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The Blue Family Constitution

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The Blue Family Constitution

by
Naomi Cahn & June Carbone*

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At the time *Roe v. Wade*¹ was decided in 1973, it joined a series of decisions about contraception, the “legitimacy” of nonmarital children, unmarried partners’ parental status, and spousal equality that laid the foundation for a new form of family organization, geared to meet the needs of the information age. This new model, which we have labelled “blue,” rewards investment in both girls’ and boys’ earning capacity and manages relationships based on reciprocity and trust rather than gendered and hierarchical family roles.² It contrasts with the red family model, rooted in religious teachings and longstanding cultural mores, which “continues to celebrate the unity of sex, marriage, and procreation.”³

To make possible the blue family system requires postponing family formation until after adults achieved the emotional

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¹ *Roe v. Wade*, 410 U.S. 113 (1973).

² NAOMI CAHN & JUNE CARBONE, *RED FAMILIES V. BLUE FAMILIES* (2010).

³ *Id.* at 2, 19, 30.

maturity and financial independence necessary to trade off work and family obligations and marshalled the resources necessary for greater investment in children. The sexual revolution was a necessary part of postponed family formation, though not necessarily the point of the transformation.⁴ The judicial decisions therefore walked a fine line. They declared that pregnancy and childbirth should be a matter of constitutionally protected privacy.⁵ They treated the use of pregnancy, nonmarital children's "illegitimate" status,⁶ and social stigma to deter nonmarital sexuality as "irrational" and therefore constitutionally suspect as grounds for state regulation.⁶ They did not, however, formally recognize the new model nor take measures to ensure that its benefits would be broadly available.

A half century later, it is clear that the new family model defines the terms of entry to the upper middle class. The age of marriage and childbearing have risen substantially, especially for college graduates.⁷ Income inequality has grown substantially, however, and family formation aggravates the inequality, as the well-off increasingly marry each other,⁸ intergenerational mobility remains flat and the likelihood of going to college

⁴ We described the terms of the blue family orders as "embrace the pill, encourage education, and accept sexuality as a matter of private choice." *Id.* at 2.

⁵ See *infra* text at notes 18-35.

⁶ See *Levy v. Louisiana*, 391 U.S. 68 (1968) (holding that under the Equal Protection Clause of the Fourteenth Amendment, a State may not create a right of action in favor of children for the wrongful death of a parent and exclude nonmarital children from the benefit of such a right); *Glonn v. Am. Guar. & Liab. Ins. Co.*, 391 U.S. 73 (1968) (striking down restrictions on the ability of mothers to recover for the wrong deaths of their nonmarital children); *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972) (holding that nonmarital children may not be excluded from sharing equally with other children in the recovery of workmen's compensation benefits for the death of their parent); *Gomez v. Perez*, 409 U.S. 535, 538 (1973) (reiterating that such distinctions are "illogical and unjust.")

⁷ See KAY HYMOWITZ, JASON S. CARROLL, W. BRADFORD WILCOX & KELLEEN KAY, *KNOT YET: THE BENEFITS AND COSTS OF DELAYED MARRIAGE IN AMERICA* 8, fig. II (2013), <http://nationalmarriageproject.org/wp-content/uploads/2013/03/KnotYet-FinalForWeb.pdf>.

⁸ Christine R. Schwartz, *Trends and Variation in Assortative Mating: Causes and Consequences*, 39 ANN. REV. SOC. 451, 460 (2013) (noting an increase in educational homogamy).

shortly after high school is highly related to family income,⁹ and the benefits of the new family model are beyond the reach of a large part of the population.¹⁰ The decision in *Dobbs*, in attempting to freeze the Constitution in the nineteenth (if not the eighteenth) century, sets back judicial support for the new family model and threatens to increase the gulf between the thriving families of the upper middle class and everyone else.¹¹

In retreating from the new “blue family system” as normative, the Supreme Court reinforces the barriers that block access for a large part of the population to stable family life. Within this neoliberal order, the state cannot be compelled to secure the prerequisites for successful families; instead, individuals bear the responsibility for getting there on their own. And those who fail to get there – that is, fail to marshal the private resources necessary to secure access to reproductive liberty or even basic health care, and investment in their children – are on their own.

This article compares the decisions of the early sixties and seventies with more recent Supreme Court decision in terms of their practical impact on family life. The first section sets out how the Supreme Court has approached the blue family model, tracing the developments that started with *Griswold v. Connecticut*'s¹² extension of a right to privacy to intimate relationships. This section shows how the Court's decisions changed over time from protection of reproductive liberty to a fuller embrace of the new family order's moral claims in their own right.

The second section explores how, even as the Court gradually accepted the new system, it refused to protect the pathways into the system, and reified a dual system of family formation based on class. At the core of the new system of family organization is later ages of family formation, and that requires

⁹ Richard V. Reeves & Eleanor Krause, *Raj Chetty in 14 Charts: Big Findings on Opportunity and Mobility We Should All Know*, BROOKINGS (Jan. 11, 2018), <https://www.brookings.edu/blog/social-mobility-memos/2018/01/11/raj-chetty-in-14-charts-big-findings-on-opportunity-and-mobility-we-should-know/>.

¹⁰ See JUNE CARBONE & NAOMI CAHN, *MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY* (2014).

¹¹ *Dobbs*, 142 S. Ct. 2228 (2022).

¹² 381 U.S. 479 (1965).

public acceptance of nonmarital sexuality. The effect of many of the Court's decisions, including a steady undermining of abortion rights, left some constitutional protections in place for those with the means to access them, but undercut access to a large part of the population and prevented the systemization and expansion of such basic benefits as health care and contraception for the country as a whole. This jurisprudence resulted, at least until *Dobbs*, in retaining the availability of the new system for elites and middle-class families, while putting it beyond the reach of lower-income Americans. That is, those who can buy into this system reap its benefits.

The final section discusses the impact of *Dobbs*, showing how it entrenches red political opposition and class-based family lives.

I. THE BLUE FAMILY CONSTITUTIONAL ORDER

The emergence of “blue families,” that is, an upper middle class strategy geared to the needs of the information age, required investment in girls’ as well as boys’ earning capacity, a postponement of family formation to marshal the material and emotional resources necessary for that investment, and a remaking of relationship norms away from the patriarchal structure of the separate spheres toward a more companionate model based on equal respect.¹³ What we have identified as the “blue family model” emphasizes women’s as well as men’s workforce participation, egalitarian gender roles, and the delay of childbearing until both parents reach the requisite emotional maturity and financial self-sufficiency.¹⁴ This new system started with the post-

¹³ See CAHN & CARBONE, *RED FAMILIES V. BLUE FAMILIES*, *supra* note 2.

¹⁴ Naomi Cahn, *The New Kinship*, 100 *GEO. L.J.* 367, 378 (2012) (summarizing the blue family model); June Carbone, *What Does Bristol Palin Have to Do with Same-Sex Marriage?*, 45 *U.S.F. L. REV.* 313, 319 (2010) (noting that the blue “family model prepares children to go off to college, manage intimate relationships that will not lead to childbearing for perhaps more than a decade, settle in a city far from home, and build professional, social, and sexual relationships without extended family support”). We also explained that red versus blue family strategies tend to be expressed in the framework of traditionalist versus modernist values orientations, which in turn overlap with conservative

war economy's increased market demand for women's labor. Then, 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.¹⁵ In 2002, Harvard economists Claudia Goldin and Lawrence Katz¹⁶ observed that half of women who were born in 1950 and attended college were married by the age of 23. A short seven years later, only 30% of women who attended college were married by the age of 23. These women, coming of age at the height of the sex revolution, won control of their reproductive lives as the Supreme Court guaranteed access to birth control and abortion and the age of majority changed from 21 to 18, eliminating the need for parental approval of their birth control prescriptions. Goldin and Katz, in an empirical study that compared early adopter states lowering the age of majority with states that did so later, found that while both contraception and abortion influenced the age of marriage, the change in legal access to contraception provided the larger effect.¹⁷

The Supreme Court in the middle of the twentieth century helped create the foundation for this new family model. First, it recognized greater rights to reproductive freedom that helped make contraception and abortion more freely available. Second, it removed nonmarital sexuality as a barrier to family recognition. Third, it recognized greater gender equality in the assumption of family roles.

versus liberal political identities creating a gulf between those who value hierarchy, order, and tradition versus equality, openness to change, and self-definition. *Id.* at 326-29. The change in upper middle class family strategies, what we are calling here the "blue family order," however, can be considered independently of the form of values expression in which it is often embedded politically, and we are using the term "blue" in this article to discuss only the change in family organization.

