, the effect on the teen birth rate is substantial. *Id.*

births for whites alone diverge most between the core northeastern states and the southern states.

d. Marital and non-marital rates

A comparison of marital versus non-marital teen births completes the data on overall births. The states with the highest percent of teen births to unmarried mothers are Massachusetts (only 8% of teen births are marital), Delaware, Pennsylvania, and Rhode Island (9%), and Connecticut and Maryland (10%),<sup>119</sup> all blue states and states with relatively low teen birth rates.<sup>120</sup> The states with the highest percentages of teen births taking place within marriage are Idaho, where 36% of teen births are marital, Utah, with 34%, Texas, with 27%, and Colorado, Kentucky, and Wyoming, each with 26%.<sup>121</sup> Not only are all of these states red, but Utah, Wyoming and Idaho produced the highest percentage of Republican voters in 2004 of any states in the union.

e. Summary

These data establish that the “blue states” of the Northeast and the mid-Atlantic have lower teen birth rates, higher use of abortion, and lower percentages of teen births within marriage, while a second set of “red states” concentrated in the South and the Southern border tend to have higher teen birth rates, fewer abortions, and a higher percentage of teen births occurring with marriage.<sup>122</sup> The first set of states effectively discourages teen childbearing, with abortion as an established fallback.<sup>123</sup> Those teens who do give birth, however, may either feel little pressure or have little opportunity to marry. In the second set of states, where teen birth rates are higher and more of them are within marriage, family formation begins at earlier ages. The higher birth rates may thus reflect either more intentional births within marriage or greater reliance on shot gun marriages rather than abortion to deal with accidental

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<sup>119</sup> Id.

<sup>120</sup> Indeed, Massachusetts and Rhode Island are the two “bluest” states, Maryland is fifth, and Connecticut is tied for sixth. See Appendix A.

<sup>121</sup> Facts at a Glance, CHILDTRENDS, Publication ##2006-03, Table 1 (2006), <http://www.childtrends.org/Files/FAAG2006.pdf>

<sup>122</sup> Vermont, New Hampshire, and Maine, among the states with the lowest teen birth rate, also had high percentages of nonmarital teen births: in Vermont, it was 87%, New Hampshire 89%, and Maine 88%. Id. The percent of births to teen mothers with respect to all births in the state was highest in New Mexico (17%), followed by Mississippi (16%), Arkansas and Louisiana (15%), and Alabama and Oklahoma (14%). Id. The lowest percentages were in Massachusetts, New Hampshire, New Jersey and Vermont (6%), and Connecticut, Minnesota, New York, and Utah (7%). Id.

<sup>123</sup> Teen pregnancy, as opposed to birth rates, suggest a somewhat different regional distribution. The lowest teen pregnancy rates were in North Dakota, Vermont, New Hampshire, Minnesota and Maine. Guttmacher, *supra* note \_\_, at 11. The states with the highest teen pregnancy rates were Nevada, Arizona, Mississippi and Texas. Id..

pregnancies.<sup>124</sup>

## 2. The relationship of age, marriage, and divorce

The relative age of marriage can be expected to complement the regional variations evident in the birth figures, and it does. The age of legal marriage in most states is 18. In the United States as a whole, the median age of marriage for women is 25.1, while for men it is 26.7.<sup>125</sup> This has changed dramatically since 1960, when the median age at first marriage was 20.3 for women, and 22.8 for men.<sup>126</sup> The five states with the lowest median age of marriage are red states: Utah, Oklahoma, Idaho, Arkansas, and Kentucky, states that also have relatively high teen birth and/or low abortion rates.<sup>127</sup> Correspondingly, the states with the highest median age of marriage are blue: Massachusetts, New York, Rhode Island, Connecticut, and New Jersey.

Age of first birth corresponds with the marriage figures. In 2000, the mean age of the mother at her first live birth for the country as a whole was 24.9; Massachusetts had the highest mean age, at 27.8, followed by Connecticut (27.2), New Jersey (27.1), New Hampshire (26.7), and New York (26.4). In contrast, Mississippi had the lowest (22.5), followed by Arkansas (22.7), Louisiana and New Mexico (23.0), Oklahoma (23.1), and Wyoming (23.2).<sup>128</sup> Over the past thirty years, all states have experienced an increase in the mean age of mothers at which the first child is born, but the changes range from a 5.3 year increase in Massachusetts to a 1.9 year increase in Utah.<sup>129</sup> With the highest rates of change concentrated in the northeast and mid-Atlantic states, and the smallest rates of change in the states with the lowest average ages of birth, the gap between the states is growing.<sup>130</sup>

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<sup>124</sup> Race seems to play more of a role in the abortion ratios than in overall birth rates. New York, New Jersey and Maryland all report more African-American pregnancies and births among African-Americans than among white teens. The New England states, however, with even lower teen birth rates, have significantly smaller percentages of African-Americans and lower abortion rates than the mid-Atlantic states. Guttmacher, *supra*, at 11. Moreover, whereas in 1988, California and Hawaii ranks 1 and 2 in abortion rates, today those states have fallen out of the top five, and been replaced by mid-Atlantic states with higher African-American populations. *Id.* African-Americans nationally have substantially greater teen abortion rates and ratios than whites. *Id.* at 4.

<sup>125</sup> Tallese Johnson and Jane Dye, INDICATORS OF MARRIAGE AND FERTILITY IN THE UNITED STATES FROM THE AMERICAN COMMUNITY SURVEY: 2000 TO 2003, Table 1 (2005), <http://www.census.gov/population/www/socdemo/fertility/mar-fert-slides.html>.

<sup>126</sup> Infoplease, Median Age at First Marriage, INFORMATION PLEASE DATABASE (2007), <http://www.infoplease.com/ipa/A0005061.html>. On the other hand, in 1890, the median age of first marriage for men was 26.1, and 22.0 for women.

<sup>127</sup> See *supra* note. \_\_\_\_.

<sup>128</sup> T.J. Mathews and Brady E. Hamilton, Mean Age of Mother, 1970-2000, 51 NAT'L VITAL STAT. REP. 1, 10 (Table 3) (2002), [http://www.cdc.gov/nchs/data/nvsr/nvsr51/nvsr51\\_01.pdf](http://www.cdc.gov/nchs/data/nvsr/nvsr51/nvsr51_01.pdf).

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* Looking at just the 1990's, however, the areas with the biggest jump in age of first birth were D.C., Massachusetts, Michigan, New Hampshire and New Jersey, North Carolina and

The states with the highest divorce rates in 2004 were Nevada,<sup>131</sup> Arkansas, Wyoming, Idaho, and Kentucky, while those with the lowest are primarily, though not entirely, blue states, with Massachusetts, followed by Pennsylvania, North Dakota, Illinois, and Connecticut.<sup>132</sup> Divorce rates vary with the number of people marrying, particularly as those most at risk for divorce become increasingly less likely to marry at all. Nonetheless, divorce risk also increases with younger age of marriage, lower economic status, and having a baby either prior to marriage or within the first seven months after marriage.<sup>133</sup> Accordingly, family strategies that either emphasize marrying young, or marriage as the solution to an improvident pregnancy are likely to increase rates of divorce, all other things being equal. Later ages of marriage and first births, however, lower overall fertility. Unsurprisingly, therefore, the percent of childless women is highest in the Northeast states, and lowest in the southern states.<sup>134</sup> The nineteen states with the highest fertility rates are red, while the sixteen states with the lowest fertility rates are blue.<sup>135</sup>

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Virginia. The states with the least change were Wyoming and Alaska, which showed declines in age, New Mexico, which stayed the same, and South Dakota and North Dakota. Id.

<sup>131</sup> Nevada's divorce rate, like its marriage rate, however, most likely reflects its tradition of relatively lax residency requirements.

<sup>132</sup> The CDC figures on divorce rates, which include rates for every one of the five years from 1999 to 2004, provide a better sense of patterns over time than the census figures. These tables also show the states with the highest divorce rates as Nevada, Arkansas, Wyoming, and Idaho, with West Virginia and Alabama ahead of Kentucky over the five year period. The CDC tallies include Massachusetts, Illinois, and Pennsylvania in the top five, but show New Jersey and Wisconsin with more consistently low rates than North Dakota or Connecticut. Division of Vital Stat., Nat'l Center for Health Stat., Center for Disease Control, Divorce Rates by State: 1990, 1995, and 1999-2004 (2005), [http://www.cdc.gov/nchs/data/nvss/divorce90\\_04.pdf](http://www.cdc.gov/nchs/data/nvss/divorce90_04.pdf)

<sup>133</sup> Paul R. Amato and Stacy J. Rogers, A Longitudinal Study of Marital Problems and Subsequent Divorce, 59 JOURNAL OF MARRIAGE AND THE FAMILY 612, 621 (1997); A. Booth and J. Edwards, Age at Marriage and Marital Instability, 47 J. OF MARRIAGE AND THE FAMILY 67-95 (1985); BARBARA DAFOE WHITEHEAD AND DAVID POPENOE, STATE OF OUR UNIONS: THE SOCIAL HEALTH OF MARRIAGE IN AMERICA Box 2 (2004), <http://marriage.rutgers.edu/Publications/SOOU/TEXTSOOU2004.htm#Divorce>.

<sup>134</sup> Jane Lawler Dye, Fertility of American Women: June 2004, 20-555 CURRENT POPULATION REP. 1, 4, table 2 (2005), <http://www.census.gov/prod/2005pubs/p20-555.pdf>. It was 48% in the northeast, which includes Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, and Pennsylvania; and 42.5% in the south, which included Delaware, Maryland, DC, Virginia, West Virginia, North Carolina, South Carolina, Georgia, Florida, Kentucky, Tennessee, Alabama, Mississippi, Arkansas, Louisiana, Oklahoma, and Texas. The statistics did not include a further breakdown by state.

<sup>135</sup> Steve Sailer, Birth Gap: How Birthrates Color the Electoral Map, THE AM. CONSERVATIVE, Dec. 2004, [http://www.amconmag.com/2004\\_12\\_06/cover.html](http://www.amconmag.com/2004_12_06/cover.html).

In the United States, there are 1,182 children born for every 1,000 women. U.S. CENSUS BUREAU TABLE S1. FERTILITY INDICATORS FOR WOMEN 15 TO 44 YEARS OLD BY STATE OF RESIDENCE: JUNE 2004, (2004), <http://www.census.gov/population/socdemo/fertility/tabS1.xls>. D.C. is, once again, an outlier, with a fertility rate of 776. States with the lowest fertility rates for never-married women were mixed, with Utah, a red state, with the lowest rate of 208, followed by Delaware (213), Minnesota (234), North Dakota (241), Idaho (247), and New Hampshire (254). Id. Alaska has the highest fertility rate, with 1,435 children born per 1,000 women, followed by Arkansas (1,418), Utah and Mississippi (1,393), and South Dakota (1,368).

Adult abortion rates correlate with lower birth rates. The states with the highest abortion ratios – the number of abortions per 1,000 live births to women between the ages of 15-44 – were New York, Delaware, Washington, Massachusetts, and Connecticut.<sup>136</sup> They each had a ratio of over 300. The states with the lowest abortion ratios, with rates under 100, were Colorado, Utah, Idaho, and South Dakota. Kentucky was fifth with a ratio slightly over 100.<sup>137</sup> Similarly, states with the lowest abortion rates were Colorado, Utah, Idaho, Kentucky, and South Dakota, while those with the highest abortion rates were New York, Delaware, Washington, New Jersey, and Rhode Island.<sup>138</sup>

The abortion rates show a slightly different regional emphasis from the birth rates discussed earlier, although the blue state tilt remains unchanged. The less diverse, upper New England states of Vermont and New Hampshire do not appear on the lists of states with the highest abortion rates, replaced by west coast Washington,<sup>139</sup> and more of the mid-Atlantic states: New York, New Jersey, and Delaware. The states with the lowest abortion rates are largely from the less diverse mountain states and upper Midwest (Colorado, Utah, Idaho, and South Dakota), largely excluding the South with the exception of Kentucky.<sup>140</sup> Abortion rates accordingly replicate red-blue, if not always Northeast-South, patterns of division.

Finally, a consideration of household composition again reflects a general, if less uniform, red-blue state replication. The states with the highest rates of unmarried partners are Maine (7.3), New Hampshire (7.2), Vermont (7.1), Alaska (6.6), and tied for fifth, Arizona and Nevada (6.3). The states reporting the fewest unmarried partners are Alabama (3.0), Utah (3.4), Arkansas (3.6), Mississippi (3.8), with Kentucky and Kansas (4.0) tied for fifth.<sup>141</sup>

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The states with the lowest fertility rates are: Maryland (991), Vermont (1,000), Massachusetts (1,020), Maine (1,022), and Delaware (1,023). *Id.* Unsurprisingly, the states with the highest percentages of childless women track the fertility rates: Vermont (53.5%), Massachusetts (51.2), Delaware (49.1), New York (48.5), and Maine (48.2)—all blue. The states with the lowest percentages of childless women are Arkansas (35.3%), Mississippi (35.4), Alaska (38.0), Alabama (38.7) and Georgia (39.3)—all red. *Id.*

<sup>136</sup> Laurie D. Elam-Evans et al., *Abortion Surveillance, United States, 2000*, 52 SURVEILLANCE SUMMARIES 1, 29 Table 3 (2003),

<http://www.cdc.gov/mmwr/preview/mmwrhtml/ss5212a1.htm>.

<sup>137</sup> *Id.* Florida and Louisiana had low rates as well, but did not report the number of abortions with respect to in-state residents. *Id.*

<sup>138</sup> *Id.* States with incomplete measures of were again excluded, as was the District of Columbia.

<sup>139</sup> Washington, while more diverse than the upper New England states, was still 78.9% white, with only 3% African-Americans. CYNTHIA A. BREWER AND TRUDY A. SUCHAN, *MAPPING CENSUS 2000: THE GEOGRAPHY OF U.S. DIVERSITY*, U.S. Census Bureau (2001)

<sup>140</sup> These data were also less complete than others, with a number of Southern states missing from the tables.

<sup>141</sup> U.S. Census Bureau, *American Community Survey*, *supra* note \_\_\_, at Table 2. Non-marital birth rates, in contrast, seem to be largely a reflection of race, religious and ethnic patterns. The

### C. *A Cultural Snapshot*

The demographic data supports the emergence of two strikingly different life cycle patterns in the United States, patterns that are correlated with a state's political votes in the 2004 U.S. presidential election. The patterns reflect different understandings about family formation, with prominent differences in age of marriage and first birth, teen childbearing and abortion rates, and overall levels of marriage, divorce and fertility. Our evaluation of this picture does not purport, however, to address causation. That is, we have made no effort to say that a pregnant nineteen-year old is choosing to conceive and bear a child because she lives in Mississippi rather than Massachusetts.<sup>142</sup>

Instead, we have tried to sketch a regional snapshot of cultural differences. We believe that the milieu in which legal issues are decided and the worldviews voters bring to the ballot box frame the family law questions of our era. Accordingly, we emphasize that these issues take on different symbolic meaning if young adults characteristically marry at 22 rather than 32, and if teen pregnancy is a routine pathway to marriage rather than an inopportune event to be managed. Moreover, we suspect that political attitudes might well vary in states where over half the population lives in married couple households versus those where household patterns are more diverse. We maintain that even if regional differences reflect an amalgam of income, class, and cultural origins, they nonetheless frame family law decision-making.<sup>143</sup>

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states with the lowest birth rates to never married mothers are Utah (208 per 1000 women of child-bearing age), Vermont (213), Minnesota (234), North Dakota (241) and Idaho (247). These states, a mix of red and blue, have relatively little diversity U.S. Census Bureau, *Fertility of American Women*, supra. If we were to consider only the birthrates to unmarried women from 2000 to 2003, however, we would pick up Colorado and New Jersey in the top ten, states with considerably more diverse populations. American Community Survey, supra. The states with the highest birth rates to never married mothers are Mississippi (690), Georgia (678), Michigan (600), Alabama (570), and Alaska (556). U.S. Census Bureau, *Fertility of American Women*, supra. If we were to look instead at recent births, the top five would be Mississippi, Louisiana, South Carolina, New Mexico and Alabama. *Indicators of Marriage*, supra.

<sup>142</sup> We have not used regression analyses to control for income (blue states are wealthier), religion (Baptists dominate in much of the south, Lutherans in the upper mid-west, etc.), rural v. urban living or ethnicity to any comprehensive degree. In addition, while we believe that these data show striking regional variations in consequences – divorce rates, fertility, and non-marital birth rates – we believe that any normative assessment of consequences does require regression analyses that control for income, race and ethnicity, and economic opportunity.

Moreover, there are data which show somewhat less polarization between red and blue states than in the picture we have painted in this section, such as the data on marital household composition by state. We are trying to show general patterns, but certainly acknowledge that not all lifestyle choices differ dramatically between red and blue states, or, indeed, among all red and blue states.

<sup>143</sup> We will amplify on this point below, but we argue that unlike social science analysis, our object here is not to isolate causation of sociological events. Instead, we wish to depict a process of cultural changes that makes legal innovations more or less acceptable. We will argue therefore the critical question is not to what degree younger age of marriage, for example,

## IV. FAMILY LAW AND FAMILY VALUES

The most striking feature in the data above involves what Barbara Dafoe Whitehead has called “different pathways to adulthood.”<sup>144</sup> Traditional family rearing practices supervised daughters’ chastity from their parents’ homes into marriage. The new blue state system allows for a substantial period of independence – and sexual experimentation – before assumption of adult responsibilities. How does the law, which does not directly address the transition to adulthood outside setting an age of majority, address these issues?

