

REDEFINING PUBLIC BENEFITS

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“[M]arried people are happier than unmarried. Is that because marriage produces happiness or because unhappy people tend to be difficult to live with or because they sort out of the marriage market and on and on or all of the above?”¹

ABSTRACT

This Article considers the interaction between marriage, households, and public welfare-type benefits. In light of constant cultural and media attention to “the two-parent privilege,” this Article argues that the very purpose of public benefits in the modern era is up for redefinition.

The information age, much like the industrial revolution before it, has remade the preconditions for entry into the middle class and contributed to new middle-class family strategies geared to the changing labor market realities. This new era, which has increased income instability and employment insecurity, has increased economic inequality and eroded what were once secure pathways into middle-class status. This changing economy requires rethinking the purpose of public benefits and a reexamination of the fairness and utility of tying benefits to employment or marriage. Rethinking these connections requires reconceiving the State’s role from one that fills in the gaps left by private jobs’ creation and relationships to one that extends access to the preconditions for middle-class status.

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1. Sam Peltzman, *The Socio Political Demography of Happiness* 3 (George J. Stigler Ctr. for the Study of the Econ. & the State, Working Paper No. 331, 2023), <https://ssrn.com/abstract=4508123>.

This Article makes three contributions. First, it shows that marriage takes on a very different meaning in the new economy. Second, this Article challenges recent exhortations to marry as a way to improve children's futures, ensure economic stability, and increase overall happiness. Finally, this Article asks how, in the context of a post-industrial economy with constantly shifting employment needs, to assist in making the preconditions for middle class status universal instead of asking how to fill in the gaps of, or supplement, a private system that no longer reliably provides life-long employment for a large part of the population. In this venture, marriage becomes largely irrelevant to benefit design.

Part I surveys the design of the public benefits associated with relationship status as a precondition for middle-class status. Part II analyzes who actually receives the different types of marriage-based benefits. While, as Windsor pointed out, a number of federal statutes use marital status as a category, that status is not always a benefit, particularly for people who do not have a job. Part III explores why marriage remains resonant—and for whom. Finally, Part IV sketches out what a redesign of the public system might look like, analyzing how relationship status might be irrelevant to the availability of benefits.

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INTRODUCTION

Claims about the wealth and happiness gaps for married couples compared to the unmarried are well known.² While there is much speculation on *why* this occurs—selection bias, with wealthier people more likely to get married,³ is certainly a partial explanation—the focus should instead be on *how* and *whether* to address the gap beyond the touted antidote of marriage. Within the nonmarriage field, articles have generally focused on private remedies, whether contracts should be enforced, whether status should matter at dissolution or death for receiving assets from the other person, and on whether benefits—such as the estate and gift tax—should be available.⁴ The fight for the recognition of nonmarriage has been a fight to allow unmarried couples and singles to gain recognition for their households and their families. That fight starts with the basic right to recognition of cohabitants as units, whose members can enter into contracts, suffer tort losses, and have their relationships subject to and governed under the laws that regulate other private relationships.⁵ These have served as an effort to gain entrance into the privatized family law system and positive governmental benefits for nonmarital couples.⁶

Broadening this analysis requires a full consideration of the interaction between marriage, households, and needs-based benefits.⁷

2. *Id.*; Erez Aloni, *The Marital Wealth Gap*, 93 WASH. L. REV. 1, 3 (2018) (providing extensive exploration of the economic distinctions); Julia Carpenter, *Moving in Together Doesn't Match the Financial Benefits of Marriage, but Why?*, WALL ST. J. (Nov. 7, 2022, 2:19 PM), <https://www.wsj.com/articles/moving-in-together-doesnt-match-the-financial-benefits-of-marriage-but-why-11667761626>.

3. JUNE CARBONE & NAOMI CAHN, MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY 90 (2014); Carpenter, *supra* note 2.

4. *E.g.*, Peter Nicolas, *Backdating Marriage*, 105 CAL. L. REV. 395, 400–01 (2017) (discussing Social Security). *But see* Lily Kahng, *The Not-So-Merry Wives of Windsor: The Taxation of Women in Same-Sex Marriages*, 101 CORNELL L. REV. 325, 328 (2016) (noting that female spouses in same-sex married couples would be both less likely to receive benefits and more likely to experience adverse consequence through the taxation system than spouses in other couples).

5. *See e.g.*, Albertina Antognini, *Nonmarital Contracts*, 73 STAN. L. REV. 67, 75 (2021); Naomi Cahn & June Carbone, *Blackstonian Marriage, Gender, and Cohabitation*, 51 ARIZ. ST. L.J. 1247, 1264 (2019); Kaiponanea T. Matsumura, *The Marital Habitus*, 99 WASH. U. L. REV. 2033, 2034 (2022). Discussions of same-sex marriage prior to *Obergefell* emphasized the federal benefits available to couples who married. *See e.g.*, Laura A. Rosenbury, *Federal Visions of Private Family Support*, 67 VAND. L. REV. 1835, 1839–40 (2014).

