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Uncoupling

Naomi Cahn and June Carbone*

ABSTRACT

A series of Supreme Court decisions recognize the end of the federal–state–corporate partnership that once provided a foundation for employment security and family stability. That partnership, which reached its pinnacle during the industrial era, established a family wage made available to the majority of the male population through unionization, a social safety net that filled the gaps left by wage labor, and the extension of these public and private benefits to women and children through marriage.

Uncoupling shows how family security and stability can no longer be linked to employment or marriage, requiring a redesign of the state response. The Supreme Court has framed the necessary elements in that response. First, although other scholars note that the Court’s marriage equality decision in Obergefell celebrates marriage, this Article emphasizes that the decision rejects the historical conception of marriage that made it mandatory, gendered, and foundational to family security. Second, the Court’s opinion in Little Sisters of the Poor in 2020 reaffirms the Court’s earlier decisions that employers owe no civic obligations to their employees or the public good and are thus inappropriate partners for the administration of state benefits. Third, the Court’s ongoing decisions interpreting the Affordable Care Act, including those pending during the upcoming Supreme Court term, lend more support to direct state–citizen compacts than to employment-based benefits.

What other legal scholars have yet to acknowledge is that these decisions point the way toward the emergence of a new legal order. This Article’s groundbreaking analysis of the rise and fall of the male family wage leads to the conclusion that coupling—between men and women in marriage and

* Naomi Cahn is the Justice Anthony M. Kennedy Distinguished Professor of Law, Nancy L. Buc ’69 Research Professor in Democracy and Equity, University of Virginia School of Law. June Carbone is the Robina Chair of Law, Science and Technology, University of Minnesota Law School. We thank Albertina Antognini, Kaiponanea Matsumura, and other participants at the 2020 Nonmarriage Roundtable for their comments, participants in the faculty workshops at the University of San Diego School of Law and William & Mary Law School, Maxine Eichner for her thoughtful comments, Andrew Hammond for his suggestions, and Grace O’Meara and Jolena Zabel for their research assistance.

between employers and state-sponsored benefits—no longer works, clearing the way for the creation of a new legal order.

ABSTRACT.....	1
INTRODUCTION.....	3
I. COUPLING: THE RISE OF THE FAMILY WAGE	7
A. The Agrarian Family Safety Net.....	9
B. Coupling: Industrialization and the Rise of the Family Wage Ideology.....	11
C. Complementing Coupling: Social Insurance Tied to Marriage and Employment.....	18
D. Completion of the Scaffolding: Unionization and Health Care	22
II. DECOUPLING AND THE RETURN OF FAMILY INSTABILITY	26
A. Women and the End of Dependence.....	27
B. Employees and the End of Loyalty	30
C. Employability and Family Strategies.....	34
III. UNCOUPLING AND THE REDESIGN OF FAMILY SECURITY AND STABILITY	37
A. Uncoupling Benefits from Marriage: The Beginning	39
B. Uncoupling Benefits from Marriage: Round 2	41
C. Uncoupling Social Insurance from Employment.....	48
IV. UNCOUPLING REALIZED: RECONSTRUCTING FAMILY SECURITY AND STABILITY	53
A. Reconstructing Through Uncoupling.....	54
B. Objections to Uncoupling	57
CONCLUSION.....	60

INTRODUCTION

Cesar Ardon lives in Siloam Springs, a small town of about 17,000 people in Arkansas, close to the Oklahoma border.¹ Mr. Ardon, who is forty years old, worked as a welder for fifteen years.² Then doctors discovered a baseball-sized tumor on his ribs.³ Since the surgery to remove it in May 2017, he has found occasional work as a handyman, but his pay and the hours he works fluctuate each week with the number of jobs he can find.⁴ Through Medicaid, he was able to get treatment and care.⁵ But then, in March 2018, the Department of Health and Human Services (HHS) granted the State of Arkansas a waiver from Medicaid requirements imposed under the Affordable Care Act (ACA).⁶ Under the AR Works Amendment, the state could require Medicaid recipients to comply with work requirements in order to continue receiving benefits.⁷

In May 2018, the state notified Mr. Ardon that he was required to work at least eighty hours a month if he wanted to keep his Medicaid coverage.⁸ Not only does Mr. Ardon have trouble securing eighty hours of work each month, but he also has difficulty reporting the work he does through the Medicaid website.⁹ Yet, if he were to lose his Medicaid coverage, perhaps only because

1. This description is based on the filings and opinions in *Gresham v. Azar*, 950 F.3d 93 (D.C. Cir.), *cert. granted sub nom. Arkansas v. Gresham*, No. 20-38, 2020 WL 7086047 (U.S. Dec. 4, 2020); see *SPLC Sues Trump Administration for Approving Arkansas Medicaid Work Requirement*, S. POVERTY L. CTR. (Aug. 14, 2018), <https://www.splcenter.org/news/2018/08/14/splc-sues-trump-administration-approving-arkansas-medicaid-work-requirement> [<https://perma.cc/6RWB-UAT7>]. The case had been set for argument on March 29, 2021, but earlier that month, the Supreme Court removed the case from its docket. *Search Results: No. 20-37*, SUP. CT. OF THE U.S., <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/20-37.html> [<https://perma.cc/Q4Z3-G2AU>]; see James Romoser, *Court Nixes Upcoming Argument on Medicaid Work Requirements*, SCOTUSBLOG (Mar. 11, 2021, 12:55 PM), <https://www.scotusblog.com/2021/03/court-nixes-upcoming-argument-on-medicaid-work-requirements/> [<https://perma.cc/F5H5-Y3NP>].

2. S. POVERTY L. CTR., *supra* note 1.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. “Medicaid establishes certain minimum coverage requirements that states must include in their plans. States can deviate from those requirements if the Secretary [of Health and Human Services] waives them so that the state can engage in ‘experimental, pilot, or demonstration project[s].’” *Gresham v. Azar*, 950 F.3d 93, 96 (D.C. Cir.) (first citing 42 U.S.C. § 1396a; and then citing 42 U.S.C. § 1315(a)) (describing statutory framework), *cert. granted sub nom. Arkansas v. Gresham*, No. 20-38, 2020 WL 7086047 (U.S. Dec. 4, 2020).

8. Complaint for Declaratory and Injunctive Relief at paras. 144, 147, *Gresham v. Azar*, 363 F. Supp. 3d 165 (D.D.C. 2019) (No. 1:18-cv-01900).

9. *Id.*

of a reporting glitch, he would have trouble paying for the health care he needs to stay alive.¹⁰

Five months after he received the notice, he became a plaintiff in a lawsuit, claiming that the AR Work Amendment violates both the Constitution and the Administrative Procedure Act.¹¹ The question of whether the ACA permits work requirements, as expressed through Cesar Ardon's challenge, characterizes the clash between legal regimes that provide individuals stability and security.¹² His story shows what happens when an old regime begins to falter, but the terms of the new order have not yet come into place.

We are at such a moment today, and we believe that the story of the ongoing litigation underlying the ACA can be told in such terms. While others have addressed how the ACA has transformed the country's approach to health care,¹³ this Article shows that the ACA litigation goes far beyond a story about health insurance. Instead, this Article is the first to bring together the ACA litigation with other Supreme Court decisions to show not just the collapse of the regime providing family security and stability but also the nascent development of a new one.¹⁴

The old regime, which arose to meet the needs of the industrial era, rested on three pillars: secure, long-term employment paying a male "family wage"; the extension of these benefits to women and children through marriage; and the design of social insurance to fill in the gaps left by the first two.¹⁵ A series of Supreme Court decisions has recognized and in some cases has accelerated the end of the federal–state–corporate partnership that once provided the elements of that system and a foundation for family security.¹⁶ Large corporations no longer provide secure employment or comprehensive

10. S. POVERTY L. CTR., *supra* note 1.

11. *Gresham*, 950 F.3d at 96.

12. As this article was finalized in early March 2021, it appeared that the Biden administration would repeal the waivers at issue in *Gresham*. Romoser, *supra* note 1. Regardless of the ultimate outcome of work requirements, the issues at the core of the case show the disintegration of the old regime for providing family security and stability.

13. See, e.g., Abbe R. Gluck & Thomas Scott-Railton, *Affordable Care Act Entrenchment*, 108 GEO. L.J. 495 (2020) (describing ACA litigation); Andrew Hammond, *Litigating Welfare Rights: Medicaid, SNAP, and the Legacy of the New Property*, 115 NW. U. L. REV. 361 (2020).

14. Other scholars discuss the changes in employment, see *infra* Part II, and marriage, see *infra* Parts II.A and B, but not the implications of these changes for redesign of the state of both sets of changes for a new state order.

15. See discussion *infra* Part I.

16. These decisions, of which *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020), is simply a recent iteration, recharacterize the role of corporations, unions, and citizens in the constitutional order. See *infra* Part III.

benefits for a large portion of the population.¹⁷ Marriage is no longer the compulsory institution for childrearing, with just under 40% of American children born outside of marriage.¹⁸ And a social safety net premised on marriage and employment can no longer meet families' needs.¹⁹

Within this context, the provision of health care became a flash point.²⁰ The old system assumed that employers would provide health insurance covering most employees, and that only supplementary services for the elderly (Medicare), the poor (Medicaid), or dependent women and children required government involvement.²¹ By the time President Obama proposed the ACA, however, very few of the assumptions on which this system was based remained true. Employees, even if they have secure jobs, switch jobs more frequently than they once did.²² And more workers cycle in and out of the labor market.²³ While married couples have two adults who might be able to secure employer-provided family health coverage, unmarried parents may have only one adult who can do so, contributing to the overall decline in employer-sponsored health care coverage.²⁴ And Medicare and Medicaid, at least as originally conceived, did not cover these gaps.²⁵

The federal government's attempt to address these changes produced the ACA. The question of what the ACA stands for, however, is far from fixed.

17. See GERALD F. DAVIS, *THE VANISHING AMERICAN CORPORATION: NAVIGATING THE HAZARDS OF A NEW ECONOMY* 122–24 (2016) (describing decline in the number of employees at large corporations and the greater transience in the labor market more generally); *id.* at ix–xii (describing change in the organization of work from “careers to jobs to tasks” (emphasis omitted)).

18. *Unmarried Childbearing*, NAT'L CTR. FOR HEALTH STAT., <https://www.cdc.gov/nchs/fastats/unmarried-childbearing.htm> [<https://perma.cc/3BJ4-VK5V>] (Dec. 9, 2019).

19. See discussion *infra* Part I.A.

20. See generally Gluck & Scott-Railton, *supra* note 13 (describing history of and reaction to the ACA).

21. See discussion *infra* Part III.C. Consider the importance of covering pre-existing conditions. Elizabeth A. Pendo, *The Health Care Choice Act: The Individual Insurance Market and the Politics of “Choice,”* 29 W. NEW ENG. L. REV. 473, 479 (2007).

22. See discussion *infra* Part II.B.

23. See Nick Bunker, *What's Behind the Decline in Male Labor Force Participation in the United States?*, WASH. CTR. FOR EQUITABLE GROWTH (June 22, 2016), <https://equitablegrowth.org/whats-behind-the-decline-in-male-labor-force-participation-in-the-united-states/> [<https://perma.cc/34E9-D559>] (maintaining that the decline in labor market participation reflects in part more time spent between jobs).

24. See, e.g., Matthew Rae, Daniel McDermott, Larry Levitt & Gary Claxton, *Long-Term Trends in Employer-Based Coverage*, PETERSON-KFF (Apr. 3, 2020), <https://www.healthsystemtracker.org/brief/long-term-trends-in-employer-based-coverage/> [<https://perma.cc/QCG5-DSUM>].

25. Indeed, the original ACA recognized this gap by mandating Medicaid expansion to cover those with incomes up to 138% of the poverty line. Gluck & Scott-Railton, *supra* note 13, at 545.

The ACA can be seen as a band-aid, covering the gaps left by a system that relies principally on employer-provided (and tax-subsidized) private insurance.²⁶ Medicaid expansion, in turn, can be characterized as a federal–state partnership in which administration of such programs is best decentralized.²⁷ The ACA, however, can also be characterized as something else altogether—the first step in a new social compact that remakes the relationship between citizen and state in fundamental ways.

This Article positions the ongoing litigation over the ACA, ranging from the D.C. Circuit’s opinion in *Gresham* to the Supreme Court’s opinion in *Little Sisters of the Poor*, within the context of the changing terms of family security and stability. Our argument is that the economy of the information age has dismantled the industrial-era system that tethered family security to the male family wage, long-term employment, and stable marriage, disguising the state role in securing family well-being.²⁸ The new system decouples the relationship between employment and family security, marriage, and women’s intrinsic dependence.²⁹ In the process, it undermines the premises of New Deal era social insurance in which benefits were tethered to marriage and long-term employment.³⁰ The fights over the ACA provide signposts defining what the terms of the new regime are likely to be.³¹

26. See *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 683–85 (2014) (recognizing corporations as no more than instruments to advance the interests of their owners).

27. Gluck & Scott-Railton, *supra* note 13, at 498.

28. Orly Lobel has powerfully argued that “there is no natural exclusive link between social welfare and employment.” Orly Lobel, *The Gig Economy & the Future of Employment and Labor Law*, 51 U.S.F. L. REV. 51, 69 (2017).

29. See discussion *infra* Part II.A.

30. See discussion *infra* Part I.C.

31. The ACA remains under challenge. See, e.g., *Texas v. United States*, 949 F.3d 182 (5th Cir.) (alleging that now that the individual mandate has been eliminated, it can no longer be justified by the taxing power), *cert. granted sub nom.* *California v. Texas*, 140 S. Ct. 1262 (Mar. 2, 2020) (No. 19-840), and *cert. granted sub nom.* *Texas v. California*, 140 S. Ct. 1262 (Mar. 2, 2020) (No. 19-1019). The national political discussion, however, has already shifted to the need to provide universal health care. A new plan, designed to overcome the obstacles the Supreme Court put in the path of the ACA, is likely to be more firmly tied to the principle of uniform national coverage than the ACA itself. Indeed, the easiest way to extend universal health care is through Medicare for all, in part because new legislation could simply build on the existing Medicare structure, a long-standing arrangement whose constitutionality is firmly established. See, e.g., Miles Mogulescu, *Conservatives and Liberals Agree: Medicare for All Would Be Constitutional*, HUFFINGTON POST (Apr. 3, 2012), <https://pnhp.org/news/conservatives-and-liberals-agree-medicare-for-all-would-be-constitutional/> [<https://perma.cc/EE2P-E4S5>]. While the Biden–Harris platform calls, instead, for a public option, that option may over time ultimately lead to the further erosion of employer-provided health care, ultimately severing the link between health care and employment altogether. See, e.g., Susannah Luthi, *Why Employers Are Flirting with the Public Option*, POLITICO (Feb. 10, 2020, 12:55 PM),

This Article considers the interrelationship between marriage, work, and economic benefits. It introduces the terms “decoupling” to describe the changes that make tying family security to marriage and employment ineffective and “uncoupling” to describe the redesign of a system that no longer makes marriage or long-term employment conditions for access to individual security and autonomy. In other words, “decoupling” is the dismantling of the older system, and “uncoupling” is the design of benefits that do not depend on either marriage or employment.³²

Part I sets up “coupling,” the normative framework for the state–corporate partnership that provided family stability and individual security. It describes the development of the family wage, explaining how this reinforced female dependency. It then turns to the origins of the state-based social insurance system, in which benefits were tied to ability to work and familial connections to the worker. Part II shows how economic changes have decoupled family security and stability from marriage and employment. Part III explores how the system that secures family stability can be uncoupled not just from marriage but also from long-term employment—and from the assumptions that arose from the male family wage of the industrial era. This then means changing the relationship between the individual and the state.³³

I. COUPLING: THE RISE OF THE FAMILY WAGE

To understand the insecurity underlying today’s family requires examining the corporate–state partnership that provided economic stability for much of the twentieth century. That system depended on the forces producing a male family wage, a gendered division of family labor, and a social insurance system tied to the notions of desert associated with marriage and employment. That story starts with the American self-image that ours is a middle-class country.³⁴ At the center of this ideal is the belief that those

<https://www.politico.com/news/2020/02/08/employers-health-care-public-option-112380> [<https://perma.cc/8R7S-4MUP>]; Christina Wilkie, *Biden Puts Health Care Front and Center with a Call To Expand Obamacare*, CNBC (Nov. 10, 2020, 5:53 PM), <https://www.cnbc.com/2020/11/10/biden-presses-for-expanding-obamacare-even-as-s.html> [<https://perma.cc/7TP8-H752>].

32. “Employment” here refers to employment at any given time with a particular employer.

33. See also Rosalind Dixon & Julie Suk, *Liberal Constitutionalism and Economic Inequality*, 85 U. CHI. L. REV. 369, 375 (2018) (noting that “many constitutional democracies . . . are actively considering, and passing, measures to increase investments in education and training, raise the minimum wage, [and] guarantee a universal basic income”).

34. The middle class can be defined to include “people . . . who are prepared to make sacrifices to create a better life for themselves but who have not started with life’s material problems solved because they have material assets to make their lives easy.” John Parker,

who acquire the right assets, observe the right values, make the right investments, and form the right families for themselves and their children can enjoy a better life.³⁵ For that to be true, however, families must have access not just to the means of subsistence but also to a surplus that allows them to invest in their own and their children's futures.³⁶

At the time of the country's founding, the United States could think of itself as a relatively egalitarian country because the principal source of family security, stability, and surplus lay with land ownership—and land in the United States, unlike Europe, was readily available.³⁷ The families of the colonial era rested on three pillars: an effective male monopoly on access to land ownership; land ownership as a prerequisite to marriage, at least for white men; and the marriage-defined homestead as a source of family, stability, and security.³⁸

Burgeoning Bourgeoisie, ECONOMIST (Feb. 14, 2009), <https://www.economist.com/special-report/2009/02/14/burgeoning-bourgeoisie> [<https://perma.cc/Q226-A5ZC>] (quoting Brazilian economist Eduardo Giannetti da Fonseca). At the time of its founding, the United States was more egalitarian than Europe because of the lack of an entrenched aristocracy. *Infra* note 37 and accompanying text. And in the early days of the Republic, 90% of the population lived on farms, with farm ownerships relatively available in comparison with Europe in the same time period. *Infra* notes 37, 43 and accompanying text. The concept of a “middle class” between wealthy capitalists and an unskilled working class is nonetheless thought of a creation of the industrial age. *See generally* STUART M. BLUMIN, *THE EMERGENCE OF THE MIDDLE CLASS* (1989).

35. Parker, *supra* note 34.

36. *Id.*

37. *See* BLUMIN, *supra* note 34, at 108–09 (describing the United States' self-image as an “egalitarian republic”); MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA* 5 (G. Edward White ed., 1985) (referring to novel circumstances in the New World including the availability of land). These descriptions, however, were never true of the South. The South, even looking just at whites, was much more radically unequal than the North; it resembled “extractive” colonial cultures in a way the North never did. *See* DARON ACEMOGLU & JAMES A. ROBINSON, *WHY NATIONS FAIL* 351–57 (2012). At the beginning of the nineteenth century, over ninety percent of African-Americans in the United States were enslaved people. *See* Aaron O'Neill, *Black and Slave Population of the United States from 1790-1880*, STATISTA (Feb. 12 2020), <https://www.statista.com/statistics/1010169/black-and-slave-population-us-1790-1880/> [<https://perma.cc/GPF7-5BD6>]. And freed blacks often faced discrimination and limits on their ability to own land, depending on the area of the country. *See, e.g.*, *Macarty v. Mandeville*, 3 La. Ann. 239, 240 (1848) (holding that given the anti-miscegenation laws, an African-American woman had no claim to the property of her partner but could keep the property that was the result of her own efforts). In addition, even for whites, the South was a more stratified society and grew increasingly so over time. “In 1850, 17 percent of the farming population held two-thirds of all acres in the rich cotton-growing regions of the South.” *The South's Economy*, DIGIT. HIST., https://www.digitalhistory.uh.edu/dispatch_textbook.cfm?smtid=2&psid=3558 [<https://perma.cc/4N9A-3XDL>].

38. While women could own property during this period, their husbands gained the right to manage the property when the women entered into marriage. Richard H. Chused, *History's*

The Industrial Revolution and the urbanization that accompanied it destabilized that regime. It involved a wholesale shift from farm production to wage labor as the principal source of family support.³⁹ Wage income, however, was intrinsically less stable than farm production.⁴⁰ In the early years of the Industrial Revolution, it increased family vulnerability to economic downturns, injuries, and premature deaths.⁴¹ Moreover, by enlisting men, women, and children in factory labor, it undermined the basis for human capital investment that provided the pathways into the middle class.⁴²

This section describes the creation of the male “family wage” as the solution that, by the middle of the twentieth century, created pathways into the stable middle class for the majority of working-class white families. This system rested on coupling family security with a male monopoly on access to the “good jobs” in the new industrial order, recreating women’s dependence within marriage, and extending access to these benefits in the middle of the twentieth century through social insurance, unionization, and labor market regulation.

A. *The Agrarian Family Safety Net*

In 1800, the family farm served as the primary source of security and stability for American families. Ninety percent of Americans lived on farms,⁴³ and the farm-based families of the era were described as “little commonwealths.”⁴⁴ They were hierarchically organized, self-sufficient, interdependent households,⁴⁵ with all members contributing to their economic viability. The security they provided rested on male property

Double Edge: A Comment on Modernization of Marital Status Law, 82 GEO. L.J. 2213, 2215 (1994) (explaining effect of coverture). On race, see generally Eleanor Brown and June Carbone, *Race, Property, and Citizenship* (2021) (unpublished manuscript) (on file with authors) (providing historical context on the pathways of Blacks into the middle class).