The legal age of marriage is fairly consistent throughout the United States, so something other than the age of consent must be responsible for the median age variations of marriage between different regions. The conflict between the two systems focuses instead on the symbolic: on public reinforcement of private understandings of appropriate behavior.

In this section, we contrast two distinct types of legal decision-making. First, we consider legislative action addressing two symbolic flashpoints in the culture wars: parental consent to abortion, and same-sex marriage.<sup>145</sup> These “wedge” issues, though they have changed somewhat over time, involve political mobilization to pass legislation that affects relatively few people, albeit in often destructive ways. We contrast red state and blue states attitudes and strategies toward these issues.

Second, we explore case law in the less publicized arenas of the role of non-marital cohabitation in custody decisionmaking. Here, while red states and blue states vary in their approaches to these issues, courts, unlike legislatures, have greater ability to finesse cultural conflict. We suggest that the differences between legislative and judicial action provide models for diffusing rather than inflaming cultural tensions. We end by considering the implications of family law polarization for a federal system.

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reflects ethnic composition – African-Americans and Latinos clearly start families at younger ages – but to what degree voter willingness to assist those bearing children at younger ages reflects cultural norms. See *infra* TAN \_\_\_\_.

<sup>144</sup> See Whitehead, *supra* note \_\_\_\_.

<sup>145</sup> There are, of course, other laws which show similar trends, such as those related to parental leave. The states that provide the most comprehensive job protection to employees who take a leave for either family or medical reasons are California, Hawaii, Oregon, Connecticut, New Jersey, Washington, Maine, Vermont, Minnesota, Rhode Island, Massachusetts, Louisiana, Wisconsin, New Hampshire, New York, and Tennessee (there are only 2 red states in the top 16). JODI GRANT, TAYLOR HATCHER AND NIRALI PATEL, NAT’L PARTNERSHIP FOR WOMEN AND FAMILIES, *EXPECTING BETTER: A STATE-BY-STATE ANALYSIS OF PARENTAL LEAVE PROGRAMS* 15 (2005),

<http://www.nationalpartnership.org/portals/p3/library/PaidLeave/ParentalLeaveReportMay05.pdf>. We leave a fuller discussion of these and similar to our forthcoming book.

### A. Parental Authority or Teen Autonomy?

If regulation of teen sexuality is a critical factor in the transition to adulthood, then the allocation of decision-making authority in this realm is likely to be a symbolic flashpoint. The struggle between proponents of abstinence education and comprehensive sex education, for example, is a dramatic illustration of this flashpoint.<sup>146</sup> Here, we address what we believe to be a central battlefield in the cultural war: parental notification as a prerequisite for teen abortion.

*Roe v. Wade*,<sup>147</sup> the Supreme Court decision, upholding a woman's right to an abortion over state prohibitions, has been one of the most divisive issues of the era since it was decided in 1973. Political candidates have repeatedly vowed to support an abortion ban, and Congress and state legislatures have adopted a series of measures designed to undermine access.<sup>148</sup> Moreover, private campaigns to picket, threaten and in some cases attack abortion providers have effectively limited its availability in many areas. In South Dakota, for example, one of the most hostile states to abortion efforts, only one provider remains, and that clinic stays open only with the assistance of out-of-state doctors who fly into Sioux Falls once a week.<sup>149</sup>

Nonetheless, the issue of parental consent to teen abortions takes on particular salience in the cultural conflict between family systems. On the one hand, the idea that parents should be involved in a decision concerning a minor child has intuitive appeal. Moreover, advocates emphasize the benefits of improved parent-teen communication,<sup>150</sup> including protection of sexually active teens from predatory partners. New Hampshire, for example, justified its parental notification statute as serving "several compelling state interests, including protecting the emotional and physical health of the pregnant mother, vindicating the importance of the parent-child relationship, and promoting the family unit."<sup>151</sup> Senators who enacted interstate parental notification measures

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<sup>146</sup> Kristin Luker provides a telling cultural account of the abstinence education battles, KRISTIN LUKER, *WHEN SEX GOES TO SCHOOL: WARRING VIEWS ON SEX -- AND SEX EDUCATION -- SINCE THE SIXTIES* (2006).

<sup>147</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>148</sup> See, e.g., the federal Partial Birth Abortion Ban upheld in *Gonzales v. Carhart*, 127 S. Ct. 1610 (2007).

<sup>149</sup> Two other states have only one abortion provider: North Dakota and Louisiana. Evelyn Nieves, *S.D. Makes Abortion Rare Through Laws And Stigma: Out-of-State Doctors Come Weekly to 1 Clinic*, Wash. Post, Tuesday, December 27, 2005, at A01.

<sup>150</sup> E.g., *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 895 (1992); *Hodgson v. Minnesota*, 497 U.S. at 417 (1990).

<sup>151</sup> Brief for Petitioners at 10-12, *Ayotte v. Planned Parenthood*, 546 U.S. 320 (2006). Professor Teresa Collett notes that parental notification laws can benefit minors through improving medical care and providing protection from sexual assault. Teresa Stanton Collett, *Protecting Our Daughters: The Need for Parental Notification Laws*, 26 VT. L. REV. 101, 102 (2001).

in 2006 “conjured up images of lascivious older men ferrying off their sexual prey to out-of-state abortion clinics”<sup>152</sup> and emphasized the importance of parent-child communication.<sup>153</sup> At the core of the issue – both as a cultural and constitutional matter – is deference to parental authority.<sup>154</sup>

On the other hand, empirical studies show that teens overwhelmingly *do* consult their parents when they elect to have abortions.<sup>155</sup> Opposition to mandatory parental involvement focuses on the reasons a minority does not, and the potential effect on the timing of abortions. An early study by Planned Parenthood found that of those minors who did not inform their parents of their abortions, 30 percent had histories of violence in their families, feared the occurrence of violence, or were afraid of being kicked out of their homes.<sup>156</sup> Other studies find that parental notification laws delay medical treatment, turning otherwise routine abortions into riskier procedures.<sup>157</sup> Moreover,

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<sup>152</sup> Collett, Parental Notification, *supra* note \_\_.

<sup>153</sup> For a comprehensive statement of the benefits of parental notification laws, including claims that such law help reduce teen pregnancy, see Teresa Stanton Collett, *Transporting Minors For Immoral Purposes: The Case For The Child Custody Protection Act & The Child Interstate Abortion Notification Act*, 16 HEALTH MATRIX 107 (2006). For a discussion of the methodological issues underlying such claims, see THEODORE JOYCE, SILVIE COLMAN AND ROBERT KAESTNER, *METHODOLOGICAL ISSUES IN THE EVALUATION OF PARENTAL INVOLVEMENT LAWS: EVIDENCE FROM TEXAS* (2006)

[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=929171](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=929171)

<sup>154</sup> See GEORGE LAKOFF, *MORAL POLITICS: HOW LIBERALS AND CONSERVATIVES THINK* (2002); DON'T THINK OF AN ELEPHANT: *KNOW YOUR VALUES AND FRAME THE DEBATE* (2004). Professors Robert Post and Reva Siegel note more generally that “[t]he antiabortion backlash that has so traumatized liberals reflects a constitutional vision that would preserve traditional family roles and resist secularization of the American state.” Post and Seigel, *supra* note \_\_, at 55.

<sup>155</sup> See, e.g., Caroline A. Placey, Comment, *Of Judicial Bypass Procedures, Moral Recul, and Protected Political Speech: Throwing Pregnancy Minors Under the Campaign Bus*, 56 EMORY L. J. 693, 703-04 (2006); Posting of Professor Kimberly Murcherson to [http://www.legalaffairs.org/webexclusive/debateclub\\_parental-notification0306.msp](http://www.legalaffairs.org/webexclusive/debateclub_parental-notification0306.msp).

<sup>156</sup> Stanley K. Henshaw, and Kathryn Kost, *Parental Involvement in Minors' Abortion Decisions*, 24 FAMILY PLANNING PERSPECTIVES, 196, 213 (Sept.-Oct., 1992).

<sup>157</sup> For example, the American Association of University Women maintains that: “While the intent of such laws is to enhance family communication, the failure to guarantee confidentiality often deters young people from seeking timely services and care resulting in increased instances of sexually transmitted diseases, unwanted pregnancies, and late term abortions.” Auriana Ojeda, *Should Abortion Rights Be Restricted?: Introduction*, enotes.com (2002) <<http://www.enotes.com/should-abortion-article/39731>>.; see also Rachel N. Pine, *Speculation and Reality: The Role of Facts in Judicial Protection of Fundamental Rights*, 136 U. PA. L. REV. 655, 677-90 (1987) (summarizing research that shows ineffective parent-teen communications about matters of sexuality and that assumptions underlying parental notification laws are unrealistic). In *Hodgson v. Minnesota*, the trial court, after a lengthy hearing on implication of that state’s parental notification law, found that: the two-parent notification requirement had particularly harmful effects on both the minor and the custodial parent when the parents were divorced or separated, especially in the context of an abusive or dysfunctional family; that the requirement also had adverse effects in families in which the minor lives with both parents, particularly where family violence is a serious problem; that the requirement actually impairs family communication in many instances, since minors

opponents maintain that in the polarized climate of abortion politics, such laws are often intended to frustrate access to abortion services altogether.<sup>158</sup>

In the period immediately following *Roe v. Wade*, parental involvement laws swept the country.<sup>159</sup> By 1988, over twenty states had enacted legislation, though about half were subject to court orders enjoining their enforcement.<sup>160</sup> Relatively liberal Massachusetts enacted one of the first (and strictest) statutes in 1974.<sup>161</sup> Today, forty-four states have at one time or another enacted such laws, and thirty-five states have them in force.<sup>162</sup> Although initially neither abortion nor parental notification laws split the states along lines of red state/blue state polarization, more recent developments do, in fact, echo this split.<sup>163</sup>

The litigation over the constitutionality of the laws captures some of the shift. In 1976, the Supreme Court first considered parental involvement laws, striking down a Missouri statute that required parental consent, unless the abortion was necessary to save the life of the child.<sup>164</sup> In subsequent cases, the Court has upheld statutes requiring parental consent, so long as they include a judicial bypass procedure that would allow a mature minor to make her own abortion decision, or that would permit an abortion to occur if it were in the child's best interest.<sup>165</sup> These early cases balanced protection of the constitutional right to abortion with the recognition ordinarily granted to

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who otherwise would inform one parent were unwilling to do so when such notification would involve going to court for a bypass in any event; that few minors can take advantage of the abuse exception because of the obligation to report the information to the authorities and the attendant loss of privacy; and that the two-parent requirement did not further the State's interests in protecting pregnant minors or assuring family integrity.

*Hodgson v. Minnesota*, 497 U.S. 417, 421 (1990).

<sup>158</sup> See Carol Sanger, *Regulating Teenage Abortion in the United States: Politics and Policy*, 18 INT'L J.L. POL'Y & FAM. 305 (2004) (statutes serve, inter alia, to make access to abortion more difficult for minors).

<sup>159</sup> For further discussion of the Roe backlash, see Robert Post and Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. REV. \_\_\_\_ (forthcoming 2007) [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=990968](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=990968).

<sup>160</sup> Theresa N. Walker, Note, *California's Parental Consent Statute: A Constitutional Challenge*, 40 HASTINGS L.J. 169, 169 n. 4 (1988) (23 states had enacted either parental notification or consent laws; 9 were subject to injunction and 3 had been declared unconstitutional.)

<sup>161</sup> Mass. Gen. Laws Ann. ch. 112, § 12P (2003). The Massachusetts statute required the consent, not just the notification, of both parents.

<sup>162</sup> Planned Parenthood, *Laws Requiring Parental Consent or Notification for Minors*.

<http://www.plannedparenthood.org/news-articles-press/politics-policy-issues/teen-pregnancy-sex-education/consent-law-6132.htm>

<sup>163</sup> See H.W. Perry, Jr. and L.A. Powe, Jr., *The Political Battle for the Constitution*, 21 CONST. COMMENTARY 641 (2004) (summarizing the political shifts and timing the start of the political polarization on the issue to the Reagan years). See also Post and Siegel, *supra* note \_\_\_\_, at 55 (summarizing research on the anti-abortion movement and concluding that opposition to *Roe* was largely a Catholic effort in the seventies and early eighties, and that evangelicals and mainstream Protestants did not initially view abortion as an important issue).

<sup>164</sup> *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976).

<sup>165</sup> *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 899-900 (1992).

parents' interest in supervising their teens. In the Court's 1976 decision in *Bellotti v. Baird*,<sup>166</sup> for example, which struck down the Massachusetts statute, Justice Powell observed that the abortion decision was crucial to a minor's future, and that the state must have important interests when seeking to restrict a minor's choice.<sup>167</sup> In contrast to later decisions, the Court in *Bellotti* focused on the right to an abortion, the potential impact of parental notification on deterring abortion, and what it clearly viewed as the negative consequences, "grave and indelible," of "unwanted motherhood" balanced against the parental interest in supervising their children.<sup>168</sup>

By 1990, however, the Court had become warier of overturning state decisions, and it fractured in *Hodgson v. Minnesota*,<sup>169</sup> overturning a two-parent involvement law that Justice Powell described as one of the strictest in the country,<sup>170</sup> but doing so in a plurality opinion later courts would find incomprehensible.<sup>171</sup> In the Supreme Court's most recent parental involvement decision, *Ayotte v. Planned Parenthood of New England*,<sup>172</sup> the Court declined to invalidate a New Hampshire statute on its face that required parental

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<sup>166</sup> *Bellotti v. Baird*, 443 U.S. 622 (1979).

<sup>167</sup> He noted:

We are concerned here with a constitutional right to seek an abortion. The abortion decision differs in important ways from other decisions that may be made during minority. The need to preserve the constitutional right and the unique nature of the abortion decision, especially when made by a minor, require a State to act with particular sensitivity when it legislates to foster parental involvement in this matter . . . . Indeed, considering her probable education, employment skills, financial resources, and emotional maturity, unwanted motherhood may be exceptionally burdensome for a minor . . . . In sum, there are few situations in which denying a minor the right to make an important decision will have consequences so grave and indelible.

Id. at 642.

<sup>168</sup> Justice Powell observed that: "Properly understood . . . the tradition of parental authority is not inconsistent with our tradition of individual liberty; rather, the former is one of the basic presuppositions of the latter. Legal restrictions on minors, especially those supportive of the parental role, may be important to the child's chances for the full growth and maturity that make eventual participation in a free society meaningful and rewarding." *Bellotti II*, 443 U.S. at 638-639 (opinion of Powell, J.).

<sup>169</sup> *Hodgson v. Minnesota*, 497 U.S. 417 (1990),

<sup>170</sup> Stevens wrote that "Minnesota[s] statute is the most intrusive in the Nation" because it is the only state - of the thirty-eight which require some form of participation by the minor's parents - to specifically mandate that both parents of the pregnant woman consent to the abortion. Id. at 425 n.5 (discussing the varying requirements from state to state for a woman who seeks an abortion). Many of the individual justices joined the other justices in part with six upholding the constitutionality of single parent notification with judicial bypass procedures, and five upholding the constitutionality of two parent notification with sufficient judicial bypass safeguards. The trial court, in *Hodgson*, however, in addition to its findings that the two parent notification served no rational state purpose, also found bypass procedures to be terrifying to the petitioners, with many judges concluding that they were pointless. Id. at

<sup>171</sup> See, e.g., *Planned Parenthood v. Camblos*, 155 F.3d 352 (4th Cir. 1998). "The Court in *Hodgson* was so fractured as to render its opinions collectively all but impenetrable, with five different Justices filing opinions variously concurring and dissenting in other opinions and parts of other opinions...."

<sup>172</sup> 546 U.S. 320 (2006).

notification without a judicial bypass. Instead, the Court emphasized that relatively few applications of the statute would raise constitutional issues, and that the Court should “try not to nullify more of a legislature’s work than is necessary, for we know that ‘[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people.’”<sup>173</sup>

As partisanship has intensified around the issue of abortion, the Court has signaled that the issue is better left to the political branches of government. In *Gonzales v. Carhart*,<sup>174</sup> which upheld federal partial birth abortion legislation, the Court reaffirmed its deference to legislative judgment. As a result, the matter of parental involvement is now clearly in the hands of state legislatures, with less expectation than in prior decades that the Court will police state activity.<sup>175</sup>

In state legislatures, the red/blue division is replicated. Six states, all of which are blue—Connecticut, Hawaii, New York, Oregon, Vermont, and Washington—do not require any form of parental involvement in minors’ abortion decisions.<sup>177</sup> New Hampshire, the battleground New England state, became the first state to repeal a parental notification during the summer of 2007.<sup>178</sup> The experience in New Hampshire emphasizes the politically polarized nature of the issue. The 2007 repeal came after Democrats swept into office in the 2006 election, replacing the Republican legislature that had passed strict – and arguably unconstitutional – parental notification laws only a few years before.<sup>179</sup> West coast blue California and Oregon had parental notification propositions on the ballot in 2006. California voters, who had overthrown a similar measure in a 2005 special election, defeated the proposition again in 2006.<sup>180</sup> Oregon defeated its parental notification proposition, which would

<sup>173</sup> Id. at 329 (citations omitted).

<sup>174</sup> *Gonzales v. Carhart*, 127 S. Ct. 1610 (2007).