6. We use the term “privatized” here to differentiate it from government-sponsored safety-nets, insurance, and transfer programs. The status of marriage relies on public recognition, but remedies, such as maintenance and property division, are not part of that government-sponsored system.

7. Deborah Widiss is careful to note:

This is a particularly important inquiry, both because of constant cultural and media attention to issues such as “the two-parent privilege”⁸ and because the very purpose of public benefits in the modern era is up for redefinition. The conventional wisdom is that the United States has never had as robust a welfare system as other developed nations, but the conventional wisdom is deeply misleading. The United States, for much of its history, has had a strong commitment to providing opportunities to join a robust and secure middle class. That commitment, which arose in colonial New England, and took hold nationally over the course of the nineteenth century,⁹ involved two components.

The first was support for the *preconditions* for a prosperous citizenry. The most important of these provisions included free secondary education, the federally funded land grant college system,¹⁰ and in later eras, the efforts to abolish child labor and secure labor

Marriage (to a wage-earner) may also raise an individual above eligibility levels for means-tested programs such as the Earned Income Tax Credit or Temporary Assistance for Needy Families. And remarriage by a widow or a divorcee generally cuts off eligibility for Social Security spousal benefits.

My deeper point is not that a given couple will always want to be considered married for federal purposes, but rather that federal law makes judgments about how to fairly distribute and apportion government resources, benefits, and obligations among various family structures, and it uses marriage as a proxy . . .

Deborah A. Widiss, *Leveling Up After DOMA*, 89 IND. L.J. 43, 48 (2014) (citations omitted). There are, of course, efforts within the nonmarriage movement to move beyond a focus on couples. See, e.g., Eleanor Brown, *Reflections: My Mother Who Fathered Me*, 72 WASH. U. J.L. & POL’Y 167, 168 (2023); Naomi R. Cahn, *Reflections on Singlehood*, 72 WASH. U. J.L. & POL’Y 27, 27–28 (2023); Matsumura, *supra* note 5, at 2060.

8. MELISSA S. KEARNEY, *THE TWO-PARENT PRIVILEGE: HOW AMERICANS STOPPED GETTING MARRIED AND STARTED FALLING BEHIND*, at ix–xii (Univ. Chi. Press, 2023); cf. Melissa S. Kearney & Phillip B. Levine, *Income Inequality, Social Mobility, and the Decision to Drop Out of High School*, BROOKINGS: PAPERS ON ECON. ACTIVITY, Spring 2016, at 333 (finding that places with higher levels of income inequality have lower social mobility rates); Nicholas Kristof, Opinion, *The One Privilege Liberals Ignore*, N.Y. TIMES (Sept. 13, 2023), <https://www.nytimes.com/2023/09/13/opinion/single-parent-poverty.html>.

9. Over the opposition of the South before and after the Civil War. See, e.g., BETSY WOOD, *UPON THE ALTAR OF WORK: CHILD LABOR AND THE RISE OF A NEW AMERICAN SECTIONALISM* 60 (2020).

10. See, e.g., William C. Dudley, President and Chief Exec. Officer, Fed. Rsrv. Bank of N.Y., Remarks at the Association for Neighborhood and Housing Development Annual Community Development Conference, New York City: Economic Opportunity and Income Mobility (Apr. 11, 2016), <https://www.newyorkfed.org/newsevents/speeches/2016/dud160411> (citing work by Raj Chetty and maintaining that high-quality education is key to social mobility); June Carbone, *The Fight to Expand Education—Two Centuries Apart*, 71 FLA. L. REV. F. 164, 167–68 (2019) (describing the importance of free secondary education to “The American Century”).

rights. The provisions that assisted in meeting the preconditions for membership in the middle class became universal (free public secondary education) or widespread (at least to White people), such as access to secure jobs and protection from child labor,¹¹ by the middle of the twentieth century. These provisions became part of a distinctively American commitment to education as a critical component in forging a prosperous and stable middle class.¹²

The second component, which gradually came into existence by the middle of the twentieth century, consisted of limited gap fillers that addressed the instability of wage labor. They were designed to complement private labor markets, and provided benefits such as unemployment compensation, workers' compensation programs, Social Security retirement and survivors' benefits, and a variety of tax incentives and exclusions, built on the concept of a "male" family wage.¹³ "Gap fillers," consequently, were limited support provided to those seen as in need due to the operation of the industrial economy. They benefitted those who were seen as deserving of assistance because of old age, unemployment, and other factors beyond their control. In contrast, those receiving assistance justified by need alone were seen as less "worthy." In between were benefits extended to women and children to compensate for the loss of a male breadwinner. Benefits such as mothers' pensions or Civil War pensions typically relied on proof of marriage precisely because the beneficiaries were

11. See Naomi Cahn et al., *Children at Work, Parental Rights—and Rhetoric*, ARK. L. REV. (forthcoming 2024) (manuscript at 14–17) (on file with authors) for a discussion on the limitations of child labor protections.