39. Hilary Land, *The Family Wage*, 6 FEMINIST REV. 55, 56–57 (1980).

40. *Id.*

41. Univ. of Wis.-Green Bay, *How Did Industrialization Alter the Family*, FOUNDS. OF W. CULTURE: THE INDUS. REVOLUTION, <http://foundations.uwgb.org/family/> [<https://perma.cc/6BKK-6VMY>].

42. *Id.*

43. Beth Waterhouse, *A Sustainable Future?*, PBS, https://www.pbs.org/ktca/farmhouses/sustainable_future.html [<https://perma.cc/K33P-8DTN>] (stating that 90% of the U.S. population lived on farms in the nineteenth century).

44. GROSSBERG, *supra* note 37, at 4–5 (citing JOHN DEMOS, *A LITTLE COMMONWEALTH: FAMILY LIFE IN PLYMOUTH COLONY*, at x (1970)).

45. Anne C. Dailey, *Constitutional Privacy and the Just Family*, 67 TUL. L. REV. 955, 964–65 (1993). “This ‘little commonwealth’ of family life was public not only in the economic sense, but as the phrase implies, in the full political sense as well.” *Id.* at 965.

ownership as the foundation for marriage, patriarchal administration of the farm economy to address the subsistence needs of its residents, and restriction of the alternatives in ways that made marriage compulsory for childrearing and a permanent source of support for dependents.⁴⁶

Well into the nineteenth century, the role of government, whether federal or state, was limited.⁴⁷ Instead, the family served as a basic unit of production and community.⁴⁸ Farm households produced products for domestic consumption and, perhaps, for sale, complementing any commercial crops they might have grown with hunting, fishing, garden plots, and animal husbandry.⁴⁹ Farmwives made their own clothes; farm parents trained their children in the agricultural methods and crafts necessary to sustain an agricultural economy.⁵⁰ The farm economy, which principally consisted of subsistence farms that provided for their residents with minimal surpluses, effectively provided its own social safety net, which extended to the young, the comparatively few elderly (at a time of shorter lifespans), the disabled, and the dependent.⁵¹

Domestic relations were governed in accordance with English common law. A man's land ownership⁵² signaled readiness for family formation, and principles of coverture treated the husband as head of the family, with the power to administer all of the family's resources, including any separate property the wife may have owned before the marriage or income she received during the union.⁵³ In return, the husband had a duty to support the

46. See GROSSBERG, *supra* note 37, at 5 (describing the household as patriarchal and women and children as subordinate and dependent); *id.* at 235 (identifying paternal authority with property ownership); *id.* at 200 (describing how "bastardy law" sought to ensure birth within marriage).

47. *Id.* at 17–18.

48. *Id.* at 4–5 (describing comprehensive roles of families).

49. Dailey, *supra* note 45, at 966 n.25 (stating that before the nineteenth century, most farms involved cooperative economic activities whether production was for subsistence or sale).

50. Univ. of Wis.-Green Bay, *supra* note 41.

51. Indeed, in 1850, 75% of those over the age of sixty-five lived in multigenerational families compared to fewer than 20% in 1975. Steven Ruggles, *Patriarchy, Power, and Pay: The Transformation of American Families, 1800-2015*, 52 DEMOGRAPHY 1797, 1798 fig.1 (2015); see also GROSSBERG, *supra* note 37, at 5 (describing dependents as subject to the authority of the patriarch).

52. Those who could not afford to own land, those unwilling to move, and those freed after the Civil War might instead become tenant farmers or sharecroppers. See Charles C. Bolton, *Farmers Without Land: The Plight of White Tenant Farmers and Sharecroppers*, MISS. HIST. NOW (Mar. 2004), <http://mshistorynow.mdah.state.ms.us/articles/228/index.php> [https://perma.cc/G63F-AS78].

53. Coverture involved a complicated system that treated marriage as the union not just of husband and wife but also of two different family lines administered in the context of a system of male descent. See, e.g., Albertina Antognini, *Nonmarital Coverture*, 99 B.U. L. REV. 2139, 2150

wife, while the wife was expected to provide domestic services.⁵⁴ Divorce was legally difficult and rare;⁵⁵ if the couple separated, the husband would typically retain the farm while the wife had limited means of support and few places to go.⁵⁶ The husband's legal authority over the household was thus deeply entrenched. Indeed, the law of domestic relations was combined, in treatises of the period, with the laws of master and servant.⁵⁷

B. *Coupling: Industrialization and the Rise of the Family Wage Ideology*

While traditionalists like to present the marital family as timeless and enduring,⁵⁸ the change from an agricultural economy to an industrial one undermined family security, requiring a reorganization of family roles—and ultimately a greater role for the state.⁵⁹ With industrialization, commercial production moved out of the household and into factories and offices.⁶⁰ Urbanization separated family households from food production, creating greater reliance on market economies.⁶¹ Wage labor replaced property ownership as the primary source of support for urban families, with the farm population falling to 40% of the American public by 1900.⁶²

(2019); Allison Anna Tait, *The Beginning of the End of Coverture: A Reappraisal of the Married Woman's Separate Estate*, 26 YALE J.L. & FEMINISM 165, 174 (2014) (explaining how women's lack of control even of property held in their names made the husbands' support critical).

54. Tait, *supra* note 53, at 179.

55. See, e.g., Allison Anna Tait, *Divorce Equality*, 90 WASH. L. REV. 1245, 1255 (2015) (observing that the southern states did not adopt judicial divorce until after the Civil War).

56. At death, farmland typically passed to the sons, who cared for the dependent widow. The widow's dower interest prevented the sale of the farm without her consent, but it entitled her to only a one-third life interest. On inheritance patterns, see Richard H. Chused, *Married Women's Property and Inheritance by Widows in Massachusetts: A Study of Wills Probated Between 1800 and 1850*, 2 BERKELEY WOMEN'S L.J. 42, 47–49 (1986).

57. See 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 104 (John M. Gould ed., 14th ed. 1896) (“The primary and most important of the domestic relations is that of husband and wife. It has its foundations in nature, and is the only lawful relation by which Providence has permitted the continuance of the human race. . . . It is one of the chief foundations of social order.”); Kaiponanea T. Matsumura, *Breaking Down Status*, 98 WASH. U. L. REV. 671, 673–74 (2021).

58. *Obergefell v. Hodges*, 576 U.S. 644, 689–90 (2015) (Roberts, C. J., dissenting) (citing JAMES Q. WILSON, THE MARRIAGE PROBLEM: HOW OUR CULTURE HAS WEAKENED FAMILIES 41 (2002)).

59. For a discussion of the expanded role of the state, see *infra* Part I.C.

60. Land, *supra* note 39 (describing movement of production into factories).

61. See Dailey, *supra* note 45, at 966 (describing how “productive work previously performed within the family was removed to the outside workplace”).

62. Although 60% of the population still lived in rural areas. JAYSON L. LUSK, MERCATUS CTR., THE EVOLVING ROLE OF THE USDA IN THE FOOD AND AGRICULTURAL ECONOMY 7 (2016),

The new system increased economic inequality and made family security more precarious. The rising middle classes, starting in the Northeast before the Civil War, set the new standard: the husband, often employed in the professions, finance, or the managerial ranks,⁶³ could earn enough money in the paid workforce to support a family.⁶⁴ His wife supervised “a remade domestic realm shorn of productive activities such as clothes making or bean picking,” which enabled middle-class families to invest more in the education and moral instruction of their young.⁶⁵ This model identified the family’s middle-class status with the careful selection of the right marital partners who could couple a husband’s middle-class earning capacity with the wife’s ability to cultivate middle-class education and values.⁶⁶

At the beginning of the industrial era, however, this model was beyond the reach of the working class, who moved into the factory jobs of the new era.⁶⁷ These families could not afford to keep women and children out of the labor market,⁶⁸ often because the men did not make enough to support the family on their own or because the men’s jobs were too insecure.⁶⁹ An injury or layoff could threaten the family’s livelihood.⁷⁰ And economic downturns

<https://www.mercatus.org/system/files/Lusk-USDA-v1.pdf> [<https://perma.cc/8EAG-KBCH>]; *see also* Ruggles, *supra* note 51, at 1800–03 (describing transformation from property-based wealth to wage labor).

63. Univ. of Wis.-Green Bay, *supra* note 41.

64. *See, e.g.*, MARY P. RYAN, *CRADLE OF THE MIDDLE CLASS: THE FAMILY IN ONEIDA COUNTY, NEW YORK, 1790-1865*, at 184–85 (1981).

65. June Carbone & Naomi Cahn, *Whither/Wither Alimony?*, 93 *TEX. L. REV.* 925, 945 (2015) (book review) (describing the much younger ages of marriage and lesser emphasis on education in working-class families).

66. RYAN, *supra* note 64, at 185.

67. *Id.* at 153 (describing how the immigrant working class in the Northeast supplied the factory labor in the new economy, with children going to work at young ages).

68. *See* Martha May, *The Historical Problem of the Family Wage: The Ford Motor Company and the Five Dollar Day*, 8 *FEMINIST STUD.* 399, 401 (1982) (explaining that at the beginning of the industrial era, wages for unskilled male labor were rarely enough to support more than a single person); Ileen A. DeVault, *Family Wages: The Roles of Wives and Mothers in U.S. Working-Class Survival Strategies, 1880-1930*, 54 *LAB. HIST.* 1, 1–3 (2013) (describing how women filled in economic gaps).

69. *See, e.g.*, Elizabeth Pleck, *A Mother’s Wages: Income Earning Among Married Italian and Black Women, 1896-1911*, in *THE AMERICAN FAMILY IN SOCIAL-HISTORICAL PERSPECTIVE* 490, 490–515 (Michael Gordon ed., 3d ed. 1983) (describing how African-American families preferred to have the wives work so the children could stay in school while Italian immigrant families sent the children to work at early ages so the wives could remain home).

70. *The (Fascinating) History of Workers’ Compensation Insurance*, PIE INS., <https://pieinsurance.com/blog/workers-comp/the-fascinating-history-of-workers-compensation-insurance/> [<https://perma.cc/Y6RP-T6KW>] (“[I]n 1913 alone, more than 25,000 employees were killed in work-related accidents and about 700,000 were seriously injured. Considered the first type of social insurance in the United States, workers’ comp provisions were adopted rapidly.

could result in large-scale unemployment.⁷¹ Women and children filled in the gaps.⁷² Particularly during economic downturns, family “disorganization” increased.⁷³ Working-class families were often locked in poverty; they lacked the means to invest in themselves and their children’s future.⁷⁴

Over time, however, the union movement sought to secure the benefits of the middle-class family model for a larger part of the country. An important part of its strategy involved the fight for the family wage.⁷⁵ The idea of the family wage, which began in the United States in the mid-nineteenth century,⁷⁶ involved two concepts as the key to societal stability: gendered family roles and gender-segmented labor markets.

The first concept, gendered family roles, involved the ideology of domesticity, which recreated female dependence through the design of gender-differentiated family roles.⁷⁷ This model assigned men the obligation to secure sufficient income to support the family and charged women with responsibility for home and children.⁷⁸ The agrarian family had hierarchical roles; men and women might work side-by-side, but the women were subject to their husband’s authority.⁷⁹ The industrial family designed complementary ones; husbands’ breadwinning moved to the market while wives received a

Thirty-six more states followed suit before the close of the decade. In fact, by 1921, only six states had not authorized compensation for workplace injuries,” with Mississippi, the last state, doing so in 1948 (footnotes omitted)).

71. In 1931, Wisconsin adopted a comprehensive labor code; it had earlier been the first state in the nation to enact unemployment compensation. Shirley S. Abrahamson & Elizabeth A. Hartman, *Building a More Perfect Union: Wisconsin’s Contribution to Constitutional Jurisprudence*, 1998 WIS. L. REV. 677, 689.

72. Land, *supra* note 39, at 57 (describing how “initially the whole family went into the factory”).

73. During the Great Depression, for example, marriage rates declined, the number of children placed in settings outside their families increased, and while divorce rates fell, desertion rates increased. Dennis Bryson, *Impact of the Great Depression on Family and Home*, ENCYCLOPEDIA.COM, <https://www.encyclopedia.com/economics/encyclopedias-almanacs-transcripts-and-maps/family-and-home-impact-great-depression> [https://perma.cc/J8R9-JJ6N] (Feb. 16, 2021).

74. *See id.*

75. *See, e.g.,* Lilach Lurie, *Unions and Unequal Pay: The Establishment of the “Family Wage,”* 157 INT’L LABOUR REV. 153, 156–57 (2018) (describing how unions pushed for the creation of the family wage in the period before the development of the welfare state).

76. May, *supra* note 68, at 401.

77. *See* Dailey, *supra* note 45, at 967 (describing the gender ideology of the separate spheres).

78. Maxine Eichner, *The Privatized American Family*, 93 NOTRE DAME L. REV. 213, 252–53 (2017) (describing welfare state model built on a model of “separate spheres,” in which women performed caretaking at home while men engaged in paid labor outside the home); *see also* May, *supra* note 68, at 403 (distinguishing between middle-class domesticity and working-class concerns about survival).

79. GROSSBERG, *supra* note 37, at 4–5 (describing patriarchal authority).

limited form of authority in the home, now shorn of its commercial role.⁸⁰ The rise of the family wage reinforced the importance of marriage as both men and women gained status from gender-differentiated marital roles.⁸¹ The male family wage thus united male success with female dependence as critical to the attainment of middle-class status.⁸²

The second concept underlying the fight for the family wage was reinforcement of gender-segmented labor markets. At the beginning of the industrial era, working-class men, women, and children often went off to the factories together—although, even then, the jobs were typically sex-segregated, and the women paid substantially less.⁸³

The Supreme Court accepted the gender differentiation on which the system rested. In 1905, the Supreme Court’s decision in *Lochner v. New York* famously struck down a law that limited the maximum hours an employee could work on the ground that such laws violated freedom of contract.⁸⁴ Three years later, in *Muller v. Oregon*, the Court upheld a similar law.⁸⁵ The difference was that the Oregon law only applied to women.⁸⁶ Men, according to the Court, had the right to enter into onerous employment contracts if they chose.⁸⁷ On the other hand, women’s “physical structure and a proper discharge of her maternal functions—having in view not merely her own

80. See Joan Williams, *From Difference to Dominance to Domesticity: Care as Work, Gender as Tradition*, 76 CHI.-KENT L. REV. 1441, 1445 (2001) (describing the change in the male role “from patriarch to breadwinner”). This authority takes the form of what Reva Siegel labels as “preservation-through-transformation.” Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2119 (1996).

81. See Ruggles, *supra* note 51, at 1798, 1800 fig.3 (2015) (indicating over 90% of women married by their mid-forties from the early 19th century through the 1970s, but that the number has steadily fallen since then).

82. See May, *supra* note 68, at 401–02 (referring to a man’s ability to spare his wife from “the drudgery of the cotton mill” (quoting Heidi Hartmann, *The Unhappy Marriage of Marxism and Feminism: Towards a More Progressive Union*, CAP. & CLASS, Summer 1979, at 16). But see Land, *supra* note 39, at 57 (describing the change in female roles as one “from partners to parasites”).

83. Univ. of Wis.-Green Bay, *Women’s Roles in the Industrial Revolution*, FOUNDS. OF W. CULTURE: THE INDUS. REVOLUTION, <http://foundations.uwgb.org/womensroles/> [<https://perma.cc/ECD8-2DMC>] (describing women’s wages as half to a third of what the men were paid). Another source notes that the “ratio of female to male earnings, adjusted for time inputs, increased from about 0.35 in 1820 for manufacturing workers, to 0.45 in 1890 for all workers.” Claudia Goldin & Solomon Polachek, *Residual Differences by Sex: Perspectives on the Gender Gap in Earnings*, 77 AM. ECON. REV. 143, 143 (1987).

84. 198 U.S. 45, 64 (1905).

85. 208 U.S. 412, 423 (1908).

86. See Melissa Murray, *The Equal Rights Amendment: A Century in the Making*, 43 HARBINGER 91, 92 (2019) (pointing out this distinction).

87. *Lochner*, 198 U.S. at 60–61 (dismissing the notion that “the legislature, in its paternal wisdom . . . [has] the right to legislate on the subject of, and to limit, the hours for such labor” that jeopardizes worker health).

health, but the well-being of the race—justify legislation to protect her from the greed as well as the passion of man.”⁸⁸ The conservative Court of the *Lochner* era was only too happy to embrace the precepts of the middle-class family system that identified women’s proper place as in the domestic sphere.⁸⁹ The same Court, however, rejected the use of state power to make the middle-class model more accessible to working-class men.⁹⁰

The success in winning a family wage, at least before the New Deal,⁹¹ came more from employers’ actions than from legislation.⁹² In 1914, Henry Ford became the first to adopt such a policy; economists have found that Ford’s five-dollar day wage, double the norm at the time, resulted in “substantial queues for Ford jobs” and “significant increases in Ford productivity and profits.”⁹³ As Ford explained when doubling the rate paid to married men, “[T]he man does the work in the shop, but his wife does the work in the home. The shop must pay them both.”⁹⁴

Ford’s competitors eventually followed suit.⁹⁵ They did so because Ford’s higher wages gave Ford Motor Company a competitive advantage.⁹⁶ The

88. *Muller*, 208 U.S. at 422.

89. Murray, *supra* note 86, at 93 (concluding that, in the Court’s view, women needed to be protected “when they ventured from their proper place in the domestic sphere into the rough and tumble of public life and the marketplace”). In contrast, the United States Supreme Court struck down a minimum wage for women in the twenties when the arguments justifying it were too close to those justifying similar measures for men. See *Adkins v. Child.’s Hosp.*, 261 U.S. 525, 556 (1923) (striking down a District of Columbia minimum wage law for women), *overruled in part by* *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

90. Kimberly R. Willoughby, *Mothering Labor: Difference as a Device Towards Protective Labor Legislation for Men, 1830-1938*, 10 J.L. & POLS. 445, 475–76 (1994) (describing how the *Adkins* briefs placed less emphasis on male–female differences than those in *Muller*).

91. The same thing is true for child labor. See Celeste Corlett, *Impact of the 2000 Child Labor Treaty on United States Child Laborers*, 19 ARIZ. J. INT’L & COMPAR. L. 713, 716 (2002). Congress had initially passed child labor laws in 1916, but the Supreme Court struck them down. *Id.*

92. At least initially, many unions relied more on private bargaining to create higher wages for unionized jobs rather than pushing for a higher minimum wage. Willoughby, *supra* note 90, at 472.

93. Daniel M.G. Raff & Lawrence H. Summers, *Did Henry Ford Pay Efficiency Wages?*, 5 J. LAB. ECON. S57, S57 (1987).

94. Deborah A. Widiss, *Changing the Marriage Equation*, 89 WASH. U. L. REV. 721, 737 (2012).

95. Raff & Summers, *supra* note 93, at S83 (“By 1928, before the United Automobile Workers had become an important factor in the automobile industry, wages were almost 40% greater than in the rest of manufacturing.”).

96. As Henry Ford himself said,

There was . . . no charity in any way involved. . . . We wanted to pay these wages so that the business would be on a lasting foundation. . . . [W]e were building for the future. A low wage business is always insecure. . . . The

major industrialists of 1914 depended on a large labor force.⁹⁷ Yet, factory jobs, particularly with the introduction of Ford's assembly line, were low paid, onerous, and boring.⁹⁸ The manufacturing system of the era was plagued by "low morale, turnover rates and aggressive union agitation."⁹⁹ In 1913, turnover at the Ford plant reached an annual rate of 370% and absenteeism had become chronic.¹⁰⁰ Ford changed the dynamic through four measures. First, the "family" wages he offered were higher than workers could earn elsewhere, winning their loyalty.¹⁰¹ Second, Ford Motor Company developed services that benefitted employees' families, including housing, playgrounds, school, libraries, and hospitals.¹⁰² Third, the company reined in frivolous or arbitrary dismissals, encouraging employees' expectations that they could enjoy a long career at the company.¹⁰³ Finally, Ford coupled eligibility for the higher wages with character requirements, enforced by a "Socialization Organization."¹⁰⁴ Organization representatives would visit the employees' homes to ensure that they avoided social ills such as gambling and drinking.¹⁰⁵ Men were deemed ineligible for the higher wages if their wives worked outside the home.¹⁰⁶ Women employees rarely had access to the

payment of five dollars a day for an eight-hour day was one of the finest cost-cutting moves we ever made

HENRY FORD IN COLLABORATION WITH SAMUEL CROWTHER, *MY LIFE AND WORK* 126, 127, 147 (1922).

97. Indeed, Ford Motor Company's labor force increased from 450 employees in 1908 to 14,000 employees in 1913. Raff & Summers, *supra* note 93, at S61–S62.

98. *Id.* at S63–S64.

99. Katherine V.W. Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 *UCLA L. REV.* 519, 532 (2001).

100. Raff & Summers, *supra* note 93, at S63.

101. See Tim Worstall, Opinion, *The Story of Henry Ford's \$5 a Day Wages: It's Not What You Think*, *FORBES* (Mar. 4, 2012, 12:28 PM), <https://www.forbes.com/sites/timworstall/2012/03/04/the-story-of-henry-fords-5-a-day-wages-its-not-what-you-think/> [<https://perma.cc/J3XY-2S6C>] (emphasizing the role of higher wages in securing employee loyalty).