¹⁵ Naomi Cahn & June Carbone, *Uncoupling*, 53 ARIZ. ST. L.J. 1, 28-30 (2021).

¹⁶ Claudia Goldin & Lawrence F. Katz, *The Power of the Pill: Oral Contraceptives and Women's Career and Marriage*, 110 J. POL. ECON. 730 (2002).

¹⁷ Women who did not attend college did not experience a similar delay in marriage for another twenty years. See Claudia Goldin, *The Long Road to the Fast Track: Career and Family*, 596 ANNALS AM. ACAD. POL. & SOC. SCI. 20 (2004), http://scholar.harvard.edu/files/goldin/files/the_long_road_to_the_fast_track_career_and_family.pdf.

A. *The Right to Privacy and Reproductive Freedom*

Documenting the emergence of the blue family system in constitutional terms starts with *Griswold v. Connecticut*, the opinion that struck down restrictions on married couples' access to contraception in 1965, and limited the ability of the state to impose the traditional moral order on intimate relationships.¹⁸ *Griswold*, and later cases, which ultimately struck down obstacles to contraception and abortion, recognized a right to privacy that left the terms of intimate relationships to individuals. The Court wrote that “[w]e deal with a right of privacy older than the Bill of Rights, older than our political parties, older than our school system.” The Court did not mention married couples' sexual relationships directly, but it did refer to the marital relationship as “intimate to the degree of being sacred” and clearly intimated that the state could not intrude into the marital bedroom.¹⁹

While the *Griswold* decision did not mention the issue, a major reason for challenging the ban on contraception was the unequal nature of contraceptive access.²⁰ In a retrospective on *Griswold*, a curator of the Smithsonian Institution told of her own mother's efforts to secure contraception – so that she could limit her family to four. She observed that for most of the twentieth century, “access to information about safe and effective contraception, like condoms and how to use them, was hidden to many, yet accessible to predominantly white, middle-class men and women.”²¹ Connecticut did not often enforce its ban on married couples' contraceptive use, but the fact that the law was on the books effectively limited access to “those in the know”

¹⁸ 381 U.S. 479 (1965).

¹⁹ *Id.* at 486. “Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.” *Id.* at 485-86.

²⁰ See Cary Franklin, *The New Class Blindness*, 128 *YALE L.J.* 2, 26 (2018) (observing that “[d]isadvantaged women were foremost in the minds of the advocates who challenged Connecticut's birth control ban in *Griswold*.”)

²¹ Alexandra M. Lord, *The Revolutionary 1965 Supreme Court Decision that Declared That Sex Was a Private Affair*, *SMITHSONIAN MAG.*, May 19, 2022, <https://www.smithsonianmag.com/smithsonian-institution/the-revolutionary-1965-supreme-court-decision-that-declared-sex-was-a-private-affair-180980089/>.

with access to the right doctors and pharmacists.²² Striking down the restrictions on contraceptive use allowed birth control clinics to open, clinics that made information available to a broader segment of the population. *Eisenstadt v. Baird*,²³ decided in 1972, is in many ways, a farther-reaching case in the extension of reproductive liberty; it struck down a Massachusetts statute that prohibited supplying contraception to single, as opposed to married, individuals.²⁴

In 1973, the Supreme Court's decision in *Roe v. Wade* considered a woman's right to abortion. The Court held that the "right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."²⁵ The Court acknowledged the burdens of pregnancy and childbirth, including the possibility that childbirth "may force upon the woman a distressful life and future," her "[m]ental and physical health may be taxed by child care," the unwanted child may cause "distress, for all concerned," "there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it," and "the continuing stigma of unwed motherhood may be involved."²⁶ Accordingly, the Court concluded that the decision should be left to "the woman and her responsible physician" to decide, at least until "the state interests as to protection of health, medical standards, and prenatal life, become dominant."²⁷

By 1977, the Supreme Court was willing to go a bit further in articulating a right to privacy that, while recognizing the state's interest in regulating morality, nonetheless also recognized a separate interest in sexual decision-making. In striking down a state law that prohibited selling contraceptives to minors under the

²² Indeed, John Hart Ely, Chief Justice Earl Warren's clerk at the time, wrote in memorandum to Warren, "Women without financial resources were the ones who wanted most for birth control." "Clinics are of course the answer," Ely argued, "[y]et it is only against the clinics that the law is enforced . . . Thus those who need birth control most are the only ones who are denied it." Franklin, *supra* note 20, at 33-34.

²³ 405 U.S. 438, 442 (1972).

²⁴ See Susan Frelich Appleton, *The Forgotten Family Law of Eisenstadt v. Baird*, 28 *YALE J.L. & FEMINISM* 1 (2016).

²⁵ *Roe v. Wade*, 410 U.S. 113, 153 (1973)

²⁶ *Id.* at 153.

²⁷ *Id.*

age of 16, the Court, citing the earlier precedents, stated that: “If the right of privacy means anything, it is the right of the individual, married or single, to be free of unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”²⁸ It called the decision to procreate “the most intimate of human activities and relationships.”²⁹ It concluded that “*Griswold* may no longer be read as holding only that a State may not prohibit a married couple’s use of contraceptives.” Instead, the Court emphasized that, read “in light of its progeny,” *Griswold* should be seen to hold “that the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the State.”³⁰

In *Carey*, the Court extended the possibility of controlling reproduction to minors.³¹ The Court observed that, “with or without access to contraceptives, the incidence of sexual activity among minors is high, and the consequences of such activity are frequently devastating,” but observed that there was little evidence that banning contraception had much impact.³² It concluded that such reasoning could not justify burdening a fundamental right, that is, the right to be free from government interference in the right to bear a child, thereby reinforcing the rights of reproductive decision-making.

Taken together, these cases helped open the door to the transformation of women’s lives. They struck down barriers to access for contraception and abortion and made it possible for ambitious women to delay marriage and childbearing. In the new family order, women’s reproductive liberty is an essential element.

If the Supreme Court jurisprudence that started with *Griswold v. Connecticut* opened the door to the blue family model, three subsequent cases – *Planned Parenthood of Southeastern Pennsylvania v. Casey*,³³ *Lawrence v. Texas*,³⁴ and *Obergefell v.*

²⁸ *Carey v. Population Servs., Int’l*, 431 U.S. 678, 685 (1977) (citing *Eisenstadt v. Baird*, 405 U.S. at 453).

²⁹ *Carey*, 431 U.S. at 685.

³⁰ *Id.* at 687.

³¹ *Carey*, 431 U.S. 678.

³² *Id.* at 696.

³³ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

³⁴ 539 U.S. 558 (2003).

*Hodges*³⁵ – expressly reference the emerging change in values. These cases acknowledge the clash in worldviews while, nonetheless, cautiously providing limited recognition of this model.

B. Building Blue

1. *Casey: Planned Parenthood of Southeastern Pennsylvania v. Casey*,³⁶ decided in the early nineties, had been widely expected to reverse *Roe* outright.³⁷ Instead, *Casey* preserved the core of the right to abortion, while permitting the states to impose new restrictions, such as waiting periods and parental consent provisions, that increased the expense and inconvenience involved in obtaining an abortion and disproportionately burdened the most vulnerable women.³⁸ While *Casey* itself has been overruled by *Dobbs*, it provides important insight into the Court's support for the blue family model.

In upholding *Roe*, Justice O'Connor penned the only significant abortion decision written by a woman.³⁹ She observed that the earlier decisions in *Griswold*, *Eisenstadt*, and *Carey* "support the reasoning in *Roe* relating to the woman's liberty because they involve personal decisions concerning not only the meaning of procreation but also human responsibility and respect for it."⁴⁰ *Casey*, alone of the Supreme Court's reproductive rights decisions, made women's relationship to the fetus growing within her central to the decision. Even *Dobbs* focused only on the fetus.⁴¹

³⁵ *Obergefell v. Hodges*, 576 U.S. 644 (2015).

³⁶ 505 U.S. 833 (1992).

³⁷ See, e.g., Linda J. Wharton et. al., *Preserving the Core of Roe: Reflections on Planned Parenthood v. Casey*, 18 YALE J.L. & FEMINISM 317, 319 (2006) (describing the expectation that *Roe* would be overturned in the decision.)