12. See, e.g., Carbone, *supra* note 10, at 165, 170–71 (observing that while the nineteenth century emphasis on more formal education initially increased inequality, over time, the United States generally saw greater education in children as creating access to better jobs and wages).

13. See e.g., Blake Emerson, *Public Care in Public Law: Structure, Procedure, and Purpose*, 16 HARV. L. & POL'Y REV. 35, 46 (2021) ("The American welfare state maintained a practice of public caring throughout the twentieth century, though this orientation has always been partial and precarious. . . . The welfare state that has developed since the New Deal remained in many respects 'patriarchal,' in the sense that it prioritized work-based entitlements disproportionately enjoyed by men over caregiving supports that disproportionately went towards women."); Zachary Liscow, *Redistribution for Realists*, 107 IOWA L. REV. 495, 519 (2022) (discussing Richard Nixon and Milton Friedman's advocacy for a "negative income tax"); Karen M. Tani, *Disability Benefits as Poverty Law: Revisiting the "Disabled State"*, 170 U. PA. L. REV. 1687, 1695 (2022) (noting Richard Nixon's support for the "ill-fated Family Assistance Plan"). On whether the Nixon proposal was progressive, see Deborah Dinner, *The Universal Childcare Debate: Rights Mobilization, Social Policy, and the Dynamics of Feminist Activism, 1966–1974*, 28 LAW & HIST. REV. 577, 614 n.151 (2010) (setting out scholarship on both sides).

seen as entitled to the benefits after the loss of income from a breadwinner legally obligated to support his family.¹⁴

The universal benefits, like free public education, that created the infrastructure for movement into and maintenance of middle-class status have become so taken for granted that they are rarely discussed as benefits at all. The gap-filler provisions that compensate for the limitations of a private labor system could have been seen as part of a state obligation to provide at least a minimum level of support for all its citizens. Instead, however, gaps in employment rather than need were seen as the primary justifications for support; the poor were typically seen as responsible for their own fate. Even Lyndon Johnson's "War on Poverty" was justified as creating opportunities rather than providing a baseline level of support.¹⁵ Although Richard Nixon supported what was essentially a universal basic income supplement, it was in the form of family assistance with work requirements¹⁶—and it was never enacted.¹⁷

Partly as a result, middle-class status was never universal. The majority of White men gained access to jobs that paid enough to support a family without a second income only after World War II,¹⁸ but the majority of Black families remained below the poverty line

14. THEDA SKOCPOL, *PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES* 32, 107 (Belknap Press of Harvard Univ. Press ed. 1995). "Widow's pensions" took a variety of forms over time and the status of the program often varied with the status of the breadwinner. *Id.* at 106–07. Military widows were often seen as particularly deserving. *See id.* at 32, 107. The Aid to Families for Dependent Children program, which began in the 1930s as a nationalization of the "mothers' pensions" adopted during the Progressive Era, was seen as benefitting widows. *Id.* at 535. Even then, the program had more restrictions (and a larger state role) than Social Security spousal benefits, and the benefits were more stigmatized than the more universal gap fillers. *See* Serena Mayeri, *Marital Supremacy and the Constitution of the Nonmarital Family*, 103 CAL. L. REV. 1277, 1299–300 (2015) (discussing the concept of "worthiness" in the history of the provision of such benefits).

15. Indeed, programs like Aid for Dependent Children, which were more closely tied to need, tended to be more stigmatized and less universally available. *See* John E. Hansan, *Public Welfare: Aid for Dependent Children*, VCU LIBRS., <https://socialwelfare.library.vcu.edu/public-welfare/public-welfare-aid-for-dependent-children/> (last visited Mar. 29, 2024); ALLISON A. TAIT, *FAMILY MONEY* (forthcoming 2024) (manuscript at 23) (on file with authors).

16. Henry Aaron, *The Politics of a Guaranteed Income*, 82 YALE L.J. 1725, 1731 (1973) (book review).

17. *See generally* Robert F. McNown, *The Story of the Family Assistance Plan*, 65 CURRENT HIST. 57, 57–58 (1973).

18. *See generally* ANDREW J. CHERLIN, *LABOR'S LOVE LOST: THE RISE AND FALL OF THE WORKING-CLASS FAMILY IN AMERICA* 1–2 (2014). And, while education was available to both boys and girls, males were expected to be the primary breadwinners.

until the War on Poverty¹⁹—even though Black women were more likely than White women to be married and employed in 1960.²⁰ While the idea of a stable middle class has long been thought important for societal stability, the ability to extend middle-class status to the bulk of the population became possible only with the greater wealth of the industrial age. However, even then, the idea of government intervention to ensure universal access did not have consensus-based support.

The information age, much like the industrial revolution before it, has remade the preconditions for entry into the middle class and contributed to new middle-class family strategies geared to the changing labor market realities. This new era, which has increased income instability and employment insecurity,²¹ has increased economic inequality and eroded what were once secure pathways into middle-class status. The new economic realities have eliminated the labor market premium accorded to male brawn, automated increasing numbers of jobs of all kinds, increased the demand for those with complex and changing skills, and created greater need for services—such as healthcare and education—that depend on public funding. This changing economy requires rethinking the purpose of public benefits and a reexamination of the fairness and utility of tying benefits to employment or marriage. This requires reconceiving the State's role from one that fills in the gaps left by private job creation and relationships to one that extends access to the *preconditions* for middle-class status to a broader segment of the entire population.