102. Stone, *supra* note 99, at 532.

103. *Id.*

104. Worstall, *supra* note 101; Kashann Kilson, *Henry Ford's Dumbest Ideas Matter Because His Smart Ones Changed the World*, *INVERSE* (June 6, 2016, 6:30 AM), <https://www.inverse.com/article/16307-henry-ford-s-dumbest-ideas-matter-because-his-smart-ones-changed-the-world> [<https://perma.cc/S396-33WK>].

105. See Sharon Hoffman, *Preplacement Examinations and Job-Relatedness: How To Enhance Privacy and Diminish Discrimination in the Workplace*, 49 *U. KAN. L. REV.* 517, 530 (2001) (detailing Ford's oversight of his employees at home and at work); Jonathan C. Lipson, *Promising Justice: Contract (As) Social Responsibility*, 2019 *WIS. L. REV.* 1109, 1143 (discussing how employers monitored workers in both public and private environments).

106. Worstall, *supra* note 101.

family wage, though the company held out potential eligibility for women who were single and supporting a family.¹⁰⁷

The changes at Ford laid the foundation for a new social system that redefined the sources of family security and entry to the middle class. Factory work, particularly work on an assembly line for low wages, did little to enhance male status. The head-of-household role, especially when coupled with membership in an elite club with higher pay (Ford Motor Company), conferred substantially greater status. Ford tied that status to marriage and the breadwinner role.¹⁰⁸ Male success depended on making marriage work,¹⁰⁹ and women in turn gained status from pairing with a successful man—the blue-collar worker of the industrial era gained a more respected social role.¹¹⁰

Employers in turn gained greater employee loyalty and productivity; with longer job tenures, employers also invested more in training employees in company-specific skills.¹¹¹ The above-market wages, particularly for the less skilled, made it less appealing for employees to quit and go elsewhere.¹¹² The emphasis on the breadwinner role and family-oriented benefits attracted men who needed the benefits to be able to maintain their “rightful” place as heads of their households¹¹³ and would be subject to family as well as employer pressure if they shirked their obligations.¹¹⁴ Over time, the increased wages

107. *Id.*

108. See Leo E. Strine, Jr., *A Job Is Not a Hobby: The Judicial Revival of Corporate Paternalism and Its Problematic Implications*, 41 J. CORP. L. 71, 82 (2015) (discussing the expectation that Ford employees get married).

A worker was eligible for the Five Dollar Day only after he had been at Ford for six months, and had to fall into one of three categories: “All married men living with and taking good care of their families”; “all single men, over twenty-two years of age,” of “proven thrifty habits”; and men under the age of twenty-two years of age, and women “who are the sole support of some next of kin or blood relative.”

May, *supra* note 68, at 413.

109. See May, *supra* note 68, at 413.

110. For example, Marlon Brando’s character in *A Streetcar Named Desire* represented the rise of working-class male status. JUNE CARBONE & NAOMI CAHN, *MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY* 13 (2014).

111. Stone, *supra* note 99, at 535, 538 (discussing the relationship between long-term job tenure and employer investment in employees’ company-specific skills).

112. Raff & Summers, *supra* note 93, at S65 (noting difference between skilled employees and the unskilled).

113. *Id.* at S70 (observing that employers saw no need to include women in the family wage program because they were less likely “to drink and fail to show up for work”).

114. See David Freeman Engstrom, “*Not Merely There To Help the Men*”: *Equal Pay Laws, Collective Rights, and the Making of the Modern Class Action*, 70 STAN. L. REV. 1, 67 (2018) (noting that activists argued that family well-being depended on the men’s ability to support their

met not just the family's subsistence needs but also facilitated the employee's ability to accrue savings, buy a house, meet emergency needs, and pay for children's education.¹¹⁵ In short, like farm ownership in the agrarian era, the family wage, premised on breadwinner–homemaker marriages, and coupled with secure long-term employment, provided a buffer from hard times that promoted family security and stability.¹¹⁶ These benefits, however, which started at Ford Motor Company as a way to keep out unions, would not extend to most of the blue-collar workforce until the triumph of the union movement during the prosperous era following World War II.¹¹⁷ And private employment, however generous, could not fully address the risks families faced from illness, premature death, or the need to care for the elderly and the disabled. Full realization of the promise of the new system would ultimately depend not just on private actors but also a greatly expanded state role.¹¹⁸

C. *Complementing Coupling: Social Insurance Tied to Marriage and Employment*

By the election of Franklin Roosevelt in 1932, the ideology of the separate spheres, and with it, breadwinner–homemaker roles and the corresponding celebration of the male family wage was well-established. The problem was how to create family security for those who did not share in a family wage paid to a male breadwinner. The Great Depression increased the challenges, with manufacturing employment declining to 67% of its 1929 level by 1933.¹¹⁹ The New Deal solution involved the design of social insurance at the

families); *see also* Land, *supra* note 39, at 64 (“There was—and is—evidence that men work their longest hours when they have dependent children and that men with large families work longer hours on average than men with small families.”).

115. May, *supra* note 68, at 401–02.

116. *See* Katherine V.W. Stone, *A Fatal Mismatch: Employer-Centric Benefits in a Boundaryless World*, 11 LEWIS & CLARK L. REV. 451, 453 (2007) (observing that the system was “structured to bind the worker to the firm, thus reflecting and contributing to an emerging employment system that valued long-term committed employees”).

117. *See generally* ANDREW J. CHERLIN, *LABOR’S LOVE LOST: THE RISE AND FALL OF THE WORKING-CLASS FAMILY IN AMERICA* 90–119 (2014) (describing how blue-collar workers gained in status, particularly in the era following World War II, and have lost ground since).

118. *See* Grace Ganz Blumberg, *The Regularization of Nonmarital Cohabitation: Rights and Responsibilities in the American Welfare State*, 76 NOTRE DAME L. REV. 1265, 1266–67 (2001) (addressing the need for such a role).

119. Michael French, *Effects of the Great Depression on Industry*, ENCYCLOPEDIA.COM, <https://www.encyclopedia.com/economics/encyclopedias-almanacs-transcripts-and-maps/industry-effects-great-depression> [<https://perma.cc/P7GN-YQFB>] (Feb. 16, 2021).

national level to complement wage labor and reinforce the necessity of marriage.¹²⁰

In the thirties—as is true today—the debate over an expanded state role involved ideological conflict. Those who supported laissez-faire policies generally opposed state interference in the market, whether in the form of greater market regulation such as the minimum wage or the abolition of child labor, higher taxes to fund public initiatives, or direct provision of services.¹²¹ At the same time, European countries were adopting more generous benefits than the United States, and Franklin Roosevelt eventually embraced the notion that society should guarantee positive socio-economic rights, such as “freedom from want.”¹²² The major New Deal provisions, although they greatly expanded the governmental role, operated in a middle ground between neoliberal and socialist ideologies: they embraced the concept of social insurance designed to address increased risk.¹²³

Insurance generally involves the collection of premiums from a broad group to compensate for losses that disproportionately affect the few.¹²⁴ “Social insurance” refers to “government programs that provide monetary protection against risks associated with living in an industrial or post-industrial society in which income typically derives from paid work.”¹²⁵

120. Employers, including the military, had begun providing various forms of pensions and other types of social insurance in the nineteenth century. Mark C. Weber, *Disability Rights, Disability Discrimination, and Social Insurance*, 25 GA. ST. U. L. REV. 575, 579 (2009). And “[b]etween 1911 and 1920, state legislatures in forty-five states passed workers’ compensation laws.” *Id.*; see also Stone, *supra* note 116, at 456–57 (describing how the courts initially struck down such laws).

121. See *Laissez-Faire*, INVESTOPEDIA, <https://www.investopedia.com/terms/l/laissezfaire.asp> [<https://perma.cc/7655-N5SE>] (July 23, 2020) (observing that “[t]he driving principle behind laissez-faire . . . is that the less the government is involved in the economy, the better off business will be—and by extension, society as a whole”); Ilana Waxman, *Hale’s Legacy: Why Private Property Is Not a Synonym for Liberty*, 57 HASTINGS L.J. 1009, 1009 (2006) (linking laissez-faire thinking to the modern neoliberal ideology, including the Bush Administration’s efforts to privatize social security).

122. See Franklin D. Roosevelt, The Annual Message to the Congress (Jan. 6, 1941), in THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 663, 672 (Russell & Russell 1969) (1941) (including freedom from want).

123. See Michael J. Graetz & Jerry L. Mashaw, *Constitutional Uncertainty and the Design of Social Insurance: Reflections on the Obamacare Case*, 7 HARV. L. & POL’Y REV. 343, 350 (2013) (explaining that while social insurance, like private insurance, “pools risks . . . social insurance depends on government action . . . designed to pursue societal purposes that could not or would not be achieved through individual contracting in private insurance markets. Social insurance is . . . a different product . . .”).

124. *Id.* (“‘Private insurance’ is composed of contracts to pool common risks so that statistically predictable economic losses will be experienced as small subtractions from all insured persons’ wealth rather than as calamities for an unfortunate few.”).

125. Weber, *supra* note 120, at 578.

These benefits are distinguished from “charity” or “welfare” (or for that matter, a broader social safety net) through their connection to work, provision of benefits triggered by the occurrence of an event (e.g., old age or injury) rather than need, designated sources of funding separate from general tax revenues and often contributory in nature (e.g., payroll taxes), mandatory participation (in part to avoid adverse selection), and legally determined benefits.¹²⁶ At the same time, such programs are different from mandatory savings programs or private pensions in that the benefits received may not necessarily bear any correlation with the amount an individual contributes, and Congress may alter the benefits in accordance with the program’s purposes.¹²⁷

The Federal Social Security Act of 1935 has been called the “key development in American social insurance,”¹²⁸ marking the adoption of comprehensive national programs of old-age security and a federal-state unemployment insurance program. As a national approach, the Social Security Act rested on three principles: first, recognition that wage labor in an industrial economy is intrinsically insecure, given the inevitability of untimely deaths, injuries, illness, old age, and recessions; second, that an expanded government role was the necessary and appropriate response;¹²⁹ and, third, that the programs were grounded in notions of merit and desert.¹³⁰

To vindicate these principles, Social Security mimicked private pension funds and emphasized the idea that employees had “earned” their benefits through the connection to work even though the program’s benefits never corresponded in any precise way to an individual employee’s contributions.¹³¹ The program then extended these benefits to dependents

126. *Id.* at 578–80. Senator Walter F. George explained that: “Social Security is not a handout; it is not charity; it is not relief. It is an earned right based upon the contributions and earnings of the individual. As an earned right, the individual is eligible to receive his benefit in dignity and self-respect.” *Flemming v. Nestor*, 363 U.S. 603, 623 (1960) (Black, J., dissenting).

127. *See Fleming*, 363 U.S. at 608–12 (describing congressional ability to take into account such factors as the financial soundness of the program or whether a recipient could live in the United States).

128. Weber, *supra* note 120, at 579–80.

129. *See* William H. Simon, *Rights and Redistribution in the Welfare System*, 38 STAN. L. REV. 1431, 1446–48 (1986) (discussing market failure rationales for federal insurance programs).

130. *See infra* notes 138–139 and accompanying text; *see also* Karen M. Tani, *Flemming v. Nestor: Anticommunism, the Welfare State, and the Making of “New Property,”* 26 LAW & HIST. REV. 379, 397–400 (2008) (describing how differences between the majority and dissent in the 5-4 decision reflected the characterization of social security benefits as a property right). It is a form of “social insurance,” designed to protect against lost wages based on death, disability, or age. Nancy J. Altman, *The Striking Superiority of Social Security in the Provision of Wage Insurance*, 50 HARV. J. ON LEGIS. 109, 114 (2013).

131. *See* Simon, *supra* note 129, at 1479–80 (estimating that about 70% of Social Security payments “represented actuarially unearned transfers from younger workers”).

through marriage,¹³² replicating and reinforcing the family wage ideology that had taken hold more generally.¹³³

Indeed, the Act's origins can be traced to the federal pension system, which had provided benefits to veterans throughout the nineteenth century.¹³⁴ Congress subsequently expanded the pension system to cover Civil War and other military widows.¹³⁵ These programs, which required proof of marriage, served as forerunners to the Social Security program.¹³⁶ The New Deal architects, in 1935 and the subsequent 1939 Amendments, expanded government benefits, tying eligibility to compensation for loss of a married male breadwinner, albeit for a limited group of families.¹³⁷ The Aid to Dependent Children (ADC) program, which was something of an afterthought to the social legislation, limited coverage to children under sixteen who had been "deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent."¹³⁸ Even then, the legislation gave the states leeway to add moral character requirements that could be used to limit minority women's access

132. Indeed, the estimates in the 1980s were that women received 54% of benefits while paying only 28% of social security contributions because women lived longer, earned less, and received more in the way of derivative benefits (that is, benefits calculated in terms of a spouse's or parent's earnings rather than their own). *Id.* at 1482.

133. Linda Gordon, *What Does Welfare Regulate?*, 55 SOC. RSCH. 609, 614 (1988). In *Califano v. Boles*, 443 U.S. 282, 283 (1979), the Supreme Court observed, in describing the programs, that "the Government has taken increasingly upon itself the task of insulating the economy at large and the individual from the buffeting of economic fortune."

134. Kristin A. Collins, *Federalism, Marriage, and Heather Gerken's Mad Genius*, 95 B.U. L. REV. 615, 621 (2015).

135. *Id.*

136. *Id.* at 621–23. See generally ALICE KESSLER-HARRIS, *IN PURSUIT OF EQUITY: WOMEN, MEN, AND THE QUEST FOR ECONOMIC CITIZENSHIP IN 20TH-CENTURY AMERICA* (2001) (providing a history of social insurance for women based on marriage); THEDA SKOCPOL, *PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES* 427–524 (1992) (comprehensive history of social insurance programs in the United States); Kristin A. Collins, *Administering Marriage: Marriage-Based Entitlements, Bureaucracy, and the Legal Construction of the Family*, 62 VAND. L. REV. 1085, 1091 (2009) (noting the historically "central role of marriage law in the development of social provision for women in the United States").

137. JUNE CARBONE, *FROM PARTNERS TO PARENTS: THE SECOND REVOLUTION IN FAMILY LAW* 201–02 (2000).

138. LINDA GORDON, *PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE* 277 (1994). "After the enactment of Aid to Dependent Children in 1935, morality requirements continued to exclude blacks; 'man-in-the-house' rules simultaneously discouraged the formation of two-parent families while policing the behavior of single women." Catherine J. Ross & Naomi R. Cahn, *Subsidy for Caretaking in Families: Lessons from Foster Care*, 8 AM. U. J. GENDER SOC. POL'Y & L. 55, 63–64 (1999).

to benefits.¹³⁹ These restrictions remained in place through the 1960s.¹⁴⁰ The ADC benefits, which were means tested, never gained the perceived legitimacy of European family allowances, which extended benefits to all children,¹⁴¹ or the social security program with its links (however attenuated in practice) to payroll taxes.

D. Completion of the Scaffolding: Unionization and Health Care

Overall, the expanded government role provided a measure of security for those who coupled the good jobs of the industrial era with enduring marriages.¹⁴² The system reached its height during the period of relative prosperity and economic equality that followed World War II. And the expansion of family security and stability involved a de facto pact, with government, unions, and private industry acting together to improve worker well-being. The system was corporatist in nature, with government and unions often acting through large corporations in ways that proved mutually reinforcing.¹⁴³

This system rested on three elements. First, the Roosevelt Administration had pushed labor legislation in 1935 that strengthened union ability to organize and engage in collective bargaining.¹⁴⁴ Union membership grew steadily after that and reached its height as a percentage of total employment

139. GORDON, *supra* note 139, at 277; CARBONE, *supra* note 137, at 201 (observing that European nations provided child allowance to encourage more births to women of “native stock”); see also Dorothy E. Roberts, *Welfare and the Problem of Black Citizenship*, 105 YALE L.J. 1563, 1569 (1996) (book review) (noting the United States focused on “the social control of poor immigrant families and the neglect of Black women”).

140. CARBONE, *supra* note 137, at 202.

141. *Id.*

142.

New Deal legislation . . . sought to protect the family’s income against the breadwinner’s loss of salary, creating a statutory scheme for unemployment compensation in case of a lost job, and social security retirement when he retired, as well as survivors’ and dependents’ benefits if he died. It also supported women’s roles in homemaking and caregiving when there was no functioning breadwinner.

Eichner, *supra* note 78, at 251 (citation omitted).

143. John Kenneth Galbraith describes the system as one of countervailing powers. JOHN KENNETH GALBRAITH, *AMERICAN CAPITALISM: THE CONCEPT OF COUNTERVAILING POWER* 196–200 (1956).

144. The National Labor Relations Act, passed in 1935, guaranteed employees’ rights to self-organization and collective bargaining. 29 U.S.C. § 157.

in the mid-fifties.¹⁴⁵ Second, with greater government support of labor,¹⁴⁶ corporate America reached a “concordat” that ushered in an era of relative labor peace.¹⁴⁷ Third, labor and government both enhanced family security by acting through corporations.¹⁴⁸

The result was a corporate-based welfare system. For example, while unions in the early part of the twentieth century focused on improving wages and working conditions, after World War II, they placed greater emphasis on social insurance—often provided through private employers.¹⁴⁹ Katherine Stone observes that from “1945 to 1970, the percentage of firms that offered pensions grew from 19% to 45%.”¹⁵⁰ Union victories also made it harder to fire employees and tied increases in wages, benefits, and job security more closely to seniority.¹⁵¹ This further enhanced the status of long-term employees, increasing the disadvantages of women who took time out of the labor market to raise children.¹⁵²

Perhaps the most emblematic aspect of this system involved health insurance. The United States, unlike most of the developed world, has never guaranteed universal health care to its citizens.¹⁵³ Instead, it created a

145. See Matthew T. Bodie, *Labor Interests and Corporate Power*, 99 B.U. L. REV. 1123, 1125 (2019) (“[B]y the mid-1950s unions represented over one-third of the American workforce.”); GERALD MAYER, CONG. RSCH. SERV., RL32553, UNION MEMBERSHIP TRENDS IN THE UNITED STATES 11 fig.1 (2004), https://www.everycrsreport.com/files/20040831_RL32553_e5e58e1832de83247c0883a6fd691bc84691a745.pdf [<https://perma.cc/AU22-69TV>] (documenting trends).

146. See John W. Cioffi, *Fiduciaries, Federalization, and Finance Capitalism: Berle’s Ambiguous Legacy and the Collapse of Countervailing Power*, 34 SEATTLE U. L. REV. 1081, 1103–04 (2011) (maintaining that government intervention on labor’s behalf was “the most critical, controversial, and divisive manifestation of governmental intervention to promote countervailing power.”).

147. Harwell Wells, “*Corporation Law Is Dead*”: *Heroic Managerialism, Legal Change, and the Puzzle of Corporation Law at the Height of the American Century*, 15 U. PA. J. BUS. L. 305, 322 (2013) (describing the agreement as one where corporate managers would be “left to run their businesses as they saw fit, and, in return, labor unions received income and benefits sufficient to carry their members into the middle class”).

148. Stone, *supra* note 116, at 454–55.

149. *Id.* at 459 (“[U]nions’ position on social insurance took an about-face during World War II.”).

150. *Id.*

151. See Alfred W. Blumrosen, *Seniority Rights and Industrial Change: Zdanok v. Glidden Co.*, 47 MINN. L. REV. 505, 505 (1963).

152. See, e.g., Stone, *supra* note 116, at 460 (“The firm provided job security, training, social insurance, and orderly advancement opportunities and obtained a loyal and knowledgeable work force in return. The longer employees stayed on the job, the more their wages rose and their benefits vested, giving them a greater stake in the firms over time.”).

153. Timothy Callaghan, *3 Reasons the U.S. Doesn’t Have Universal Health Coverage*, U.S. NEWS (Oct. 26, 2016, 12:22 PM), <https://www.usnews.com/news/national-news/articles/2016-10-26/3-reasons-the-us-doesnt-have-universal-health-coverage> [<https://perma.cc/Y68E-N8PL>].

patchwork quilt of programs built around employer-centered benefits.¹⁵⁴ That system gained hold during World War II when employers sought to get around wartime wage and price controls by offering a new benefit—health insurance plans for employees and their families.¹⁵⁵ Following the war, employers, who received generous tax treatment of the costs, expanded the programs.¹⁵⁶ By 2010, employer-provided health insurance had become the largest tax expenditure in the federal budget, with most employees having the option of including family members in their plans.¹⁵⁷ Using tax subsidies to finance private employer plans effectively disguised the substantial federal role in ensuring health care availability.

Yet, precisely because the United States has refused to guarantee health care as a right, the provisions never reached the entire population.¹⁵⁸ In the sixties, the federal government dealt with seniors by directly financing Medicare, a health insurance plan for those over the age of sixty-five, through payroll taxes.¹⁵⁹ Spouses receive derivative eligibility through their partners.¹⁶⁰ The less generous Medicaid program, in contrast, is administered through the states and tied eligibility to need.¹⁶¹ Over time, it would come to cover a high percentage of the nation’s children, particularly those born to

154. See Thomas C. Buchmueller & Alan C. Monheit, *Employer-Sponsored Health Insurance and the Promise of Health Insurance Reform*, 46 INQUIRY 187, 188 (2009).

155. See *id.* (“The link between employment and private health insurance was strengthened during World War II when the War Labor Board ruled in 1943 that controls over wages and prices imposed by the 1942 Stabilization Act did not apply to fringe benefits such as health insurance.”).