³⁸ *Id.* at 319-20 (explaining that these provisions included "mandatory waiting periods, informed consent scripts that force doctors to give their patients information biased against abortion, onerous licensing and regulatory schemes for abortion providers, detailed reporting requirements, consent and notification requirements for minors, abortion procedure bans, and laws making abortion providers strictly liable for any and all damage to their clients.").

³⁹ To be sure, female Justices have written significant dissents in abortion cases. E.g., *Gonzales v. Carhart*, 550 U.S. 124, 171 (Ginsburg, J. dissenting).

⁴⁰ *Casey*, 505 U.S. at 852-53.

⁴¹ See Sonia Suter & Naomi Cahn, *The Disembodied Pregnant Person*, NAT'L L.J. (July 1, 2022), <https://www.law.com/nationallawjournal/2022/07/01/the-disembodied-pregnant-person/>.

O'Connor explained that the clash over abortion involved two contrasting approaches to the question of responsibility. "One view," she wrote, "is based on such reverence for the wonder of creation that any pregnancy ought to be welcomed and carried to full term no matter how difficult it will be to provide for the child and ensure its well-being."⁴² The alternative view, she continued, "is that the inability to provide for the nurture and care of the infant is a cruelty to the child and an anguish to the parent."⁴³

These two views go to the heart of "red" versus "blue" worldviews. The view that the conception of a child involves a commitment that it should be "carried to full term" tends to correspond with the view that the woman's difficulties in carrying a child to term, whether they be health or economic, is subordinate to the life of the child, and that preventing that child from being born is an immoral act. Historically this has almost exclusively meant channeling sex into marriage by stigmatizing nonmarital sexuality⁴⁴ and limiting women's ability to control their reproductive lives.

The alternative view "that the inability to provide for the nurture and care of the infant is a cruelty to the child and an anguish to the parent"⁴⁵ is typically linked to the view that the decision whether to bear a child should be a matter of individual privacy.⁴⁶ Yet, this part of O'Connor's formulation captures almost perfectly the "blue" conception of personal responsibility. In accordance with these values, having a child is one of the most profound commitments most people will ever make, and blue family values involve an obligation not to have a child until a prospective parent is ready to fully assume the obligations that come with childrearing. That means being abstinent, if one

⁴² *Id.* at 853.

⁴³ *Id.*

⁴⁴ Indeed, New York Times columnist Ross Douthat wrote after the publication of our book, *Red Families v. Blue Families*, that our description of the new "blue" model for middle class life works in promoting stable, two parent families, but it could never become universal because it depends on abortion. He therefore maintained that the emphasis on abstinence outside of marriage was essential. Ross Douthat, *Red Family, Blue Family*, N. Y. TIMES (May 9, 2010), <http://www.nytimes.com/2010/05/10/opinion/10douthat.html>.

⁴⁵ *Id.*

⁴⁶ See Carbone, *What Does Bristol Palin?*, *supra* note 14.

chooses, using birth control if one is sexually active, and, yes, having an abortion where the woman is unwilling or unable to commit to fully providing for the child who would result. Indeed, today, the majority of women having abortions already have children⁴⁷ and are making a decision not to have an additional child who might literally take food out of the mouths of children that they are already struggling to support.⁴⁸ This second, blue view, which is often characterized as a matter of self-expression, is also, as O'Connor realized, a matter of profound responsibility that balances the commitment to existing children against the responsibility for additional children.

2. *Lawrence*: The second expression of a blue worldview occurred in the Supreme Court's decision in *Lawrence v. Texas*.⁴⁹ *Lawrence* involved a criminal prosecution for same-sex sodomy. The two men in the case were arrested in a private residence when the police arrived to investigate a purported weapons disturbance.⁵⁰ In his opinion for the majority, Justice Kennedy emphasized that the Texas statute being enforced in the case is not just about prohibiting a "particular sexual act."⁵¹ Instead, the laws at issue have "penalties and purposes" with "far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home" Kennedy added that "[t]he statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals."⁵² The majority opinion went further, however, to say that the behavior at issue was a matter of free expression consistent with principles of human dignity. The opinion concluded that: "When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons

⁴⁷ Jeff Diamant & Besheer Mohamed, *What the Data Says About Abortion in the U.S.*, PEW RES. CTR. (June 24, 2022), <https://www.pewresearch.org/fact-tank/2022/06/24/what-the-data-says-about-abortion-in-the-u-s-2/> (showing that 60% of women who had abortions in 2019 already had children).

⁴⁸ *Id.* (showing that poorer women are more likely to have abortions).

⁴⁹ 539 U.S. 558.

⁵⁰ *Id.* at 562.

⁵¹ *Id.* at 567.

⁵² *Id.*

the right to make this choice.”⁵³ The Court thus put its imprimatur on the choice of a partner and sexual conduct as an expression of that choice as a matter of individual self-definition.

Writing in dissent, Justice Scalia made clear that he thought that moral disapproval of same-sex sexuality was exactly what the case should have been about. He denounced “the end of all morals legislation”⁵⁴ that the decision represented, in effect suggesting that red versions of appropriate sexual behavior could no longer be enforced.⁵⁵

The opinions in *Lawrence* thus frame a blue family approach to sexuality. The majority opinion embraced an alternative view of sexual conduct while Justice Scalia warned that this could mean a redefinition of marriage.

3. *Obergefell*: In *Obergefell v. Hodges*,⁵⁶ the case upholding the right to marriage equality, the majority went even further in recognizing a “blue” approach to family values while the dissent reaffirmed the need to channel sexuality into marriage. Justice Kennedy’s opinion for the majority expressly described marriage in terms of choices that shape “an individual’s destiny”⁵⁷ rather than as a gendered institution designed to address procreation. Quoting the Massachusetts Supreme Court, Kennedy emphasized that “civil marriage is an esteemed institution, and the decision whether and whom to marry is among life’s momentous acts of self-definition.”⁵⁸ Marriage between two people of the same sex is not different, Kennedy reasoned, because the “nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality. . . . 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.”⁵⁹

The *Obergefell* majority described the role of marriage in blue terms, allowing spouses to “live their lives,” or “honor [a]

⁵³ *Id.* at 557.

⁵⁴ *Lawrence*, 539 U.S. at 586, 599 (Scalia, J., dissenting).

⁵⁵ *Id.* at 605.

⁵⁶ *Obergefell*, 576 U.S. 644.

⁵⁷ *Id.* at 666.

⁵⁸ *Id.* citing *Goodridge v. Dep’t Pub. Health*, 798 N.E.2d 941, 955 (Mass. 2003).

⁵⁹ *Id.*

spouse[‘s] memory.”⁶⁰ The Court thus recognized the change in marriage from an intrinsically gendered (and we have argued unequal)⁶¹ institution designed to order human reproduction to a vehicle expressing a couple’s commitment to each other and facilitating their shared investment in the couple’s relationship and their children. The *Obergefell* majority acknowledged that same-sex couples, in a manner no different from different sex couples, often choose to marry because of the community recognition, legal structure, and material and emotional benefits marriage brings to family formation and childrearing.⁶² And in noting the evolving changes in marriage, the Court pointed to the ending of coverture as women obtained rights.⁶³ We argued in 2010 that these changes make marriage equality not only permissible but morally compelled by those who embraced the remade nature of the institution, a remade nature fully compatible with same-sex relationships.⁶⁴ The *Obergefell* decision reflected an embrace of blue sensibilities.

The four justices who dissented celebrated the traditional notion of marriage. Justice Alito explicitly rejected an understanding of marriage in which it “indirectly benefits society because persons who live in stable, fulfilling, and supportive relationships make better citizens.”⁶⁵ Instead, he reiterated the traditional understanding of marriage as linked to procreation.⁶⁶

While he acknowledged that family understandings and behavior could change over time, he simply treated data such as the

⁶⁰ *Id.* at 559,

⁶¹ And we have argued, an implicitly unequal institution. See CARBONE & CAHN, MARRIAGE MARKETS, *supra* note 10, at 110-11 (describing marriage as changing from an institution premised on female dependence to one based on the interdependence of presumptive equals).

⁶² *Id.* at 688 (“Under the laws of the several States, some of marriage’s protections for children and families are material. But marriage also confers more profound benefits. By giving recognition and legal structure to their parents’ relationship, marriage allows children “to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.”).