<sup>175</sup> See, e.g., Perry and Powe, *supra* note \_\_, observing that legislatures in the era immediately after *Roe* sometimes passed legislation with the expectation that the Court would invalidate it, taking the political heat away from the legislature for the decision.

<sup>177</sup> Planned Parenthood, *Laws Requiring Parental Notification*, *supra* note \_\_. Connecticut provides for counseling the teen about the possibility of parental notification, but does not mandate it. CONN. GEN. STAT. ANN. §§ 19a-600 to -601 (West, 2007).

<sup>178</sup> New Hampshire to Repeal Parental Notification Law, N. Y. TIMES, July 2, 2007.

<http://select.nytimes.com/search/restricted/article?res=F20B13FB34540C7B8CDDAF0894DF404482>.

<sup>179</sup> Id. The *Ayotte* Court observed that the failure to provide an exception to the parental notification provision to protect the life or health of the mother raised potential constitutional issues and remanded for a determination of whether an injunction would cure the problem. *Ayotte v. Planned Parenthood of New England*, 546 U.S. 320 (2006).

<sup>180</sup> The California legislature had enacted a parental involvement statute in 1987, which was subsequently declared unconstitutional pursuant to the state’s constitutional right to privacy in 1997. See *Am. Acad. of Pediatrics v. Lungren*, 940 P.2d 797, 800 (Cal. 1997) (striking down California’s law because it offended the minor’s right of privacy guaranteed by the California constitution). The Proposition failed in 2006 by a vote of 46% to 54%. AMERICAVOTES2006, CNN.COM. [HTTP://WWW.CNN.COM/ELECTION/2006/PAGES/RESULTS/BALLOT.MEASURES/](http://www.cnn.com/ELECTION/2006/PAGES/RESULTS/BALLOT.MEASURES/)

have changed state law allowing teens fifteen and older to obtain abortions without parental involvement, by a similar margin.<sup>181</sup>

Some states, while mandating notification or consent, make them less of a barrier to obtaining an abortion. The majority of these states are blue. Maine, for example, allows a physician to override the parental involvement requirement and permits other family members to be notified in lieu of a parent.<sup>182</sup> Other states have relatively broad waiver provisions, including the blue states of Delaware and Maryland, and red West Virginia that like Maine allow a physician to waive parental notice in the best interests of the child.<sup>183</sup> A few states, blue and red, have also broadened the class of adults who can consent or to whom notice must be given in lieu of a parent.<sup>184</sup> Finally, some states have taken no state action the wake of older decisions invalidating parental notification statutes.<sup>185</sup>

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<sup>181</sup> *Id.*

<sup>182</sup> ME. REV. STAT. ANN. tit. 22, §§ 1597-A(2)(A)(West, 2007)

<sup>183</sup> DEL. CODE ANN. tit. 24, § 1783(a) (1997) (allowing notice to a licensed mental health professional not associated with an abortion provider); MD. CODE ANN., HEALTH-GEN. § 20-103(c) (2007) (allowing a physician to determine that parental notice is not in the minor's best interest); and W. VA. CODE § 16-2F-1 (stating physician not affiliated with an abortion provider may waive the notice requirement). Kansas also permits physician waiver but only in the event of a medical emergency. KAN. STAT. ANN. § 65-6705(j) (2007) (allowing a physician to bypass parental notice in cases where the physician determines that an emergency exists that threatens the "well-being" of the minor).

<sup>184</sup> See, e.g., WIS. STAT. ANN. §§ 48.375(2)(b)(West, WESTLAW through 2005 Act 60)(in lieu of parental consent, a grandparent, aunt, uncle, or sibling who is at least 25 years old may provide consent); OHIO REV. CODE ANN. § 2919.12 (Anderson 2007) (stating that notice may be given to a brother, sister, step-parent, or grandparent if certain qualifications are met). Some states broaden the class of adults to include other family members, such as grandparents, with whom the teen is living, but we view the purpose of these laws as less about parental authority. See Planned Parenthood, *Laws Requiring Parental Notification*, supra note \_\_\_\_.

<sup>185</sup> Planned Parenthood lists nine states where courts have issued injunctions against enforcement of their parental notification laws. Of these states, four (California, Illinois, New Hampshire, and New Jersey) are blue, though New Hampshire is a battleground state, and the remaining five are red (Alaska, Idaho, Montana, New Mexico, and Nevada), with Nevada and New Mexico battleground states. In the four blue states, none of the state laws have been reinstated through legislative action, despite the fact that the injunctions were issued some time ago. Indeed, California voters rejected a parental notification proposition and New Hampshire repealed its parental notification law after the Supreme Court decision in *Ayotte*. See note \_\_\_\_ supra; see also *Planned Parenthood of Cent. N.J. v. Farmer*, 762 A.2d 620 (N.J. 2000) (finding the law violated the state's constitution, no further action taken); *Zbaraz v. Ryan*, No. 84 C 771 (N.D. Ill. Feb. 8, 1996) (finding state notification statute unconstitutional because of lack of judicial bypass procedure). In the five red states, three states (including the battleground states of Nevada and New Mexico and mountain west Montana) have taken no further action; Alaska moved promptly to reinstate the law and Idaho is appealing the injunction. See *Wicklund v. State*, No. ADV-97-671 (Mont. Dist. Ct. Feb. 12, 1999) appeal dismissed (Mont. Nov. 29, 1999) (law is unconstitutional and unenforceable because it violates the equal protection clause of the Montana Constitution by infringing, without adequate justification, the privacy rights of pregnant young women who wish to terminate their pregnancies); see also N.M. Op. Att'y Gen. No. 90-19 (Oct. 3, 1990) (finding notification statute unconstitutional in 1990, no further action taken); *Glick v. McKay*, 937 F.2d 434 (9th Cir. 1991) (preliminary injunction upheld), No. CV-

Taking these developments together, the blue states as a whole look different from the red states. Of the nineteen states that voted for Kerry in 2004, almost a third (six) have no parental involvement statutes.<sup>186</sup> A seventh, New Hampshire, repealed its law, the only state to do so. Three have had their state statutes declared unconstitutional, and declined to enact alternative measures (with California having defeated propositions that would do so two years in a row), for a total of ten with no enforcement whatsoever.<sup>187</sup> Four additional states have softened the impact of their parental involvement statutes through physician waivers or an expansion of the adults who can act in place of parents.<sup>188</sup> This leaves five of the nineteen states with relatively strict laws intact: Massachusetts,<sup>189</sup> Minnesota,<sup>190</sup> Rhode Island,<sup>191</sup> Pennsylvania,<sup>192</sup> and Michigan.<sup>193</sup> None of these more restrictive statutes, however, has been enacted since 2000.

All of the thirty-one red states, in contrast, have enacted parental notification statutes. Twenty-five of these states have strict parental notification

N-85-331-ECR (D. Nev. Oct. 10, 1991) (permanent injunction issued); *Planned Parenthood v. State*, 3AN-97-6014 CI (Alaska Super. Ct. Oct. 13, 2003). That decision is currently being appealed by the state to the Alaska Supreme Court. *Planned Parenthood v. State*, S-11365 (Alaska Feb. 17, 2004) (appeal filed). In March 2007, Idaho enacted a new parental consent law to replace previous versions of the statute which the courts had held were unconstitutional and unenforceable. *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 926 (9th Cir. 2004), cert. denied, No. 04-703 (Mar. 28, 2005) (unconstitutional and unenforceable because the statute contained an inadequate medical emergency exception to protect a young woman's health). In Florida, by contrast, following a decision that an earlier parental notification statute was unconstitutional in *N. Fla. Women's Health & Counseling Serv. v. State*, 866 So. 2d (Fla. 2003), the state amended its constitution to reinstate such a requirement. FLA. STAT. ANN. § 390.01114 (West 2006) (enacted following a constitutional amendment by referendum that would permit parental notification without violating the minor's state constitutional right of privacy, as long as the parental notification contained certain exceptions and a judicial bypass.).

<sup>186</sup> These states are Connecticut, Hawaii, New York, Oregon, Vermont, and Washington.

<sup>187</sup> California rejected such a proposition at the polls, Illinois has yet to adopt a judicial bypass process a decade after the original ruling and New Jersey has taken no action after seven years.

<sup>188</sup> The four states are Maine, Delaware, Maryland and Wisconsin. Delaware, however, only requires parental involvement for teens under 16. *Planned Parenthood, Parental Notification Laws*, supra note \_\_. Carol Sanger emphasizes that the contrast between nuanced consent laws for medical care, including contraceptive use, and the blanket consent or notification requirements for abortion underscores the politicized nature of these enactments. Sanger, *Regulating Teenage Abortion*, supra note \_\_, at 307 ("The sweep of coverage suggests from the start that parental involvement statutes focus not on adolescence as a stage of development but rather on minority as a site of control.")

<sup>189</sup> The Massachusetts law, which originally required the consent of both parents, was limited to one parent and upheld in *Planned Parenthood League of Massachusetts, Inc. v. Attorney General*, 677 N.E.2d 101 (Mass. 1997).

<sup>190</sup> Minnesota's restrictive law was upheld in *Hodgson v. Minnesota*, 497 U.S. 417 (1990).

<sup>191</sup> See R.I. GEN. LAWS ANN. § 23-4.7-6 (enacted 1982)

<sup>192</sup> The state's parental consent law was upheld in *Planned Parenthood of SE Pa. v. Casey*, 505 U.S. 833 (1992).

<sup>193</sup> Michigan's parental consent law was upheld in *Planned Parenthood of Mid-Michigan, Inc. v. Attorney General*, No. D 91-0571 AZ (Mich. Cir. Ct. Apr. 29, 1994).

or consent statutes, while six have less stringent laws.<sup>194</sup> Moreover, two red states, Mississippi<sup>195</sup> and North Dakota,<sup>196</sup> mandate that *both* parents consent.<sup>197</sup> Oklahoma, Texas, Utah, and Wyoming require both parental consent and notification.<sup>198</sup>

Parental notification statutes—and the fight to enact or repeal them—reinforce the distinctions between the two family systems described above. Carol Sanger suggests that “parental involvement statutes, while often couched in the language of family togetherness and child protection, are less concerned with developing sound or nuanced family policies in the area of adolescent reproduction than with securing a set of political goals aimed at thwarting access to abortion, restoring parental authority, and punishing girls for having sex.”<sup>199</sup> Empirical research, while imperfect, concurs that parental involvement laws are more important in discouraging abortion than in promoting individual teen health or family communications.<sup>200</sup> We believe parental notification laws are different because they address the linchpin of the two family systems we have described. The blue state system rests on sexual autonomy and delayed childbearing. While delayed adulthood might suggest less room for adolescent decision-making, few things would more quickly derail blue state adolescence than an improvident birth. Accordingly, acknowledging teen immaturity makes the abortion that much more important to secure.<sup>201</sup>

The red state system places more of a premium in channeling teens from childhood into adulthood without a period of independence.<sup>202</sup> Autonomy is less important even in adulthood, and authority is more critical. George Lakoff,

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<sup>194</sup> In three red states – Montana, New Mexico, and Nevada - the laws have been enjoined and no further action has been taken. Two more, West Virginia and Ohio, permit waivers or the expansion of the adults who can act in lieu of parents. An additional state lowers the age of mandatory parental involvement to teens younger than 17 and permits grandparents acting in loco parentis to take the place of the parents S.C. CODE ANN. §§ 44-41-10(m), (n) (original statute enacted 1990), -30 (enacted 1990), -31 to -37 (enacted 1990).

<sup>195</sup> See *Barnes v. Mississippi*, 992 F.2d 1335 (5th Cir.), cert. denied, 510 U.S. 976 (1993); *Pro-Choice Miss. v. Fordice*, 716 So. 2d 645 (Miss. 1998).

<sup>196</sup> N.D. CENT. CODE §§ 14-02.1-03.1 (enacted 1981), 14-02.1-03 (enacted 1975), 14-02.1-02 (Enacted 1975; Last Amended 1995), 14-02.1-02.1 (Enacted 1991).

<sup>197</sup> GUTTMACHER INSTITUTE, PARENTAL INVOLVEMENT IN MINORS' ABORTIONS, STATE POL'Y IN BRIEF (2007), [http://www.guttmacher.org/statecenter/spibs/spib\\_PIMA.pdf](http://www.guttmacher.org/statecenter/spibs/spib_PIMA.pdf).

<sup>198</sup> Planned Parenthood, Parental Notification Laws, supra note \_\_\_\_.

<sup>199</sup> Sanger, *Regulating Teenage Abortion*, supra note \_\_\_, at 307.

<sup>200</sup> See Naomi Cahn and June Carbone, *Empirical Research on Parental Involvement Laws* (unpublished manuscript on file with authors, 2007).

<sup>201</sup> Of course, for those who object to abortion per se on moral grounds, the practical consequences are irrelevant; nonetheless, parental notification assumes the availability of abortion as a permissible choice. The major effects of the parental notification laws has been to delay the abortion, with health consequences for teens. See Guttmacher, *Parental Involvement*, supra note \_\_\_\_.

<sup>202</sup> Indeed, given the absence of full cognitive maturity throughout the teen years, any system that provides for the assumption of adult responsibilities before that age is likely to do so in the context of social channeling rather than independent action.

in his study of differences in American cultural styles, emphasizes the distinction what he terms “the strict father” and “the nurturing mother” in styles of communication.<sup>203</sup> Parental notification statutes reaffirm the primacy of parental authority,<sup>204</sup> with, as Sanger suggests, a subtext of punishment for sex within a cultural context that also places more emphasis on punishment and redemption.<sup>205</sup> The result is to reinforce different family formation strategies in the two systems.

### *B. Same-Sex Marriage*

Same-sex marriage and, indeed, recognition of same-sex relationships more generally inspired Justice Scalia’s reference to a “culture war,” and few issues are more polarizing.<sup>206</sup> Nonetheless, recognition of same-sex relationships, like parental involvement laws, is an evolving process.<sup>207</sup> Relatively liberal states, like California, voted overwhelmingly for a proposition defining marriage as a relationship between a man and a woman in 2000, and then a short time later elected a Democratic legislature that adopted a broad domestic partnership statute without much fanfare.<sup>208</sup> The intensity of the issue in recent years has been tied in part to a Republican political strategy of placing anti-same-sex marriage initiatives on the ballot as a way of increasing the fundamentalist turnout.<sup>209</sup> That strategy may have helped seal the outcome of

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<sup>203</sup> GEORGE LAKOFF, *DON’T THINK OF AN ELEPHANT: KNOW YOUR VALUES AND FRAME THE DEBATE* (2004); *MORAL POLITICS: HOW LIBERALS AND CONSERVATIVES THINK* (2002) [hereinafter *MORAL POLITICS*].

<sup>204</sup> Lakoff emphasizes that within a strict father universe, children are “born bad” and learn through punishment. Interview by Bonnie Powell with George Lakoff (2003), [http://www.berkeley.edu/news/media/releases/2003/10/27\\_lakoff.shtml](http://www.berkeley.edu/news/media/releases/2003/10/27_lakoff.shtml); see also Martin Guggenheim, *Minor Rights: The Adolescent Abortion Cases* 30 *HOFSTRA L. REV.* 589, 639 (2002) (“The abortion cases are simply a use of state power to reorder society, shifting power over children from parents to judges when it serves an instrumental value wholly apart from a child’s rights. . . . For those minors who, for whatever reason, choose not to seek parental consent, a new adult was vested with the power over them.”).

<sup>205</sup> Of course, Lakoff further observes that within such a system, abortion may not be appropriate at all. “According to Strict Father morality, an unmarried teenage girl should not be having teenage sex at all. . . . She has to be responsible for the consequence of her actions if she is to learn from her mistakes. An abortion would simply sanction her immoral behavior.” *MORAL POLITICS*, supra note \_\_\_, at 267-68. If abortion is not appropriate, however, it is also less of a concern that parental notification statutes may delay or frustrate the procedure.

<sup>206</sup> See *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>207</sup> See, e.g., [http://www.religioustolerance.org/hom\\_poll2.htm](http://www.religioustolerance.org/hom_poll2.htm) (discussing poll that asked, “Do you think homosexual relations between consenting adults should or should not be legal?”, and documenting the increase in the percent saying these relations should be legal from 43% in June 1977 to 60% in June 2003)

<sup>208</sup> [http://www.religioustolerance.org/hom\\_mar13.htm](http://www.religioustolerance.org/hom_mar13.htm). It received 61.4% of the vote. RELIGIOUS TOLERANCE.ORG. TWO CALIFORNIA LAWS REGARDING SEXUAL MINORITIES.