156. *Id.*

157. See JOINT COMM. ON TAXATION, 114TH CONG., JCX-141R-15, ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2015–2019, at 28–42 tbl.1 (2015), <http://www.jct.gov/publications.html?func=startdown&id=4857> [<https://perma.cc/25C7-DYZ9>]. Before adoption of the ACA, the exclusion for employer-provided health insurance was the largest federal tax expenditure, with an annual value of \$246.1 billion in 2007. David Gamage, *Perverse Incentives Arising from the Tax Provisions of Healthcare Reform: Why Further Reforms Are Needed To Prevent Avoidable Costs to Low- and Moderate-Income Workers*, 65 TAX L. REV. 669, 681 (2012).

158. In the mid-nineties, for example, 14% of children and 19% of adults lacked health insurance coverage. SAMANTHA ARTIGA & PETRY UBRI, KAISER FAM. FOUND., KEY ISSUES IN CHILDREN’S HEALTH COVERAGE 2 fig.1 (2017), <https://www.kff.org/medicaid/issue-brief/key-issues-in-childrens-health-coverage/> [<https://perma.cc/7DDX-EQ5J>].

159. *History of SSA During the Johnson Administration 1963-1968*, SOC. SEC. ADMIN., <https://www.ssa.gov/history/ssa/lbjmedicare1.html> [<https://perma.cc/6XGM-9B92>].

160. *Retirement Benefits*, SOC. SEC. ADMIN., <https://www.ssa.gov/benefits/retirement/planner/applying7.html> [<https://perma.cc/F7CE-ZUKN>].

161. *What Is the Difference Between Medicare and Medicaid?*, U.S. DEP’T OF HEALTH & HUM. SERVS., <https://www.hhs.gov/answers/medicare-and-medicaid/what-is-the-difference-between-medicare-medicaid/index.html> [<https://perma.cc/96MY-FXGA>].

unmarried parents.¹⁶² Yet, many voters see Medicare, a federally administered program, as a matter of right akin to Social Security,¹⁶³ while Medicaid benefits remain less popular, less secure, and more subject to the vagaries of state politics.¹⁶⁴

* * *

Industrialization began to take hold in the United States in the early part of the nineteenth century.¹⁶⁵ The United States succeeded in bringing a measure of stability and security to the families of the industrial age more than a hundred years later.¹⁶⁶ Central to that security was the role of the male family head, able to provide for a family because of the guarantee of lifelong employment, with steady raises, ample insurance, and societal respect.¹⁶⁷ Male working-class income almost doubled, controlling for inflation, between 1950 and the early seventies, and companies benefitted as productivity increased along with wages.¹⁶⁸ Virtually everyone (94% of men and 96% of women) married, with the average age of marriage falling substantially in the post-war period.¹⁶⁹ Children were more likely to be raised

162. “For the nation’s youngest children, Medicaid and CHIP play an outsized role, covering 45 percent of children under the age of six, compared to 36 percent of children between the ages of six and 18.” ALISA CHESTER & ELISABETH WRIGHT BURAK, GEORGETOWN UNIV. HEALTH POL’Y INST., MEDICAID’S ROLE FOR YOUNG CHILDREN 1 (2016), <https://ccf.georgetown.edu/wp-content/uploads/2017/02/MedicaidYoungChildren.pdf> [<https://perma.cc/6MMN-XWSA>]. CHIP involves a health care plan specifically tailored to ensure coverage for children through Medicaid as well as a separate CHIP program, and it is administered by the states. *Children’s Health Insurance Program*, MEDICAID.GOV, <https://www.medicaid.gov/chip/index.html> [<https://perma.cc/R4R4-P3ZE>].

163. See Mollyann Brodie, Elizabeth C. Hamel & Mira Norton, *Medicare as Reflected in Public Opinion*, 39 J. AM. SOC’Y ON AGING 134, 135 (2015), <https://www.kff.org/wp-content/uploads/2015/06/generations-medicare-as-reflected-in-public-opinion-brodie-et-al.pdf> [<https://perma.cc/Z2HT-6F4H>] (stating 96% of the public views Medicare as important for the public).

164. *Data Note: 5 Charts About Public Opinion on Medicaid*, KAISER FAM. FOUND. (Feb. 28, 2020), <https://www.kff.org/medicaid/poll-finding/data-note-5-charts-about-public-opinion-on-medicaid/> [<https://perma.cc/F2ND-YH2S>] (showing a partisan divide in approval of Medicaid). For a discussion of stereotypes of recipients of social assistance programs, such as Medicaid, see Catherine Powell & Camille Gear Rich, *The “Welfare Queen” Goes to the Polls: Race-Based Fractures in Gender Politics and Opportunities for Intersectional Coalitions*, 108 GEO. L.J. 105, 109 (2020).

165. CHERLIN, *supra* note 117, at 1.

166. *Id.* at 85.

167. *Id.* at 92–93 (describing how the role of the father as sole provider and family head, irrespective of occupation, still seems fulfilling and ennobling to many men).

168. *Id.* at 93.

169. *Id.* at 94–95.

in a two-parent household than before or since¹⁷⁰ because death rates declined and divorce rates, which had been rising since the Civil War, leveled off.¹⁷¹ Wives described marriage in terms of greater security, comfort, stability, and status that their unmarried friends envied.¹⁷² This ideal was built on secure jobs that, while they were not necessarily fulfilling, paid a male family wage that enhanced the husband's authority within the family and status among his peers.

This system, even at its height in the postwar era, never benefitted everyone.¹⁷³ The "good" industrial jobs were largely restricted to white men,¹⁷⁴ and the New Deal legislation creating social insurance intentionally excluded farmworkers and domestic workers, who were overwhelmingly nonwhite, thus failing to reach those most in need.¹⁷⁵ Social insurance tied to employment and marriage never sought to be universal; it did, however, increase the stability and security associated with wage labor.¹⁷⁶

II. DECOUPLING AND THE RETURN OF FAMILY INSTABILITY

Just as the industrial age destabilized the sources of stability in the agrarian age, so too has the information age dismantled the family wage of the industrial era. A growing academic literature describes the different components—women's greater economic independence and changing family dynamics; the disappearance of high-paid manufacturing jobs for blue-collar

170. *Id.* at 115 (observing that it is the only period in which working-class families were able to realize "the culturally potent ideal of the breadwinner husband and the homemaker wife, at least during the years when they had preschool-age children at home").

171. *Id.* at 99.

172. *Id.* at 100.

173. *Id.* at 116–17.

174. *See id.* at 87–88. African-American men, however, gained increased access, particularly in the Northern states, in the forties and made some progress in the fifties. *Id.* at 87, 94.

175. *See Simon, supra* note 129, at 1442–43 (concluding that while the insurance state "afforded an important degree of security to a substantial segment of the working class, . . . with relatively dignified and secure employment and favorable working conditions and compensation," it left out "a relatively unorganized sector, with relatively low status, irregular work, and unfavorable working conditions and compensation"). A substantial literature documents the racism that contributed to these arrangements. *See, e.g.,* Dorothy E. Roberts, *Irrationality and Sacrifice in the Welfare Reform Consensus*, 81 VA. L. REV. 2607, 2620 (1995) (observing that "Northern and Southern Democrats struck a deal that systematically denied blacks eligibility for Social Security benefits, omitting federal eligibility standards and excluding agricultural workers and domestic servants in a deliberate effort to maintain a black menial labor caste in the South. Even Aid to Dependent Children was created for white mothers, who were not expected to work." (footnotes omitted)).

176. *Simon, supra* note 129, at 1140–41.

men and the corresponding increase in economic insecurity and inequality;¹⁷⁷ and the decreasing ability of social insurance to provide an effective social safety net, as fewer people have secure jobs or stable personal relationships.¹⁷⁸

What no one has discussed, however, is the way that these elements contribute not just to increased family insecurity but also to a change in the dynamics of the entire system. The new system rewards those who manage the human capital investments necessary to achieve labor market nimbleness and family relationships based on flexibility, reciprocity, and trust—qualities beyond the reach of much of the population. Seeing the changes in these terms underscores the conclusion not just that the family wage system of the industrial era is gone, but also that it cannot be resurrected. Neither long-term employment nor marriage can work as a foundation for family security and stability in the information age; they have become markers of success rather than pathways to security.

A. *Women and the End of Dependence*

The move from an agrarian to an industrial economy did more than move men's labor out of the homestead.¹⁷⁹ It also commercialized domestic labor, as sewing, candle-making, and other women-identified activities moved into the market.¹⁸⁰ The service economy that arose in the middle of the twentieth century accelerated the process.¹⁸¹ Women's labor market participation started to grow in the fifties, with increased employer demand for services women have traditionally provided, and then grew steadily through the rest

177. Indeed, it has only been in the last few years that social scientists have begun to accept the relationship between the changing workplace and family organization. Compare WILSON, *supra* note 58, at 156 (denying the role of economics in cultural change), and CHARLES MURRAY, *COMING APART: THE STATE OF WHITE AMERICA, 1960-2010*, at 204–12 (2012) (attributing changes to the erosion of cultural values), with CHERLIN, *supra* note 117 *passim*, and David Autor, David Dorn & Gordon Hanson, *When Work Disappears: Manufacturing Decline and the Falling Marriage Market Value of Young Men*, 1 AM. ECON. REV. 161, 163 (2019) (observing that “a fall in the relative economic stature of men . . . reduces the prevalence of marriage” (emphasis omitted)).

178. See MAXINE EICHNER, *THE FREE-MARKET FAMILY: HOW THE MARKET CRUSHED THE AMERICAN DREAM (AND HOW IT CAN BE RESTORED)* (2020) (calling for an improved safety net); CARBONE & CAHN, *supra* note 110, at 101 (discussing how the role of employment instability exacerbates family tensions).

179. See Melvin Kranzberg & Michael T. Hannan, *Women in the Workforce*, BRITANNICA, <https://www.britannica.com/topic/history-of-work-organization-648000/Women-in-the-workforce> [<https://perma.cc/9N7G-7DNP>].

180. See *id.*

181. See *id.*

of the twentieth century in a reinforcing series of steps.¹⁸² Over the course of these developments, women gained relatively greater economic independence, resetting relationship terms.¹⁸³

The post-war economy increased market demand for women's labor, starting with clerical work, then expanding to teachers needed to fill the classrooms of the baby boom generation, and eventually extending to a greater need for medical personnel with the expansion of health insurance.¹⁸⁴ With greater prosperity, women's education increased, with the number of women attending college doubling in the sixties and increasing by another 50% in the seventies.¹⁸⁵

By then, the Civil Rights and Women's Movements had taken hold. The Civil Rights Act of 1964 outlawed sex discrimination.¹⁸⁶ And the women's movement secured greater reproductive rights, allowing women to postpone marriage and stay in school longer.¹⁸⁷ As more women entered the workplace in the seventies and eighties, demand grew further for day care centers, restaurants, dry-cleaning establishments, and other service industries that met the needs of dual-income families.¹⁸⁸ The growth in service sector jobs disproportionately increased the demand for women workers.¹⁸⁹ And labor-saving devices (washing machines, dryers, and microwaves) made it

182. MITRA TOOSI & TERESA L. MORISI, U.S. BUREAU OF LAB. STAT., *WOMEN IN THE WORKFORCE BEFORE, DURING, AND AFTER THE GREAT RECESSION* 1–3 (2017), <https://www.bls.gov/spotlight/2017/women-in-the-workforce-before-during-and-after-the-great-recession/pdf/women-in-the-workforce-before-during-and-after-the-great-recession.pdf> [https://perma.cc/9L6Y-6ZVQ].

183. Between 1980 and 2000, the percentage of wives employed outside the home rose from 58% to 75%. PAUL R. AMATO, ALAN BOOTH, DAVID R. JOHNSON & STACY J. ROGERS, *ALONE TOGETHER: HOW MARRIAGE IN AMERICA IS CHANGING* 101 (2007).

184. CARBONE, *supra* note 137, at 231 (noting increased demand for women's market labor).

185. See JUNE CARBONE, NAOMI CAHN & NANCY LEVIT, *SHAFTED: THE FATE OF WOMEN IN A WINNER-TAKE-ALL WORLD* (forthcoming 2021) (on file with authors).

186. Civil Rights Act of 1964, 42 U.S.C. § 2000e-2.

187. Claudia Goldin & Lawrence F. Katz, *The Power of the Pill: Oral Contraceptives and Women's Career and Marriage Decisions*, 110 J. POL. ECON. 730, 748–49 (2002) (linking women's greater graduate school presence to the ability to postpone childbearing).

188. AMATO ET AL., *supra* note 183, at 123–24 (describing how dual-income families became better able “to afford services, such as high-quality child care, take-out meals, and home cleaning, that help to ease the family burdens associated with dual employment”).

189. Jim Tankersley, *Shift to a Service-Driven Economy Delays Job Recovery*, WASH. POST (May 3, 2013), http://www.washingtonpost.com/business/economy/shift-to-services-delays-job-recovery/2013/05/03/a78ec0f0-b3f3-11e2-9a98-4be1688d7d84_story.html [https://perma.cc/29KX-Z6PH]. “Goods production supplied about three-fifths of economic output in 1950 and about half of its jobs. By 2010, growth in the service sector has accounted for two-thirds of output and seven out of every 10 jobs.” *Id.*; see also CARBONE & CAHN, *supra* note 110, at 112 (describing how women have benefitted from expansion of the service sector).

easier to deal with household tasks.¹⁹⁰ By the end of the eighties, women's increasing access to education won them access to the professional and managerial ranks.¹⁹¹ By the turn of the twenty-first century, women had become the better-educated sex, and in the early years of the twenty-first century, women's labor force participation reached all-time highs, even though their wages still lagged behind men's wages throughout the labor force.¹⁹²

Women's economic progress undermined the male family wage system in three important ways. First, while men continued to earn more than women, women have won greater economic independence. As late as 1971, principles of coverture still limited a woman's rights in marriage.¹⁹³ By the end of the twentieth century, she was much more likely to have her own job, her own income and, if she wanted, control of her separate assets.¹⁹⁴ This meant women had greater ability to leave an unhappy relationship if they chose.¹⁹⁵ With divorce reform and the pent-up divorce demand from the unusually young marriages of the fifties, divorce rates rose steadily from the seventies into the nineties.¹⁹⁶

Second, two-earner families have become more critical to family well-being. The stability of women's employment steadily increased both compared to the days when women were forced to leave the labor force if they got pregnant¹⁹⁷ and in comparison with the declining security in men's

190. CARBONE, *supra* note 137, at 104 (describing the impact of fast-food restaurants and labor-saving devices).

191. CARBONE & CAHN, *supra* note 110, at 40–41.

192. See, e.g., Mary Beth Marklein, *College Gender Gap Widens: 57% Are Women*, USA TODAY (Oct. 19, 2005, 11:41 PM), http://usatoday30.usatoday.com/news/education/2005-10-19-male-college-cover_x.htm [<https://perma.cc/E7YW-AZND>] (showing male and female representation on college campuses by race and income using data compiled by the National Center for Education Statistics); TOOSI & MORISI, *supra* note 182, at 2 (showing trends in women's labor force participation); CARBONE ET AL., *supra* note 185 (manuscript at 1–5).

193. See *Obergefell v. Hodges*, 576 U.S. 644, 674 (2015) (“One State’s law, for example, provided in 1971 that ‘the husband is the head of the family and the wife is subject to him; her legal civil existence is merged in the husband, except so far as the law recognizes her separately, either for her own protection, or for her benefit.’” (quoting GA. CODE ANN. § 53–501 (1935))).

194. CARBONE & CAHN, *supra* note 110, at 40–41.

195. *Id.* at 114–16.

196. Sara McLanahan, *Diverging Destinies: How Children Are Faring Under the Second Demographic Transition*, 41 DEMOGRAPHY 607, 613–14 (2004) (showing steady increase in divorce rates into the nineties after which the rates diverge by class).

197. LYNDIA LAUGHLIN, U.S. CENSUS BUREAU, MATERNITY LEAVE AND EMPLOYMENT PATTERNS OF FIRST-TIME MOTHERS: 1961–2008, at 3–4 (2011), <https://www.census.gov/prod/2011pubs/p70-128.pdf> [<https://perma.cc/4R8N-6DCZ>]. One of the reasons is that women are more likely to be employed in the public sector. Approximately 60% of employees in the state and local public sector (teachers, etc.) are women compared to about

employment over time.¹⁹⁸ Yet trading off workforce participation and domestic responsibilities is more challenging than managing rigid gender roles, especially during periods of increased male income insecurity.¹⁹⁹

Third, the infrastructure necessary to support women's workforce participation has yet to be fully institutionalized. Well-off women's increased income pays for the labor-saving devices, cleaning crews, restaurant meals, and commercial childcare that make full-time workforce participation possible.²⁰⁰ These expenses—whether for high-quality day care centers or housekeeping crews—are often beyond the reach of the working class.²⁰¹ Working-class women, like the working-class women in factory jobs a century earlier, often find themselves in inflexible jobs that they do not particularly enjoy that take them away from home and children more than they would like.²⁰² This in turn makes them more dependent on families and partners to fill in the gaps, which in turn increases relationship stress.²⁰³

But the other change in family security depended on what was happening to men. The secure job paying a family wage was disappearing and that meant women's market labor was becoming essential to family well-being for all but those at the very top of the economic scale.²⁰⁴

B. *Employees and the End of Loyalty*

Katherine Stone begins an article on the changing nature of employment with a description of a play depicting striking British miners in the Thatcher

47% of employees in the private sector. David Cooper & Julia Wolfe, *Cuts to the State and Local Public Sector Will Disproportionately Harm Women and Black Workers*, ECON. POL'Y INST.: WORKING ECON. BLOG (July 9, 2020, 4:58 PM), <https://www.epi.org/blog/cuts-to-the-state-and-local-public-sector-will-disproportionately-harm-women-and-black-workers/> [https://perma.cc/5M5U-WLRN]. African-Americans are also more likely to work in the public sector. *Id.* And public-sector jobs have become more unionized. Press Release, U.S. Bureau of Lab. Stat., Union Membership (Annual) News Release (Jan. 22, 2021, 10:00 AM), <https://www.bls.gov/news.release/union2.htm> [https://perma.cc/VR8N-MFAC]. Indeed, public-sector unions have five times the membership rate of private-sector unions. *Id.*

198. Stone, *supra* note 99, 544–48, 574 (summarizing evidence that shows declining job tenure and concluding that it understates the increased precarity of employment).

199. AMATO ET AL., *supra* note 183, at 123–24 (describing how working-class women's need to work to compensate for their partners' declining fortunes has led to increased marital tensions and divorce proneness).

200. *Id.* (describing how the income better-educated women contributed to their families often went to hiring cleaning services or restaurant means).

201. *Id.*

202. *Id.* at 124 (describing increase in marital tensions by class).

203. *Id.* at 122.

204. *Id.* at 123–24.

era.²⁰⁵ She writes about how the play portrays the end of the nineteenth and twentieth century workers' world, with "notions of community, solidarity, and manhood" giving way to "a new world of individual expression, personal risk, and opportunity."²⁰⁶ In the new world, employment security disappears.²⁰⁷ New opportunities emerge for those positioned to take advantage of them.²⁰⁸ But risks increase, and corporatized social insurance does not address the new uncertainties.²⁰⁹ In the new world of the information age, "knowledge workers, entrepreneurs, free agents, and laboring drifters move about in diffuse networks, working on projects, delinked from stable employing institutions."²¹⁰

Four key changes explain the new era. First, automation has reduced the need for manual labor.²¹¹ Large industrialization-era organizations like Ford Motor Company or U.S. Steel once employed large labor forces to perform routine tasks.²¹² Today, much of that production has been mechanized, reducing labor demand.²¹³ Second, globalization has made it easier to shift production abroad, with large corporations moving factories to countries with lower labor costs.²¹⁴ This contributes to the erosion of blue-collar wages in the United States.²¹⁵ Third, legal changes and deunionization have made it easier to outsource jobs, not just abroad, but also to the janitorial company

205. Katherine V.W. Stone, *Rupture and Invention: The Changing Nature of Work and the Implications for Social Policy*, in THE CAMBRIDGE HANDBOOK OF U.S. LABOR LAW FOR THE TWENTY-FIRST CENTURY 154, 154–55 (Richard Bales & Charlotte Garden eds., 2020).

206. *Id.* at 155.

207. *Id.* at 159–60.

208. *Id.*

209. *Id.* at 155.

210. *Id.*

211. Claire Cain Miller, *The Long-Term Jobs Killer Is Not China. It's Automation*, N.Y. TIMES: THE UPSHOT (Dec. 21, 2016), <https://www.nytimes.com/2016/12/21/upshot/the-long-term-jobs-killer-is-not-china-its-automation.html> [<https://perma.cc/V259-C7TN>]; ANDREW YANG, THE WAR ON NORMAL PEOPLE: THE TRUTH ABOUT AMERICA'S DISAPPEARING JOBS AND WHY UNIVERSAL BASIC INCOME IS OUR FUTURE, at xiii–xiv (2018).

212. Stone, *supra* note 99, at 527–28, 531–33.

213. YANG, *supra* note 211, at 36–40; Miller, *supra* note 211 (summarizing academic literature and concluding that automation is a bigger factor than trade in explaining loss of manufacturing jobs); see also Richard Baldwin, *White-Collar Robots Are Coming for Jobs*, WALL ST. J. (Jan. 31, 2019, 8:00 AM), <https://www.wsj.com/articles/white-collar-robots-are-coming-for-jobs-11548939601> [<https://perma.cc/W5XG-2FJM>] (describing new round of automation affecting white-collar employees).