⁶³ *Id.* at 660.

⁶⁴ See CAHN & CARBONE, RED FAMILIES V. BLUE FAMILIES, *supra* note 3, at 128 (describing marriage equality within the blue paradigm as “a matter of basic equality and fairness.”).

⁶⁵ *Obergefell*, 576 U.S. at 736, 738.

⁶⁶ *Id.*

40% nonmarital birth rate as further reason states could chose to double-down on this traditional understanding⁶⁷ – drawing clear distinctions between those able to achieve the blue family life, and those unable to do so.

In their desire to reaffirm traditional understandings, the *Obergefell* and *Lawrence* dissenters expressed no concern for the impact of such laws on groups who did not share the same values⁶⁸ or could not afford a white picket fence.⁶⁹ At least in part as a result, while these decisions acknowledge the emergent blue family strategy, they do nothing to make it available to a larger portion of the population.

II. Blue Families Beyond the Reach of the Poor (but the poor need not apply)

The blue family model has been a successful adaptation to the needs of the information age, but it has also been one that exacerbates class and racial inequality. The markers of family form closely track access to the new model. As we argued in *Marriage Markets*, family form has intensified income inequality. For college graduates, who increasingly marry and bear children later in life, divorce rates have returned to levels of the mid-sixties, before adoption of no-fault divorce.⁷⁰ Between the early nineties and 2008, the unintended pregnancy rate fell in half for those earning 200% or more of the poverty line, while it rose substantially for those below the poverty line.⁷¹ And in 2012, 65% of children whose mothers never made it past high school would spend at least part of their childhoods in a single-parent

⁶⁷ “While, for many, the attributes of marriage in 21st-century America have changed, those states that do not want to recognize same-sex marriage have not yet given up on the traditional understanding. They worry that by officially abandoning the older understanding, they may contribute to marriage’s further decay.” *Id.* at 739–40.

⁶⁸ *E.g.*, Melissa Murray, *Obergefell v. Hodges and Nonmarriage Inequality*, 104 CALIF. L. REV. 1207 (2016).

⁶⁹ See June Carbone & Naomi Cahn, *Is Marriage for Rich Men?*, 13 NEV. L.J. 386, 401 (2013); Sara McLanahan & Christine Percheski, *Family Structure and the Reproduction of Inequalities*, 34 ANN. REV. SOC. 257, 261 (2008).

⁷⁰ CAHN & CARBONE, *MARRIAGE MARKETS*, *supra* note 10, at 15-16.

⁷¹ Guttmacher Institute, *Unintended Pregnancy in the United States* (2019), <https://www.guttmacher.org/fact-sheet/unintended-pregnancy-united-states>

home compared to 8% of children whose mothers were college graduates.⁷² Rather than embrace universal access to the blue family model, the Supreme Court rejected measures that might have made the new model more available.

The Court's cases have enshrined the familial patterns of the elite, which we define in this article as the roughly one-third of the country who graduate from college and/or enjoy substantial incomes. By contrast, the Court has further marginalized the bottom third.⁷³ As this Section shows, it did so in a series of cases that blame poverty on the poor and limit access to benefits that might provide a more secure foundation for family life.

In assessing the relationship between family law and class, the iconic description comes from Jacobus tenBroek, who described family law as having two parts that differ in substance, purpose, and procedure.⁷⁴ One system focused on private arrangements, and supported the families of those who were economically self-sufficient, those whom we identify with the blue family system. Jacobus tenBroek maintained, however, that a parallel second system existed, one imposed on those who sought public assistance. In this second system, individual family members do not have the same control over their lives, and Supreme

⁷² Emily Badger, *The Terrible Loneliness of Growing up Poor in Robert Putnam's American*, WASH. POST (Mar. 6, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/03/06/the-terrible-loneliness-of-growing-up-poor-in-robert-putnams-america/>.

⁷³ In other work, we have addressed those in the middle, arguing that group is in flux. June Carbone & Naomi Cahn, *The Triple System of Family Law*, 2013 MICH. ST. L. REV. 1185. Perhaps not surprisingly, this group is left out of Supreme Court jurisprudence as well.

⁷⁴ tenBroek wrote that:

[W]e have two systems of family law in California: different in origin, different in history, different in substantive provisions, different in administration, different in orientation and outlook. One is public, the other private. One deals with expenditure and conservation of public funds and is heavily political and measurably penal. The other deals with the distribution of family funds, focuses on the rights and responsibilities of family members, and is civil, nonpolitical, and less penal. One is for underprivileged and deprived families; the other for the more comfortable and fortunate.

Jacobus tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status (pt. I)*, 16 STAN. L. REV. 257, 257-58 (1964).

Court decisions accept the ability of states to impose more oversight on their behavior.

A. *Welfare Benefits*

A set of cases focused on eligibility for government benefits fosters a system in which, as tenBroek had charged, the poor were treated differently.⁷⁵ This did not just mean that they were faced with the regulatory system of public welfare, but it also meant that, without the expansion of benefits that wealthier people could afford to buy, poor people could not pay their way for entry into the new system. The United States, unlike many European countries, has never had a system of family allowances. Instead, beginning during the Progressive Era, the states had adopted “mothers’ pensions” that provided support to “worthy” widows lacking a husband’s support for their children.⁷⁶ Congress federalized the system with adoption of the Aid to Dependent Children (ADC) program in the thirties, limiting aid to children who had “been deprived of parental support by reasons of the death, continued absence from the home, or physical or mental incapacity of a parent.”⁷⁷ It also allowed the states to impose additional eligibility standards, such as “moral character” requirements that excluded the children of unmarried parents from the program.⁷⁸

The program had been originally premised on the family of the separate spheres. It presumed that the mothers of young children could not simultaneously work outside their home and care for children, and the programs’ principal concern was pensionless widows, whose children would otherwise land in orphan-

⁷⁵ Serena Mayeri, *Marital Supremacy and the Constitution of the Nonmarital Family*, 103 CALIF. L. REV. 1277, 1297 (2015) (discussing the racist origins of many of the restrictions).

⁷⁶ JUNE CARBONE, FROM PARTNERS TO PARENTS: THE SECOND REVOLUTION IN FAMILY LAW 200 (2000) (observing that by 1919, 39 states and the territories of Alaska and Hawaii had authorized programs providing direct funds that allowed children to stay with their parents rather than go to orphanages).

⁷⁷ *Id.* at 201. “Congress’ primary objective in enacting section 402 of the Social Security Act, Aid to Dependent Children, was to provide support for children who did not have a ‘breadwinner’ to provide support.” Mari Brita Maloney, *Out of the Home onto the Street: Foster Children Discharged into Independent Living*, 14 FORDHAM URB. L.J. 971, 976 (1986).

⁷⁸ *Id.*

ages because their mothers could not support them.⁷⁹ By 1961, however, the percentage of widows receiving federal benefits had fallen from 43% of the ADC caseload in 1937 to 7%.⁸⁰ Safer worker conditions, longer life expectancy, and more comprehensive survivors' benefits had largely addressed the problem of premature death. Instead, a growing number of children in need had been born to poor, never-married mothers, numbers that increased with the beginning of deindustrialization in the urban North.⁸¹ Moral character requirements either rendered children ineligible because of the circumstances of their birth or subjected their mothers to intrusive inspections of their intimate relationships.⁸² Serena Mayeri observes that that such "regulations were widely understood to [privatize] dependency by withholding public benefits from nonmarital families;"⁸³ the program assumed that marriage would eliminate the family's needs.

In fact, however, by the mid-sixties, Black families were experiencing the first wave of deindustrialization, particularly in the rustbelt North.⁸⁴ The terms of entry to the middle class were increasing and Blacks fell further behind. The Black percentage of the poor increased from a quarter to a third of the American total during this period and half of Black children fell below the poverty line.⁸⁵ Meeting children's basic needs was becoming more difficult, and Black families were the first to experience the destabilizing effects that came from the loss of secure jobs for blue collar men. Only greater early childhood support could keep

⁷⁹ *Id.*

⁸⁰ *Id.* at 202. The program's name changed from ADC to Aid to Families with Dependent Children (AFDC) in 1962. Maloney, *supra* note 77, at 977.