With this switch—from gap fillers that complemented marriage and employment as gateways to adult status, to the creation of new pathways into mature adulthood—marriage becomes irrelevant. Instead of a universally accessible avenue to the assumption of adult responsibility, marriage becomes possible only for those who can realize the preconditions of middle-class status. Instead of viewing public benefits as anti-poverty measures, they should be seen as investments in income

19. The Black poverty rate in 1959 was 55.1%. Dylan Matthews, *Poverty in the 50 Years Since 'The Other America,' in Five Charts*, WASH. POST (July 11, 2012, 9:48 AM), <https://www.washingtonpost.com/news/wonk/wp/2012/07/11/poverty-in-the-50-years-since-the-other-america-in-five-charts/>.

20. See U.S. DEPT OF LABOR, NEGRO WOMEN WORKERS IN 1960, at 40 tbl.A-5 (1964), https://fraser.stlouisfed.org/files/docs/publications/women/b0287_dolwb_1964.pdf.

21. See Eleanor Brown, Naomi Cahn & June Carbone, *The Price of Exit*, 99 WASH. U. L. REV. 1897, 1901 (2022); AUSTIN NICHOLS, TRENDS IN INCOME INEQUALITY, VOLATILITY, AND MOBILITY RISK, URB. INST. 1, 23 (Nov. 25, 2008), <https://www.urban.org/sites/default/files/publication/32196/411799-trends-in-income-inequality-volatility-and-mobility-risk.pdf>.

security and family stability. This is, as others have noted, a matter of justice,²² but it is also a necessity for productive societies.

While some identify the success sequence for adulthood as graduating high school, getting a job, marrying, and then having kids,²³ the true success sequence is one that starts with adequate healthcare and nutrition during pregnancy. It continues with support for new families during the postpartum period, food security and residential stability during childhood, the ability to remain healthy through adulthood, and educational opportunities that enhance cognitive development in early childhood. This success sequence extends not just through college graduation, but through the lifelong acquisition of the essential skills and training necessary to be productive members of the workplace. Recognizing these factors as prerequisites for meaningful citizenship, rather than as rewards or gap fillers, underscores the importance of making such benefits universal and tied to individual rather than family status. Responsible workers and stable families follow from these investments; they should not be seen, as marriage promotion theorists sometimes argue, as rewards for adopting conventional family forms. Instead, public benefits should be redesigned to make the advantages of the new economy available to a broader segment of the public.

This Article makes three contributions. First, it shows that marriage takes on a very different meaning in the new economy. Stable industrial employment, which depended on unionization and other labor market interventions, ultimately created narrow portals of entry into secure jobs that offered opportunities for advancement.²⁴ In such a world, getting hired for the first job, ideally soon after completing one's education, was the point; the employer provided training, experience, and opportunities for raises and promotions. Preconditions, typically a terminal degree, were at a minimum and benefits complemented the regulated and predictable labor marketplace. Men who could get such jobs could marry and, at least in the mid-twentieth century, did so at relatively young

22. For arguments to this effect, see MAXINE EICHNER, *THE SUPPORTIVE STATE: FAMILIES, GOVERNMENT, AND AMERICA'S POLITICAL IDEALS* 11–12 (2010); MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY*, at xv (2004); LINDA C. MCCLAIN, *THE PLACE OF FAMILIES: FOSTERING CAPACITY, EQUALITY, AND RESPONSIBILITY* 117–18 (2006); Serena Mayeri, *Marriage (In)equality and the Historical Legacies of Feminism*, 6 CAL. L. REV. CIR. 126, 132 n.36 (2015) (citing, among other sources, Johnnie Tillmon, *Welfare Is a Women's Issue* (1972), MS. MAG., Spring 2002).

23. See, e.g., Brian Alexander, *What Is the 'Success Sequence' and Why Do So Many Conservatives Like It?*, ATLANTIC (July 31, 2018), <https://www.theatlantic.com/family/archive/2018/07/get-out-of-poverty-success-sequence/566414/>.

24. Katherine V.W. Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 UCLA L. REV. 519, 533–35 (2001).

ages. They and their families enjoyed the benefits that accompanied employment. In a post-industrial world, by contrast, employers invest less in worker training, employment is more precarious, the preconditions for stable employment—which include both shifting skills and experience—are greater, and “gap-fillers”—such as unemployment compensation and disability benefits—themselves have gaps that leave out a substantial part of the population. These shifts make benefit design ripe for reconsideration. A larger part of the population requires access to preconditions such as retraining or additional education over the course of a lifetime, “welfare” benefits based on need may be necessary to complement paid work, and marriage—and family form generally—is less relevant to benefit design.