<sup>209</sup> See, e.g., *RED AND BLUE NATION? CHARACTERISTICS AND CAUSES OF AMERICA’S POLARIZED POLITICS* (Pietro S. Nivola and David W. Brady eds., 2006) (evaluating claims of polarization, and distinguishing between polarized parties and public attitudes); Wayne Baker, *Purple America* (2005) <http://webuser.bus.umich.edu/wayneb/Purple%20America%20June%202005.pdf> (emphasizing

the 2004 election, and increased the visibility of same-sex issues within the political system.<sup>210</sup>

National politics aside, however, divisions on same-sex marriage also involve central parts of the two family systems we have charted above. The first is the difference between marriage as an institution designed to facilitate commitment and companionship versus marriage as an institution uniquely designed to promote the unity of sex, procreation and childrearing.<sup>211</sup> The Religious Coalition for Marriage argues, for example, that marriage provides the optimal setting for childrearing, as children do best with a mother and a father. Consequently, “when marriage is entered into and gotten out of lightly, when it is no longer the boundary of sexual activity, or when it is allowed to be radically redefined, a host of personal and civic ills can be expected to follow.”<sup>212</sup>

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that there is greater polarization among the political parties and political activists than among the public as a whole.);

<sup>210</sup> Debra Rosenberg and Karen Breslau, Culture Wars: Winning the “Values” Vote, *NEWSWEEK CAMPAIGN* 2004, <http://www.msnbc.msn.com/id/6401635/site/newsweek/>. But see Gregory B. Lewis, Same-Sex Marriage and the 2004 Presidential Election, 38 *POL. SCI. & POLITICS*, page, 195-9 (2005) (suggesting other issues may have been more critical to the outcome). See also Post and Siegel, *supra* note 25, at 56, n.232 (emphasizing that conservative groups see abortion and same-sex marriage as essentially the same issue).

<sup>211</sup> For articulation of these two positions, see Douglas W. Allen, An Economic Assessment of Same-Sex Marriage Laws, 29 *HARV. J. L. & PUB. POL.* 949, 951-954 (2006). (draft at 8); see also PEW RESEARCH CENTER, *AS MARRIAGE AND PARENTHOOD DRIFT APART, PUBLIC IS CONCERNED ABOUT SOCIAL IMPACT* 27 (2007), <http://pewresearch.org/assets/social/pdf/Marriage.pdf> (finding that only 41% of Americans find children important to making a marriage worked in 2007 compared to 55% in 1993. By contrast, sharing household chores and having a happy sexual relationship have become more important, with 62 and 70%, respectively, citing those factors as important to a successful marriage). When asked “which is closer to your views about the main purpose of marriage? Forming a lifetime union between two adults for mutual happiness and fulfillment or for bearing and raising children,” 65% chose mutual happiness and fulfillment, 23% chose bearing and raising children, and 7% said both. *Id.* at 29.

<sup>212</sup> RELIGIOUS COALITION FOR MARRIAGE, *A LETTER FROM AMERICA’S RELIGIOUS LEADERS IN DEFENSE OF MARRIAGE* (2006), <http://www.nhclc.org/about/pdf/defenseofmarriage.doc>. See also Maggie Gallagher, (How) Will Gay Marriage Weaken Marriage as a Social Institution: A Reply to Andrew Koppelman, 2 *U. ST. THOMAS L. REV.* 33 (2005). She does not want to be misunderstood as saying that:

“marriage is in order to produce children.” Marriage is not a factory for childbearing. . . . Marriage as a universal social institution is grounded in certain universal features of human nature. When men and women have sex, they make babies . . . . Marriage intrinsically aims at an enduring, exclusive, sexual union between a man and a woman, because managing the procreative consequences of human sexual attraction is at the core of its reason for existence.

*Id.* at 44, 46.

For articulation of the religious position in favor of recognition of same-sex marriage, see David Myers and Letha Scanzoni, *WHAT GOD HAS JOINED TOGETHER: A CHRISTIAN CASE FOR GAY MARRIAGE* (2005). Letha Scanzoni is active in the Evangelical and Ecumenical Women’s Caucus. <http://www.eewc.com/Update/Fall2003Contemporaneity.htm>

Closely related to the role of marriage as maximizing child development is its role as a “boundary of sexual activity.” Accordingly, the Religious Coalition for Marriage finds gay marriage particularly threatening to the concept of faithfulness in marriage because gay men are less likely to value sexual fidelity than are lesbians or married people.<sup>213</sup> Indeed, while Americans generally support the ideal of marital fidelity, they differ in the importance they attach to regulation of sexuality in other contexts – and in the importance of channeling sexual activity into marriage.<sup>214</sup>

Differences in worldview exacerbate differences in the understanding of the marital ideal. Poll data indicates for example that 55% of Americans believe that homosexuality is a “sin,” and that these views are more strongly held by evangelicals (76%).<sup>215</sup> Moreover, while the country is evenly divided on whether homosexuality can be changed, evangelicals and those with conservative political beliefs are substantially more likely to find that homosexuality is a matter of lifestyle choice.<sup>216</sup> Indeed, negative attitudes

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<sup>213</sup> RELIGIOUS COALITION FOR MARRIAGE, TOP 10 SOCIAL SCIENTIFIC ARGUMENTS AGAINST SAME SEX MARRIAGE (2006); see also Ariela R. Dubler, Immoral Purposes: Marriage and the Genus of Illicit Sex, 115 YALE L.J. 756, 812 (2006) (“Marriage is at once powerful to confer legal privileges and to shield people from the dangers of sexual illicitness, and powerless to protect itself from the taint of those very illicit practices.”). On the other hand, several studies refute the idea that gay men are much more promiscuous than heterosexual men. Rauch, *supra* note \_\_, at 143; DALE CARPENTER, THE MYTH OF GAY PROMISCUITY (2003), <http://www.marriage Debate.com/2003/08/myth-of-gay-promiscuity-dale-carpenter.htm>. Based on his research, Eugene Volokh noted on his blog: “gay and bisexual males (defined as having had at least one same-sex relationship in the last 5 years) have an average (not a median) of 26.6+/-11.5 lifetime sexual partners compared to an average of 16.9+/-3 for straights. . . the GSS dataset . . . reports that the median for gay and bisexual men is about 10, compared to a median for straight men of about 6.” The Volokh Conspiracy, [http://volokh.com/2003\\_05\\_18\\_volokh\\_archive.html#200329250](http://volokh.com/2003_05_18_volokh_archive.html#200329250).

<sup>214</sup> Linguist George Lakoff observes: [T]ake gay marriage, which the right has made a rallying topic. Surveys have been done that say Americans are overwhelmingly against gay marriage. Well, the same surveys show that they also overwhelmingly object to discrimination against gays. These seem to be opposite facts, but they're not. "Marriage" is about sex. When you say "gay marriage," it becomes about gay sex, and approving of gay marriage becomes implicitly about approving of gay sex.. Bonnie Azab Powell, Framing the Issues: UC Berkeley Professor George Lakoff Tells How Conservatives Use Language to Dominate Politics, UC Berkeley News, Oct. 27, 2003, [http://www.berkeley.edu/news/media/releases/2003/10/27\\_lakoff.shtml](http://www.berkeley.edu/news/media/releases/2003/10/27_lakoff.shtml). The Pew Research Center, for example, while it found that the public continues to emphasize fidelity in marriage (93% rate it as important to a successful marriage), also found that 59% believe that a couples having sexual relations before marrying is either either not wrong at all or only sometimes wrong. Pew Research Center, *supra* note \_\_, at 3.

<sup>215</sup> THE PEW FORUM ON RELIGION AND PUBLIC LIFE, RELIGIOUS BELIEFS UNDERPIN OPPOSITION TO HOMOSEXUALITY (2003), <http://pewforum.org/docs/index.php?DocID=37>.

<sup>216</sup> *Id.* Twice as many liberals as conservatives say that people are born homosexual. In addition, “73% of committed white evangelicals think homosexuals can change their sexual orientation; 61% of black Protestants agree. By comparison, 54% of white Catholics and half of white mainline Protestants think homosexuals cannot change their orientation, a view shared by two-thirds (66%) of seculars.” *Id.* See also Nancy J. Knauer, Homosexuality as Contagion: From the Well of Loneliness to the Boy Scouts, 29 HOFSTRA L. REV. 401 (2000).

toward homosexuality tend to correspond with red/blue divisions more generally. The most negative attitudes toward gays and lesbians, for example, are held in the South, the least negative in the East, more negative in rural than urban areas, by those with more conservative political beliefs, and by the least educated.<sup>217</sup> A major study further found “homosexuality in general not merely the contentious issue of gay marriage is a major topic in churches and other houses of worship. In fact, clergy are nearly as likely to address homosexuality from the pulpit as they are to speak out about abortion or prayer in school.”<sup>218</sup>

In what we term blue state family values, in contrast, greater emphasis is placed on equality, empathy and tolerance.<sup>219</sup> As a matter of secular reason, “sin” disappears from the lexicon, and increasing majorities in the country as a whole disapprove of the criminalization of consenting sexual activity between adults.<sup>220</sup> Marriage is no longer associated with hierarchal authority or the gendered assignment of family roles,<sup>221</sup> and instead becomes a matter of choice designed to express love and commitment.<sup>222</sup> Within this tradition, recognition

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<sup>217</sup> PEW FORUM, *supra* note 193.

<sup>218</sup> *Id.* “The clergy in evangelical churches focus considerably more attention on homosexuality and address it far more negatively than do ministers and priests in other denominations. Two-thirds of evangelical Protestants who attend church services at least once a month say their ministers speak out on homosexual issues, compared with only about half of Catholics (49%) and just a third of mainline Protestants (33%). And compared with others who attend services where homosexuality is discussed, substantially more evangelicals (86%) say the message they are receiving is that homosexuality should be discouraged, not accepted.”

<sup>219</sup> See, e.g., Naomi R. Cahn, *The Moral Complexities of Family Law*, 50 *STAN. L. REV.* 225, 270-71 (1997) (noting a shift in moral values, placing greater emphasis on gender equity as a “primary objective,” and individual rights “within the contexts of community, equality, and commitment.”); Vivian Hamilton, *Principles of U.S. Family Law*, 75 *FORDHAM L. REV.* 31 (2006).

<sup>220</sup> Religious tolerance, *supra*. See also AEI Studies in Public Opinion, *Attitudes About Homosexuality and Gay Marriage* (2004), [http://www.aei.org/docLib/20050121\\_HOMOSEXUALITY.pdf](http://www.aei.org/docLib/20050121_HOMOSEXUALITY.pdf) (summarizing poll results that find between 57% and 74% disapprove of criminal sanctions against homosexuality depending on the polls same and wording).

<sup>221</sup> But see MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* (1995); NANCY D. POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW* (forthcoming 2008) (manuscript on file with authors); KATHERINE FRANKE, *EMANCIPATION APPROXIMATION* (forthcoming) (manuscript on file with authors).

<sup>222</sup> See, e.g., JONATHAN RAUCH, *GAY MARRIAGE: WHY IT IS GOOD FOR GAYS, GOOD FOR STRAIGHTS, AND GOOD FOR AMERICANS* 6 (2004). Similarly, the Pew Research Center study found that the overwhelming majority of Americans choose companionship over procreation as the principal purpose of marriage. Pew Research Center, *supra* note \_\_. The study did not provide a regional breakdown, but it did find Latinos more likely than whites to rank children more highly as a purpose of marriage. 69% ranked children “very important” to a successful marriage compared to 35% of whites and 49% of blacks. Nonetheless, even Latinos chose companionship over children as the “main purpose” of marriage, albeit by smaller margins (51 to 38% as opposed to 67 to 21% for whites, and 63 to 23% for blacks. *Id.* at 8. Regular churchgoers chose companionship over raising children by 58 to 25% while those attending less regularly or not at all chose companionship over children by 74 to 18%. *Id.* at 7.

of same-sex relationships becomes a matter of basic equality,<sup>223</sup> and inclusion of gay and lesbian relationships within marriage a symbol of the institution's transformation from its more patriarchal past.<sup>224</sup> The cultural meaning of same-sex marriage within the well-educated, secular, urban coasts differs dramatically from its context within the still closeted, more rural, evangelical Midwest and South.<sup>225</sup>

We also suspect that age of family formation intersects with tolerance toward homosexuality to reinforce these differences. As the movie "Brokeback Mountain" illustrates, youthful marriages often occur before young adults have fully worked through their own sexuality. As a result, family members may first become aware of homosexual behavior in the context of divorce. In areas of the country that are more supportive of gay and lesbian relationships, or among groups that marry later, sexual orientation and identity is more likely to be firmly established before entry into a long-term relationship.<sup>226</sup> Same-sex relationships in these regions are thus coded as part of a fight for recognition rather than an association with infidelity and family crisis.<sup>227</sup>

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<sup>223</sup> The state judicial decisions that have required recognition of same-sex marriage, civil unions, or domestic partnerships have all turned on equal rights analysis. See *Goodridge v. Mass. Department of Public Health*, 798 N.E. 2d 941 (2003); *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006); *Baker v. Vermont*, 744 A.2d 864, 886 (Vt. 1999). In Washington, while the court declined to find that the state constitution mandated recognition of same-sex marriage, also used an equal rights framework for analysis, though it emphasized judicial restraint and the failure to establish a suspect class. *Andersen v. King County*, 138 P.3d 963 (Wash. 2006) (en banc). In contrast, the New York decision in *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006), based its analysis rejecting recognition of same-sex marriage on the distinctive relationship between marriage and procreation.

<sup>224</sup> Indeed, marriage reassumes its traditional role in channeling sexual expression and restraining promiscuity. See WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT* 8-9 (1996); see generally, WILLIAM N. ESKRIDGE AND DARREN R. SPEDALE, *GAY MARRIAGE: FOR BETTER OR FOR WORSE?: WHAT WE'VE LEARNED FROM THE EVIDENCE* (2006).

<sup>225</sup> We acknowledge that substantial hostility toward gays and lesbians and toward same-sex marriage exists in blue-states as well. Nonetheless, polls show greater movement of attitudes in those states. In addition, there is a substantial difference between Catholics, who often dominate in the Northeast and upper and industrial Midwest on these issues, and evangelical Protestants. Catholics are much more likely to view homosexuality as something that can't be changed and Catholic clergy, who are more likely than Protestant clergy to emphasize abortion, are less likely to discuss homosexuality. The Pew Forum, *supra* note 193.

<sup>226</sup> See, e.g., TAN (cases discussed in the next section). Family law cases addressing homosexuality have overwhelmingly involved disputes between divorcing couples where same-sex attraction was a factor in custody and visitation determinations. Today, a larger number of cases, particularly in blue states, involve the separation of same-sex partners. See, e.g., *Chambers v. Ormiston*, Case No. 06-340-M.P., pending before the Rhode Island Supreme Court (one of the authors of this article is a signatory to an amicus brief in this case which involves whether a Rhode Island court can dissolve a Massachusetts same-sex marriage). See [http://www.glad.org/GLAD\\_Cases/Amici/Chambers\\_Ormiston/GLAD.pdf](http://www.glad.org/GLAD_Cases/Amici/Chambers_Ormiston/GLAD.pdf).

<sup>227</sup> See *infra* TAN (discussing the change over time from cases that focused on custody and visitation in divorce actions involving one parent's acknowledgment of a same-sex relationship to cases focusing on recognition of same-sex partners who have jointly parented a child).

Given these differences, it would be remarkable if same-sex marriage were not a politically contentious issue, even within blue states.<sup>228</sup> These states differ most from red states in the degree of change in attitudes over the last three decades. In the period from 1973 to 2002, the percentage of the country as a whole responding yes to the question “Are homosexual relations always wrong?” dropped 18% points. The groups dropping most dramatically were younger (especially those 30 to 44), Democrats and Independents rather than Republicans (who dropped by only 9 points), those attending church once a month as opposed to both the more and less religious,<sup>229</sup> and those in the Northeast (23%) as opposed to the South (13%).<sup>230</sup>

Recognition of same-sex relationships follows greater tolerance toward homosexuality more generally. One state, the bluest of blue states, recognizes same-sex marriage.<sup>231</sup> Five states – all blue – recognize civil unions or domestic partnerships that are the equivalent of marriage.<sup>232</sup> Three states and the District of Columbia – all blue – provide some statewide rights to same-sex couples falling short of marriage.<sup>233</sup> Altogether, nine of the nineteen blue states – and none of the red states -- extend at least some legislative recognition to same-sex couples.

At the other end of the spectrum, thirty-three states now have statutory bans on marriage for same-sex couples – overwhelmingly as a result of propositions place on the ballot between 2004 and 2006.<sup>234</sup> Three (Alaska,

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<sup>228</sup> Although the number of people who “strongly oppose” gay marriage in March 2006 – 28% -- has decreased from its high of 42% in February 2004, and although the overwhelming majority of Americans support equality for gays and lesbians, a majority remains against gay marriage nationally. See William Saletan, *Gay-Marriage Proposal*, WASH. POST, April 30, 2006, at B2. Nonetheless, the most recent polls see the public split almost 50-50 on the issue of Civil Unions, down from the majority that had supported them earlier. PEW RESEARCH CENTER, *supra* note \_\_\_, at 48.

<sup>229</sup> Those attending church once a month dropped from 72% to 46%, compared with those attending once a week who dropped from 84% to 79% and those attending once a year or less, who dropped from 63% to 46%. AEI, *supra* note \_\_.

<sup>230</sup> *Id.* The Northeast fell from 64 to 41%; the South from 84 to 71%.

<sup>231</sup> See *Goodridge v. Mass. Department of Public Health*, 798 N.E. 2d 941 (Mass. 2003); Mass. Gen. Laws ch. 207 (2007)

<sup>232</sup> Vermont (civil unions, 2001); Connecticut (civil unions, 2005); California (domestic partnerships, last amended in 2006); New Hampshire (civil unions, effective January 2008); New Jersey (civil unions, 2007); Oregon (domestic partnerships, effective January 2008). HUMAN RIGHTS CAMPAIGN, *Relationship Recognition in the U.S.*, [http://www.hrc.org/Template.cfm?Section=Your\\_Community&Template=/ContentManagement/ContentDisplay.cfm&ContentID=16305](http://www.hrc.org/Template.cfm?Section=Your_Community&Template=/ContentManagement/ContentDisplay.cfm&ContentID=16305) (updated May 31, 2007)

<sup>233</sup> *Id.* Hawaii (reciprocal beneficiaries, 1997); Maine (domestic partnerships, 2004); Washington State (domestic partnerships, July 2007); District of Columbia (domestic partnerships, implemented in 2002). See also Leslie Harris, *Same-Sex Unions Around the World: Marriage, Civil Unions, Registered Partnerships—What are the Differences and Why do the Matter?*, 19 PROBATE & PROPERTY 31, 33 (Sept/Oct 2005)

<sup>234</sup> <http://www.thetaskforce.org/downloads/marriagemap.pdf>.