⁸¹ CARBONE, FROM PARTNERS TO PARENTS, *supra* note 76, at 203 (observing that by the nineties, unmarried mothers had replaced mothers experiencing divorce or desertion as the majority of the aid recipients). Although it was not apparent at the time, many have argued since that the growth in Black non-marital births, which accelerated between 1965 and 1985, reflected the first stages of deindustrialization, which dramatically reduced the employment opportunities for blue collar men. *Id.* at 76-78 (describing the high unemployment rates, particularly for Blacks, in the urban North).

⁸² *Id.* at 202 (observing that a program called "Operation Bedcheck" involved unannounced midnight home visits checking for the presence of a "man in the house.").

⁸³ Mayeri, *supra* note 75, at 1279.

⁸⁴ CARBONE, FROM PARTNERS TO PARENTS, *supra* note 76, at 78, 80-81.

⁸⁵ *Id.* at 80-81.

open the pathways to upward mobility and that depended on access to government support. In a series of cases in the nineteen-sixties, the Supreme Court seemed primed to consider unequal treatment based on economic class as suspect, a move that if it had continued would have recognized a broader range of entitlements to government benefits.⁸⁶

In the 1966 case of *Harper v. Virginia*, a case involving a poll tax, the Court stated: “Wealth, like race, creed, or color, is not germane to one’s ability to participate intelligently in the electoral process. Lines drawn on the basis of wealth or property, like those of race are traditionally disfavored.”⁸⁷ Two years later, in *King v. Smith*, the Court considered a challenge to Alabama’s “man in the house rule,” which assumed a man who cohabited with a welfare recipient to be a “substitute father.”⁸⁸ It deemed the man’s income available to the family, thereby affecting the family’s qualification for public welfare.⁸⁹ The Court sidestepped the constitutional issues in the case, striking down the Alabama regulation on statutory grounds, noting “that protection of . . . children is the paramount goal of AFDC.”⁹⁰ A year later, in *Shapiro v. Thompson*, the Court upheld the rights of poor people to move between states, striking down durational residency requirements for the receipt of welfare benefits.⁹¹ The Court recognized that “[a]n indigent who desires to migrate, resettle, find a new

⁸⁶ See ADAM COHEN, *SUPREME INEQUALITY: THE SUPREME COURT’S 50-YEAR BATTLE FOR A MORE UNJUST AMERICA* 16-17 (2020).

⁸⁷ *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 668 (1966); see COHEN, *supra* note 86, at 17.

⁸⁸ *King v. Smith*, 392 U.S. 309, 314 (1968). Smith’s attorney, New York anti-poverty lawyer Martin Garbus, argued that questioning a mother about her “most intimate relationships” and requiring answers as a condition of receiving benefits “violates her right to privacy,” infringing upon her freedom of association in a manner that was “destructive of her personal relationships and [that] violate[d] her and her children’s constitutional rights.” Mayeri, *supra* note 75, at 1298.

⁸⁹ *King*, 392 U.S. at 313.

⁹⁰ *Id.* at 325. Andrew Hammond argues that “[t]he role of federal law—and with it, the role of federal courts—in welfare administration would never be the same after *King*.” Andrew Hammond, *Litigating Welfare Rights: Medicaid, SNAP, and the Legacy of the New Property*, 115 Nw. U. L. REV. 361, 374 (2020).

⁹¹ *Shapiro v. Thompson*, 394 U.S. 618 (1969); see COHEN, *supra* note 86, at 30-33.

job, and start a new life will doubtless hesitate if he knows that he must risk making the move without the possibility of falling back on state welfare assistance during his first year of residence, when his need may be most acute.”⁹² It also noted that poor mothers’ interests in geographic mobility overlapped with those of wealthier mothers who also relocated to take advantage of more robust public benefits such as higher quality education, recognizing both as legitimate.⁹³

One other Supreme Court decision, although not directly concerned with family structure, looked like it would be important in strengthening family access to government benefits. *Goldberg v. Kelly* interpreted the Due Process Clause to require a fair hearing before the government could terminate a recipient’s benefits, a potential move towards recognizing a vested interest in government benefits.⁹⁴

But that recognition of overlapping interests, with the poor and the wealthy, was short-lived. Reflecting a shift in the balance of the Court from Earl Warren to Warren Burger,⁹⁵ the Court began, shortly thereafter, to reinforce distinctions based on wealth and cut back on access to government benefits as a matter of right. Although the Court may have seemed to be moving towards recognition of income as deserving at least intermediate scrutiny in *Harper*, the Court’s 1973 opinion in *San Antonio Independent School District v. Rodriguez* (the same year as *Roe*) firmly established that income-based distinctions were subject only to rational basis review.⁹⁶ *Dandridge v. Williams* upheld a Maryland law that subjected benefit levels to a ceiling that did not vary based on family size or need,⁹⁷ undercutting the premise in *Smith v. King* that the program eligibility should reflect children’s need rather than adult behavior.

⁹² *Shapiro*, 394 U.S. at 629.

⁹³ *Id.* at 632. The Court stated: “we do not perceive why a mother who is seeking to make a new life for herself and her children should be regarded as less deserving because she considers, among others factors, the level of a State’s public assistance. Surely such a mother is no less deserving than a mother who moves into a particular State in order to take advantage of its better educational facilities.” *Id.*

⁹⁴ *Goldberg v. Kelly*, 397 U.S. 254 (1970).

⁹⁵ COHEN, *supra* note 86, at 35.

⁹⁶ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

⁹⁷ 397 U.S. 471, 473 (1970).

One year later, in *Wyman v. James*,⁹⁸ the Court showed just how much welfare jurisprudence had changed; while *King* had seemed to move away from judgment about a welfare recipient's sexual relationships, including their living arrangements and partners, allowing such recipients more autonomy, *Wyman* reinforced the ability of the state to police welfare recipients. New York state law required that social service workers remain in "close contact" with those on public assistance, directing that recipients "be visited as frequently" as necessary.⁹⁹ The relevant regulations required home visits to public welfare recipients once every three months, with the alleged goal of verifying information concerning eligibility for welfare, providing professional counseling, and preventing welfare fraud. In addition, New York law specified that a child would only be eligible for aid "if his home situation is one in which his physical, mental and moral well-being will be safeguarded and his religious faith preserved and protected."¹⁰⁰ Barbara James, a public welfare recipient, refused to allow her caseworker to visit her home, informing the caseworker that while she would provide any information that was relevant to her continued receipt of welfare, she did not want the caseworker to make a home visit. The lower court found the visit unwarranted, and, quoting the eighteenth-century British politician William Pitt, stated:

'The poorest man may in his cottage bid defiance to all the force of the Crown. It may be frail— its roof may shake— the wind may blow through it—the storm may enter, the rain may enter— but the King of England cannot enter— all his force dares not cross the threshold of the ruined tenement.'¹⁰¹

The Supreme Court reversed. It upheld the validity of the home visits, focusing on distinguishing a true Fourth Amendment search from the "visitation" at issue. The Court treated the visits as a condition for eligibility in the program consistent with the protection of children's interests; they were not, according to the

⁹⁸ 400 U.S. 309 (1971); see Michael Grossberg, *Some Queries About Privacy and Constitutional Rights*, 41 CASE W. RES. L. REV. 857, 860 (1991) (discussing the Court's class-based approach in *Wyman*).

⁹⁹ *Wyman*, 400 U.S. at 311 n.2.

¹⁰⁰ *Wyman*, 400 U.S. at 312 n.4.

¹⁰¹ *James v. Goldberg*, 303 F. Supp. 935, 946 (S.D.N.Y. 1969), *rev'd sub nom.* *Wyman v. James*, 400 U.S. 309 (1971).

opinion, “forced or compelled, and . . . the beneficiary’s denial of permission is not a criminal act. If consent to the visitation is withheld, no visitation takes place. The aid then never begins or merely ceases.”¹⁰²

In dissent, Justices Marshall and Brennan explained:

[I]t is argued that the home visit is justified to protect dependent children from ‘abuse’ and ‘exploitation.’ These are heinous crimes, but they are not confined to indigent households. Would the majority sanction, in the absence of probable cause, compulsory visits to all American homes for the purpose of discovering child abuse?¹⁰³

Later cases have continued this differential treatment of the poor.

B. *Cutting Back on Blue*

The Court (and particularly the more conservative justices like Powell) did not, in *Wyman*, interfere with the ability of the state to supervise beneficiary mothers.¹⁰⁴ Nor did it second-guess the state’s continued reliance on marital status as a factor in determining immigration and social security eligibility – at least to the extent that marital status could be arguably connected to factors that went beyond the sex that produced the child.¹⁰⁵ And the Court continued to view childhood poverty as a function of parental failings. Rather than recognize the terms of a new economy that dismantled the male family wage and made reliable incomes a marker of class, the Court has continued to assume that childhood poverty is a function of parental shirking.