This Article’s second contribution is to reconsider recent exhortations to marry as a way to improve children’s futures, lead to economic stability, and increase overall happiness as a factor in benefit design. These exhortations are not new, and the debate about whether married people are happier to begin with, or whether marriage makes people happier, for example, has studies on both sides.²⁵ Missing from the discussion is an acknowledgement that earlier efforts to stabilize the family depended on stabilizing the male breadwinner role in an era of female dependence; many of the gap-filler benefits compensated for breadwinner loss. In an era of dual earners and changing family composition, benefit design becomes more complex. The precondition benefits, for example, that contribute to productive adulthood begin in early childhood. Benefits such as family allowances or subsidized daycare should—much like elementary and secondary education—be tied to individual children, not family structure. On the other hand, housing subsidies may take on an entirely different form tied much more directly to household composition. As this Article shows, the question is how best to prepare the population for the new post-industrial age and benefit design in this context will necessarily be tied less to marriage.

Finally, this Article asks how, in the context of a post-industrial economy with constantly shifting employment needs, one might assist in making the preconditions universal instead of asking how to fill in the gaps of, or supplement, a private system that no longer reliably provides life-long employment for a large part of the population. In this venture, marriage becomes largely irrelevant to benefit design. The current debate over public benefits reform is asking the wrong questions because it fails to acknowledge that today’s economy, unlike the economy of the

25. Olga Khazan, *Take a Wife ... Please!*, ATLANTIC (Aug. 31, 2023), <https://www.theatlantic.com/ideas/archive/2023/08/does-marriage-make-you-happier/675145/>.

industrial age, no longer provides a large number of “good jobs,” offering security, advancement, and complementary benefits such as health insurance and old age pensions.²⁶ The benefits system instead needs to start with the question where the jobs of the future are to come from in an era of “disruption,” automation, and shifting employer needs. Benefits such as the Earned Income Tax Credit (“EITC”), Medicaid, and other benefits, as a practical matter subsidize the creation of lower paying jobs. Gap-fillers have become more varied, as they compensate less for the loss of a single breadwinner, and “welfare” benefits that meet some minimum level of need become—or should become—universal. The new system should acknowledge that entry into the middle-class system requires a new infrastructure that starts in the cradle and extends through retirement. Pretending that this can be done entirely on a free market basis reifies class divisions, and marriage has become one of those divisions. It is a *consequence*, not a *cause*, of the inability of large parts of the population to reach middle-class status.

Part I surveys the design of the public benefits associated with relationship status as a precondition for middle-class status, exploring the historical reasons that marriage has served as a dividing line. It provides a more nuanced view of those benefits, noting their socioeconomic bias and setting up an argument that marriage should be irrelevant to the design of a new public benefits system that provides the preconditions for middle-class status.

Part II analyzes who *actually* receives the different types of marriage-based benefits. Part III explores why marriage remains resonant—and for whom. Finally, Part IV sketches out what a redesign of the public system might look like, analyzing how relationship status might be irrelevant to the availability of benefits.²⁷ For example, under the current system, a stay-at-home spouse can claim Social Security based on a breadwinning spouse’s work record, essentially a guaranteed income based solely on age and marriage to a worker; by contrast, there is no universal basic income available, regardless of age.

26. See Arne L. Kalleberg, GOOD JOBS, BAD JOBS: THE RISE OF POLARIZED AND PRECARIOUS EMPLOYMENT SYSTEMS IN THE UNITED STATES, 1970S TO 2000S, at 9 (2011).

27. See Daniel Hemel, *Beyond the Marriage Tax Trilemma*, 54 WAKE FOREST L. REV. 661, 702 (2019) (“[S]etting aside the efficiency implications, are there meaningful harms—expressive or otherwise—when the law distinguishes among individuals on the basis of their coupling decisions?”).

I. MARRIAGE AS A DIVIDING LINE FOR BENEFITS

Marriage is often celebrated. From *United States v. Windsor* through *Obergefell v. Hodges*, the Supreme Court has extolled both the emotional benefits of marriage and recognized the thousand-plus “incidents, benefits, and obligations” available because of marriage.²⁸ The law has served a channeling function with respect to marriage, and both federal and state laws support marriage.²⁹ The federal government provides family and medical leave, estate and gift tax benefits, and Social Security benefits (among others).³⁰ State law similarly provides economic benefits, such as tax breaks, marital property distribution and alimony, and family and medical leave; it also recognizes emotional interdependence through default assumptions—such as those relating to surrogate healthcare decision-making—and marriage, at least historically, has been an institution that privatizes dependence and controls women’s sexuality.³¹ For those following the traditional success sequence, it creates an economic foundation for family life and serves as a channel that transfers capital (human and financial) to the next generation. This Part briefly explores the role of marriage as a vehicle for the distribution of assets, and then turns to show that not all marriages even receive those benefits.

28. *United States v. Windsor*, 570 U.S. 744, 768 (2013); *Obergefell v. Hodges*, 576 U.S. 644, 666–70 (2015). Note that the terminology includes not just benefits but other conditions that attach to marital status.