Nebraska, and Nevada) had constitutional provisions limiting marriage to a relationship between a man and a woman before 2004.<sup>235</sup> Two (Louisiana and Missouri) adopted such an amendment in early 2004.<sup>236</sup> Eleven more states adopted such amendments on November 2, 2004: Arkansas, Georgia, Kentucky, Michigan, Mississippi, Montana, North Dakota, Ohio, Oklahoma, Oregon, and Utah.<sup>237</sup> Kansas and Texas added such amendments in 2005.<sup>238</sup> Alabama did so in early 2006. Colorado, Idaho, South Carolina, South Dakota, Tennessee, Virginia, and Wisconsin passed additional amendments banning same-sex marriage in November, 2006, with voters in Arizona rejecting such a proposal in their state.<sup>239</sup> Moreover, the amendments in Alabama, Arkansas, Georgia, Kentucky, Louisiana, Michigan, Nebraska, North Dakota, Idaho, Oklahoma, Ohio, South Carolina, South Dakota, Texas, Virginia, Wisconsin, and Utah also have language that may limit civil unions or domestic partnerships.<sup>240</sup> Twenty-four of the twenty-six states with such amendments are red, and six of the seven remaining red states (as well as twelve of the blue states) have statutes limiting marriage to a relationship between a man and a woman.<sup>241</sup>

The only red state not to ban same-sex marriage through either a constitutional amendment or legislation is New Mexico; its legislature has repeatedly refused to enact such provisions.<sup>242</sup> Of the blue states, only Rhode

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<sup>235</sup> The Alaska Constitution states: "To be valid or recognized in this state, a marriage may exist only between one man and one woman." ALASKA CONST. art. 1, § 25; the Nebraska Constitution provides: "Only marriage between a man and a woman shall be valid or recognized in Nebraska. The uniting of two persons of the same-sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska." NEB. CONST. art. 1, § 29; and in Nevada, the constitution states: "Only a marriage between a male and female shall be recognized and given effect in this state." NEV. CONST. art. 1, § 21

<sup>236</sup> Julie L. Davies, Family Law Chapter: State Regulation of Same-Sex Marriage, 7 GEO. J. GENDER & L. 1079, 1086 (2006).

<sup>237</sup> *Id.* at 1087.

<sup>238</sup> *Id.*

<sup>239</sup> Stateline.org, Tetons Handily Press Gay Marriage Ban (Nov. 7, 2005)

<sup>240</sup> State Prohibitions on Marriage for Same-Sex Couples, HUMAN RIGHTS CAMPAIGN, Nov. 2006,

<http://www.hrc.org/Template.cfm?Section=Home&CONTENTID=28225&TEMPLATE=/ContentManagement/ContentDisplay.cfm>. These provisions vary, but they are potentially more immediate in their impact. While few of the states banning same-sex marriage were likely to recognize such marriages even without the amendments, a number of states might have provided other recognition to same-sex couples. The Ohio Supreme Court recently resolved a dispute between lower state courts as to whether a domestic violence criminal conviction violates the Ohio Defense of Marriage Act to the extent it criminalizes abuse committed against a nonmarital (same-sex or heterosexual) partner. *State v. Carswell*, 2007 Ohio LEXIS 1654 (July 25, 2007).

<sup>241</sup> HUMAN RIGHTS CAMPAIGN, STATE RECOGNITION. A number of the blue states, however, including California, Connecticut, Oregon, Hawaii, Maine, New Hampshire, Vermont and Washington, provide recognition to domestic partnerships, civil unions or reciprocal beneficiaries. None of the red states do.

<sup>242</sup> Religious Tolerance, *supra*, [http://www.religioustolerance.org/hom\\_marrnm.htm](http://www.religioustolerance.org/hom_marrnm.htm). Studies of attitudes toward homosexuality generally indicate that Hispanics are more tolerant than whites or blacks, *id.* at 4, and that Catholics are more tolerant than Protestants. *Id.* at 5. In contrast, Catholic priests place greater emphasis in the pulpit on abortion than do Protestant ministers. *Id.*

Island has neither banned same-sex marriage nor adopted some recognition for same couples. The other states, however, without effective statutory prohibitions are blue: Massachusetts, New Jersey, New York, Connecticut, Rhode Island, and Vermont.<sup>243</sup>

### *C. Non-marital Cohabitation in Custody Cases*

If same-sex marriage and anything connected to abortion are among the most polarizing family law issues of the day, what about the more prosaic issues of family law decision-making? Do red-blue distinction matter only when the press and politicians are involved? To assess that question, we also examine a quieter issue, albeit one likely to affect a potentially larger number of litigants: *viz.*, the role of non-marital cohabitation in custody decision-making. A comparison of judicial decisions to legislative action indicates that regional differences still exist, but that they play out in contexts with the potential to diffuse rather than inflame conflicts between warring paradigms. Considering the difference between legislative and judicial decision-making is critical to assessing the future of family law federalism.

In the context of a family system that has largely deregulated adult relationships, child custody decisions at divorce have become “ground zero in the gender wars.”<sup>244</sup> That is, while divorces granted on no fault grounds do not necessarily pass judgment about the circumstances that produced the split,<sup>245</sup> custody decisions, which evaluate the quality of parenting, often rest, implicitly or explicitly, on moral views of parenting behavior.<sup>246</sup> For family systems that continue to celebrate marriage, and to draw clear lines between marital and non-marital sexuality, cohabitation with an unmarried partner should be a matter relevant to the child’s interests. At the same time, in those states that deregulate consensual adult behavior, non-marital cohabitation, with a same-sex or different sex partner, should not be a matter of concern. We would ordinarily expect therefore red states and blue states to differ in their approach to custody. They do, but not as starkly as the battles over legislative issues might suggest.

We start with a brief description of the evolution of the law in this area. At one time, most states considered the morality of the parents’ conduct in

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<sup>243</sup> HUMAN RIGHTS CAMPAIGN, RELATIONSHIP RECOGNITION IN THE U.S., *supra* note \_\_\_, Maine’s legislation, which is the most limited, allows both same-sex and opposite sex couples to register for domestic partnership, a status which grants various rights in protective proceeding and intestacy; California, Connecticut, and Vermont offer couples almost all of the rights associated with marriage (Vermont and Connecticut’s legislation are limited to same-sex partners); New Jersey and Hawaii offer somewhat less expansive rights. *Id.*

<sup>244</sup> See generally CARBONE, *supra* note \_\_\_.

<sup>245</sup> States vary considerably, however, as to whether they allow fault to be considered for some purposes in the financial allocations at divorce. See Ira Mark Ellman, *The Place of Fault in a Modern Divorce Law*, 28 ARIZ. ST. L.J. 773 (1996) (summarizing and cataloguing the different state approaches).

<sup>246</sup> *Id.*

awarding custody, and viewed non-marital cohabitation, with a different sex and particularly a same-sex partner, to be a relevant if not automatically disqualifying factor.<sup>247</sup> Today, most courts require proof of actual harm or detriment to the child arising from the relationship before it can be a basis for restricting visitation or changing custody.<sup>248</sup> Moreover, while some courts continue to presume harm from a non-marital partner's presence in the home or the parent's bedroom while the child is present,<sup>249</sup> most require a more direct showing of adverse effect on the child before they restrict parental contact – at least in the context of heterosexual relationships.<sup>250</sup>

The courts are more divided on the issue of homosexual conduct. While the courts have overwhelmingly held that sexual orientation per se should not be a basis for denying parental contact with the child,<sup>251</sup> many continue to condition custody or visitation on the absence of overnight visitors or explicit displays of affection or to consider it in the award of custody.<sup>252</sup> To assess the regional distribution of these decisions, we go back to our list of the states with the lowest (Utah, Oklahoma, Idaho, Arkansas, and Kentucky – all red) and highest (Massachusetts, New York, Rhode Island, Connecticut, and New Jersey – all blue) median age of first marriage, and describe the progression of the reported opinions on the issue in each state.

We find, unsurprisingly, that the red and blue states approach the issue

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<sup>247</sup> See, e.g., *Jarrett v. Jarrett*, 400 N. E. 2d 421 (Ill. 1979), cert. denied, 449 U.S. 927; *Dockins v. Dockins*, 475 So. 2d 571 (Ala. Civ. App. 1985) (mother denied custody; entertained paramour in home when children were present).

<sup>248</sup> *Dunn v. Dunn*, 609 So. 2d 1277 (Miss. 1992)(error for the chancellor to prohibit the presence of the father's lover during visitation with his children, because there was no evidence of any detriment to the children and harm could not be presumed from lover's presence alone); *Buschardt v. Jones*, 998 S.W.2d 791 (Mo. Ct. App. W.D. 1999), reh'g and/or transfer denied, (June 1, 1999) and transfer denied, (June 29, 1999)(moral misconduct insufficient to deprive a parent of the right to continuing contact with the child); *Rushing v. Rushing*, 724 So. 2d 911; (Miss. 1998)(error to restrict mother's visitation to absence of male visitors without showing of detriment to the child); *In re Marriage of Pleasant*, 256 Ill. App. 3d 742, 628 N.E.2d 633, 195 Ill. Dec. 169 (1993)(parent's open involvement in lesbian relationship not grounds to restrict visitation in the absence of evidence of inappropriate behavior in child's presence).

<sup>249</sup> See, e.g., *Lasseigne v. Lasseigne*, 434 So. 2d 1240 (La. Ct. App. 1st Cir. 1983)(restricting father's visitation on the grounds that having children exposed to his relationship with "his concubine" would undermine respect for the family as an institution).

<sup>250</sup> See, e.g., *Dunn*, supra note \_\_; Robin Cheryl Miller, *Restrictions on Parent's Child Visitation Rights Based on Parent's Sexual Conduct*, 99 A.L.R.5th 475 (2002) (citing only four states -- Florida, Louisiana, Vermont, and Virginia -- that do so). Virginia has recently reaffirmed this practice. See *Carrico v. Blevins*, 402 S.E. 2d 235, 237 (Va. 1991)(upholding the restriction that the child could not be kept overnight where the mother and her lover lived together); *A.O.V. v. J.R.V.*, 2007 Va. App. LEXIS 64 (Feb. 27, 2007)(upholding restrictions on overnight guests and displays of affection in front of the children.)

<sup>251</sup> See, e.g., *T.C.H. v. K.M.H.*, 784 S.W.2d 281 (Mo. App. 1989), *In re Marriage of Birdsall*, 197 Cal. App. 3d 1024, 243 Cal. Rptr. 287 (Cal. App. 1988); *Pryor v. Pryor*, 714 N.E.2d 743 (Ind. App. 1999); *Scott v. Scott*, 665 So. 2d 760 (La. App. 1995).

<sup>252</sup> See, e.g., *A.O.V. v. J.R.V.*, 2007 Va. App. LEXIS 64 (Feb. 27, 2007) (upholding restrictions on overnight guests and displays of affection in front of the children.)

differently. The red states have been slower to move away from policing the morality of the litigants before them, and they remain more likely to reaffirm traditional moral values as part of their decisions. The blue states, in contrast, have been much more eager to review lower court decisions to insure equality and fairness for gay and lesbian parents. Nonetheless, both red and blue decisions have evolved in a much less polarized fashion than the legislative actions we have described in the context of same-sex marriage. That lesser polarization has occurred in spite of another major difference between the red and blue states we describe below: three of the five red states (Arkansas, Idaho and Kentucky), but none of the blue states, have elected judges on the state's highest court.

The leading Utah Supreme Court case on the issues is *Kallas v. Kallas*,<sup>253</sup> decided in 1980. The father appealed the trial court's grant of overnight visitation to the mother on the ground of her lesbianism and former drug use;<sup>254</sup> the Supreme Court agreed, finding that:

such evidence bears clearly on the defendant's ability to deal appropriately with the three minor children . . . , the most appropriate duration for any visits allowed, and, most importantly, the psychological impact on the children resulting from more extended visits with a mother who may, as a role model, at least to some extent cause serious conflict in the minds of the children concerning certain basic life-styles.<sup>255</sup>

Citing cases from New York and New Jersey, the court suggested that overnight visits might not be appropriate or that such visits might be conditioned on a prohibition of non-marital cohabitation in the children's presence.<sup>256</sup>

The Utah Supreme Court revisited the issue in 1994. In *Tucker v. Tucker*,<sup>257</sup> the intermediate appellate court had reversed a trial court decision to transfer custody from the mother to the father, finding that the trial court failed to link its findings of emotional instability and moral unfitness to the mother's parenting ability, and gave disproportionate weight to her lesbian relationships.<sup>258</sup> The Utah Supreme Court reversed the court of appeals and reinstated the

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<sup>253</sup> 614 P.2d 641 (Utah 1980).

<sup>254</sup> The trial court had excluded testimony on the subject because both factors had existed at the time of the divorce (although the father did not know about them at the time).

<sup>255</sup> *Id.* at 643.

<sup>256</sup> *Id.* at 645. Two justices dissented, suggesting that the trial court was fully aware of the sensitive nature of the evidence, and no abuse of discretion had occurred.

<sup>257</sup> 881 P.2d 948 (Utah app. 1994), rev'd 910 P. 2d 1209 (Utah 1996).

<sup>258</sup> *Id.* at 1214. The trial court found that: "[Lynn] has chosen to act out her sexual preference by conducting a relationship with a woman companion involving cohabitation without benefit of marriage in the same home with the minor child. The court finds that this can be analyzed and should be analyzed similarly to a situation involving cohabitation with a member of the opposite sex without benefit of marriage in the presence of a minor child. The court finds that this conduct on the part of [Lynn] during the pendency of this action and prior to the custody trial in

trial court decision. It observed that:

The issue was not whether a trial court could properly question a parent's morality where that parent merely cohabited with a member of the same sex. Rather, the issue was whether a trial court could properly question the morality of a parent who had cohabited with another person before the divorce and while still married. The trial court found that the occurrence of this conduct during the marriage and in the presence of the child demonstrated Lynn's lack of moral example. It cannot be said that the trial court abused its discretion in reaching this conclusion.<sup>259</sup>

While moving away from the visitation restrictions in *Kallas* designed to shield children from their parent's homosexuality, the Utah Supreme Court still upheld the relevance of more nuanced moral determinations in a best interests analysis.

The Oklahoma Supreme Court, with its appointed justices, considered the issue in *Fox v. Fox*,<sup>260</sup> decided about the same time as *Tucker*, and took a very different approach. Four years later after the parties divorced, the father petitioned for a change of custody on the ground that the mother was a lesbian. The trial court granted the father's motion. The Oklahoma Supreme Court reversed, observing that: "the evidence in this case is not of sufficient quality to prove the essential determinative factor -- a significant change of circumstance that directly and adversely affects the children."<sup>261</sup>

The standard the court adopted, which appears to have resolved the issue in Oklahoma, is consistent with the majority approach in cases of heterosexual cohabitation and, as developed below, most blue state rulings.

The Idaho Supreme Court, with elected justices, addressed the issue in 2004. In *McGriff v. McGriff*,<sup>262</sup> the initial divorce decree provided for joint physical and legal custody, with the two children spending roughly equal time with each parent. After the mother discovered that the father was gay and that his male companion had moved into the home, she sought a modification in the custody decree. The magistrate agreed, granting the mother sole physical

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this matter demonstrates a lack of moral example to the child and a lack of moral fitness. This conduct is unlawful in the State of Utah." *Id.* at 1213.

<sup>259</sup> *Id.* at 1217-18. The case was followed in *Thomas v. Thomas*, 987 P.2d 603(1999). A fifteen year marriage ended after the wife had an affair with her jui jitsu instructor, who was also married. The trial court found that although the mother's role as primary caretaker would have ordinarily justified an award of custody to her, recent gun and domestic violence charges against her lover and her continuing involvement with him justified the award to the father. The court of appeal emphasized that this is not a case based solely on the fact of the non-marital affair or the character of the parties, but a combination of factors related to the children's best interests. *Id.* at 608.

<sup>260</sup> 904 P.2d 66 (1995).

<sup>261</sup> *Id.* at 70.