¹⁰² *Wyman*, 400 U.S. at 317-18.

¹⁰³ *Id.* at 338, 341-42 (Marshall, J., dissenting).

¹⁰⁴ *See Wyman*, 400 U.S. 309; Grossberg, *supra* note 98, at 860 (discussing the Court’s class-based approach in *Wyman*).

¹⁰⁵ *See, e.g., Mathews v. Lucas*, 427 U.S. 495, 497 (1976) (upholding Social Security Act requirements that “condition the eligibility of certain illegitimate children for a surviving child’s insurance benefits upon a showing that the deceased wage earner was the claimant child’s parent and, at the time of his death, was living with the child or was contributing to his support.”) *Cf. Jimenez v. Weinberger*, 417 U.S. 628 (1974), *aff’d*, 523 F.2d 689 (7th Cir. 1975) (finding that “the complete statutory bar to disability benefits which the act imposed upon nonlegitimated illegitimates born after onset of disability was not reasonably related to valid governmental interest of preventing spurious claims and contravened the equal protection provisions of the Due Process Clause of the Fifth Amendment.”).

Consider the Court’s 2011 opinion in *Turner v. Rogers*.¹⁰⁶ *Turner* involved the question of whether “the Fourteenth Amendment’s Due Process Clause requires the State to provide counsel (at a civil contempt hearing) to an indigent person potentially faced with . . . incarceration.”¹⁰⁷ The Court concluded that there was no right to counsel, but that “the State must nonetheless have in place alternative procedures that ensure a fundamentally fair determination of the critical incarceration-related question, whether the supporting parent is able to comply with the support order.”¹⁰⁸

By 2011, the evidence had become substantially stronger that the child support enforcement system was itself excessively punitive.¹⁰⁹ A 2009 survey, for example, found that in South Carolina, the state in which *Turner* originated, “one in eight inmates had been jailed for failure to pay child support.”¹¹⁰ Two years early, an Urban Institute study had found that in nine large states, 70% of child support arrears “were owed by people who reported less than \$10,000 a year in income,” who on average were ordered to pay 83% of their income in child support — a percentage dramatically higher than for those in higher income brackets.¹¹¹ These factors disproportionately affect Black men, effectively trapping “poor men in a cycle of debt, unemployment

¹⁰⁶ *Turner v. Rogers*, 564 U.S. 431 (2011).

¹⁰⁷ *Id.* at 435.

¹⁰⁸ *Id.*

¹⁰⁹ See Leslie Joan Harris, *Questioning Child Support Enforcement Policy for Poor Families*, 45 *FAM. L.Q.* 157, 165–66 (2011) (observing that the formal system is counterproductive for poor children because their fathers contribute more when they maintain informal ties with the mother and children and child support actions tend to undermine that contact, resulting in less overall support); Solangel Maldonado, *Deadbeat or Deadbroke: Redefining Child Support for Poor Fathers*, 39 *U.C. DAVIS L. REV.* 991, 1014 (2006) (stating that child support enforcement, by “criminalizing nonpayment of child support and pursuing deadbroke fathers without first ensuring that they can pay the amount awarded . . . turns these men into felons, the least desirable employees” and thus undercuts their employability).

¹¹⁰ Frances Robles & Shaila Dewan, *Skip Child Support. Go to Jail. Lose Job. Repeat*, *N.Y. TIMES* (Apr. 20, 2015), <https://www.nytimes.com/2015/04/20/us/skip-child-support-go-to-jail-lose-job-repeat.html>.

¹¹¹ *Id.*

and imprisonment.”¹¹² The majority offered some recognition of these considerations, providing greater due process protections.

Justice Thomas’s *Turner* dissent, on behalf of the Court’s four most conservative justices, is quite dismissive of poor fathers. Using gratuitously disparaging language, he wrote that “many ‘deadbeat dads’ opt to work in the underground economy to ‘shield their earnings from child support enforcement efforts.’”¹¹³ He charged that “[t]o avoid attempts to garnish their wages or otherwise enforce the support obligation, ‘deadbeats’ quit their jobs, jump from job to job, become self-employed, work under the table, or engage in illegal activity.”¹¹⁴ Providing no acknowledgment of the increased employment precarity that characterizes most low income communities and that makes jumping from job to job, becoming self-employed and more likely to work under the table commonplace,¹¹⁵ Thomas insisted on the importance of civil contempt,¹¹⁶ effectively blaming the men for the “flight” from marriage.

Child support enforcement involves administration of a system in ways that impose obligations that poor men cannot meet, ignores their often substantial in-kind contributions to their families, contributes to the racially disparate impact of the criminal justice system, and does so based on a false premise – if only fathers contributed more, the needs of poor children could be met. In the meantime, the emphasis on child support enforcement ignores the wholesale change in the economy, under which low-income men no longer have access to the jobs that would allow them to provide support for their families.

C. *Placing the Blue Family System Out of Reach*

We have argued that what explains the emergence of a new, blue, upper middle-class strategy is not just a shift in moral val-

¹¹² *Id.* See also Maldonado, *supra* note 108, at 1003-04 (estimating that 41% of African-American fathers are too poor to pay more than the minimum child support award).

¹¹³ *Turner*, 564 U.S. at 459.

¹¹⁴ *Id.* at 459-60.

¹¹⁵ See Maldonado, *supra* note 108, at 1002 (reporting that “seventy percent of the \$96 million owed in back child support in 2003 was owed by men earning \$10,000 per year or less, many of whom were unemployed or employed part-time.”).

¹¹⁶ *Turner*, 564 U.S. at 460.

ues from traditionalist to modernist ones, but an economic transformation that made the new system pay off and that undermined the economic viability of the old model.¹¹⁷ That economic transformation has two critical components: much greater rewards for investment in women's as well as men's earning capacity as two incomes became important for all but the wealthiest families and the stable, secure well-paying jobs of the industrial era began to disappear.

This economic shift had significant implications for women's relationship to health care. While healthy young men can get by with little access to health care, women from puberty through menopause need to be concerned about reproductive health – from contraception to fertility to pregnancy and childbirth to abortion. The lack of a comprehensive health care system is therefore a major factor in gender, class, and racial inequality, though it is not often discussed in such terms, particularly in Supreme Court opinions. A hidden feature in the Supreme Court opinions that discuss health care access is thus maintaining the barriers that separate those with systematic health care access from those who lack it. These barriers police the distinctions between the new upper middle class, and those who cannot attain the benefits of the new blue system. The statistics are striking.

In 2019, the government-funded Medicaid program paid for 42.1% of American births.¹¹⁸ Women who received Medicaid benefits were substantially less likely than woman covered by private insurance to have had any health insurance coverage before the pregnancy or after the birth.¹¹⁹ In addition, between 2015 and 2017, 57% of those receiving Medicaid assistance and 50% of those with no insurance reported having an unplanned pregnancy in comparison with only 34.5% of those with private insurance.¹²⁰ The health outcomes for mother and child were

¹¹⁷ See generally CARBONE & CAHN, MARRIAGE MARKETS, *supra* note 10 (discussing the new system).

¹¹⁸ *Medicaid and CHIP Beneficiary Profile: Maternal and Infant Health* (Dec. 2020), <https://www.medicaid.gov/medicaid/quality-of-care/downloads/mih-beneficiary-profile.pdf>.

¹¹⁹ *Id.* at 6.

¹²⁰ *Id.* at 21.

substantially better for mother and child for those with private insurance coverage than for those receiving Medicaid benefits.¹²¹

Access to health care thus affects the mother's health before she becomes pregnant, her ability to obtain the more effective contraceptive methods, such as the pill or IUDs, the impact of the pregnancy on the mother's health and the health of her child, and their well-being after birth. And women who want an abortion but are unable to secure one are more likely to be locked into poverty than similar women who have abortions.¹²² Access to health care thus shapes women's lives. And while the line of cases from *Griswold to Casey* freed women from restrictions on access, they did not make reproductive medicine available to those who could not afford it. The cases addressing these issues rarely provide recognition of the effect of the decisions – or of the counterproductive effects that often stem from the promotion of “moral values” beyond the reach of those affected by the decisions.