214. Katherine V.W. Stone, *Globalization and the Middle Class* 2, 21–22 (Univ. Cal. L.A. Sch. of L., Research Paper No. 12-16, 2012), <http://dx.doi.org/10.2139/ssrn.2150412> [<https://perma.cc/TJ5W-U56L>].

215. *Id.* at 2 (arguing that the price of labor in China may affect what American workers can bargain for).

down the street.²¹⁶ A company janitor at General Motors often enjoyed the same health and pensions benefits as other employees; a janitor with a small business typically enjoys lower pay, less job security, and fewer benefits.²¹⁷

Finally, the combination of technological innovation, financialization, and short-term focused corporate objectives have increased the rate of change.²¹⁸ The corporations that dominated the national landscape in 1910 were largely the same corporations that did so in the sixties, and they tended to be companies that either benefitted from economies of scale and barriers to entry (steel, autos) or that served regulated markets (energy, communications).²¹⁹ The largest firms today, in contrast, involve a more varied and rotating mix of financial (Berkshire-Hathaway), tech (Apple), and retail (Walmart) giants in addition to some of the surviving energy and auto companies.²²⁰ Moreover, while tech appears to be the biggest winner, it employs substantially fewer workers than manufacturing and retail did at their height.²²¹ These companies depend to a greater degree on skilled workers who can navigate the companies' changing needs in competitive global markets.²²²

These changes substantially alter the employment relationship. Katherine Stone has described the result as a new “psychological contract,” in which both the company and the worker “have lower expectations for long-term employment, employees are responsible for their own career development,

216. Timothy P. Glynn, *Taking the Employer Out of Employment Law? Accountability for Wage and Hour Violations in an Age of Enterprise Disaggregation*, 15 EMP. RTS. & EMP. POL'Y J. 201, 212–13 (2011) (“While a large or medium-size firm in the middle of the twentieth century might have produced its own component parts and other inputs, and provided its own janitorial, maintenance, copying, printing, food, delivery, distribution, and storage services, these tasks now have been shifted to independent firms, sometimes through multiple intermediaries or supply chains. . . . [and] outsourcing production overseas and domestically is standard practice.”); see also DAVID WEIL, *THE FISSURED WORKPLACE* 8–10 (2014) (arguing that the fissured workplace involves transferring all of a business's non-core activities to other entities); David Weil, *Understanding the Present and Future of Work in the Fissured Workplace Context*, 5 RSF 147, 148 (2019).

217. Stone, *supra* note 205, at 158–59, 161 (describing outsourcing not just of cleaning needs but also bookkeeping and accounting, and describing the use of “phony ‘independent contractors’” to perform janitorial services).

218. Stone, *supra* note 99, at 531–35, 549 (noting the pressure for “short-term cost reduction” and the resulting changes in production).

219. JOHN KENNETH GALBRAITH, *THE NEW INDUSTRIAL STATE* 92–94, 118–19 (1967).

220. *Fortune 500*, FORTUNE (2020), <http://fortune.com/fortune500/> [<https://perma.cc/4S2Z-TJJF>]. Walmart is number one; Amazon (a combination of tech and retail) is number two. *Id.*

221. DAVIS, *supra* note 17, at 92 (discussing relatively low numbers of employees in tech-dominated corporations).

222. See Stone, *supra* note 205, at 161.

and commitment to the work has replaced commitment to the job and organization.”²²³ Others refer to it as the “casualization” of employment.²²⁴

These new employment terms have different implications for the skilled and the unskilled. “The ambitious see many positions as stepping stones in a personal saga rather than as a source of commitment.”²²⁵ For them, “employability security” has replaced “employment security.”²²⁶ Those with the best opportunities acquire the right degrees, going back to school if necessary.²²⁷ They seek experience, often starting with unpaid internships.²²⁸ They switch jobs—and often cities—as opportunities arise.²²⁹ In accordance with the implicit terms of this psychological contract, neither employer nor employee is loyal to the other.²³⁰

For unskilled workers, these changes mean that there may be neither security nor opportunity. Blue-collar industrial jobs often required little skill outside of company-specific training.²³¹ When these factories close, the workers have few options that pay as well.²³² By the nineties, retail firms (and McDonald’s) had eclipsed manufacturing as the biggest employers.²³³ Companies like Walmart are willing to hire those without skill or experience, but Walmart pays its hourly workers little more than the minimum wage with

223. Stone, *supra* note 99, at 552 (quoting Marcie A. Cavanaugh & Raymond A. Noe, *Antecedents and Consequences of Relational Components of the New Psychological Contract*, 20 J. ORGANIZATIONAL BEHAV. 323, 324 (1999)).

224. See LUC BOLTANSKI & ÈVE CHIAPELLO, *THE NEW SPIRIT OF CAPITALISM* 224 (Gregory Elliott trans., 2007).

225. June Carbone & Nancy Levit, *The Death of the Firm*, 101 MINN. L. REV. 963, 1009 (2017); BOLTANSKI & CHIAPELLO, *supra* note 224, at 93 (observing that acquisition of experience increases personal capital and thus employability).

226. Stone, *supra* note 99, at 525.

227. *Id.* at 546–47.

228. *Id.* at 540–44.

229. *Id.* (describing frequent jobs changes).

230. *Id.* at 653.

231. *Id.* at 535.

232. CATHERINE RUCKELSHAUS & SARAH LEBERSTEIN, NAT’L EMP. L. PROJECT, *MANUFACTURING LOW PAY: DECLINING WAGES IN THE JOBS THAT BUILT AMERICA’S MIDDLE CLASS* 1, 5–7 (2014), <https://s27147.pcdn.co/wp-content/uploads/2015/03/Manufacturing-Low-Pay-Declining-Wages-Jobs-Built-Middle-Class.pdf> [<https://perma.cc/D3CG-MUAH>] (observing that even in the same industries, such as autos, the new manufacturing jobs are not as good as the ones that have been lost).

233. See Lauren Weber, *Some of the World’s Largest Employers No Longer Sell Things, They Rent Workers*, WALL ST. J. (Dec. 28, 2017, 11:46 AM), <https://www.wsj.com/articles/some-of-the-worlds-largest-employers-no-longer-sell-things-they-rent-workers-1514479580> [<https://perma.cc/2VHD-6A4G>]; Alexander E.M. Hess, *The 10 Largest Employers in America*, USA TODAY (Aug. 22, 2013, 7:48 AM), <https://www.usatoday.com/story/money/business/2013/08/22/ten-largest-employers/2680249/> [<https://perma.cc/95RU-GJQW>].

few benefits or opportunities for advancement.²³⁴ Finally, independent contractors, gig workers,²³⁵ and temp agencies²³⁶ provide a variety of employment opportunities that fill in the gaps left by other forms of employment. While they provide some workers greater control of working hours and conditions, they typically require that workers acquire skills on their own and provide little in the way of social insurance or benefits.²³⁷

C. Employability and Family Strategies

The upwardly mobile middle class responded to these changes, just as the upwardly mobile middle class of the industrial era did: with a new family strategy. As we have written elsewhere, this strategy involves investment in women's as well as men's income capacity, postponing family formation until after a couple achieves emotional maturity and financial independence, and the remaking of relationship terms to emphasize mutual respect and shared decision-making.²³⁸ The changed relationship between partners contributes to a family's ability to realize "employability security" rather than "employment security."²³⁹ Mature adults (in this system) have completed their formal education, worked through the internships and job changes that give them marketable skills, and acquired the cushion in terms and income and flexibility necessary to be able to trade-off responsibilities with a partner. This new strategy provides a measure of family security—on terms beyond the reach of a good part of the population.

234. Nelson Lichtenstein, *Wal-Mart: A Template for Twenty-First-Century Capitalism*, in *WAL-MART: THE FACE OF TWENTY-FIRST-CENTURY CAPITALISM* 3, 21 (Nelson Lichtenstein ed., 2006).

235. BD. OF GOVERNORS OF THE FED. RSRV. SYS., REPORT ON THE ECONOMIC WELL-BEING OF U.S. HOUSEHOLDS IN 2018, at 18 (2019), <https://www.federalreserve.gov/publications/files/2018-report-economic-well-being-us-households-201905.pdf> [<https://perma.cc/C32Z-68V4>]. A Federal Reserve study indicated that 30% of American adults had engaged in a gig activity in the last month, with an average of five hours for each respondent who did. *See id.* at 2. The report defined "gig" work to include on-line and off-line activities such as child care. *Id.* at 18.

236. *See, e.g.*, ERIN HATTON, *THE TEMP ECONOMY* 1–2 (2011) (documenting the rise of the temp economy); Keith Cunningham-Parmeter, *From Amazon to Uber: Defining Employment in the Modern Economy*, 96 B.U. L. REV. 1673, 1676 (2016) (discussing the lack of protection for temp workers and independent contractors).

237. *See* Stone, *supra* note 205, at 160–61; HATTON, *supra* note 236, at 1–2.

238. *See, e.g.*, CARBONE & CAHN, *supra* note 110, at 117–18 (describing new marital script); NAOMI CAHN & JUNE CARBONE, *RED FAMILIES V. BLUE FAMILIES* 1–2 (2010) (showing class-based nature of marriage); DANIEL MARKOVITS, *THE MERITOCRACY TRAP: HOW AMERICA'S FOUNDATIONAL MYTH FEEDS INEQUALITY, DISMANTLES THE MIDDLE CLASS, AND DEVOURS THE ELITE* 30 (2019) (documenting how the loss of middle-class jobs results in lower marriage rates).

239. Stone, *supra* note 99, at 525.

The legal regulation of marriage reinforces this strategy.²⁴⁰ The changed marital terms are egalitarian in form as they assume a partnership with equal contributions. At divorce, the couple's assets are equally divided, and shared parenting has become the norm.²⁴¹ For couples in unequal, unhappy, unfair, or unstable relationships, however, legal commitments may undermine security.²⁴²

To explain why, it is useful to consider the economics of risk management. That analysis posits that business enterprises with high-income volatility require a larger capital base to survive.²⁴³ The reason is that most businesses, like most families, have fixed expenses. If revenues plunge, even temporarily, the entity may be forced to default on its payments, triggering evictions, collection actions, or bankruptcy.²⁴⁴ Families are no different.²⁴⁵ A Federal Reserve Report indicated that close to 40% of Americans would have difficulty paying an unexpected bill of \$400.²⁴⁶ According to the same report, 30% of American adults have income that varies from month to month, and a quarter of adults under the age of thirty receive financial assistance from someone outside of their household, typically parents.²⁴⁷ Many couples, particularly young couples, have no cushion to weather unexpected expenses or income losses.²⁴⁸

240. See CARBONE & CAHN, *supra* note 110, at 111–17 (describing the emergence of “see-saw” marriages in which couples trade off work and family obligations as circumstances change and corresponding legal changes).

241. See June Carbone & Naomi Cahn, *Nonmarriage*, 76 MD. L. REV. 55, 85–87 (2016) (describing changed legal regulation of marriage).

242. *Id.* at 118–21 (explaining how marriage is a bad deal for couples who do not equally share responsibilities).

243. See, e.g., *Earnings Volatility*, CORP. FIN. INST., <https://corporatefinanceinstitute.com/resources/knowledge/finance/earnings-volatility/> [<https://perma.cc/5GK3-9KHF>] (describing how greater earnings volatility increases risk of bankruptcy and increases cost of capital).

244. JOANNA SMITH-RAMANI, DAVID MITCHELL & KATHERINE LUCAS MCKAY, ASPEN INST., *INCOME VOLATILITY: WHY IT DESTABILIZES WORKING FAMILIES AND HOW PHILANTHROPY CAN MAKE A DIFFERENCE* 4 (2017), https://assets.aspeninstitute.org/content/uploads/2017/12/AFN_2017_Income-Volatility_Final.pdf [<https://perma.cc/Q8HZ-F3XV>] (finding that income volatility contributes to paying bills late, foregoing necessary medical care, food insecurity, housing instability, and higher costs associated with late fees and credit card debt).

245. *Id.* at 6 (describing an increase in income volatility, particularly for low-income families, because of “instability and unpredictability in earned income, changes in income from public benefits, and changes in household income caused by changes in household structure”).

246. See BD. OF GOVERNORS OF THE FED. RSRV. SYS., *supra* note 235, at 2.

247. *Id.*

248. See, e.g., Lisa A. Gennetian, Sharon Wolf, Heather D. Hill & Pamela A. Morris, *Intrayear Household Income Dynamics and Adolescent School Behavior*,

Instability thus destabilizes working-class families. While better-off couples may have the resources to respond to a job loss by going back to school or taking a lower-paying job that supplies new skills, working-class men have more difficulty recovering financially,²⁴⁹ and layoffs often exacerbate substance abuse, violence, and other behavioral issues.²⁵⁰ Even without such issues, many individuals are reluctant to commit to a partner who is not financially stable for fear that the relationship will deplete their own resources.²⁵¹

Practically this means that while marriage is a source of strength for couples who can trade off childcare and workforce participation in ways that allow the family to marshal the resources necessary for investment in children and in adult “employability,” it can be a threat to working-class families.²⁵² It also means that the working class has little ability to form families on middle-class terms, and that marriage without those terms does not and cannot serve as the foundation for family security and stability.²⁵³

* * *

52 DEMOGRAPHY 455, 473 (2015) (finding income instability to be nearly double in the lowest quintile compared to the highest quintile despite welfare programs); Eichner, *supra* note 78, at 258 (maintaining that the social safety net is “less responsive to external economic shocks suffered by poor and female-headed families than it was thirty years ago”).

249. See, e.g., ARNE L. KALLEBERG, GOOD JOBS, BAD JOBS: THE RISE OF POLARIZED AND PRECARIOUS EMPLOYMENT SYSTEMS IN THE UNITED STATES, 1970S TO 2000S 103–04 (2011) (indicating that while white-collar workers often switch jobs, blue-collar workers are more likely to experience involuntary layoffs with longer periods between jobs and long-term declines in income).

250. See, e.g., Tony Dokoupil, *Lifestyle: Laid-Off Men Don't Do Dishes*, NEWSWEEK (Feb. 20, 2009, 7:00 PM), <http://www.newsweek.com/2009/02/20/men-will-be-men.html> [<https://perma.cc/D8XB-FNDL>] (describing laid-off men as more likely to engage in domestic violence and alcoholism); KATHRYN EDIN & MARIA KEFALAS, PROMISES I CAN KEEP: WHY POOR WOMEN PUT MOTHERHOOD BEFORE MARRIAGE 73 (3d ed. 2011) (indicating that over half of poor women’s relationships with the fathers of their children end because of domestic violence).

251. See, e.g., Linda M. Burton & M. Belinda Tucker, *Romantic Unions in an Era of Uncertainty: A Post-Moynihan Perspective on African American Women and Marriage*, 621 ANNALS AM. ACAD. POL. & SOC. SCI., 132, 135–36 (2009) (observing that many African-American women were concerned that “monetary entanglements with another would deplete their resources”).

252. See, e.g., HANNA ROSIN, THE END OF MEN AND THE RISE OF WOMEN 2 (2012) (describing a young woman who explains that being with the father of her child “would just mean one less granola bar for the two of us.”).

253. For a description of these marriage/nonmarriage dynamics, see *id.* at 118–22 (describing wariness about sharing principles); June Carbone & Naomi Cahn, *The Triple System of Family Law*, 2013 MICH. ST. L. REV. 1185; Naomi Cahn & June Carbone, *Blackstonian Marriage, Gender, and Cohabitation*, 51 ARIZ. ST. L.J. 1247 (2019).

These changes act together to dismantle the family wage system of the industrial era. The new organizational regime prizes high degrees of flexibility, which in turn depend on network-based organization and human capital investment.²⁵⁴ The upwardly mobile middle class has redesigned its family strategy to facilitate greater flexibility and investment.²⁵⁵ The benefits of this system are beyond the reach of the working class. They lack access to the good jobs of the new economy, and without income stability or a capital cushion, they lack access to the “see-saw” relationships that hedge against risk and provide a cushion in the new era.²⁵⁶ Social insurance tied to specific employers and marriage does not reach them at all. It is time to rethink the terms of family—and societal—stability and security.

III. UNCOUPLING AND THE REDESIGN OF FAMILY SECURITY AND STABILITY

At the height of the industrial era, society provided for family security and stability through three interlocking mechanisms. First, large industrial organizations secured a stable workforce by providing relatively secure employment at above-market wages²⁵⁷ to a reliable workforce groomed to meet their needs.²⁵⁸ Second, the male family wage extended the benefits of that system in ways that reinforced breadwinner identification with employment as a source of status and meaning,²⁵⁹ with a husband’s income affecting whether a wife worked.²⁶⁰ Third, the New Deal architects designed

254. Stone, *supra* note 205, at 158–59 (“Knowledge and innovation rather than economies of scale are the key source of value and competitive advantage,” and firms therefore seek “both operational flexibility to utilize employees in different capacities as needed, and numerical flexibility to grow or shrink the size of the workforce on short notice.”). Correspondingly, Kaiponanea Matsumura argues that family law must consider what he labels “transition rules” to minimize disruptions in status and enable people to move between relationships. Matsumura, *supra* note 57, at 730–34.

255. See CARBONE & CAHN, *supra* note 110, at 83–87 (describing how the benefits of the system come from increased class differences in parental time and money spent on children).

256. ROSIN, *supra* note 252, at 4–5 (referring to see-saw marriages).

257. See Raff & Summers, *supra* note 93, at S83 (discussing how the Ford strategy took hold in the entire auto industry, which paid wages 40% higher than other industries).

258. See *supra* Part I.B.

259. See *supra* Part I.B.

260.

As married women began to enter the labor market in greater numbers, labor economists analyzed female labor supply decisions in the context of the family unit, rather than the individual, and inquired about the influence of husband’s income on wife’s “gainful employment.” . . . [M]arried women’s gainful employment was negatively related to husband’s income. The evidence

a social insurance system that filled in the gaps of this system while disguising the role of the state in doing so.²⁶¹ Unionization, particularly in the era following World War II, helped to reset labor markets in ways that raised blue-collar wages outside the ranks of the unionized, and social insurance programs such as Social Security largely eliminated poverty among seniors through a system that depended more on redistribution than the narrow definitions of desert used to justify the program.²⁶² The system, in short, depended on large, dominant corporate institutions that acted in concert with an active governmental role and the institutionalization of worker interests.²⁶³

The design of a new system must similarly complement the redesign of employment and family. Large corporate entities have become much more network-like in their organization. They routinely prune workforces and replace them with independent contractors, temporary workers, or new affiliates.²⁶⁴ They invest less in worker training while giving individual employees greater authority in ways that enhance their experience, skills, and ultimate employability.²⁶⁵ They have shifted pension benefits from defined benefit systems guaranteeing workers' retirement income to more portable, defined contribution systems that transfer the risk of market losses to the workers. In short, the companies benefit from deregulation and the destruction of union power, giving them much greater flexibility—and increasing individual insecurity and family instability.²⁶⁶

suggested a rather large income effect, “a freeing of married women from the necessity of working outside the home.”

Claudia Goldin, *The Quiet Revolution that Transformed Women's Employment, Education, and Family*, 96 AM. ECON. REV. 1, 6 (2006).

261. Graetz & Mashaw, *supra* note 123, at 350.

262. KATHLEEN ROMIG, CTR. ON BUDGET & POL'Y PRIORITIES, SOCIAL SECURITY LIFTS MORE AMERICANS ABOVE POVERTY THAN ANY OTHER PROGRAM (2020), <http://www.cbpp.org/sites/default/files/atoms/files/10-25-13ss.pdf> [https://perma.cc/G76P-2L29]; TERESA GHILARDUCCI, BRIDGET FISHER & ZACHARY KNAUSS, SCHWARTZ CTR. FOR ECON. POL'Y ANALYSIS, NOW IS THE TIME TO ADD RETIREMENT ACCOUNTS TO SOCIAL SECURITY: THE GUARANTEED RETIREMENT ACCOUNT PROPOSAL 4 (2015), http://www.economicpolicyresearch.org/images/docs/retirement_security_background/GRA_3_0.pdf [https://perma.cc/4V22-QKKZ].

263. Cioffi, *supra* note 146, at 1103–04 (describing Galbraith's conception of countervailing powers); Wells, *supra* note 147, at 322 (describing union-management peace in the postwar era).

264. See, e.g., *All Employees, Temporary Help Services (1990-2016)*, FED. RSRV. BANK OF ST. LOUIS, <https://research.stlouisfed.org/fred2/series/TEMPHELPS> [https://perma.cc/V7U2-AYRQ] (charting the rise of temporary workers from 1990 to 2020); Stone, *supra* note 99, at 561–62 (observing that globalization has to focus on adaptability).

265. BOLTANSKI & CHIAPELLO, *supra* note 224, at 93 (observing that workers value experience that enhances employability more than employment security in the new era).

266. SMITH-RAMANI ET AL., *supra* note 244, at 4–6 (describing increase in family instability and attributing it changes in work, benefits, and family structure).

The challenge, therefore, for a new system of family security and stability is how to protect individuals in this new environment. Unlike the old system, the new one can no longer depend on long-term employment, nor on the breadwinner–homemaker families that have become obsolete in the new era. The system must accordingly become more individualized; it must be uncoupled from employment and from marriage. In many ways, the transformation is already well underway. The most critical issue, however, is whether the state role will continue to be disguised or whether it will come out into the open as a critical component of family security and stability.

A. Uncoupling Benefits from Marriage: The Beginning

The prerequisite for individual financial security has become “employability;” that is, acquisition of the education, skills, and experience necessary to become marketable in a competitive labor pool.²⁶⁷ The partnership ideal in the information age has become two adults with the flexibility, maturity, and trust necessary to trade off work, childcare, and other family tasks in ways that reflect shared decision-making.²⁶⁸ Marriage without employability (or without trust) is unlikely to provide security and stability.²⁶⁹ This ideal today is beyond the reach of a good part of the population.²⁷⁰ Consequently, tying benefits to marriage simply increases economic inequality in punitive and counterproductive ways.