29. See Carl E. Schneider, *The Channelling Function in Family Law*, 20 HOFSTRA L. REV. 495, 498 (1992).

30. *Id.* at 503.

31. June Carbone, *Out of the Channel and into the Swamp: How Family Law Fails in a New Era of Class Division*, 39 HOFSTRA L. REV. 859, 871 (2011); Linda C. McClain, *Love, Marriage, and the Baby Carriage: Revisiting the Channelling Function of Family Law*, 28 CARDOZO L. REV. 2133, 1234–35, 2139, 2161 (2007); Schneider, *supra* note 29, at 503.

A. *Why Marriage?*

Many benefits tied to marriage are relics of an era in which marriage served as the foundation for childrearing.³² The standard marriage model presumed a male breadwinner and a female homemaker who, even if she received paid compensation for work outside the home, would earn substantially less than the primary breadwinner.

In such a patriarchal world, the precondition for marriage was the breadwinner's ability to secure a stable income. Middle-class status then followed from greater investment in children and the ability of boys to defer marriage long enough to obtain the "good" jobs of the industrial era.³³ The ability of men to find stable employment varied over time.³⁴ Sara McLanahan lauded the benefits to children from the marriage-based families of the industrial era, but with no recognition that it took a century for the children of the White working class to be able to fully realize the benefits she described and that the advantages of the system had never been available on a wholesale basis to Black families and other racial minorities.³⁵ Instead, a majority of the working class gained access to the benefits of the system only with the creation of an infrastructure that expanded the federal economic role to tame the business cycle and encouraged a union movement that promoted job security. With this system, men with a high-school degree could typically get jobs that offered the ability to support a family and

32. See McClain, *supra* note 31, at 2134–35. In 1940, more than seventy-five percent of U.S. households were married-couple families; that has dropped to less than half, and the percent of married couples with children has fallen in half. Linda A. Jacobsen et al., *Household Change in the United States*, POPULATION BULL. 3 (Sept. 2012), <https://www.prb.org/resources/household-change-in-the-united-states/>; Thomas Gryn et al., *Married Couple Households Made up Most of Family Households*, U.S. CENSUS (May 25, 2023), <https://www.census.gov/library/stories/2023/05/family-households-still-the-majority.html>. Note that the precise percentages vary, depending on the source. For example, another report finds that thirty-one percent of women never married in 1880. JULISSA CRUZ, NAT'L CTR FOR MARRIAGE RSCH., *MARRIAGE: MORE THAN A CENTURY OF CHANGE* (2013), <https://www.bgsu.edu/content/dam/BGSU/college-of-arts-and-sciences/NCFMR/documents/FP/FP-13-13.pdf>. And, over the past 100 years, it has not gotten higher than seventy percent. *Id.*

33. CHERLIN, *supra* note 18, at 5–7, 115–17.

34. *Id.* at 12.

35. Sara McLanahan, *Diverging Destinies: How Children Are Faring Under the Second Demographic Transition*, 41 DEMOGRAPHY 607, 614 fig.6 (2004) (showing divergence in family income by class accelerating in the later part of the twentieth century); see generally CHERLIN, *supra* note 18, at 93–94, 119 (describing how blue-collar workers gained in status, particularly in the era following World War II, and have lost ground since); Brown et al., *supra* note 21, at 1921 (explaining the raced-based nature of these benefits).

stability over time. The more visible public benefits of the era—Social Security retirement and survivors’ benefits, unemployment compensation, and employer provided health insurance—were designed to complement and reinforce the role of private employment and marriage as foundational to the households of the era.

Even public welfare depended on social norms about marriage. The origins of Aid for Families with Dependent Children (“AFDC”—today “TANF”) are the movements for mothers’ pensions and support for deserted wives and widowed mothers.³⁶ And, as Serena Mayeri points out, even the challenges to the requirements of worthiness for receiving assistance focused on the worthiness of the children, with the State permitted to regulate the morality of the parent.³⁷

B. *Changing Marriage*

Today, the *preconditions* for stable relationships have changed, with lower-income people less likely to marry and more likely to divorce: marriage seems out of reach (or less advantageous). The secure industrial era jobs available to men with high-school degrees have largely disappeared. They have been replaced by a post-industrial economy that simultaneously produces more high-end jobs requiring greater education, experience, and skill; more low-end jobs with few benefits and little security; and many more jobs at all levels of the economy for women. Within this new economy, marriage has become the province of the relatively well-off who can manage either a single breadwinner capable of supporting the family (today likely to require income of over \$250,000 a year) or two incomes in the context of a relationship based on equal respect.³⁸ As a practical matter, therefore, the prerequisites for marriage have changed. Those who marry—and stay married—typically do so after both spouses have acquired the education, experience, and skills that allow spouses to trade off work and family roles and have enough of a financial cushion to weather job changes, layoffs, and changing family needs.³⁹

36. LINDA GORDON, *PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE, 1890–1935*, at 35, 37 (1994).

37. Mayeri, *supra* note 14, at 1299.

38. In fifty-five percent of heterosexual marriages, the husband is still the primary or sole breadwinner; this is true for the wife in only sixteen percent of marriages. Richard Fry et al., *In a Growing Share of U.S. Marriages, Husbands and Wives Earn About the Same*, PEW RSCH. CTR. (Apr. 13, 2023), <https://www.pewresearch.org/social-trends/2023/04/13/in-a-growing-share-of-u-s-marriages-husbands-and-wives-earn-about-the-same/>.