<sup>262</sup> 99 P.3d 111 (Idaho 2004).

custody and providing the father visitation on the condition he not reside with his male partner during their visits. The magistrate found, inter alia, that:

Father's decision to openly co-habit with [his partner] . . . is a change that will generate questions from the girls and their friends regarding their Father's lifestyle. Moreover, Father has minimized this issue in regard to the conservative culture and morays (sic) in which the children live. Father has shown some insensitivity to the girls' needs regarding his lifestyle, . . . expressly contrary to the requests of and excluding the children's Mother.<sup>263</sup>

The father appealed, maintaining that the mother had difficulty accepting his sexual orientation, and that her motion to change custody was entirely based on his sexual orientation without a showing of detriment to the children. The Idaho Supreme Court affirmed the trial court order. While it emphasized that a change of custody could not be based on sexual orientation per se,<sup>264</sup> it found that magistrate had made specific findings on the effect on the children arising from the growing hostility between the parents, the father's partner's actions toward the Mother, and the Father's refusal to respect the mother's wishes for joint communication with the children about the father's homosexuality.<sup>265</sup>

The Arkansas Supreme Court, again with elected justices, walked a different tightrope in *Taylor v. Taylor*,<sup>266</sup> decided during the same time period as the Idaho case. In *Taylor*, the mother shared her home with an "admitted lesbian," who paid rent and sometimes slept in the mother's bed.<sup>267</sup> The children occasionally joined them.<sup>268</sup> The mother testified, however, that she believed that homosexuality was wrong, and that she did not have a sexual relationship with the woman.<sup>269</sup> The trial court granted the father's motion to modify custody, observing that the mother's decision simply to let a lesbian live in her house with the children "even without sex is inappropriate behavior . . . . It is at least poor parental judgment on the part of defendant to allow a well known lesbian to both reside with defendant and the children and sleep in the same bed with defendant."<sup>270</sup>

The Arkansas Supreme Court reversed. Although it acknowledged that "this court has held that a parent's unmarried cohabitation with a romantic

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<sup>263</sup> Id. at 117.

<sup>264</sup> Id.

<sup>265</sup> The court observed that: "She simply alleges that his living openly as a homosexual needed to be appropriately explained to the children through the help of professional counseling and a cooperative effort by both parents--not an unreasonable request." Id. at 118. The father, however, who became visibly angry in the Mother's presence, maintained that she had difficulty accepting his sexual orientation and had refused to work with him. Id.

<sup>266</sup> 110 S.W.3d 731 (Ark. 2003).

<sup>267</sup> Id. at 732.

<sup>268</sup> Id.

<sup>269</sup> Id. at 732-33.

<sup>270</sup> Id. at 734. The court cited the *Taylor* decision.

partner, or a parent's promiscuous conduct or lifestyle, in the presence of a child cannot be abided,"<sup>271</sup> it emphasized "the absence of proof that a homosexual relationship was occurring" and the evidence showing that the children were well adjusted and happy and "had not been adversely affected" by their mother's living arrangement.<sup>272</sup>

The distinction between homosexuality per se and non-marital cohabitation in the child's presence remains good law in Arkansas. In a recent case affirming a change of custody from mother to father, the intermediate court of appeal claimed that its decision did not depend on the mother's sexual orientation, but the fact that she "had six different sexual partners in a four-and-a-half year period. In every instance, appellant cohabited with her partner in the presence of Zachary despite an explicit court order that forbade extramarital cohabitation in front of the child."<sup>273</sup>

The Arkansas Supreme Court has applied the same test to heterosexual couples, upholding a transfer of custody in 2005 based on the mother's non-marital cohabitation, remarking that it indicated instability in the child's life.<sup>274</sup> Arkansas courts continue to affirm the importance of moral values to custody decisions.

In contrast to the other states, Kentucky has almost no reported opinions

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<sup>271</sup> *Id.* at 737.

<sup>272</sup> *Id.* at 739.

<sup>273</sup> *Holmes v. Holmes*, 2007 Ark. App. LEXIS 251 (Apr. 11, 2007). The initial order prohibiting cohabitation occurred in response to the father's first motion to modify custody, when the mother was living with a man to whom she was engaged. The trial court, explaining the change of custody, emphasized the mother's purposeful lack of compliance with the court order, and the fact that the non-cohabitation order was designed to provide stability in the child's life. The trial court found that the mother's frequent change of partners showed a "lack of residential, employment, financial and moral stability manifest[ing] an overall lack of stability in Zachary's life warranting a change of custody."

<sup>274</sup> See *Alphin v. Alphin*, 219 S.W.3d 160 (Ark. 2005). The trial court relied explicitly on the Mother's "illicit sexual relationship" in changing custody, and viewed her marriage to the boyfriend "as a ruse" because the partners testified that they moved up the date to look better in front of the court. *Id.* at 165. The Supreme Court, in affirming the trial court order, observed that: "It is true that this court and the court of appeals have held that extramarital cohabitation in the presence of children 'has never been condoned in Arkansas, is contrary to the public policy of promoting a stable environment for children, and may of itself constitute a material change of circumstances warranting a change of custody.'" (Citations omitted). *Id.* The court then noted, however, that other cases in which the courts transferred custody involved violation of a non-cohabitation order. It nonetheless upheld the transfer of custody in this case on the basis of the court's specific findings that the mother's frequent changes of residence (and romantic partners) involved instability not in the best interests of the child. *Id.* at 166. Justice Betty C. Dickey dissented, accusing the trial court of applying a "blatant double standard" as it criticized the mother's "illicit sexual relationship" before her remarriage, but not the father's relationship with his new wife, who was three months pregnant with his child at the time they married. *Id.* at 167. 167 (Dickey, J., dissenting). The dissent also noted that the mother's residential instability was caused in part by the father's failure to contribute to their daughter's care. *Id.* at 167-68.

on point. The last reported decision occurred in 1980, when the Kentucky Court of Appeals, citing expert testimony, held that:

Without question, in my opinion, there is social stigma attached to homosexuality. Therefore Shannon will have additional burdens to bear in terms of teasing, possible embarrassment and internal conflicts. Also, there is excellent scientific research on the effects of parental modeling on children. Speculating from such data, it is reasonable to suggest that Shannon may have difficulties in achieving a fulfilling heterosexual identity of her own in the future. There would seem to me to be no rational reason for purposely submitting a child to these additional and potentially debilitating influences.<sup>275</sup>

The Kentucky courts refused to apply a similar standard to a case of heterosexual cohabitation in 1989, holding that mere misconduct without a showing that the misconduct has affected or is likely to have an adverse effect on the child is an insufficient basis for a modification of custody.<sup>276</sup> The only recent case to address same-sex cohabitation is one refusing to recognize a lesbian partner as a de facto parent under Kentucky law.<sup>277</sup> While Kentucky custody decisions may not be hostile to sexual activity outside of marriage, they do appear hostile to such activity when it occurs between gay and lesbian partners.

The five states with the highest median ages of marriage, Massachusetts, New York, Rhode Island, Connecticut, and New Jersey, are also among the most liberal in the country when it comes to numerous issues, including a parent's sexual choices. Massachusetts, most obviously, has mandated recognition of same-sex marriage as a matter of basic equality. The New Jersey courts have required recognition of a status comparable to marriage, and Connecticut has adopted domestic partnership legislation.<sup>278</sup> Nonetheless, the issue is not whether these states take different positions on non-marital or same-sex cohabitation from those in red states, but *when* they did so.

Massachusetts has ruled from the early eighties that "a parent's life-style, standing alone, is insufficient ground for severing the natural bond between a parent and a child."<sup>279</sup> In a 1980, the Massachusetts Supreme Judicial Court reversed a dependency case that turned on the trial judge's finding that "[t]he environment in which [the mother] proposes to raise the children, namely, a Lesbian household, creates an element of instability that would adversely

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<sup>275</sup> 608 S.W.2d 64, 66 (Ky. Ct. App. 1980).

<sup>276</sup> *Sosh v. Sosh*, 1989 Ky. App. LEXIS 72 (Ct. App.) (mother's extramarital affair with overnight guest).

<sup>277</sup> *B. F. v. T.D.*, 194 S.W.3d 310 (Ky. 2006).

<sup>278</sup> See *supra* note \_\_\_\_.

<sup>279</sup> *Doe v. Doe*, 452 N.E.2d 29 (Mass. 1983).

affect the welfare of the children."<sup>280</sup> The appellate courts extended the ruling in 1983 to a divorce proceeding, holding that the mother's relationship with a lesbian cohabitant was not grounds to grant sole custody to the father.<sup>281</sup> Nor did the court suggest restrictions on overnight visitors would be appropriate.

The New York cases of *Di Stefano v. Di Stefano*<sup>282</sup> and *In re Jane B.*,<sup>283</sup> decided in the seventies, have been cited by other jurisdictions as precedent for restricting the custodial rights of gay or lesbian parents.<sup>284</sup> Both cases granted custody to the fathers over lesbian mothers, finding that same-sex cohabitation "creates an improper environment" for children.<sup>285</sup>

Despite the early New York cases, the appellate division in 1986 upheld a transfer of custody from the mother to a gay father living with a male partner in one of the first reported cases in the country to do so.<sup>286</sup> Thus, the court distanced itself from the New York decisions of the seventies, adopting a nexus test that made sexual orientation irrelevant absent a showing that the children are emotionally affected.<sup>287</sup> It also cited with approval another New York case, striking restrictions on the father's male partner as pointless and punitive.<sup>288</sup>

Rhode Island, like Kentucky, has relatively few cases on point. In 1989, the state Supreme Court upheld conditions that prohibited a custodial mother from having overnight male visitors even without a showing of negative impact on the child.<sup>289</sup> By 2000, however, the Supreme Court had no trouble upholding a trial court's finding that a request for such an order was frivolous.<sup>290</sup> Rhode Island has also recognized lesbian partners as de facto parents under state law.<sup>291</sup>

In Connecticut in 1980, the state supreme court upheld a restriction on

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<sup>280</sup> *Bezio v. Patenaude*, 410 N.E. 2d 1207, 1211 (Mass. 1980).

<sup>281</sup> *Doe v. Doe*, 452 N.E.2d 29 (Mass. 1983).

<sup>282</sup> 401 N.Y.S.2d 636(4th Dep't 1978) . In *Di Stefano*, the appellate court upheld a grant of custody of the couple's three children to the father, and conditioned the wife's visitation on the absence of her lesbian partner, finding that the lower court's decision "reasonably may be read to conclude that the wife's conduct in failing to keep her lesbian relationship with . . . [her partner] separate from her role as a mother has had, and predictably will have, a detrimental effect upon the children." *Id.* at 638.

<sup>283</sup> 380 N.Y.S.2d 848 (Sup. Ct. 1976).

<sup>284</sup> See, e.g., *Kallas v. Kallas*, 614 P.2d 641, 645 (Utah 1980).

<sup>285</sup> 380 N.Y.S.2d 848, 859 (Sup. Ct. 1976)

<sup>286</sup> *M.A.B., v. R.B.*, 510 N.Y.S.2d 960 (Sup. Ct. 1986).

<sup>287</sup> *Id.* at 927.

<sup>288</sup> See *Gottlieb v Gottlieb*, 488 N.Y.S.2d 180 (1985). In this case, the court excised portions of the judgment that conditioned the father's visitation privileges upon the total exclusion of his lover or any other homosexuals during visitation. The court said: "[The] daughter must be fully conversant with the fact that her father has a live-in male lover, and that excluding the lover as a condition of visitation serves no real purpose other than as a punitive measure against the father." *Id.* at 182 (Kupferman, J.P., concurring).

<sup>289</sup> *Parrillo v. Parrillo*, 554 A.2d 1043 (R. I. 1989).

<sup>290</sup> *Logan v. Logan*, 763 A.2d 587, 589 (R.I. 2000).

<sup>291</sup> *Rubano v. DiCenzo*, 759 A.2d 959 (R.I. 2000).

the father's visitation that excluded overnight visitation "where the defendant is living with another woman without the benefit of wedlock."<sup>292</sup> By 2000, however, Connecticut courts were rejecting a mother's request to limit father's visitation in light of his non-marital visitation because there was no evidence it adversely affected children or that children, who were Catholic, expressed religious concerns about it.<sup>293</sup> In addition, the Superior Court had no difficulty changing a joint custody order to sole custody for a lesbian mother living with her partner in light of the father's mental health issues, commenting only that both parents had "non-traditional households."<sup>294</sup> The state also recognizes the standing of same-sex partners to seek visitation.<sup>295</sup>

Finally, New Jersey has had the most complete transformation. In the early seventies, state courts restricted the visitation rights of a father who took his three children to gay marches and rallies. The court required in one case that during visitation, the father could not:

- 1) not cohabit or sleep with any individual other than a lawful spouse,
- 2) not take the children or allow them to be taken to "The Firehouse," and
- 3) not involve the children in any homosexual related activities or publicity.
- 4) not be in the presence of his lover.<sup>296</sup>

The New Jersey Supreme Court, in its 2006 decision requiring the state to extend recognition to same sex couples on the same terms as marriage, referred explicitly to this case as an example of discrimination.<sup>297</sup> Nonetheless, as early as 1979, the state appellate courts reversed a trial court order that transferred custody from the mother to the father as a result of the mother's homosexuality.<sup>298</sup>

The red states in this group certainly differ from the blue states. Of the five red states with the lowest median age of marriage, only one (Oklahoma) expressly reversed a trial court's consideration of a parent's same-sex cohabitation because it did not make specific findings of adverse effect. Three states (Utah, Idaho and Arkansas) have upheld the relevance of such

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<sup>292</sup> Gallo v. Gallo, 440 A.2d 782, 787 (Conn. 1981). It nonetheless limited the restriction to the woman about whom the trial court had made specific findings with respect to the impact on the child rather than to all women.

<sup>293</sup> Duffany v. Duffany, 2000 Conn. Super. LEXIS 2821.

<sup>294</sup> Zienka v. Zienka, 2004 Conn. Super. LEXIS 1638.

<sup>295</sup> Laspina-Williams v. Laspina-Williams, 742 A.2d 840, 844 (Conn. Super. Ct. 1999) (holding that lesbian co-parent had standing to petition for visitation).

<sup>296</sup> In re J. S. & C., 324 A.2d 90, 97 (N.J. Sup. 1974).

<sup>297</sup> Lewis v Harris, 908 A.2d 196.

<sup>298</sup> M.P., v. S.P., 404 A.2d 1256 (N.J. 1979)(holding that children's best interests were to remain with defendant and that they could best learn how to cope with her homosexuality by confronting its existence rather than being sheltered.)

considerations, with Arkansas and Idaho doing so in relatively recent decisions and Utah doing so in 1994. In contrast, in the five blue states with the highest median age of marriage, the most recent decision we could find addressing non-marital sexuality in the context of custody or visitation was the 1989 Rhode Island decision affirming restrictions over overnight heterosexual cohabitation. Massachusetts and New Jersey were reversing trial court decisions based on sexual orientation by 1980, and New York expressly affirmed the transfer of custody from a fit mother to a gay father in the mid-eighties. None of the five states have current reported decisions within the last decade restricting custody or visitation on the basis of the parent's sexual activity.

Aside from the results, the tone of the cases differs as well. The state supreme courts in Utah, Idaho and Arkansas have expressly affirmed the lower courts' consideration of parent's morality, while the blue state courts, especially in Massachusetts and New Jersey, were more likely to use the language of equality,<sup>299</sup> and even when using similar language, more likely to overturn lower court decisions that took sexual orientation into account.<sup>300</sup>

Nonetheless, the reported judicial decisions show significantly less polarization than the legislation on abortion and same-sex marriage. All of the reported decisions reject sexual orientation as a per se factor precluding custody or visitation, and all require findings of fact that tie sexuality to an impact on the children, though they differ in the rigor of the showing necessary to do so.<sup>301</sup> Moreover, the states generally appear to be moving in the direction of less rather than more regulation of sexuality even if they are not all doing so at the same time.<sup>302</sup> The most telling facts may be not so much the cases on the record, but the relative silence from states such as Utah unlikely to rule out such considerations altogether.

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<sup>299</sup> See especially New Jersey and Massachusetts decisions on marriage *supra*.

<sup>300</sup> Trial courts in a number of states found that parents with unmarried partners created more unstable environments for their children. Compare, e.g., *Holmes v. Holmes*, 2007 Ark. App. LEXIS 251 (April 11, 2007)(upholding decision transferring custody to father after consideration of wife's "unstable" relationships with different partners) with *Bezio v. Patenaude*, 381 Mass. 563, 579 (1980) (overturning trial court decision based on such grounds).

<sup>301</sup> See, e.g., *Holmes v. Holmes*, 2007 Ark. App. LEXIS 251 (Apr. 11, 2007)(construing the trial court finding as not having anything to do with sexual orientation at all, only with the mother's instability in having many different partners and her defiance of a trial court order forbidding cohabitation). Cf. *In re Marriage of Wicklund*, 932 P.2d 652 (Wash. 1996)(parental conduct may be restricted only if child's physical, mental, or emotional health would be endangered).

<sup>302</sup> See, e.g., the rulings from other red states only slightly below the five red states with the lowest median ages of marriage: *Fulk v. Fulk*, 827 So. 2d 736 (2002 Miss. App.)(court should not have restricted lesbian mother's parent's visitation rights unless the visitation seriously endangered the child.); *Moses v. King*, 637 S.E.2d 97 (2006 Ga. App.), cert. denied, *King v. Moses*, 2007 Ga. LEXIS 84 (Jan. 8, 2007)(overturning trial court ruling that placed too much emphasis on mother's affair with another woman, and inappropriately restricted her visitation rights). Georgia and Mississippi have systems for the nonpartisan election of judges. AMERICAN JUDICATURE SOCIETY, *JUDICIAL SELECTION IN THE STATES: APPELLATE AND GENERAL JURISDICTION COURTS* (2004), <http://www.ajs.org/js/JudicialSelectionCharts.pdf>.

*D. Conclusion: Family Law Federalism: Is Polarization Avoidable?*

If two different family systems exist, then conflict may appear inevitable. We believe, however, that the tensions between the two systems can be managed. That is, the greatest clashes occur in the context of high profiles cases (e.g., *Roe v. Wade* and its progeny) that become wedge issues serving the interests of political parties that hope to profit at the ballot box. The alternative is a system of dispute resolution that creates more space for the evolution of family mores over time.