To a large degree, American law already reflects this change in the institution of marriage. The Supreme Court, as early as the 1970s, recognized the elements of the new middle-class marriage system, which depends on women’s reproductive autonomy and more egalitarian marital relationships.²⁷¹ And in 2015, the Supreme Court embraced a modern marriage model shorn of its gendered attributes in extending marriage equality to same-sex couples.²⁷² What has yet to happen is the emergence of a state role extending the benefits of this system to the population as a whole, decoupling benefits from relationships.

267. Stone, *supra* note 99, at 552–53 (describing change from “employment security” to “employability security”).

268. CARBONE & CAHN, *supra* note 110, at 113–14.

269. See *supra* Part II.C; CARBONE & CAHN, *supra* note 110, at 101 (discussing the relationship between economic security and marriage).

270. These developments parallel the changes with the Industrial Revolution, which also produced class-based differences in family strategies. See, e.g., RYAN, *supra* note 64, at 184–85 (describing class-based differences to industrialization).

271. For a summary of the changes, see CARBONE & CAHN, *supra* note 110, at 111–13 (describing new marital script).

272. See discussion of *Obergefell v. Hodges*, *infra* notes 305–329 and accompanying text.

The Supreme Court, when squarely presented with the issue of punitive distinctions based on marriage, has agreed that they are pointless. In *Levy v. Louisiana*, for example, the Supreme Court struck down distinctions between marital and nonmarital children's ability to bring a wrongful death action.²⁷³ The Court observed:

Why should the illegitimate child be denied rights merely because of his birth out of wedlock? He certainly is subject to all the responsibilities of a citizen, including the payment of taxes and conscription under the Selective Service Act. How under our constitutional regime can he be denied correlative rights which other citizens enjoy?²⁷⁴

The Court was even more direct in *Eisenstadt v. Baird*.²⁷⁵ In this case, the Court considered a challenge to a Massachusetts statute that prohibited unmarried persons' contraceptive use.²⁷⁶ Seven years earlier, the Court had recognized a constitutional right to privacy, permitting married couples access to contraception.²⁷⁷ While Massachusetts argued that unmarried individuals did not enjoy the same expectation of sexual privacy, the Court relied on the Equal Protection Clause to find that a married couple was "not an independent entity with a mind and heart of its own, but an association of two individuals."²⁷⁸ Each individual, not each married couple, enjoyed the right to privacy.²⁷⁹

These opinions laid the foundation for a new legal approach to marriage, one that no longer treated marriage as mandatory and placed less weight on it as a bright-line distinction for the allocation of rights. In this context, sexuality did not always have to coincide with marriage,²⁸⁰ and preventing

273. *Levy v. Louisiana*, 391 U.S. 68, 71 (1968).

274. *Id.* For a thorough review of the Supreme Court's treatment of the legitimacy cases and their emphasis on harm to "innocent children," see Serena Mayeri, *Marital Supremacy and the Constitution of the Nonmarital Family*, 103 CALIF. L. REV. 1277, 1290 (2015).

275. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

276. *Id.* at 440.

277. *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965) (holding that a ban on contraceptive access to married couples was unconstitutional as a violation of the right to privacy); *Eisenstadt*, 405 U.S. at 453 (establishing the same right for unmarried couples seven years later).

278. *Eisenstadt*, 405 U.S. at 453. The Court used the term "invidious" to describe the distinction, and also referred to an "arbitrary and unreasonable government," suggesting that the standard is close to rational basis. *Id.* at 454.

279. Melissa Murray, *Obergefell v. Hodges and Nonmarriage Inequality*, 104 CALIF. L. REV. 1207, 1225 (2016).

280. During this same period, the shotgun marriage, which has served as the fall back channeling pregnancy into marriage, was also fading. See George A. Akerlof, Janet L. Yellen & Michael L. Katz, *An Analysis of Out-of-Wedlock Childbearing in the United States*, 111 Q.J. ECON. 277, 278 (1996).

the distribution of contraception to single women became pointless and cruel. The *Eisenstadt* Court, in applying the Due Process clause, explained that: “It would be plainly unreasonable to assume that Massachusetts has prescribed pregnancy and the birth of an unwanted child [or the physical and psychological dangers of an abortion] as punishment for fornication.”²⁸¹ The Court employed the same reasoning to hold a few years later that the right to privacy did not permit New York to prohibit the sale or distribution of contraceptives to individuals under the age of sixteen.²⁸² The Court reiterated that it was inappropriate to attempt to channel sexuality into marriage by making the birth of a child the penalty, and it doubted in any event whether deterrence worked.²⁸³ Linking substantial benefits to a desire to promote marriage, when it results in hardship to substantial parts of the population, should be seen as similarly irrational.²⁸⁴ The Supreme Court in the seventies nonetheless did not find a state obligation to treat married and unmarried couples equally²⁸⁵ nor did it find an affirmative obligation to extend benefits to the unmarried.²⁸⁶ In a 5-4 decision in 1979, for example, the Supreme Court continued to interpret Social Security survivors’ benefits solely as a replacement for a wage-earner’s income that allowed married mothers to stay out of the labor market.²⁸⁷

B. *Uncoupling Benefits from Marriage: Round 2*

The much more dramatic redefinition of the state role came with the congressional dismantling of ADC in the nineties. The statutory changes, while ironically done in the name of marriage promotion, constitute a major

281. *Eisenstadt*, 405 U.S. at 448. The Court also expressed skepticism about whether it worked. *Id.*

282. *Carey v. Population Servs. Int’l*, 431 U.S. 678, 695 (1977).

283. *Id.*

284. See Courtney G. Joslin, *Discrimination In and Out of Marriage*, 98 B.U. L. Rev. 1, 2 (2018) (arguing for the dismantling of distinctions based on marriage); Kaiponanea T. Matsumura, *A Right Not To Marry*, 84 FORDHAM L. REV. 1509, 1545–47 (2016) (noting that not every law that incentivizes or deters marriage is unconstitutional).

285. See Mayeri, *supra* note 274, at 1352 (concluding that the cases stopped short of recognizing the link between “marital supremacy” and the “battle for racial, sexual, and economic justice”).

286. See *id.* at 1337 (describing how the Court distinguished between provisions that made children ineligible for benefits because their parents were unmarried, thereby punishing the children for “illegitimacy” versus provisions for adults premised on the loss of access to a wage-earner’s support, where “marriage *could* be used as a shorthand for dependency” on the lost income).

287. *Califano v. Boles*, 443 U.S. 282, 293 (1979). The Court ruled that “Congress could reasonably conclude that a woman who has never been married to the wage earner is far less likely to be dependent upon the wage earner at the time of his death.” *Id.* at 289.

part of the uncoupling from marriage. The New Deal legislation of the thirties had rejected universal child allowances in favor of the means-tested program, known in the nineties as Aid for Families with Dependent Children (AFDC).²⁸⁸ Once women gained access to the workforce, however, it no longer made sense to treat women as intrinsically dependent solely because of motherhood, and President Bill Clinton vowed “to end welfare as we know it.”²⁸⁹ In 1996, Congress replaced the program with the Temporary Assistance for Needy Families (TANF) program.²⁹⁰

TANF, however, rested on a fundamental contradiction.²⁹¹ Two of its four objectives were tied to marriage, treating marriage promotion and the prevention of nonmarital births as primary objectives.²⁹² Yet, most of its focus involved its second objective: getting single mothers off the welfare rolls and into paid employment,²⁹³ rejecting the premise that only men could earn enough to support a family.²⁹⁴ TANF used punitive measures, limiting the duration and nature of benefits, as a principal means of accomplishing its ends.²⁹⁵ The idea of “responsible motherhood” had shifted from procreation within marriage to not having more children than you could support without government assistance.²⁹⁶

288. See CARBONE, *supra* note 137, at 200–01 (describing how these programs were shaped to prioritize assistance to widows and exclude African-Americans and immigrants); Alberto Alesina, Edward Glaeser & Bruce Sacerdote, *Why Doesn't the United States Have a European-Style Welfare State?*, 2001 BROOKINGS PAPERS ON ECON. ACTIVITY 187, 195 tbl.4 (emphasizing that as far back as 1870, the United States has had lower public welfare benefits than European countries).

289. See CARBONE, *supra* note 137, at 205–07 (observing that welfare reform “was fought on the battleground of permissible motherhood” and that the Act was named the “Personal Responsibility Act”).

290. See Andrew Hammond, *Welfare and Federalism's Peril*, 92 WASH. L. REV. 1721, 1770 (2017) (describing program).

291. Mayeri, *supra* note 274, at 1337–38 (addressing differential treatment of nonmarital parents).

292. 42 U.S.C. § 601(a).

293. The purpose section of TANF explicitly includes “end[ing] the dependence of needy parents on government benefits by promoting job preparation, work, and marriage.” *Id.* § 601(a)(2).

294. See Eichner, *supra* note 78, at 257 (stating that TANF required mothers to work in paid jobs in order to receive government aid).

295. See Hammond, *supra* note 290, at 1730 (observing that most state-level changes “involved increased uses of sanctions, the introduction of family caps, and other means by which to push recipients off the welfare rolls, all of which would reduce expenditures.”).

296. Eichner, *supra* note 78, at 257 (treating the adoption of TANF as the triumph of neoliberal ideology).

The real import of the shift from AFDC to TANF became the elimination of cash payments to needy families as an entitlement.²⁹⁷ That means that not all of those who qualify receive benefits, and even those who remain enrolled do not necessarily receive the promised assistance.²⁹⁸ And, unsurprisingly, it has had almost no effect on what was supposed to be the program's central purpose—increasing marriage rates.²⁹⁹

In eliminating AFDC, Congress did recognize, however, that employment alone might not be sufficient to meet the needs of poor families. To make it possible for poor mothers to work and support their families, Congress took three additional steps that provided benefits that were not premised, as AFDC had been, on compensation for the absence of a wage-earner. It expanded health care eligibility,³⁰⁰ the Earned Income Tax Credit (EITC),³⁰¹ and food stamps.³⁰² While eligibility for these programs often involves restrictive requirements and while recipients have sometimes been maligned,³⁰³ the programs recognize a new basis for benefits: the idea that employability requires at least minimum access to food and medicine and that the market does not necessarily permit all families to be self-sufficient, given the relative decline in blue-collar wages and employment security.³⁰⁴

297. See Hammond, *supra* note 290, at 1732 (describing a major consequence of the enactment of TANF as “the elimination of the entitlement”).

298. *Id.*

299. See, e.g., CARBONE & CAHN, *supra* note 110, at 14–20 (summarizing class-based changes in family formation); see also Sara Sternberg Greene, *The Bootstrap Trap*, 67 DUKE L.J. 233, 233 (2017) (observing that the “parents who have most internalized narratives of self-sufficiency are particularly at risk of financial ruin under the new regime”).

300. Before passage of the ACA, Medicaid “covered only pregnant women, some parents with dependent children, seniors in long-term care, and low-income individuals with disabilities.” Gluck & Scott-Railton, *supra* note 13, at 509–10.

301. See Anne L. Alstott, *Why the EITC Doesn't Make Work Pay*, 73 LAW & CONTEMP. PROBS. 285, 285 (2010) (describing the EITC as the “largest cash-transfer program for low-income workers with children”). The EITC, however, benefits only those parents who have paid jobs. Greene, *supra* note 299, at 237 n.11.

302. See Michael W. Long et al., *Public Support for Policies To Improve the Nutritional Impact of the Supplemental Nutrition Assistance Program (SNAP)*, 17 PUB. HEALTH NUTRITION 219, 220 (2012) (“Seventy-seven per cent of [those polled] believed that federal spending on SNAP should be increased (48%) or maintained (29%) . . .”).

303. The notion of “deserving poor” has been carried through to Medicaid. See Nicole Huberfeld & Jessica L. Roberts, *Health Care and the Myth of Self-Reliance*, 57 B.C. L. REV. 1, 12 (2016); Dayna B. Matthew, *Justice and the Struggle for the Soul of Medicaid*, 13 ST. LOUIS U. J. HEALTH L. & POL'Y 29, 31 (2019).

304. See, e.g., Greg M. Shaw, *Changes in Public Opinion and the American Welfare State*, 124 POL. SCI. Q. 627, 634–35 (2009) (noting that programs that benefit children and the elderly or that provide in-kind assistance, such as food stamps or medical care, enjoy more support than need-based cash assistance).

Completing the process of decoupling from marriage is a fundamental redefinition of the institution's purpose and significance.

In *Obergefell v. Hodges*, the Supreme Court's embrace of marriage equality did pay homage to the continuing importance of marriage,³⁰⁵ but the opinion affirms a model that makes marriage a voluntary act of individual self-expression.³⁰⁶ Justice Kennedy's opinion described four principles underlying recognition of a constitutional right to marry.³⁰⁷ The first two involve personal self-definition.³⁰⁸ He argued that a right to "marriage is inherent in the concept of individual autonomy"³⁰⁹ and that the right to marry is "fundamental because it supports a two-person union unlike any other in its importance to the committed individuals."³¹⁰ These first two principles do not involve an obligation to marry or a definition of marriage tied to its role in providing economic security and stability.

The last two principles involve the benefits that come from public recognition of a couple's marital status.³¹¹ Yet, the second two principles, which treat marriage as fundamentally important to the societal order, are in many ways in tension with the first two. If marriage is a critical part of self-definition, then it should, by definition, be optional: not all individuals, or couples, will choose to define themselves in terms of marriage.³¹² The majority opinion clearly rejected the notion that the principal importance of marriage lies with its connection to heterosexual procreation,³¹³ but it did not convincingly address the question of why marriage should remain foundational to the social order—and therefore "fundamental" as a matter or right—at all.

305. For criticism of the case in these terms, see Murray, *supra* note 279, at 1249, 1252 (arguing that the Court's praise of marriage will encourage lower courts to interpret statutory terms like "family" or "kinship" narrowly to require marriage rather than broadly to include nonmarital families).

306. Some refer to this as "capstone" marriage, suggesting that it serves as a celebration of the couple's success. We dislike the term because it obscures the family strategies that make human capital investment the necessary precondition to stable and secure relationships. *See supra* Part II.C.

307. *Obergefell v. Hodges*, 576 U.S. 644, 646–48 (2015).

308. *Id.* at 646–47.

309. *Id.* at 665, 666 (observing further that marriage decisions are "among the most intimate that an individual can make").

310. *Id.*

311. *Id.* at 669 ("[M]arriage is 'the foundation of the family and of society, without which there would be neither civilization nor progress.'" (quoting *Maynard v. Hill*, 125 U.S. 190, 211 (1888))).

312. *Cf. id.* at 646 (linking marriage to childrearing).

313. *Id.* at 669 ("[T]he right to marry is less meaningful for those who do not or cannot have children.").

Justice Kennedy’s third principle, describing the importance of marriage for childrearing, underscores the fact that parental connection to children, rather than marriage itself, has become the defining feature of family life. His opinion stated that “[w]ithout the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser.”³¹⁴ Presumably, what Justice Kennedy had in mind when he referred to predictability is the difficulty unmarried couples have had in gaining legal recognition of their parental status.³¹⁵ One of the couples in the *Obergefell* litigation, for example, consisted of two women raising children together in Michigan.³¹⁶ Michigan permitted only married couples or single individuals to adopt.³¹⁷ Since the two women could not marry, their children each had only one legal parent.³¹⁸ Justice Kennedy explained that, if tragedy were to befall either partner, “the other would have no legal rights over the children she had not been permitted to adopt.”³¹⁹ This couple, in bringing the case, sought “relief from the continuing uncertainty their unmarried status creates in their lives.”³²⁰ It is clearly accurate to say that the lack of legal recognition of *their parental status* complicates their children’s lives, but that does not answer the question why it is marriage, rather than parental recognition, that constitutes the problem.³²¹

Justice Kennedy emphasizes in the second half of the sentence that children are also harmed by the stigma that comes from the denial of their parents’ ability to marry, particularly where that denial reflects disapproval

314. *Id.* at 668.

315. The opinion, in referring to unpredictability and instability, mentioned marriage-related benefits such as

taxation; inheritance and property rights; rules of intestate succession; spousal privilege in the law of evidence; hospital access; medical decisionmaking authority; adoption rights; the rights and benefits of survivors; birth and death certificates; professional ethics rules; campaign finance restrictions; workers’ compensation benefits; health insurance; and child custody, support, and visitation rules.

Id. at 670. Some of these rights, such as intestate succession, can be addressed through wills or other forms of contract, but parenthood cannot be. *Id.*

316. *Id.* at 658.

317. *Id.* at 658–59.

318. *Id.* at 659.

319. *Id.*

320. *Id.* The unpredictability argument, however, at least as it relates to marriage, is circular. It maintains that since the couple cannot marry, they cannot acquire legal recognition as parents of each other’s children, and that lack of legal recognition creates harmful uncertainty for their children; therefore, they should be allowed to marry.

321. See, e.g., Douglas NeJaime, *The Constitution of Parenthood*, 72 STAN. L. REV. 261, 269 (2020).

of the parents' relationship with each other.³²² This argument is more compelling. Nonetheless, if it is the differential treatment that causes the stigma, this is a classic equal protection argument, resting on the discriminatory denial of access to a state-sanctioned status rather than a due process argument resting on the fundamental importance of the status itself.³²³

The fourth principle Justice Kennedy articulates is similarly unpersuasive. It refers to the role of marriage as “a keystone of the Nation’s social order.”³²⁴ The majority makes no effort to explain why marriage should still be seen as such a keystone. Instead, the opinion again invokes equal protection analysis to state that “it is demeaning to lock same-sex couples out of a central institution of the Nation’s society, for they too may aspire to the transcendent purposes of marriage.”³²⁵ The harm the Court identifies from being denied access is dignitary;³²⁶ it comes from the societal judgment that the unions same-sex couples form are somehow lesser and therefore stigmatized. The value *Obergefell* associates with the institution of marriage comes from its “transcendent purposes,” i.e., from its dynamic allowing “two people to find a life that could not be found alone, for a marriage becomes greater than just the two persons.”³²⁷

In short, *Obergefell*'s ode to marriage, which scholars have read to denigrate the standing of those who do not marry, celebrates marriage's importance as an expression of the couple's commitment to each other and the harm that comes from the denial of an equal right to recognition for same-sex couples.

The meaning of marriage within the family wage tradition was quite different. That had what James Q. Wilson refers to as “the authority of marriage” tied to a command that one must marry in order to merit societal support for the childrearing project, based on an assumption of women and

322. *Obergefell*, 576 U.S. at 660 (referring to condemnation of same-sex intimacy “as immoral by the state itself in most Western nations” through the middle of the twentieth century).

323. For an examination of this debate, see Gregg Strauss, *What's Wrong with Obergefell*, 40 CARDOZO L. REV. 631, 633–34 (2018) (describing the argument that in order to justify a positive right to marry, the *Obergefell* opinion “waded into debates about the nature of marriage that it could have avoided with equality analysis”).

324. *Obergefell*, 576 U.S. at 646. As Serena Mayeri notes in her exploration of nonmarital parenthood, the Court does not “question the superiority of marital families.” Serena Mayeri, *Foundling Fathers: (Non-)marriage and Parental Rights in the Age of Equality*, 125 YALE L.J. 2292, 2392 (2016).

325. *Obergefell*, 576 U.S. at 647.

326. *Id.* at 666 (“There is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices.”).

327. *Id.* at 647, 657.

children’s intrinsic dependence.³²⁸ Instead, what *Obergefell* recognized is that marriage has become a means to express love and commitment by those in a position to make a meaningful choice about how they wish to live their lives.³²⁹

This jurisprudence, much like the Supreme Court’s decision in *Muller v. Oregon* a century earlier, embraces what has become the middle-class family ideal. In the *Muller* time period, that family ideal was a breadwinner husband supporting a dependent wife; today, the middle-class model involves an egalitarian romantic ideal. What none of these developments address is how the elements that allow couples to reach the point of self-definition have been placed beyond the reach of a large part of the population. The Supreme Court’s decisions from *Griswold* to *Carey*, for example, while striking down prohibitions on the sale and distribution of contraception, did nothing to ensure that access would be available.³³⁰ The result has been a “dual system” of contraceptive access;³³¹ those who enjoy family security have far more access than those who do not, in large part because of employer-provided (and taxpayer-subsidized) health insurance.³³² Yet, contraceptive access does more to promote self-definition than the decision in *Obergefell*, which

328. WILSON, *supra* note 58, at 217. “[B]y bestowing a respected status and material benefits on married couples, society encourages men and women to conduct sexual relations within marriage rather than without.” *Obergefell*, 576 U.S. at 689–90 (Roberts, C.J., dissenting). “This singular understanding of marriage has prevailed in the United States throughout our history. . . . To those who drafted and ratified the Constitution, this conception of marriage and family ‘was a given: its structure, its stability, roles, and values accepted by all.’” *Id.* at 690.

329.

Choices about marriage shape an individual’s destiny. As the Supreme Judicial Court of Massachusetts has explained, because “it fulfils yearnings for security, safe haven, and connection that express our common humanity, civil marriage is an esteemed institution, and the decision whether and whom to marry is among life’s momentous acts of self-definition.”

Obergefell, 576 U.S. at 666 (quoting *Goodridge v. Dept. of Pub. Health*, 798 N.E.2d 941, 955 (Mass. 2003)).