39. We called the emergence of this new family system “blue families” because the new system emerged first in the more liberal (or politically “blue”) areas of the country and because an embrace of contraception and abortion as necessary to the postponement of

Those who fail to obtain the needed education, skills, and experience are much more likely to cycle in and out of insecure jobs with few benefits, and to cycle in and out of transient relationships. More than thirty percent of American households lack the savings to deal with an unexpected \$400 bill.⁴⁰ The net result of these economic changes is a two-tiered economy: a first tier that allows marshaling the substantial resources necessary to obtain good jobs, manage stable relationships, and—if the adults choose to have children—invest in preparing the next generation to assume similar roles and a second tier that locks a substantial portion of the overall population into a subsistence existence, in which adults live paycheck to paycheck, with a limited ability to weather unexpected expenses or loss of income. These class (and often race) based differences explain not only why marriage has become a marker of privilege but why Black Americans receive less benefit from marriage than White Americans.⁴¹

C. *When Does Marriage Matter?*

In conjunction with the Defense of Marriage Act, the federal government undertook an examination of where marriage mattered in federal statutes.⁴² The careful analysis identified thirteen categories of statutes for which marital status made a difference with respect to classifications for eligibility.⁴³ While many of them are “benefits,” the report itself characterized statutory provisions by whether they made “marital status relevant.”⁴⁴ These provisions can be grouped into two distinct sets.

family obligations is a distinguishing feature of the new system. NAOMI CAHN & JUNE CARBONE, *RED FAMILIES V. BLUE FAMILIES: LEGAL POLARIZATION AND THE CREATION OF CULTURE* 1–2 (2010); Naomi Cahn & June Carbone, *The Blue Family Constitution*, 35 J. AM. ACAD. MATRIM. L. 505, 508 (2023); Richard Reeves & Christopher Pulliam, *Middle Class Marriage is Declining and Likely Deepening Inequality*, BROOKINGS (Mar. 11, 2020), <https://www.brookings.edu/articles/middle-class-marriage-is-declining-and-likely-deepening-inequality/>.

40. FED. RSRV., *ECONOMIC WELL-BEING OF U.S. HOUSEHOLDS IN 2021*, at 35 (2022), <https://www.federalreserve.gov/publications/files/2021-report-economic-well-being-us-households-202205.pdf>.

41. See Christina Cross, *The Myth of the Two-Parent Home*, N.Y. TIMES (Dec. 9, 2019), <https://www.nytimes.com/2019/12/09/opinion/two-parent-family.html> (“[F]amily structure has a weaker relationship to the educational success of black adolescents than of white adolescents.”).

42. U.S. GOV’T ACCOUNTABILITY OFF., GAO/OGC-97-16, *DEFENSE OF MARRIAGE ACT* (1997) [hereinafter GAO 1997 REPORT], <https://www.gao.gov/assets/ogc-97-16.pdf>; U.S. GOV’T ACCOUNTABILITY OFF., GAO-04-353R, *DEFENSE OF MARRIAGE ACT: UPDATE TO PRIOR REPORT* (2004).

43. GAO 1997 REPORT, *supra* note 42, at 3.

44. *Id.*; GAO 2004, *supra* note 42, at 2.

First, in the most important of economic-related statutes that relied on marital status, such as Social Security or income, estate, and gift taxation, “recognition of the marital relationship is integral to the design of the program[s]” as they treat the family as a single economic unit and provide, in various ways, for survivors and dependents.⁴⁵ A variety of veterans’, military, and federal employee benefits also extend eligibility for such programs to spouses,⁴⁶ and regulation of private employee benefits often includes protections for spouses.⁴⁷ Similarly pervasive in federal tax law is the distinction between married and unmarried status.⁴⁸ Spouses may also have a variety of advantages under immigration law,⁴⁹ with respect to tribal property ownership,⁵⁰ filing for bankruptcy,⁵¹ or in acquiring federal lands or water and mineral rights.⁵²

Second, in other programs, the income of the family unit is built into eligibility determinations and may be a disadvantage for the married couple.⁵³ Spouses may be disqualified in some cases from certain positions because of conflicts of interest or be subject to reporting requirements, and family relationships may define criminal activities that would not necessarily be crimes between unrelated individuals.⁵⁴

Many of the benefits, such as Social Security and Medicare, also reflect an assumption that couples may be dependent on each other and, therefore, a pension earned by one should be available to the other.⁵⁵ The importance of marriage to such programs, however, also

45. GAO 1997 REPORT, *supra* note 42, at 1–4. In particular, “the law establishing the Old Age, Survivors, and Disability Insurance (OASDI) program (Social Security) is written in terms of the rights of husbands and wives, and widows and widowers” and “prescribes in great detail the corresponding rights of the current or former spouse.” *Id.* at 5.