Nonetheless, the question of whether *elected* state courts can effectively police the fairness of trial court results in the context of contested values remains in doubt. A series of Alabama decisions demonstrate that the culture wars we have chronicled exist within states as much as they do between red states and blue, and the injection of polarized rather than consensus values into the debate undermines the role of courts in mediating public morality even in the most conservative of states.

Let us turn to Alabama. The Chief Justice of the Alabama Supreme Court Roy Moore is renowned for his insistence on displaying the ten commandments in the Alabama courthouse, and Alabama eventually removed him from office because of his defiance of the federal order requiring that he desist.<sup>303</sup> Less well known is his injection of religious authority into family law decision-making. His efforts came to a head in *Ex parte H.H.*<sup>304</sup> In that case, the mother, who was living with a lesbian partner in California, sought to modify an order granting the father custody, on the grounds that the father was physically abusive toward the children, whipping them with a belt, and slapping at least one of the children hard enough to cause a nosebleed.<sup>305</sup> The father disputed the characterization and severity of the events. The trial court ruled in his favor, but the court of appeals reversed finding that the mother had substantiated her claim of physical abuse.<sup>306</sup> The Alabama Supreme Court reversed again, reinstating the trial court judgment. It held in a brief opinion that the appellate court should have deferred to the trial court judge, who had evaluated “the credibility of the testimony and who observed the demeanor of the witnesses, [and] found that, although the father's disciplinary actions may occasionally be excessive, no abuse had occurred.”<sup>307</sup>

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<sup>303</sup> See Alabama Ousts Justice Moore, WorldNetDaily, November 13, 2003 (reporting that Chief Justice Roy Moore had been removed from the court halfway through his elected term for “defiance of a federal judge's order to move his Ten Commandments monument from the rotunda of the state courthouse.”)

[http://www.worldnetdaily.com/news/article.asp?ARTICLE\\_ID=35566](http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=35566).

<sup>304</sup> 830 So. 2d 21 (Ala. 2002).

<sup>305</sup> *Id.* at 23.

<sup>306</sup> *Id.* at 24-25.

<sup>307</sup> *Id.* at 25.

Justice Moore wrote a separate opinion to emphasize that “the homosexual conduct of a parent—conduct involving a sexual relationship between two persons of the same gender—creates a strong presumption of unfitness that alone is sufficient justification for denying that parent custody of his or her own children.”<sup>308</sup> He acknowledged that the mother had entered into a domestic partnership in California, but found this utterly irrelevant, given that Alabama provides no legal recognition to same-sex relationships. Moreover, he insisted, in extremely strong and direct language, that:

Homosexual conduct is, and has been, considered abhorrent, Immoral, detestable, a crime against nature, and a violation of the laws of nature and of nature's God upon which this Nation and our laws are predicated. Such conduct violates both the criminal and civil laws of this State and is destructive to a basic building block of society -- the family. The law of Alabama is not only clear in its condemning such conduct, but the courts of this State have consistently held that exposing a child to such behavior has a destructive and seriously detrimental effect on the children. It is an inherent evil against which children must be protected.<sup>309</sup>

The contrast between the majority opinion and the concurrence is striking. In earlier cases, the Alabama Supreme Court had held that a trial court could restrict custody and visitation to avoid children’s exposure to non-marital cohabitation even without a showing of detriment to the child.<sup>310</sup> In this case, the court did not mention these prior rulings, which would have provided an alternative basis for the result. Instead, the court used technical grounds for the reversal, finding that the intermediate court had not given sufficient deference to the trial court’s findings of fact.. Justice Moore, in one of the single most intemperate opinions in the country, used the occasion not only to reaffirm the earlier rulings, but to condemn homosexuality with references to “Sodom and Gomorrah.”<sup>311</sup>

The Alabama Supreme Court, increasingly wary of the issue, demonstrated similar deference to the trial court in a heterosexual cohabitation

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<sup>308</sup> *Id.* at 26.

<sup>309</sup> *Id.*

<sup>310</sup> See *Ex parte J.M.F.*, 730 So. 2d 1190 (Ala. 1998), holding that where the father had remarried and the mother had changed from involvement in a discreet affair to open cohabitation with her lesbian partner, the trial court could transfer custody to father on the basis of a best interests finding without a showing of detriment to the child. See also *Ex parte D. W. W (R. W. v. D. W. W.)*, 717 So. 2d 793 (Ala. 1998), holding that even without evidence of adverse effect, the trial judge would have been justified in restricting the mother's visitation in order to limit her children's exposure to her "lesbian lifestyle." The court noted that exposing children to a "lifestyle . . . that is illegal under the laws of this state[,] and immoral in the eyes of most of its citizens, could greatly traumatize them." 717 So. 2d at 796.

<sup>311</sup> *Ex parte H.H.*, 830 So. 2d 21, 26, 31 (Moore, J., concurring).

case decided the same year.<sup>312</sup> The parties had divorced as a result of the mother's adultery, and the mother had moved in with her boyfriend while the father was stationed with the Army in Korea.<sup>313</sup> By the time of the appellate decision, she had also given birth to a child with the boyfriend.<sup>314</sup> The court of appeals nonetheless affirmed the trial court's refusal to grant the father's motion to modify custody, and the Supreme Court declined to grant certiorari.<sup>315</sup> Justice Moore filed an impassioned dissent, writing that, "[f]or years there has been a steady deterioration of this Court's standard regarding the fitness of an adulterous parent in a custody case. Prior decisions of this Court establish a conclusive presumption that a parent who has committed adultery is unfit to have custody of a minor child."<sup>316</sup>

Justice Moore, elected to his position on the Alabama Supreme Court,<sup>317</sup> wished to make the reaffirmation of Christian standards of morality central to family law decision-making. The other justices responded by shifting to more technical and procedural grounds for their decisions – and have declined to take another non-marital cohabitation (heterosexual or homosexual) case in the five years since Justice Moore's opinions.<sup>318</sup> In the interim, the Alabama appellate courts have neither actively policed the fairness of trial court decisions<sup>319</sup> nor

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<sup>312</sup> 848 So. 2d 963 (Ala. 2002)

<sup>313</sup> Pankey v. Pankey, 848 So.2d 958, 961 (Ala. Ct. App. 2002).

<sup>314</sup> Id. at 962.

<sup>315</sup> Id. at 963.

<sup>316</sup> Id. at 968.

<sup>317</sup> We thank political scientist Jane Curry for the observation that whether or not justices are elected might affect decision-making in this area. Oklahoma, which has gone the farthest towards a blue state approach of our five red states on non-marital cohabitation, has an appointed judiciary. Arkansas, which has taken the largest number of cases involving non-marital cohabitation, has an elected judiciary, as do Alabama, Idaho, and Kentucky. See Institute for Legal Reform, Justice System, <http://www.instituteforlegalreform.com/states/justicesystem.cfm?state=ID>. Utah justices are appointed. AMERICAN JUDICATURE SOCIETY, JUDICIAL SELECTION IN THE STATES: APPELLATE AND GENERAL JURISDICTION COURTS (2004), <http://www.ajs.org/js/JudicialSelectionCharts.pdf>. In the five blue states – Massachusetts, Connecticut, New York, New Jersey and Rhode Island – all of the justices of the states' highest court are appointed. Id.

<sup>318</sup> Lower Alabama courts have dealt with issues of nonmarital cohabitation during this time period. In Pankey v. Pankey, 848 So. 2d 958, 961 (Ala. Civ. App. 2002), the court referred to the mother's adultery, the existence of the child she bore with the boyfriend, and the boyfriend's financial support, but, nonetheless, did not change custody to the father. Id. at 961-62. In the one appellate decision to raise the issue of homosexual conduct during this time period, the court went out of its way to emphasize that the trial court had not based its decision transferring custody to the father solely on the mother's cohabitation with a lesbian partner, but rather on an unweighted variety of factors, including allegations of neglect and interference with the father's visitation, affecting the child's best interests. L.A.M. v. B.M., 906 So. 2d 942 (Ala. Civ. App. 2004). The court underscored the father's testimony that he would have had the same concerns for the child's well being if the mother's partner "was a man" and that the "visitation disputes, neglect, and a concern for the child's safety, as well as the mother's relationship with P.M., gave him reason to file the modification petition." Id. at 947

<sup>319</sup> The courts have been more willing to do so in the cases of heterosexual cohabitation. In another cases decided in 2002, the intermediate appellate court reversed a trial court decision

claimed a role as arbiters of family morality with the same confidence as the courts in earlier eras.<sup>320</sup>

## V. CREATING SPACE FOR FAMILY LAW FEDERALISM

Partisanship is an increasingly salient fact of American political life. Political activists have used “wedge” issues to energize their core supporters, and divide an electorate that most polls show has overwhelmingly moderate and stable political views.<sup>321</sup> Few issues have been more successful in this respect than moral values. While public attitudes on the economic, racial and other issues that once defined party positions have remain largely unchanged over the last forty years, public attitudes toward abortion and sexuality have shifted – and become much more polarized.<sup>322</sup> We argue in this article that family issues are not only particularly vulnerable to partisan tactics, but also that they are central to the success of partisan tactics because the divisions over family values rest on genuine and deep-seated cultural anxieties.

Age is the defining element in the tensions between the two systems. The blue state system, which we have termed the “new middle class morality,” posits a substantial separation from the beginning of adulthood and the assumption of family responsibilities.<sup>323</sup> This separation necessarily involves

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that had transferred custody to the father solely on the basis of the mother’s cohabitation in the presence of the child with men to whom she was not married. The appellate court reversed holding that for “heterosexual misconduct” to be a basis for a change of custody, there must be a showing of detriment to the child. *Riley v. Riley*, 882 So. 2d 342, 346 (Ala. Civ. App. 2002). Although the opinion was issued in November, 2002, it was not released for publication until mid-2004. See, e.g., *Davis v. Davis*, 883 So. 2d 1252 (Ala. Civ. App. 2003)(reversing trial court modification of custody order on the basis of the mother’s non-marital cohabitation, finding that it was insufficient as sole basis for modification of custody in case in which mother married boyfriend, and father also had intimate partner overnight in the house in the presence of the children).

<sup>320</sup> For example, in 1998, the Alabama Supreme Court baldly stated: “[e]ven without this evidence that the children have been adversely affected by their mother’s relationship, the trial court would have been justified in restricting R.W.’s visitation, in order to limit the children’s exposure to their mother’s lesbian lifestyle . . . Restrictions such as those at issue here are common tools used to shield a child from the harmful effects of a parent’s illicit sexual relationships -- heterosexual or homosexual.” *Ex parte D.W.W.*, 717 So. 2d 793, 796 (Ala. 1998).

<sup>321</sup> John W. Evans, *Have Americans’ Attitudes Become More Polarized?—An Update*, 84 *SOC. SCI. Q.* 71 (2003); *FIORINA*, *supra* note \_\_\_.

<sup>322</sup> Delia Baldassarri and Andrew Gelman, *Partisans without constraint: Political polarization and trends in American public opinion*, (June 13, 2007), <http://www.stat.columbia.edu/~gelman/research/unpublished/BGpolarization4.pdf> (finding polarization on moral issues largely non-existent forty years ago, greater polarization today on moral issues among the better educated and more politically active, and polarization on moral issues increasing much more dramatically since the mid-eighties).

<sup>323</sup> As discussed *supra*, sociologist Barbara Dafoe Whitehead has termed this new “pathways to adulthood.” She observes that “preparation for adult life is more prolonged than it has been in the past. This is largely due to two related factors: a longer period of schooling before entry into the work world and the postponement of marriage until older ages.” Barbara DaFoe Whitehead,

training for autonomy.<sup>324</sup> Young adults now have more time in which they must manage dramatically more choices about sexuality,<sup>325</sup> the nature of workforce participation, and the construction of gender roles.<sup>326</sup> When in their mid-to-late twenties (or early thirties for the more educated) they form families, they do so as mature adults, already socialized into adult roles. The linchpin in this process is avoiding improvident childbirth, and that too is a matter of managing choice: birth control, abortion, and the possibility of single parenthood are critical options in the new era.<sup>327</sup>

New life patterns present a direct affront to more traditional, conservative, and religious moral understandings and to the laws that have supported them. They conflict with the systems that have historically shepherded young adults from parent-supervised adolescence into formally prescribed adult roles. Yet, marriage at younger ages is a risky enterprise. It has historically required a high degree of community-reinforced socialization into marital roles – including stereotypical gender roles, male financial contributions and female dependence – to succeed.<sup>328</sup> New research emphasizes that full emotional maturity does not occur until the mid-twenties, and the less than fully mature early twenties brain (especially if male) is primed for risk-taking and sexual experimentation.<sup>329</sup> At the same time, the modern economy provides fewer opportunities for the men who are ready to start families in their early twenties to move into productive employment.<sup>330</sup>

Trends Shaping Youthful Sexuality,

<http://www.nplc.org/commonground/papers/whiteheadpaper.htm>

<sup>324</sup> *Id.*

<sup>325</sup> Whitehead emphasizes that one of the most dramatic elements in this shift is the interval between age of first intercourse (17 for women, 16 for men) and marriage (25 for women and 26 for men). For African-Americans, the average interval is 12 years for women and 19 years for men. *Id.*

<sup>326</sup> MILTON C. REGAN, JR., *ALONE TOGETHER: LAW AND THE MEANINGS OF MARRIAGE* (1999), *AND FAMILY LAW AND THE PURSUIT OF INTIMACY* (1993)(describing the challenge of intimacy in a post-modern world where roles, rather than constitutive of self, become partial, changing and subject to an almost infinite array of choices and combinations).

<sup>327</sup> We note that while we have described the process of cultural change largely in geographic terms, the rate at which different groups have moved toward the blue state model also differs by class and race. The most highly educated sector of the population throughout the country is more likely to defer the beginning of sexual activity, more likely to use contraception to manage non-marital sexuality and less likely to experience non-marital childbirth. See McLanahan, *supra*. Moreover, there is considerable disagreement on the benefits of postponing childbearing for the most disadvantaged portions of the population. Studies show, for example, that African-Americans experience greater fertility problems than whites, and depend more on older relatives such as grandparents who may be less able to assist as time passes. See, e.g., AT Geronimus, *The weathering hypothesis and the health of African-American women and infants: evidence and speculations*. 2 *Ethn Dis* 207 (1992) (documenting faster decline in fertility for African-Americans.)

<sup>328</sup> For a discussion of the relationship between marriage and socialization into gender roles, see MILTON C. REGAN, JR., *FAMILY LAW AND THE PURSUIT OF INTIMACY* 92-94 (1993).

<sup>329</sup> See *supra* note \_\_\_\_.

<sup>330</sup> Liana C. Sayer, Nathan Wright and Kathryn Edin, *Class Differences in Family Attitudes* 3 (2005)(summarizing literature on class, employment prospects, and family patterns)(manuscript on file with authors)(review and resubmit, *Journal of Marriage and the Family*).

These changes pose challenges for the country (and, indeed, the world) as a whole. They exacerbate class and racial inequalities. In Europe and Japan, they are associated with an increasingly intense debate about fertility rates that have plunged well below the replacement level.<sup>331</sup> In the United States, however, they contribute to polarization over the issue of morality because they lead to very different political and legal prescriptions. The “blue states” (and the more liberal, more secular elite everywhere) have largely accepted the changes. They support their daughters’ education about sexuality and birth control. They want abortion to be available. They address sexuality activity through a lens of tolerance and equality. They recognize that women’s financial and men’s domestic contributions are vital to family success. They negotiate rather than mandate family formation and the assumption of adult roles. And to the extent they share concern about family instability and unbridled sexuality, they believe that the solutions lie in private reinforcement of acceptable standards of conduct rather than in public condemnations.

For the red states (and particularly for the more conservative, more traditional and religious among them), these changes have produced a high degree of cognitive dissonance. The cornerstone of the change – the increasing delay between the beginning of adulthood and marriage – is impossible to manage within the established values framework. Relaxing attitudes towards non-marital sexuality requires letting go of religiously mandated teachings. Yet, expecting abstinence until the mid-twenties is unrealistic. Social science research does suggest that religious women start sexuality activity later, but more than half of even weekly church-goers were no longer virgins by the age of 18,<sup>332</sup> it further suggests that well over 90% of all adults engage in sex before they marry, and that even those who delay sexual activity into their twenties are likely to do so.<sup>333</sup> Moreover, marriage at an early age – particularly one compelled by an improvident pregnancy – is unlikely to last, and the children produced by dysfunctional unions a greater drain on public and grandparent resources. To the extent that abstinence and early marriage have worked historically, they have required a high degree of public consensus and reinforcement of appropriate behavior. Nationally, that consensus is gone.<sup>334</sup>

The divergence in these family systems and worldviews poses a difficult challenge for law. If each system proceeded on its own terms, within political

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<sup>331</sup> Indeed, a new European paper suggests that the difference between the higher fertility northern European states and the lower fertility Southern European states is age of family formation. Young adults in higher fertility nations begin childbearing (and leave home) at earlier ages; they are also more likely to have children outside of marriage. See Bignami-Van Assche and Billari, *supra* note \_\_\_\_.

<sup>332</sup> MARK D. REGNERUS, *FORBIDDEN FRUIT: SEX & RELIGION IN THE LIVES OF AMERICAN TEENAGERS* 121 (2007).