330. During the same era, Congress passed Title X, but since 1980, the funding has been periodically under assault and unavailable to many groups, such as undocumented immigrants. See Naomi Cahn, *Contraception Matters: Rights, Class, and Context*, 24 WASH. & LEE J.C.R. & SOC. JUST. 529, 537–39 (2018) (discussing class-based inequities in contraceptive access).

331. *Id.* at 549.

332. *Id.* at 550–51 (“A 2010 survey (pre-Affordable Care Act) found that more than one-third of female voters had struggled to afford prescription birth control at some point in their lives and, as a result, had used birth control inconsistently. At that point, birth control payments constituted approximately 30–44% total out-of-pocket expenses for health care.”).

simply—and appropriately—lets additional couples into marriage who have marshalled the resources on their own necessary to realize its aspirations.³³³

While *Obergefell* thus recognizes the changed nature of marriage, it does not recognize how the marital ideal it articulates is beyond the reach of much of the population—and how the very nature of the ideal makes the uncoupling of marriage from societal benefits that much more critical. Fewer than two-thirds of American children live with married parents.³³⁴ Accordingly, children’s needs will not be met effectively by any attempt to: 1) condition important benefits on marriage; 2) use differential benefits to attempt to coerce parents into marriage;³³⁵ or 3) promote marriage as an end in itself. Existing efforts have shifted from marriage to work,³³⁶ but these too are inadequate, given the changing nature of work. The net effect of the failure to reconceive the terms of effective support has been to lock more children in persistent poverty.³³⁷

C. *Uncoupling Social Insurance from Employment*

The New Deal social insurance system, to the extent it provided greater family security, depended on the parallel interests of large employers in securing a stable workforce and the societal interest in encouraging greater family stability.³³⁸ In the information age, employers do not depend to the same degree on either large numbers of workers or long-term worker tenure.³³⁹ Yet, families still depend not just on employment but also on

333. See CAHN & CARBONE, *supra* note 238, at 128 (arguing that the change in the nature of marriage made recognition of marriage equality not only permissible but also a matter of basic fairness and equality).

334. *The American Family Today*, PEW RSCH. CTR. (Dec. 17, 2015), <https://www.pewsocialtrends.org/2015/12/17/1-the-american-family-today/> [https://perma.cc/5RQK-JDLN].

335. Indeed, more recent efforts have focused on removing the disincentives to marriage embedded in means-tested programs. See, e.g., W. BRADFORD WILCOX, JOSEPH P. PRICE & ANGELA RACHIDI, MARRIAGE, PENALIZED: DOES SOCIAL-WELFARE POLICY AFFECT FAMILY FORMATION? 29–31 (2016), <https://ifstudies.org/ifs-admin/resources/marriage-penalty-hep-2016.pdf> [https://perma.cc/4KHC-DVCZ]. Even then, the studies conclude that program design has little impact on the incidence of marriage among the poorest recipients. *Id.* at 31.

336. This was the third objective of the TANF program. See discussion *supra* Part III.A.

337. Hammond, *supra* note 290, at 1730.

338. Catherine A. Paul, *President Roosevelt’s New Deal*, VA. COMMONWEALTH UNIV. LIBRS. SOC. WELFARE HIST. PROJECT (2017), <https://socialwelfare.library.vcu.edu/eras/great-depression/the-new-deal/> [https://perma.cc/9K6D-E5JM].

339. *Changes in the American Workplace*, PEW RSCH. CTR. (Oct. 6, 2016), <https://www.pewsocialtrends.org/2016/10/06/1-changes-in-the-american-workplace/> [https://perma.cc/5VDC-J9M3].

income stability to feel secure.³⁴⁰ Three changes, in particular, mean that employers are no longer appropriate partners for the provision of public benefits, requiring uncoupling social insurance from employment.

First, and most significantly, as employment has become less secure, tying benefits to individual employers is no longer feasible. Full-time employment is less universal than it once was. In 1954, male labor market participation peaked at over 97%.³⁴¹ It has steadily declined since, with employment becoming more steeply cyclical since the late seventies.³⁴² Men with no more than a high school degree suffered the biggest drop, falling by 14%.³⁴³ Women's labor market participation rose during much of the period, but peaked in the late nineties and has declined since then.³⁴⁴ These figures reflect not just less employment but also less secure job tenure and longer periods between jobs.³⁴⁵ Employment is thus no longer sufficiently pervasive to anchor essential social benefits,³⁴⁶ and social insurance is not well designed to cover the gaps.³⁴⁷

Second, as the nature of employment has changed, employer and employee interests do not align to the same degree.³⁴⁸ Today, corporate officers prioritize short-term shareholder interests at the expense of other stakeholders.³⁴⁹ As part of this shift, they have transferred risk to the

340. See, e.g., Greene, *supra* note 299, at 297–99 (describing how financial instability traps families in property).

341. EXEC. OFF. OF THE PRESIDENT OF THE U.S., COUNCIL OF ECON. ADVISERS, THE LONG-TERM DECLINE IN PRIME-AGE MALE LABOR FORCE PARTICIPATION 2 (2016), https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160620_cea_primeage_male_lfp.pdf [<https://perma.cc/U8PY-RUNV>].

342. See, e.g., Ruggles, *supra* note 51, at 1817 fig.16 (showing that the percentage of adult males engaged in wage labor peaked in 1970 and has steadily declined down to levels last seen in 1860, when a high percentage of the male population still lived on farms). Ruggles also shows that female labor force participation now roughly equals male participation and is expected to exceed it in the years ahead. *Id.*

343. EXEC. OFF. OF THE PRESIDENT OF THE U.S., *supra* note 341, at 13.

344. Elisabeth Jacobs & Kate Bahn, *Women's History Month: U.S. Women's Labor Force Participation*, WASH. CTR. FOR EQUITABLE GROWTH (Mar. 22, 2019), <https://equitablegrowth.org/womens-history-month-u-s-womens-labor-force-participation/> [<https://perma.cc/S9RT-MKR8>].

345. Bunker, *supra* note 23.

346. *Id.* (showing that male employment has declined significantly after each recession over the last half century and that employment in each case never returned to its prerecession rates, with the downturns becoming more severe after the late seventies).

347. See, e.g., Pendo, *supra* note 21 (discussing high rates of rejection for those with pre-existing conditions, which are much more of a problem with frequent job changes).

348. Carbone & Levit, *supra* note 225, at 1026–29; DAVIS, *supra* note 17, at 124–26.

349. See, e.g., Lynne L. Dallas, *Short-Termism, the Financial Crisis, and Corporate Governance*, 37 J. CORP. L. 265, 296–97, 304 (2012) (describing emphasis on short-term earnings

employees.³⁵⁰ This means that social insurance, in turn, needs to address the systemic risks that were once factored into the protections large employers offered.³⁵¹

Finally, the information economy produces more “good jobs” with full benefits for high-value employees and more “bad jobs” with lower wages and few benefits for the unskilled.³⁵² This means that employer-provided plans leave out a high percentage of the labor force. For example, in 2009, roughly half the workforce lacked employer-based retirement plans.³⁵³ And declining rates of employer-provided insurance coverage was an important motive for adoption of the ACA.³⁵⁴ Compounding the problem, particularly in the case of health insurance, is the fact that tax-subsidized coverage for some increases the prices for the uninsured.³⁵⁵ As a result, employer-provided plans have become regressive in effect; taxpayers subsidize the better off in ways that make those without employer benefits worse off in relative and sometimes absolute terms.³⁵⁶

Complementing these developments, the Supreme Court sees corporations as no more than instruments to advance their owners’ aims and unions as no more than private actors whose societal role does not merit protection. Both developments suggest that corporations are no longer appropriate partners for the societal interest in promoting family security and stability, and that, instead, individuals are the appropriate focus.

that boost share price at the expense of other corporate interests); Dorothy S. Lund, *The Case Against Passive Shareholder Voting*, 43 J. CORP. L. 493, 520–23 (2018); Lynn A. Stout, Response, *The Toxic Side Effects of Shareholder Primacy*, 161 U. PA. L. REV. 2003, 2014 (2013); Jeff Schwartz, *De Facto Shareholder Primacy*, 79 MD. L. REV. 652, 665, 681 (2020) (indicating that companies often increase share price at the expense of employees). And Delaware has made it possible to waive even those obligations. DEL. CODE ANN. tit. 6, §§ 18-1101 to -1110 (2021).

350. See, e.g., JACOB S. HACKER, *THE GREAT RISK SHIFT* 13–14 (2008) (describing increased financial risks including job loss, difficulty in securing health insurance, and less secure pension rights).

351. See DAVIS, *supra* note 17, at 122–24 (describing decline in the number of employees at large corporations and the greater transience in the labor market more generally).

352. See KALLEBERG, *supra* note 249, at 12–18 (arguing that the information economy tends to produce more good jobs and bad jobs, hollowing out the center).

353. Maureen Minehan, *Obama Budget Could Increase Employer Obligations*, 26 EMP. ALERT 1, 1 (2009).

354. See, e.g., Pendo, *supra* note 21, at 474 (“[T]he erosion of employer-sponsored coverage has increased the ranks of the uninsured.”).

355. Graetz & Mashaw, *supra* note 123, at 354 (observing that “[t]he tax subsidies for employment-based health insurance and retirement income [have become] the federal government’s largest ‘tax expenditures’”).

356. See, e.g., *id.* at 350–51 (describing intrinsic failings of private health insurance markets).

The Supreme Court's hostility to labor unions has been compared to the Court's actions during the *Lochner* era.³⁵⁷ The current Court's conservative majority has rejected the very idea of collective action to promote a civic society ideal.³⁵⁸ Thus, in *Janus v. AFSCME, Council 31*, the Court held that the First Amendment forbids public-sector unions from collecting mandatory union fees from nonmember employees,³⁵⁹ threatening the financial base of these unions.³⁶⁰ The Court privileged the right of an individual employee to avoid paying dues over the union role in advancing workers' collective interests.³⁶¹

The Supreme Court, at the same time, has adopted a view of corporations as agents of their owners, with no need to take other considerations, such as employee interests, into account. In *Burwell v. Hobby Lobby Stores*, a closely held, for-profit corporation refused to provide federally mandated health care benefits to its employees because the benefits covered the morning after pill,³⁶² which the company claimed, inaccurately, acted as an abortifacient.³⁶³ In ruling for the corporation, the Court observed that owners who act through such corporations do not surrender the rights they might otherwise have.³⁶⁴

357. See, e.g., Kate Andrias, *Janus's Two Faces*, 2018 SUP. CT. REV. 21, 30 (describing criticism that "the Roberts Court has used the First Amendment much as the *Lochner* Court did the Due Process Clause—to thwart democratically chosen outcomes and, more specifically, to protect the privileges of the economically powerful while resisting legislative and executive efforts to advance the interests of the less powerful").

358. Linda Greenhouse, *The Supreme Court's Challenge to Civil Society*, 2019 SUP. CT. REV. 335, 336 ("[I]n fostering a constitutional culture that entitles individuals to opt out of duties they find disagreeable, the court is eroding the expectation of collective obligation that civil society requires if it is to thrive.").

359. See *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2459–60 (2018).

360. *Id.* at 2490 (Kagan, J., dissenting) (recognizing that "basic economic theory shows why a government would think that agency fees are necessary for exclusive representation to work," given legislative requirements mandate union representation of all employees, whether members or not, and classic free-rider problems); see also Bill Blum, Opinion, *Recent Rulings Expose Supreme Court's Anti-Worker Bias*, TRUTHDIG (Aug. 8, 2018), <https://www.truthdig.com/articles/recent-rulings-expose-the-supreme-courts-anti-worker-bias/> [<https://perma.cc/4PKG-XTUX>] (claiming that *Janus* poses an existential threat to union survival).

361. *Janus*, 138 S. Ct. at 2474 (contending that it is impossible to argue that the extent of state spending for employee benefits is not a matter of a great public concern and therefore that public employees should not have to pay union fees to advance positions with which they may not agree); see also *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1616, 1626 (2018) (upholding employers actions requiring employees to sign, as a condition of employment, arbitration agreements banning collective judicial and arbitral proceedings of any kind, which had the effect of prohibiting union actions to address wages and hour violations on behalf of the employees).

362. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 688–91 (2014).

363. See Rachel Frank, *Miss-Conceptions: Abortifacients, Regulatory Failure, and Political Opportunity*, 129 YALE L.J. 208, 211–24 (2019).

364. *Burwell*, 573 U.S. at 706–07.

As a result, Hobby Lobby's owners had a constitutional right to simultaneously benefit from publicly subsidized health insurance benefits while picking and choosing the benefits it offered based on the owners' particular religious views. The ability to receive public benefits no longer comes with a duty to advance the public good.³⁶⁵

The Court's subsequent opinion in *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania* extended the principle.³⁶⁶ The Little Sisters operate nursing homes for the elderly poor.³⁶⁷ In accordance with Catholic teachings, the Little Sisters took the view "that deliberately avoiding reproduction through medical means is immoral."³⁶⁸ The original HHS regulations provided that religious employers could be exempted from the mandate to cover contraception if they filed certain paperwork "self-certifying" their objections.³⁶⁹ The Little Sisters, however, objected that "the self-certification accommodation renders them 'complicit in providing [contraceptive] coverage to which they sincerely object.'"³⁷⁰ The Trump administration issued new regulations broadly extending the ability of businesses to opt out of government provisions.³⁷¹

The Court upheld the regulations on a 7-2 vote,³⁷² finding that the regulations allowing for exemptions from the contraceptive mandate based on "'sincerely held' moral and religious objections" were valid.³⁷³ Indeed, employers may be entitled to the exemption without consideration of the

365. Carbone & Levit, *supra* note 225, at 1016–26; *see also* Greenhouse, *supra* note 358, at 347–54.

366. *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020).

367. *Id.* at 2375.

368. *Id.* at 2376.

369. *Id.* at 2370.

370. *Id.* at 2403 (Ginsburg, J., dissenting) (alteration in original).

371. Religious Exemptions and Accommodations for Coverage of Certain Preventative Services Under the Affordable Care Act, 45 C.F.R. § 147.132 (2018). For a more detailed discussion of potential government responses to these cases, see Douglas NeJaime and Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 *YALE L.J.* 2516 (2015).

372. Justices Breyer and Kagan, who had dissented in *Hobby Lobby*, upheld the Trump regulations on administrative law grounds. *Little Sisters*, 140 S. Ct. at 2396–401 (Kagan, J., concurring).

373. *Id.* at 2386 (majority opinion); *see* Greenhouse, *supra* note 358, at 352 ("Judge Wendy Beetlestone, in granting a preliminary injunction . . . marveled at the new rule's 'remarkable breadth' and asked: 'Who determines whether the expressed moral reason is sincere or not or, for that matter, whether it falls within the bounds of morality or is merely a preference choice?' The administration, she observed, 'has conjured up a world where a government entity is empowered to impose its own version of morality on each one of us. . . . That cannot be right.'" (first alteration added)).

impact on the affected group (in this case women who would like access to basic means of contraception such as the birth control pill).³⁷⁴

Justice Alito's opinion for the majority in *Hobby Lobby* and his concurring opinion in *Little Sisters* emphasize the government's potential ability to deliver contraceptive access in other ways.³⁷⁵ His logic follows from his embrace of the unlimited nature of corporate rights. The obvious corollary to the conclusion that corporate owners have no societal obligations when they enter the public square is that they are unsuitable partners for advancing public ends. The obvious response, as Justice Alito suggests, is direct government provision of health insurance benefits. With employment no longer providing security, and unions no longer serving as a countervailing force that systematizes employer benefits, corporations are no longer appropriate partners for the state in assuring family security.

IV. UNCOUPLING REALIZED: RECONSTRUCTING FAMILY SECURITY AND STABILITY

As corporations change, this has implications for designing a system of family security. Ronald Coase, in his classic article, *The Nature of the Firm*, observed in the 1930s that the hallmark of the industrial age was the rise of large institutions and what Katherine Stone calls "internal labor markets,"³⁷⁶ and that these features characterized both socialist and capitalist institutions.³⁷⁷ Today's firms have reversed that process, preferring networks that rely on external markets (e.g., temp agencies, independent contractors)

374. While Justice Alito insisted in *Hobby Lobby* that the ruling would not cost women anything, the Trump administration, in its petition for certiorari in *Little Sisters*, took the position that the contested regulations should be upheld even if they did burden women, asserting that "any loss of contraceptive coverage to women whose private employers invoke the religious exemption would result from decisions of those employers, not the government." Petition for Writ of Certiorari at 26, *Trump v. Pennsylvania*, 140 S. Ct. 918 (No. 19-454) *sub nom. Little Sisters*, 140 S. Ct. 2367 (2020); *see also* Greenhouse, *supra* note 358, at 352.

375. *Little Sisters*, 140 S. Ct. at 2393 (Alito, J., concurring) (suggesting that the Government could send out "a special card that could be presented at a pharmacy to fill a prescription for contraceptives without any out-of-pocket expense" or inform employees of the ability to obtain free contraceptives "by going to a conveniently located government clinic"); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 765 (2014) (Ginsburg, J., dissenting) (referring to Alito's insistence that the government could itself "assume the cost of providing" the contraceptives or could replicate the accommodation provided for religiously affiliated nonprofit organizations); *see NeJaime & Siegel, supra* note 371, at 2532 (noting difficulties with the proposal).

376. That is, employers who hire almost exclusively at the entry level and promote from within. *See* Stone, *supra* note 116, at 460; *see also* Carbone & Levit, *supra* note 225, at 972-74 (explaining significance of Coase's insights).

377. Ronald H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386, 389-90 (1937) (observing that the rise of large institutions characterizes both capitalist and socialist economies).

to create more flexible commercial entities.³⁷⁸ The family ideal of the modern age has changed, in turn, to complement the network-like business organization.³⁷⁹ Within this system, commitment to children, rather than marriage, becomes the indispensable moral command.³⁸⁰ Security comes from capital (human and financial) investments that pay off in terms of savings, employability, and adult relationships built on flexibility, trust, and mutual respect.³⁸¹

A. *Reconstructing Through Uncoupling*

The missing piece in this reconstruction of the sources of family stability and security is the redesign of the state role necessary to fill in the gaps of the new economic order and make its benefits more universally available. The challenge is how to secure the human capital investment in “employability” necessary for full participation in the new economy.³⁸² Given that neither work nor marriage nor the combination of the two necessarily produces stability in the new order, the question is how to provide the minimum terms of a social safety net (food, clothing, housing, health care, and education) that remakes the basis for family security. Designing such a system—and redesigning the state to implement it—would require volumes. The fight over implementation of the ACA illustrates the terms on which the fight for the new system is likely to be waged.³⁸³

Health insurance access was originally built on the family wage model.³⁸⁴ Congress structured Medicare to complement the Social Security retirement program, using a dedicated payroll tax to fund at least part of the program. Medicaid was initially enacted

to furnish (1) medical assistance on behalf of families with dependent children and of aged, blind, or disabled individuals, whose income and resources are insufficient to meet the costs of

378. Stone, *supra* note 205, at 155 (describing shift to more flexible and network-like corporate structures).

379. CARBONE, *supra* note 137, at 104.

380. *Id.* at xiii (describing how the courts are rebuilding family law based on the principle of obligation to children).

381. See CARBONE & CAHN, *supra* note 110, at 117–18 (describing how changed marital scripts reflect women’s greater equality).

382. See *supra* Part II.C.

383. See Abbe R. Gluck, Mark Regan & Erica Turret, *The Affordable Care Act’s Litigation Decade*, 108 GEO. L.J. 1471, 1474 (2020) (noting “[t]he ACA retains the mixed system of federal, state, and private healthcare that came before it, but seeks to make the system more generous and accessible,” and ongoing litigation over it has moved the nation towards more universal access).

384. See *supra* Part I.C.

necessary medical services, and (2) rehabilitation and other services to help such families and individuals attain or retain capability for independence or self-care.³⁸⁵

That is, both plans were designed to fill in the gaps of the family wage system. By the time President Obama proposed the ACA in 2009, however, increasing numbers of working Americans could no longer obtain health insurance from their employers, and the cost of private insurance was rising so rapidly that scholars feared a “death spiral” undermining the system.³⁸⁶

Over time, however, the principle underlying the ACA has become the right of access to health care itself.³⁸⁷ In January 2020, a majority of the country (56%) favored a national Medicare-for-all health plan and two-thirds of the public (68%) supported a government-administered “public option.”³⁸⁸ A larger government role has become more palatable, and the principle of universal access has become even more widely accepted.³⁸⁹

The litigation over the ACA has been long and complicated, but the Act has been easiest to defend where its principles have been articulated most unequivocally and where its benefits have been most universally available.³⁹⁰

385. *Gresham v. Azar*, 950 F.3d 93, 99 (D.C. Cir.), *cert. granted sub nom. Arkansas v. Gresham*, No. 20-38, 2020 WL 7086047 (U.S. Dec. 4, 2020).

386. Elizabeth A. Pendo, Book Review, 29 J. LEGAL MED. 117, 118 (2008) (reviewing SUSAN STARR SERED & RUSHIKA FERNANDOPULLE, *UNINSURED IN AMERICA: LIFE AND DEATH IN THE LAND OF OPPORTUNITY* (2007)) (“The death spiral is a term used to describe the process by which a pool of people covered by an insurance plan loses its relatively healthy members, causing costs to increase for the remaining members. Unchecked, the spiral continues until the insurance plan can no longer be sustained and ultimately ‘dies.’”).