An important case enforcing a class line in reproductive access, for example, was *Harris v. McRae*.¹²³ After *Roe v. Wade*, Congress, in a provision known as “the Hyde Amendment” after its congressional sponsor, Representative Henry Hyde, prohibited the use of federal funds to reimburse the cost of abortions under the Medicaid program, including abortions that were the result of rape or incest or necessary to protect the mother's health.¹²⁴ In a 5-4 opinion in 1980, the Supreme Court upheld the constitutionality of the Amendment. The majority opinion for the Court treated the issue as a classic one of negative liberty, which the Court had long upheld, versus positive rights, which it did not recognize, explaining that the freedom to choose to have an abortion, even one necessary to save a woman's life, does not carry with it a government obligation to fund the abortion. The Court emphasized that “although government may not place obstacles in the path of a woman's exercise of her freedom of

¹²¹ *Id.*

¹²² Ronnie Cohen, *Denial of Abortion Leads to Economic Hardship for Low-Income Women*, REUTERS (Jan. 2, 2018), <https://www.reuters.com/article/us-health-abortion-hardship/denial-of-abortion-leads-to-economic-hardship-for-low-income-women-idUSKBN1F731Z>.

¹²³ *Harris v. McRae*, 448 U.S. 297 (1980).

¹²⁴ *Id.* at 302.

choice, it need not remove those not of its own creation.” It then added that: “Indigency falls in the latter category. The financial constraints that restrict an indigent woman’s ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortions, but rather of her indigency.”¹²⁵

The four dissenters viewed the Hyde Amendment as upholding class-based distinctions. Justice Blackmun made the point that the legislators championing the Hyde Amendment cynically sought to express their own views on the morality of abortion by imposing those views “only upon that segment of our society which, because of its position of political powerlessness, is least able to defend its privacy rights from the encroachments of state-mandated morality.” He would have accordingly subjected the legislation to more exacting judicial review.¹²⁶ Justice Stevens emphasized that “the Court expressly approves the exclusion of benefits in ‘instances where severe and long-lasting physical health damage to the mother’ is the predictable consequence of carrying the pregnancy to term” and, indeed, “even if abortion were the only lifesaving medical procedure available.”¹²⁷ Justice Marshall observed that “nonwhite women obtain abortion at nearly double the rate of whites” and that “as many as 100 excess deaths may occur each year as a result of the Hyde Amendment.”¹²⁸

In *Harris*, the Court recognized the validity of an extraordinarily cynical statute. An earlier decision had upheld state regulations limiting public funding of abortions to medically necessary abortions during the first three months of pregnancy.¹²⁹ That case, which the Court decided on a 6-3 basis, could be said to express the traditional judicial reluctance to compel public funding.¹³⁰ *Harris v. McRae*, in contrast, involved a Congressional ban on the use of federal funds to pay for *any*

¹²⁵ *Id.* at 316.

¹²⁶ *Id.* at 332.

¹²⁷ *Id.* at 354.

¹²⁸ *Id.* at 343.

¹²⁹ *Maher v. Roe*, 432 U.S. 464 (1977).

¹³⁰ Franklin, *supra* note 20, at 6 (describing the conventional view that the Supreme Court in these cases “rejected the idea that the Constitution guarantees affirmative rights.”).

abortion, including one necessary to save the life of the mother. The federal government, which recognized the importance of public funding for these women's health care, including their pregnancies, denied them assistance in potentially life-threatening circumstances outside of the women's control. Congress, in effect, restricted poor women's access to medically necessary abortions because it could – it could allow expression of the anti-abortion sentiments of members of Congress at the expense of a relatively powerless group.

In subsequent decisions, the Supreme Court has further encouraged this bifurcated approach. Following *Casey*, the Court upheld ever more restrictive abortion provisions across the country.¹³¹ By the time of the *Dobbs* decision, 90% of counties in the United States no longer offered abortion services. The result meant, at a practical level, that while the wealthy and the sophisticated could easily access abortion, the isolated and the impoverished could not.¹³² The proportion of women having abortions who were poor increased substantially between 1990 and 2014, but only because the disparities in unplanned pregnancies increased even more during this period.¹³³ Poor women have never had the comprehensive access to reproductive choice that has benefitted wealthier women.¹³⁴

¹³¹ Although Franklin argues that as recently as the Supreme Court decision in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2302 (2016), the Court held that if “a regulation impedes access to abortion for “poor, rural, or disadvantaged women,” then those are the subgroups on which the constitutional inquiry must focus—regardless of whether the state is responsible for the difficult life circumstances faced by many women in these groups.” Franklin, *supra* note 20, at 78, *Dobbs*' elimination of a right to abortion will produce exactly the result the *Whole Women's Health* opinion rejected—the effective elimination of access to abortion for marginalized subgroups but not for those with resources..

¹³² Sabrina Tavernise, *Why Women Getting Abortions Now Are More Likely to Be Poor*, N.Y. TIMES (July 9, 2019), <https://www.nytimes.com/2019/07/09/us/abortion-access-inequality.html>.

¹³³ *Id.* (observing that half of all women who got an abortion in 2014 lived in poverty compared to a quarter of the women who had abortions in 1994).

¹³⁴ Heather D. Boonstra, *Abortion in the Lives of Women Struggling Financially: Why Insurance Coverage Matters*, 19 GUTTMACHER POL'Y REV. (2016), <https://www.guttmacher.org/gpr/2016/07/abortion-lives-women-struggling-financially-why-insurance-coverage-matters> (concluding that one in four poor women who want an abortion are unable to afford one).

The major aid to poorer women's reproductive autonomy came with adoption of the Affordable Care Act, which has contributed to a drop in poor women's overall fertility rates, a drop that began with the financial crisis and continued over the next decade.¹³⁵ Yet, the Supreme Court has weakened rather than strengthened poor women's access to these benefits.

First, the decision that upheld the overall constitutionality of the Affordable Care Act (ACA) accepted Congress's power to establish the exchanges that made health insurance available to those who could afford to purchase subsidized coverage while striking down the provision that would have mandated Medicaid expansion to those within 133% of the poverty line throughout the country.¹³⁶ The majority in *National Federation of Independent Businesses v. Sebelius* objected that the ACA imposed too great a penalty on the states. It reasoned that while Congress could condition state eligibility for federal funding under the new program, it could not take away their existing Medicaid funding,¹³⁷ describing the "inducement" in the Act as "a gun to the head."¹³⁸ Justice Ginsburg's dissent objected that Congress was "simply requiring States to do what States have long been required to do to receive Medicaid funding: comply with the conditions Congress prescribes for participation."¹³⁹

The discussion cloaks the real issue underlying Medicaid expansion. Justice Ginsburg observed that "what makes this such a simple case, and the Court's decision so unsettling" is that the legislation, in an effort "to assist the needy, has appropriated federal money to subsidize state health-insurance programs that meet federal standards."¹⁴⁰ Indeed, the federal government picked up 100% of the initial costs associated with implementing

¹³⁵ Colleen MacCallum-Bridges & Claire Margerison, *The Affordable Care Act Contraception Mandate & Unintended Pregnancy in Women of Reproductive Age: An Analysis of the National Survey of Family Growth, 2008-2010 v. 2013-2015*, 101 *CONTRACEPTION* 34 (2019), <https://pubmed.ncbi.nlm.nih.gov/31655071/>.

¹³⁶ *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 585–86 (2012).

¹³⁷ *Id.* at 585.

¹³⁸ *Id.* at 581. The Court observed that "Medicaid spending accounts for over 20 percent of the average State's total budget, with federal funds covering 50 to 83 percent of those costs." *Id.*

¹³⁹ *Id.* at 519 (Ginsburg, J. dissenting).