<sup>333</sup> *Id.*

<sup>334</sup> See discussion *supra* note \_\_\_\_.

and legal units that shared a common cultural framework, we would predict continued evolution, but not necessarily irreconcilable conflicts. Differences about family morality are not unprecedented and have undergone similar processes of evolution in the past. Moreover, the two systems share common values and objectives. The secular middle class is rediscovering the importance of commitment, with falling divorce rates and more self-conscious consideration of the importance of stability for children.<sup>335</sup> Falling teen birth rates involve greater abstinence as well as more effective contraception, particularly for the better off.<sup>336</sup> The length of time between the beginning of sexuality and marriage is increasing in red states as well as blue, and doing so without much evidence of abstinence extending into early adulthood. And all states are to some degree purple, with differences within them that play out on race, class, gender, religious and urban/rural lines.

Nonetheless, the intrusion of polarized political discourse into core issues of family law poses a particular difficult challenge for the judiciary. The courts, in their day-to-day decision-making on intimate family matters often act as midwives guiding the birth of new values. The change in custody decision-making from a maternal preference to an ideal of shared custody presents a case in point. Faced with increasing divorce rates and the changing role of women, the judiciary, with or without legislation in the background, articulated on a case-by-case basis over a period of decades new willingness to consider shared custody arrangements, and the development of principles that made shared responsibility for children the new starting point for custody decision-making. Despite the opposition of both feminists and traditionalists, the new ethic has taken hold not just in terms of legal doctrine, but as a consensus norm for post-divorce ordering.<sup>337</sup>

Effective judicial leadership, however, requires a consensus-building, non-partisan stance. Such leadership may not be possible on abortion,<sup>338</sup> just as the courts foundered historically on no-fault divorce. Significant portions of the judiciary and the public had been willing to consider mutual consent divorce without a showing of fault since the 1920's. Religious opposition, however, blocked no-fault legislation for decades. In the interim, courts circumvented the legislative stalemate through expansion of the category of "extreme cruelty" or manufactured cases of adultery.<sup>339</sup> The hypocrisy involved in implementing legislation that no longer reflected the views of the judges or the litigants before them, however, threatened the legitimacy of the judicial process. The disrepute that infected the process may have ultimately made as powerful a case for

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<sup>335</sup> McLanahan, *supra* note \_\_.

<sup>336</sup> CHILD TRENDS, CHILD TRENDS DATA BANK, PERCENTAGE OF BIRTHS TO UNMARRIED WOMEN, <http://www.childtrendsdatabank.org/indicators/75UnmarriedBirths.cfm>.

<sup>337</sup> For an account of this transformation, see CARBONE, *supra* note \_\_, Chapter 13

<sup>338</sup> See Post and Siegel, *supra* note \_\_.

<sup>339</sup> *Id.*

divorce reform as the substance of the no-fault principle itself.<sup>340</sup>

The divergence in family systems in a time of partisanship poses similar challenges as the courts navigate the political and cultural minefields underlying moral issues. Condemnation of non-marital sexuality might have moral salience when made on a consensus basis; it has little as a partisan stance. Nonetheless, excusing non-marital cohabitation, particularly between same-sex couples, may be a matter of course in Rhode Island and politically perilous in Arkansas. The experience of the Alabama appellate courts, which have skirted condemnation of non-marital cohabitation once Justice Moore associated it with assertion of Biblical references as legal authority, provides a cautionary case in point. So, too, does the experience of the New Hampshire legislature in first embracing, then rejecting parental notification laws with a change in the political composition of the legislature. Parental notification, even if misguided, once commanded overwhelming political support. Nuanced implementation might have diffused the symbolic affront to traditional values while softening or circumventing the difficulties of implementation.<sup>341</sup> Using it to wage culture war through the initiative process threatens to discredit the enterprise, and to undermine the credibility of the judiciary who must implement the resulting laws.<sup>342</sup>

At the same time, however, values assertion, when done as a genuine expression of either consensus leadership or majority values, does have a place in the judicial process. Recognition that there may be two (or more) internally coherent and conflicting family systems raises challenges for a federal system whether or not they are caught up in partisan challenges. Yet, these challenges should be the ordinary ones of federalism, rather than polarized disputes that threaten to derail judicial decision-making. Federalism, after all, is designed to recognize and diffuse regional differences. We note, in particular, the following tools at its disposal:

First, given the deep divisions we have documented, the expression of values may be best undertaken within smaller political units with greater sensitivity to regional variation. Family law, in particular, is state law, and

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<sup>340</sup> *Id.*

<sup>341</sup> In Maine, for example, a doctor's statement provides the basis for objection. ME. REV. STAT. ANN. tit. 22, §§ 1597-A(2)(A)(West 2007). The doctor's statement, as opposed to use of the judicial process, keeps the issue private. Moreover, as Professor Sanger's article demonstrates, doctors are involved in counseling the patients on whom they would perform abortions in any event; judges are unsuited to the role, and the formal judicial process serves primarily to humiliate teens caught up in the process, who, if they have good reasons not to inform their parents, are likely to be already victims of dysfunctional families and often coercive or abusive sexual relations. Sanger, *Regulating Teenage Abortion*, *supra* note \_\_\_\_.

<sup>342</sup> The overwhelming experience of judges conducting judicial bypass proceedings is to refuse to hear the cases, to reject all petitions on the basis of anti-abortion beliefs, or to rubber stamp them on the grounds that the courts have little basis on which to second guess the assertions. See *id.*

articulation of normative aspirations can be undertaken at that level. While incorporating fire and brimstone in judicial decisions may not be appropriate anywhere, sensitivity to religious values and appropriate cultural expression of these values will necessarily differ with geography and time.<sup>343</sup>

Second, the courts should continue to police the distinction between the *expression* of shared values, and the imposition of state control on those who dissent. *Lawrence v. Texas*,<sup>344</sup> which held criminal prosecution of same-sex sodomy unconstitutional, struck exactly the right balance in this regard. It provided safeguards from state intrusion in the bedroom, recognizing the value of same-sex intimacy without a direct challenge to the expression of contrary values. The majority opinion emphasized that:

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."<sup>345</sup>

Third, the courts should pay particular attention to the avenues of family evolution. The Supreme Court decisions in *Griswold v. Connecticut* and *Roe v. Wade* were important milestones in protecting autonomy in individual decisions about the constitution of family. While we believe there is room for legislating balancing in the terms of access to such services, the courts should continue to guard against wholesale prohibitions.<sup>346</sup> Access to contraception could easily become as much of a battleground as access to abortion.<sup>347</sup>

Fourth, courts often diffuse hot button issues by selecting less controversial frames as a basis for resolution. A critical part of respect for differing family systems, for example, involves interstate travel and recognition, and the right to travel is likely to become an increasingly important part of

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<sup>343</sup> The polygamy cases, particularly those involving polygamous marriages performed abroad, also involve interesting issues along these lines. American courts have tended to deal with the issue by refusing to recognize the validity of the marriage itself, but often implementing inheritance rights that depend on the marriage. In objecting to polygamy, moreover, modern courts use secular rather than Christian justifications for asserting incompatibility with American law. SEE LESLIE JOAN HARRIS, LEE C. TEITELBAUM AND JUNE CARBONE, FAMILY LAW 187-90 (2005).

<sup>344</sup> See supra note \_\_\_\_.

<sup>345</sup> *Lawrence*, 539 U.S. at 574 (citing *Casey*).

<sup>346</sup> In this respect, we are persuaded by the extensive literature that locates the widespread opposition to *Roe* less in religious principles about the beginning of life, but in opposition to the creation of new understandings about family formation. See Post and Siegel, supra note \_\_\_\_, Kristen Luker, *The Politics of Motherhood*, supra, \_\_\_\_.

<sup>347</sup> Russell Shorts, *Contra- Contraception*, N.Y. TIMES, May 7, 2006, 6 (magazine), at 48

abortion jurisprudence.<sup>348</sup> The fight for interstate recognition of same-sex adoption and parenting is already winning more battles than the fight for same-sex marriage,<sup>349</sup> in part because it is a less direct and confrontational fight, and in part because it draws on the strengths of our federalist system. In similar fashion, where values conflicts threaten to undermine judicial legitimacy, decisions that use procedural devices to avoid judgment on controversial issues may command greater support. The Alabama decisions that emphasized deference to trial court findings of fact provided a way to diffuse irreconcilable conflict on the source of custody decision-making.<sup>350</sup>

Finally, in the face of irreconcilable differences, silence may sometimes be the better course. Legislatures, for example, have largely chosen not to regulate assisted reproduction, and, indeed, a third of state legislatures have yet to address the less controversial issue of paternity in the context of artificial insemination by donor.<sup>351</sup> The Supreme Court, which only rarely hears family law cases in any event, has not granted certiorari on the host of parental rights cases that have arisen since its 2000 decision in *Troxel v. Granville*.<sup>352</sup>

Nonetheless, the courts should seize opportunities to crystallize a moral shift capable of commanding broad acceptance. The courts in Oklahoma, Mississippi, Illinois, Georgia and Rhode Island have each used the common law process to recognize the change from per se condemnation of non-marital cohabitation to closer exploration of the nexus between sexual activity and parenting. These decisions may have taken place at different times in different contexts in different states, but in each case the decisions reflected a change in approach that synthesized a gradual evolution in sensibilities.

The role of the courts in mediating values conflicts can be instrumental in expressing the common ground underlying seeming conflicts. Case-by-case decision-making that can be tailored to the facts at hand is often less divisive than broader pronouncements of legislation or morality. Family law has become a situs for fundamental moral change, and the integrity of the courts an important instrument in values formation. The courts have historically played the midwife role to cultural change in other contexts, and they have begun to play that role in working through the minefield of non-marital sexuality. They cannot do so, however, when caught in a culture war that sees judicial outcomes as exercises of power in which one ideological side "wins" over the other.

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<sup>348</sup> See SUSAN FRELICH APPLETON, GENDER, ABORTION, AND TRAVEL AFTER ROE'S END, 51 St. Louis L.J. 655 (2007); Teresa Collett Stanton, *supra*.

<sup>349</sup> See *Miller-Jenkins v. Miller-Jenkins*, 637 S.E.2d 330 (Va. App. 2006) (reversing lower court refusal to recognize parenting status based on Vermont civil union on jurisdictional grounds); *Finstuen v. Crutcher*, 2007 U.S. App. LEXIS 18500 (10th Cir. August 3, 2007) (holding that Oklahoma must give full faith and credit to adoptions by same-sex parents in other states).

<sup>350</sup> See *supra* notes \_\_\_\_.

<sup>351</sup> NAOMI CAHN, THE PARENT PLAN (forthcoming 2008).

<sup>352</sup> *Troxel v. Granville*, 528 U.S. 1151 (2000).

When that happens, the moral authority of the courts becomes a casualty.

## Appendix A

The states ranked in accordance with votes for Bush

<b>RED STATES</b>	
UT	71
WY	69
ID	68
NE	67
OK	66
AL	63
ND	63
AK	62
KS	62
TX	61
SD	60
MS	60
KY	60
IN	60
MT	59
GA	58
SC	58
LA	57
TN	57
NC	56
WVA	56
AR	55
VA	54
ARK	54
MO	53
CO	52
FL	52
OH	51
NM	50
NEV	50
IA	50

<b>BLUE STATES</b>	
MA	37
VT	39
RI	39
NY	40
MD	43
CT	44
CA	44
ME	45
IL	45
HI	45
NJ	46
DE	46
WA	46
OR	47
MI	48
MN	48
NH	49
PA	49
WI	49

## APPENDIX B

State <sup>353</sup>	Required Parental Involvement in Minors' Abortions <sup>354</sup>			Gay marriage <sup>355</sup>	Teen Pregnancy Rate Rank <sup>356</sup>	Teen Abortion Rate Rank <sup>357</sup>	Divorce Rate 2004 <sup>358</sup>	Church Attendance 24-58% <sup>359</sup>
	Consent	Notification	None					
<b>Alabama r</b>	X			S 98	15	30	4.9	58%
<b>Alaska r</b>	▼			Broad S 97, C 98	30	35	4.3	Not avail.
<b>Arizona r</b>	X			S 96	2	19	4.2	35%
<b>Arkansas r</b>	X			Broad s '97, C '98	10	41	6.1	55%
<b>California</b>	▼			S 00	7	5	--	32%
<b>Colorado r</b>		X		S 00	22	21	4.4	35%
<b>Connecticut</b>			X		33	9	3.1	37%
<b>Delaware</b>		X <sup>360</sup>		S 96	11	8	3.7	43%
<b>DC</b>			X		na	na	1.9	33%
<b>Florida r</b>		X		Broad S 97	6	7	4.8	
<b>Georgia r</b>		X		Broad C 04, S 96,	8	22	--	52%
<b>Hawaii</b>			X	S 98	12	6	--	
<b>Idaho r</b>	§			S 96	37	45	5.0	43%
<b>Illinois</b>		▼		S 96	20	10	2.6	42%
<b>Indiana r</b>	X			S 97	31	38	--	46%
<b>Iowa</b>		X		S 98	43	42	2.8	46%
<b>Kansas r</b>		X		S 96	34	39	3.3	47%

<sup>353</sup> Red indicates that George W. Bush won the state in the 2004 presidential election; Blue indicates that John Kerry won the state in the 2004 presidential election.

<sup>354</sup> Except where indicated, parental involvement laws in minors' abortions require the involvement of one parent and apply to minors under 18.

<sup>355</sup> Based on National Gay and Lesbian Task Force (2005), <http://www.thetaskforce.org/downloads/marriagemap.pdf>.

S refers to a statute; C refers to a constitutional amendment; broad refers to ban on other forms of patnerhip recognition, other than the "basic" ban on same-sex marriage.

<sup>356</sup> Ranking by rates of pregnancy per 1,000 women aged 15-19 according to state of residence, 2000.

<sup>357</sup> Ranking by rates of abortion per 1,000 women aged 15-19 according to state of residence, 2000.

<sup>358</sup> Divorce rates are based on provisional counts of divorces by state of occurrence. Rates are per 1,000 total population residing in area. Includes annulments. Includes divorce petitions filed or legal separations for some counties or States.

<sup>359</sup> Church or Synagogue Attendance by State, San Diego Union-Tribune, May 2, 2006. The national average is 42% or people who say they attend a church or synagogue either once a week or almost once per week. There are no blue states in the top 15, and only one red state in the bottom 15.

<sup>360</sup> Law applies to women under 16

<b>Kentucky r</b>	X			Broad C 04, S 98	25	47	4.9	48%
<b>Louisiana r</b>	X			Broad C 04, S 99	19	44	--	58%
<b>Maine</b>			X	S 97	46	31	4.3	31%
<b>Maryland</b>		X*			13	3	3.2	41%
<b>Massachusetts</b>	X				40	11	2.2	31%
<b>Michigan</b>	X			Broad C 04, S 96	27	15	3.4	
<b>Minnesota</b>		Both parents		S 97	47	36	2.8	44%
<b>Mississippi r</b>	Both parents			S 97, C 04	3	28	4.5	57%
<b>Missouri r</b>	X			S 96, C 04	29	34	3.8	46%
<b>Montana r</b>		▼		Broad S 97, C 04	38	32	3.8	34%
<b>Nebraska r</b>		X		Broad 00	41	40	3.4	53%
<b>Nevada r</b>		▼		C 02	1	4	6.4	27%
<b>New Hampshire</b>		▼		S 04	48	25	3.9	24%
<b>New Jersey</b>		▼			16	1	3.0	34%
<b>New Mexico r</b>	▼				4	18	4.6	41%
<b>New York</b>			X		14	2	3.0	33%
<b>North Carolina r</b>	X			S 96	9	17	4.2	53%
<b>North Dakota r</b>	Both parents			Broad C 04, S 97	50	48	3.1	43%
<b>Ohio r</b>	X			Broad C & S 04	28	27	3.6	43%
<b>Oklahoma r</b>		X		Broad C 04, S 96	21	37	4.9	50%
<b>Oregon</b>			X	C 04	23	13	4.1	32%
<b>Pennsylvania</b>	X			S 96	39	23	3.0	43%
<b>Rhode Island</b>	X				36	16	3.0	Not avail.
<b>South Carolina r</b>	X <sup>361</sup>			S 96	17	24	3.2	58%
<b>South Dakota r</b>		X		S 96	44	49	3.1	45%
<b>Tennessee r</b>	X			S 96	18	29	4.9	52%
<b>Texas r</b>	X			Broad S 03 & C 05	5	26	3.6	49%
<b>Utah r</b>		X		Broad C 04	45	50	4.1	55%
<b>Vermont</b>			X		49	33	3.9	24%
<b>Virginia r</b>	X			Broad S 04, S 97	32	20	3.9	44%
<b>Washington</b>			X	S 98	26	12	4.3	32%
<b>West Virginia r</b>		X*		S 00	35	46	5.0	46%
<b>Wisconsin</b>	X*				42	43	3.0	43%

<sup>361</sup> Law applies to women under 17

<b>Wyoming r</b>	<b>X</b>				<b>24</b>	<b>14</b>	<b>5.2</b>	<b>36%</b>
<b>Total</b>	<b>25</b>	<b>18</b>	<b>7 + DC</b>					

▼ Enforcement permanently enjoined by court order; policy not in effect.

§ Temporarily blocked by court order; policy not in effect.

\* Allows specified health professionals to waive parental involvement if judge is unavailable.

~ Physicians may, but is not required to, inform the minor's parent