387. After he left office, Obama observed, “We fought to make sure that in America, health care is not just a privilege, but a right for every single American.” President Barack Obama, Remarks by the President on the Affordable Care Act (Oct. 20, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/10/20/remarks-president-affordable-care-act> [<https://perma.cc/L98K-BG8T>].

388. Lunna Lopes, Liz Hamel, Audrey Kearney & Mollyann Brodie, *KFF Health Tracking Poll—January 2020: Medicare-for-All, Public Option, Health Care Legislation and Court Actions*, KAISER FAM. FOUND. (Jan. 30, 2020), <https://www.kff.org/health-reform/poll-finding/kff-health-tracking-poll-january-2020/> [<https://perma.cc/F5AD-C2MC>]. In addition, the public supported the ACA by a margin of 53% to 37%, a considerably higher ratio than during the Obama Presidency. *Id.*

389. *See, e.g.*, Gluck et al., *supra* note 383, at 1474 (observing that while the ACA originated as a compromise incorporating market norms, “it has emerged from a decade of litigation much more closely aligned with the norms of solidarity and universal coverage than it was in 2010”).

390. *See Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 544 (2012) (upholding the Act as within congressional taxing power). Congress, however, later abolished the individual mandate, and new cases are pending challenging the ACA on the ground that it is no longer a tax and therefore no longer authorized by the taxing power. *See Texas v. United States*, 945 F.3d 355, 369 (5th Cir. 2019), *cert. granted sub nom. California v. Texas*, 140 S. Ct. 1262 (Mar. 2, 2020) (No. 19-840), and *cert. granted sub nom. Texas v. California*, 140 S. Ct. 1262 (Mar. 2, 2020) (No. 19-1019).

Implementation of the ACA depends on state-run insurance markets that allow individuals to purchase policies from private insurers at subsidized prices, expanded employer coverage, and state-administered Medicaid expansion.³⁹¹ Each element of the program has different requirements, and each has been subjected to extended attack.³⁹² On the other hand, more direct federal provisions of health care benefits, such as Medicare-for-all or a public option, might well be harder to challenge, legally and politically.³⁹³

Cesar Ardon's situation is an example of how the norm of universal access to health care, now identified with the ACA, departs significantly from the older system that tied benefits to the family wage regime.³⁹⁴ The Secretary of HHS, in approving the Arkansas work requirements that threatened Ardon's eligibility, observed that they would "encourage beneficiaries to obtain and maintain employment or undertake other community engagement activities that research has shown to be correlated with improved health and wellness."³⁹⁵ While being employed may be correlated with better health outcomes, taking away health insurance for failing to find work is a different matter.³⁹⁶ The D.C. Circuit, in striking down the requirements, held that: "The text of the statute includes one primary purpose, which is providing health care coverage without any restriction geared to healthy outcomes, financial independence or transition to commercial coverage."³⁹⁷

In justifying its approval of exceptions to the program in Arkansas, Kentucky, and elsewhere, the Trump administration argued that the threat of sanctions was necessary to force people to work.³⁹⁸ Yet, the D.C. Circuit emphasized that such reasoning failed to take into account the loss of coverage—"a matter of importance under the statute."³⁹⁹ The court record showed that "in Arkansas, more than 18,000 people (about 25% of those

391. Gluck et al., *supra* note 383, at 1475–76.

392. *Id.* at 1477–91 (summarizing the challenges).

393. *Id.* at 1492 ("It would be an ironic legacy for a law that began as a market-oriented compromise, and then was challenged as government overreach, to pave the way toward nationalization.").

394. *See supra* notes 1–11 and accompanying text.

395. *Gresham v. Azar*, 950 F.3d 93, 97 (D.C. Cir.), *cert. granted sub nom. Arkansas v. Gresham*, No. 20-38, 2020 WL 7086047 (U.S. Dec. 4, 2020); *see Hammond, supra* note 13.

396. HANNAH KATCH, JENNIFER WAGNER & AVIVA ARON-DINE, CTR. ON BUDGET & POL'Y PRIORITIES, TAKING MEDICAID COVERAGE AWAY FROM PEOPLE NOT MEETING WORK REQUIREMENTS WILL REDUCE LOW-INCOME FAMILIES' ACCESS TO CARE AND WORSEN HEALTH OUTCOMES 16 (2018), <https://www.cbpp.org/sites/default/files/atoms/files/2-8-18health2.pdf> [<https://perma.cc/KTF9-QLK3>].

397. *Gresham*, 950 F.3d at 102; *see Gluck & Scott-Railton, supra* note 13, at 530, 557 (characterizing the decision as a rejection of a "normative or moral retrenchment based on a new narrative of deservingness").

398. *Gresham*, 950 F.3d at 97.

399. *Id.* at 102.

subject to the work requirement) lost coverage as a result of the project in just five months.”⁴⁰⁰ Research on work requirements in other programs generally finds that they neither reduce poverty nor increase long-term employment.⁴⁰¹ Indeed, the causation may run in the opposite direction, with access to health care positively related to an individual’s ability to work.⁴⁰² If Ardon has no access to health care, he is also unlikely to be able to work.⁴⁰³ Of course, the critical point in the court’s opinion in rejecting the tie between work and benefits is the concept of access to health care, and in that, the D.C. Circuit, perhaps ironically, echoes Justice Alito’s opinion in *Little Sisters* by rejecting the tie-in between work and benefits.⁴⁰⁴

Gresham involved a matter of statutory construction.⁴⁰⁵ Yet, the critical issue in the lawsuit requires the willingness to interpret the ACA in terms of a congressional intent to see access to health care as a matter of right that serves as a precondition for employability rather than as a reward for employment.⁴⁰⁶ At a time when secure jobs are hard to come by and many cannot afford gap measures such as COBRA, the design of the ACA embraced the principle of universal access.⁴⁰⁷ The D.C. Circuit decision clearly interpreted the Act in such terms.⁴⁰⁸ The challenge now lies with the Supreme Court’s willingness to accept the clear statement of congressional intent.

B. Objections to Uncoupling

Of course, uncoupling is not uncomplicated, and it raises pragmatic issues of affordability and political feasibility. It also leads to more theoretical questions of why government should bear the burdens.⁴⁰⁹

400. *Id.* at 102–03.

401. KATCH ET AL., *supra* note 396, at 16.

402. Larisa Antonisse & Rachel Garfield, *The Relationship Between Work and Health: Findings from a Literature Review*, KAISER FAM. FOUND. (Aug. 7, 2018), <https://www.kff.org/medicaid/issue-brief/the-relationship-between-work-and-health-findings-from-a-literature-review/> [<https://perma.cc/SK6G-58T2>].

403. *See supra* notes 1–11 and accompanying text.

404. *Gresham*, 950 F.3d at 101–02.

405. *See id.* at 99–102.

406. *Id.* at 101–02.

407. Gluck et al., *supra* note 383, at 1492.

408. *Gresham*, 950 F.3d at 102.

409. *See generally* Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski & K. Sabeel Rahman, *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L.J. 1784 (2020) (articulating the need for such a new vision in legal scholarship).

One objection is that, as articulated by the *Obergefell* dissent, marriage remains a positive good that the state should promote for the benefit of children.⁴¹⁰ Our response is, first, that the causality runs in the other direction; it is the decline in security that undermines marriage, not the lack of marriage that undermines family security.⁴¹¹ Second, as the Supreme Court emphasized in the seventies, conditioning benefits on marriage, when marriage is beyond the reach of much of the population, is pointless and cruel.⁴¹² That proverbial ship has sailed.

A second objection, that work ensures productive citizens and provides dignity and social meaning, is more difficult. That concept is the basis for incentivizing labor market participation in TANF and other programs through punitive means.⁴¹³ Others propose rebuilding security and stability through redesigning work. The Earned Income Tax Credit,⁴¹⁴ which has the effect of subsidizing low-income employment, is an example of this approach.⁴¹⁵ Uber CEO Dara Khosrowshahi has called for the redesign of benefits to require employer contributions to create a fund workers could use for the benefits of their choice.⁴¹⁶ These work-centered approaches suffer, however, from three principal limitations. First, they would have to ensure that employment is universally available at a time when automation is

410. *Obergefell v. Hodges*, 576 U.S. 644, 689 (2015) (Roberts, C.J., dissenting).

411. See discussion *supra* Part II; see also Douglas S. Massey & Robert J. Sampson, *Introduction: Moynihan Redux: Legacies and Lessons*, 621 ANNALS AM. ACAD. POL. & SOC. SCI. 6, 13 (2009) (observing that the debate over family change that started with the Moynihan Report in the sixties involves the premise that “whenever males in any population subgroup lack widespread access to reliable jobs, decent earnings, and key forms of socially rewarded status, single parenthood will increase, with negative side effects on women and children”).

412. See discussion *supra* Part III.A.

413. Perhaps the most remarkable insistence on cutting assistance in order to encourage employment came from Treasury Secretary Steve Mnuchin, who has insisted that Congress should cut unemployment benefits by two-thirds during the COVID-19 pandemic because otherwise recipients will not have an incentive to return to work. Mary Papenfuss, *Study Contradicts Steven Mnuchin Claim that Lazy Workers Choose Unemployment over Jobs*, HUFFPOST (Aug. 3, 2020, 7:46 AM), https://www.huffpost.com/entry/mnuchin-unemployment-aid-work-study_n_5f276f92c5b656e9b09d3eac [<https://perma.cc/LUA8-62GK>].

414. Anne L. Alstott, *The Earned Income Tax Credit and the Limitations of Tax-Based Welfare Reform*, 108 HARV. L. REV. 533, 533 (1995) (“The earned income tax credit (EITC), which uses the federal income tax system to provide an earnings subsidy to low-income workers, has enjoyed support across the political spectrum as a ‘pro-work, pro-family’ alternative to traditional welfare programs.”).

415. See Daniel Shaviro, *The Minimum Wage, the Earned Income Tax Credit, and Optimal Subsidy Policy*, 64 U. CHI. L. REV. 405, 460 (1997) (describing the tax credit as a subsidy).

416. Dara Khosrowshahi, Opinion, *I Am the C.E.O. of Uber. Gig Workers Deserve Better*, N.Y. TIMES (Aug. 10, 2020), <https://www.nytimes.com/2020/08/10/opinion/uber-ceo-dara-khosrowshahi-gig-workers-deserve-better.html> [<https://perma.cc/BQ47-Q5HJ>] (“I’m proposing that gig economy companies be required to establish benefits funds which give workers cash that they can use for the benefits they want, like health insurance or paid time off.”).

reducing market demand for unskilled labor.⁴¹⁷ Second, the redesign would have to cover not just getting the first job, but also the ability to switch to a new job.⁴¹⁸ Third, if the program is invisible, Congress can abolish it. Social Security is untouchable because older people identify so strongly with it.

This raises a final objection: cost. Medicaid is expensive, and the ACA's expansion of Medicaid increased costs by about 14%.⁴¹⁹ The existing American health care system, however, which is the most expensive in the world, does not deliver health care benefits commensurate with its costs.⁴²⁰ Changing the system so that money is spent more efficiently would not necessarily increase costs.⁴²¹

Still, reestablishing a comprehensive system of family security and stability requires reconsideration of political support for government spending.⁴²² The ACA, for example, has proven to be surprisingly resilient, generating not just support for the ACA itself, but also for the principle of universal coverage.⁴²³

On the jurisprudential question of whether uncoupling calls for a new relationship between individual and state rather than trying to recreate the prior marriage–work–benefits partnership, the short answer is that there is no other real choice. Marriage is no longer universal; employment is no longer universal. Work-based solutions work only when they can reset labor markets, which requires the kind of active state role that existed in the era following World War II. Moreover, as the new political economy movement

417. For discussion of the idea of a “job guarantee,” see *infra* notes 439–442 and accompanying text.

418. The issue of impermanent employment also complicates efforts to strengthen unions. While we believe a reinvigorated union movement would help change the political calculus, we believe that unions would have to become more independent of individual employers to work in an uncoupled environment. See, e.g., KATHERINE V.W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE 9 (2004).

419. *Medicaid Expansion Spending*, KAISER FAM. FOUND., <https://www.kff.org/medicaid/state-indicator/medicaid-expansion-spending/> [<https://perma.cc/7GZW-SFE6>].

420. Erin Albert, Note, *The Case for Pharmacists as Legal Health Care Providers*, 9 IND. HEALTH L. REV. 187, 188 (2012) (“[T]he World Health Organization’s rankings of global health care systems [places] the U.S. health care system [as] thirty-seventh overall in terms of performance, while at the same time, it also is the most expensive health care system in the entire world.”).

421. See Christopher Cai et al., *Projected Costs of Single-Payer Healthcare Financing in the United States: A Systematic Review of Economic Analyses*, PLOS MED., Jan. 15, 2020, at 2–3, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6961869/> [<https://perma.cc/42Q4-UMRR>].

422. Indeed, some economists argue that the only real limit on federal spending is inflation; whether for tax cuts or health, deficit spending is not an issue on its own. See STEPHANIE KELTON, THE DEFICIT MYTH: MODERN MONETARY THEORY AND THE BIRTH OF THE PEOPLE’S ECONOMY 9 (2020) (observing that “the most important constraint on government spending is inflation.”).

423. See Gluck & Scott-Railton, *supra* note 13, at 498.

in the law suggests, calling attention to issues of power and distribution provides a critical step in seeing legal developments as the product of political forces, not as the neutral or inevitable response to market forces.⁴²⁴

CONCLUSION

This Article focuses attention on how the legal structures supporting family security have become decoupled from marriage and employment. Understanding the ways in which the family wage system developed from the structure of industrial-era employment leads to the conclusion that the information age will inevitably require a new model to deliver a basic level of family security.⁴²⁵ Indeed, the Supreme Court has repeatedly recognized that corporations no longer need to take responsibility for their employees and that the meaning of marriage has changed. It has even provided a few signposts for how, in the absence of long-term employment or stable relationships, individual security might still be protected.

The dominant political view over the last several decades has nonetheless been a neoliberal one, in which the state's primary goal has been to support the "free market[]", rather than regulating to promote public goods" like economic or social justice.⁴²⁶ This neoliberal philosophy is similar to the laissez-faire beliefs that generated wholesale opposition to labor market regulation during the *Lochner* era.⁴²⁷ It has similarly inspired entrenched opposition today to the ACA's premise that the government should ensure universal access to health care.⁴²⁸ Within this view, Cesar Ardon's first priority ought to be his own financial independence, with the loss of health care benefits as the penalty for his inability to do so.⁴²⁹ In this story, individuals are responsible for their own well-being, and employment and marriage are treated as the universally available private mechanisms for securing family stability.⁴³⁰

424. See Britton-Purdy et al., *supra* note 409, at 1784 (calling for legal scholarship to center "themes of power, equality, and democracy").

425. See Cynthia Estlund, *What Should We Do After Work? Automation and Employment Law*, 128 *YALE L.J.* 254, 261 (2018) (noting the need to protect workers without encouraging employers to automate).

426. Eichner, *supra* note 78, at 218 n.21.

427. *Id.* (stating that neoliberalism "resuscitates much of classical liberal economics that supports laissez-faire regulation of the market").

428. See generally Gluck & Scott-Railton, *supra* note 13 (summarizing legal and political opposition to the ACA). And, of course, the litigation remains ongoing. See discussion of *Texas v. United States*, *supra* note 390.

429. See *supra* note 413 and accompanying text.

430. See *supra* note 413 and accompanying text.

An alternative vision maintains that family security and stability come from a societal design that complements the principal form of economic organization and that addresses the inevitable instability that arises from the economic system itself.⁴³¹ This view has historical resonance, as this Article shows: once wage labor replaced farm ownership as the primary source of family support, a larger government role became the only way to maintain a comparable level of family stability.⁴³² This vision, in which the state has an obligation to ensure family security and stability, builds on Justice Alito’s prescription for how to provide medical insurance that covers contraception; in a world in which employers enjoy much greater freedom to design employment to meet their individual ends,⁴³³ only direct government provision to individual employees can give them the same flexibility.⁴³⁴

Redesigning an alternative system of family security without either marriage or long-term employment as a starting premise, however, will require more than simply providing universal access to health care. Three basic models already exist for the reconstruction of the citizen–state relationship.⁴³⁵ The first is based on an unconditional cash grant.⁴³⁶ In building on the jurisprudence of legal and economic scholars, former Presidential candidate Andrew Yang termed it a “Freedom Dividend,” similar to earlier proposals for a universal basic income.⁴³⁷ It would be uncoupled from both marriage and employment but structured in a way likely to generate more jobs and more stable relationships.⁴³⁸

431. See, e.g., KELTON, *supra* note 422, at 65 (arguing that the business cycle is inevitable in capitalist economies); see also MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* (1995) (arguing that responsibility for children should be seen as a societal rather than a private obligation).

432. See *supra* Part I.A (describing minimal state role during the agrarian era in which farms could meet the subsistence needs of their residents).

433. See *supra* notes 362–370 and accompanying text (discussing how the Court upheld employers’ constitutional right to receive government benefits that conform to their individual religious beliefs even if it means limiting their employees’ access to benefits).

434. See also Dixon & Suk, *supra* note 33, at 375 (“[M]any constitutional democracies . . . are actively considering, and passing, measures to increase investments in education and training, raise the minimum wage, [and] guarantee a universal basic income . . .”).

435. See, e.g., Miranda Perry Fleischer & Daniel Hemel, *The Architecture of a Basic Income*, 87 U. CHI. L. REV. 625, 638 (2020) (stating that arguments for Universal Basic Income “derive varying levels of support from at least three main ethical theories: welfarism, egalitarianism, and libertarianism”).

436. See, e.g., Anne L. Alstott, *Work vs. Freedom: A Liberal Challenge to Employment Subsidies*, 108 YALE L.J. 967, 971–72 (1999) (proposing universal cash grants).

437. See YANG, *supra* note 211, at 166.

438. *Id.* at 178 (describing empirical evidence that family income security results in children more likely to be able to hold a job and enter into stable relationships as adults).

The second is modern monetary theory's proposal for a job guarantee.⁴³⁹ The job guarantee would create a public employment program that would ensure a job with a minimum wage and benefit package to anyone who wanted to work.⁴⁴⁰ The job guarantee is part of a macroeconomic policy framework designed to produce full employment and offset the private business cycle's impact on unemployment.⁴⁴¹ The program would be designed both to ensure that low-skill individuals could find employment and to contribute to public infrastructure including care work.⁴⁴²

The third, binary economics, is designed to give each adult a capital stake in the U.S. economy.⁴⁴³ The theory rests on the idea that capital ownership, such as holding shares in corporations, should be more broadly dispersed,⁴⁴⁴ and that the capital owners should therefore be able to share in the returns to capital.⁴⁴⁵

Each proposal involves the redesign of a system of family security and stability uncoupled from marriage and employment. With the Supreme Court's redefinition of marriage in terms of individual self-expression, the severing of the civic obligations of corporate owners, and the undermining of the federal-state-private compacts that once secured individual benefits, an alternative system must grapple with just what form uncoupling should take to respond to the challenges of contemporary inequality.

Ultimately, the more basic issue involves the terms on which the government can extend a basic right to security and stability to all Americans, that is, how to design a new state-administered regime that complements the information age by uncoupling family security and stability from marriage

439. For an explanation of modern monetary theory, see Rohan Grey, *Money Isn't Scarce—It's Infinite*, 37 LAW & INEQ. 132 (2019); cf. Heather Boushey, *The Left Should Resist the Siren Song of 'Modern Monetary Theory'*, WASH. POST (Apr. 19, 2019, 9:25 AM), https://www.washingtonpost.com/outlook/the-left-should-resist-the-siren-song-of-modern-monetary-theory/2019/04/19/37e92190-5b9b-11e9-b8e3-b03311fbbbfe_story.html [https://perma.cc/T74D-HFQM].

440. KELTON, *supra* note 422, at 63–64.

441. Bill Mitchell, *What Is a Job Guarantee?*, BILL MITCHELL—MOD. MONETARY THEORY BLOG (May 5, 2013), <http://bilbo.economicoutlook.net/blog/?p=23719> [https://perma.cc/BV9A-RBCR].

442. KELTON, *supra* note 422, at 64.

443. See BRUCE ACKERMAN & ANNE ALSTOTT, *THE STAKEHOLDER SOCIETY* 3 (1999) (proposing that each American receive a “stake” of \$80,000 at maturity and attributing the concept to Thomas Paine).

444. See, e.g., Robert Ashford, *Using Socio-Economics and Binary Economics To Serve the Interests of Poor and Working People: What Critical Scholars Can Do To Help*, 8 SEATTLE J. FOR SOC. JUST. 173, 202 (2009) (describing the role of “the distribution of capital acquisition and ownership and its crucial relation to wealth maximization, economic prosperity, and justice for all people”).

445. *Id.* at 218–19 (describing proposal to expand capital ownership).

and from employment.⁴⁴⁶ By limiting family security to those “deserving” of it, whether based on marriage or work, the existing system is premised on outmoded and exclusionary assumptions about the appropriate relationship between individual and state. As a legal, social, and cultural matter, family security and stability are important, but, with the dynamic and systemic dismantling of the old system that tied that stability to employment and to marriage, only a new system can address these issues. In exploring how the relationship between individual and state might be reconceptualized, this Article offers guidance on the first jurisprudential steps towards a redesign of the state–citizen compact.

446. See, e.g., Khiara M. Bridges, *White Privilege and White Disadvantage*, 105 VA. L. REV. 449, 473 (2019) (exploring the historical invisibility of non-white people in the social safety net); Andrew Hammond, *Pleading Poverty in Federal Court*, 128 YALE L.J. 1478, 1537 (2018) (discussing the broader social context for welfare claims).