¹⁴⁰ *Sebelius*, 567 U.S. at 633.

the program, and 90% thereafter so that the financial burden on the states was fairly minimal¹⁴¹ – and less than the state share of the pre-ACA program.¹⁴² Chief Justice Roberts, in contrast, objected that what Congress was doing was threatening the states with loss of their existing Medicaid funding for failure to adopt what Roberts characterized as a different, entirely new program. What neither opinion discussed is why states opposed Medicaid expansion, given the substantial financial incentives in the ACA for the states to do so. Most commentators attribute the opposition to the states' ideological opposition to government provision of health insurance, if not outright hostility to the poor people in their states.¹⁴³ Today, 11 states have still not adopted Medicaid expansion. In effect, the Court ruling allowed the states to promote ideological stances at the expense of the people in their states who need these additional benefits.¹⁴⁴

Second, the Supreme Court also cut back on support for women's ability to control the timing of reproduction in *Burwell v.*

¹⁴¹ A study of the impact of Medicaid expansion on state budgets between 2014 and 2017 indicated that in many states, it was net negative, meaning that the states gained more in revenue from the federal government and other program savings than they spend on additional costs. Bryce Ward, *The Impact of Medicaid Expansion on States' Budgets*, COMMONWEALTH FUND (May 2020), <https://www.commonwealthfund.org/publications/issue-briefs/2020/may/impact-medicaid-expansion-states-budgets>.

¹⁴² *Sebelius*, 567 U.S. at 637 (noting that Congress reimbursed the older Medicaid program at 83%).

¹⁴³ See, e.g., Trudy Lieberman, *The Gloves Are off in the Fight over Medicaid Expansion in Holdout States* (May 5, 2021), <https://centerforhealthjournalism.org/2021/05/04/why-fight-over-medicaid-expansion-holdout-states-far-over> (observing that the opposition comes primarily from fear that Medicaid expansion will eventually lead to a single payer health care system, but that others have attributed opposition to “[r]acism, a dislike for poor people, and a commonly held but mistaken belief that Medicaid recipients are able-bodied men and women too lazy to work.”)

¹⁴⁴ In recent years, Medicaid expansion has passed in every state where it was on the ballot, except in Montana, which proposed funding the state share through an unpopular tobacco tax, which triggered well-funded opposition from the tobacco industry. Erin Brantley & Sara Rosenbaum, *Ballot Initiatives Have Brought Medicaid Eligibility to Many but Cannot Solve the Coverage Gap* (June 23, 2021), <https://www.healthaffairs.org/doi/10.1377/forefront.20210617.992286/#:~:text=more%20recently%2C%20almost%20all%20states,%E2%80%94Virginia%E2%80%94expanded%20through%20legislation.>

*Hobby Lobby Stores*¹⁴⁵ and *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*.¹⁴⁶ In *Hobby Lobby*, the Court upheld the right of entities, including a closely held, for-profit corporation, to refuse to provide federally mandated health care benefits to their employees because the benefits covered the morning after pill, which the company claimed, inaccurately, acted as an abortifacient.¹⁴⁷ The Court gave little regard to women's loss of access to the contraceptives, holding that the federal government, if it chose, could provide them directly, without involving the women's employer.

In her dissenting opinion, Justice Ginsburg emphasized that the "ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."¹⁴⁸ She then recounted the legislative history of the ACA and the HHS regulations, noting that women have typically had to pay more for health services than men and that the ACA and the regulations specifically addressed the importance of covering preventive care, including contraception.¹⁴⁹ She concluded that the majority opinion "demands accommodation of a for-profit corporation's religious beliefs no matter the impact that accommodation may have on third parties who do not share the corporation owners' religious faith—in these cases, thousands of women employed by Hobby Lobby and Conestoga or dependents of persons those corporations employ."¹⁵⁰ The Court's subsequent opinion in *Little Sisters of the Poor* extended the principle.¹⁵¹ It upheld regulations that made it easier for employers who asserted religious objections to contraceptive coverage to simply opt out of the government regulations, thus allowing The Little Sisters, who operate nursing homes for the elderly poor, not to cover any contraceptive services for their employees.

¹⁴⁵ 572 U.S. 683 (2014).

¹⁴⁶ 140 S. Ct. 2367 (2020).

¹⁴⁷ Cahn & Carbone, *Uncoupling*, *supra* note 15, at 51-52.

¹⁴⁸ *Sebelius*, 567 U.S. at 741 (Ginsburg, J., concurring in part dissenting in part).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 740.

¹⁵¹ 140 S. Ct. 2367 (2020).

In these contraception cases, the Court undercuts the rights of female employees to access what the Supreme Court itself has acknowledged in past cases is necessary to their ability to participate equally in the economic and social life of the country.

The Supreme Court's decision in *Dobbs* represents a new chapter in this saga. While *Dobbs* is the most direct frontal assault on the terms of the blue family order, it does not necessarily undermine the blue family model in the states that will strengthen the right to choose.¹⁵² In other states, however, it directly overturns abortion rights, a lynchpin of the new system of reproductive control, and threatens those in the states that provide practical support for someone seeking to leave the state.¹⁵³ Moreover, the majority opinion scarcely notices that restricting abortion has an impact on those who might become pregnant.¹⁵⁴ Justice Alito mentions that women have insurance coverage for pregnancy care as well as laws that ban pregnancy discrimination, that guarantee leave for pregnancy and childbirth, and that allow women "safe havens" to give up their child with impunity. Of course, the protections for pregnancy discrimination are incomplete, a minority of states provide for paid family and medical leave for pregnancy complications and after birth, and safe haven laws do not necessarily prevent against prosecution.¹⁵⁵ Not only does the Court fail to mention these problems with existing protection, it also does not recognize the significant personal and bodily intrusion of forcing people to carry pregnancies to term.

Instead, *Dobbs* contributes to a system that locks poor women into poverty. The United States has higher rates of unplan-

¹⁵² Assuming, of course, that Congress does not eventually restrict the right to abortion at the national level.

¹⁵³ David Cohen, Greer Donley & Rachel Rebouché, *The New Abortion Battleground*, 123 COLUM. L. REV. __ (forthcoming 2022).

¹⁵⁴ See Suter & Cahn, *supra* note 41.

¹⁵⁵ Jennifer Bennett Shinall, *The Pregnancy Penalty*, 103 MINN. L. REV. 749, 753 (2018) ("Pregnant women remain among the most vulnerable workers in the labor market, even in the presence of two federal laws allegedly available, but insufficient, to protect them."); Deborah A. Widiss, *Equalizing Parental Leave*, 105 MINN. L. REV. 2175, 2203 (2021) (noting the lack of paid parental leave laws).

ned pregnancies than most other developed countries.¹⁵⁶ The states likely to restrict abortion have lower rates of contraceptive use¹⁵⁷ and less support for the babies who result. Studies show that early childbearing reduces the life chances of mother and child, barring women denied reproductive control from a pathway to a better life.¹⁵⁸

Conclusion

Dobbs follows from this retrenchment on support for the conditions necessary for blue family creation in Supreme Court jurisprudence. The interests of women in reproductive autonomy, critical to a blue family model, has become a matter that women are no longer necessarily free to secure for themselves; these interests now involve an interpretation of when life begins or individual obligations to fetuses at odds that are aligned with state preferred moral teachings.

In the context of these decisions, the blue family model becomes simply a set of personal choices about how to provide for families. The fact that it is beyond the reach of a large part of the country receives no recognition. Statutes such as the ACA are not interpreted in terms of their efforts to make the model more generally available to all, regardless of wealth; nor are the availability of such benefits considered to be either compelling governmental interests or central to women's equality. This restriction on the recognition of the preconditions for a new family system, a system that the Court cautiously supported in *King*, *Eisenstadt*, *Casey*, and *Lawrence*, undercuts the new system – and continues to block its availability for those who cannot afford it.

¹⁵⁶ Susheela Singh, Gilda Sedgh & Rubina Hussain. *Unintended Pregnancy: Worldwide Levels, Trends, and Outcomes*, 41 *STUD. IN FAM. PLANNING* 242 (2010), <https://pubmed.ncbi.nlm.nih.gov/21465725/>.

¹⁵⁷ Ayana Douglas-Hall, Kathryn Kost & Megan L. Kavanaugh, *State-Level Estimates of Contraceptive Use in the United States, 2017* (2018), <https://www.guttmacher.org/report/state-level-estimates-contraceptive-use-us-2017>.

¹⁵⁸ Kate Bahn et al, *Linking Reproductive Health Care Access to Labor Market Opportunities for Women*, CENTER FOR AMERICAN PROGRESS (2017), https://americanprogress.org/issues/women/reports/2017/11/21/442653/linking-reproductive-health-care-access-labor-market-opportunities-women/?_ga=2.70553554.33618461.1657514333-1768016308.1657085475; Caitlin Myers, Rachel Jones, & Ushma Upadhyay, *Predicted Changes in Abortion Access and Incidence in a Post-Roe World*, 100 *CONTRACEPTION* 367 (2019).