46. *Id.* at 3 (describing veterans’ benefits, including: pensions, indemnity compensation for service-connected deaths, medical care, nursing home care, right to burial in veterans’ cemeteries, educational assistance, and housing available to spouses); *id.* at 4–5 (describing laws governing federal employees and officers in which marriage affects health, life insurance, or survivor benefits).

47. *Id.* at 5–6.

48. *Id.* at 3.

49. *Id.* at 6.

50. *Id.* at 7.

51. *Id.*

52. *Id.* at 12.

53. *Id.* at 10 (describing loan eligibility).

54. *Id.* at 9–10.

55. And, in fact, married couples are more likely to commingle their finances while unmarried couples vary widely on this point. *See, e.g.*, D’Vera Cohn, *Cohabiting Couples and Their Money*, PEW RSCH. CTR. (Nov. 11, 2011), <https://www.pewresearch.org/social-trends/2011/11/22/cohabiting-couples-and-their-money/>; Joanna R. Pepin & Philip N.

involves the decision to subsidize old age and other benefits through the connection to employment.⁵⁶ While pension benefits are seen as “earned,” they in fact reflect substantial government subsidies only indirectly related to employment. Had the government funded old age benefits directly, for example, it would have tied eligibility to individual circumstances and marriage would have been much less important.

II. THE TIERED APPROACH

The benefits of the industrial age have long had a two-tiered approach. The greatest subsidies have gone to the benefits associated with long-term employment⁵⁷ and are extended to spouses and other family members through marriage. A second tier of programs provides underfunded support to those who are in need and have failed to attain the preconditions for middle-class status.⁵⁸ Marriage within this system brings fewer benefits; for example, they might have too much joint income for eligibility for long-term care through Medicaid, and imprisonment might threaten the marriage.⁵⁹

The post-industrial economy has made this two-tiered system worse. Social scientists have described the polarization of the labor market between low-wage, low-skill jobs and well-paid, high-skill jobs, with an

Cohen, *Nation-Level Gender Inequality and Couples' Income Arrangements*, 42 J. FAM. ECON. ISSUES 13, 14 (2021) (noting, in surveys of twenty countries, that “[t]he nearly universal tendency of cohabiting couples to exhibit lower levels of financial integration is surprising given the disparate trends in cohabitation.”).

56. See, e.g., 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, 680–81 (2012) (explaining that even before the adoption of the Affordable Care Act, employer provided healthcare was the biggest tax subsidy in the federal budget).

57. See *id.* at 681 (noting the enormous subsidies associated with employer provided healthcare); Naomi Cahn & June Carbone, *Uncoupling*, 53 ARIZ. ST. L.J. 1 passim (2021); see also Thomas C. Buchmueller & Alan C. Monheit, *Employer-Sponsored Health Insurance and the Promise of Health Insurance Reform*, 46 INQUIRY 187, 188 (2009) (describing private health insurance subsidies as the largest tax expenditures in the federal budget).

58. JOINT ECON. COMM., 117TH CONG., PARTISAN ATTACKS ON UNEMPLOYMENT COMPENSATION ARE NOTHING NEW 1 (Issue Brief 2021), https://www.jec.senate.gov/public/_cache/files/7577ebd3-1406-47d5-874e-c2a294923e9d/partisan-attacks-on-unemployment-insurance-are-nothing-new-final-2021-08-03.pdf.

59. For some of the difficulties of the reentry process, see Ann Cammett, *Deadbeats, Deadbrokees, and Prisoners*, 18 GEO. J. ON POVERTY L. & POL'Y 127, 158 (2011); Kelly Orians & Thomas Frampton, *In Defense of Reentry: A Response to Shreya Subramani's Productive Separations*, 47 FORDHAM URB. L.J. 993, 998 (2020).

increase in work arrangements without security or benefits.⁶⁰ Despite these changes, the benefits that go to the first tier, often (like Social Security) tied to marriage, tend to be seen as merited and universally obtainable—even when marriage itself and stable employment are less universal now than they once were. The benefits that go to the second tier, particularly when they are triggered by adverse events such as layoffs or need, tend to be less generous and more grudgingly extended.⁶¹

A. *The Needs-Based Tier*

The role of marriage in this benefits structure makes the inequities worse. The system continues to provide meaningful benefits for the successful, but the older-style benefits, even when they are available to the second tier, are not well-designed to meet their most pressing needs. Most of the federal statutes that use marital status, such as the estate taxation system that was at the core of *Windsor*, for example, are not useful to lower-income couples. Workers in unstable or low-income jobs may not qualify for federal family leave protection (and they are less likely to have access to paid leave)—or more likely to have equal earnings with their spouse that subject the couple to higher taxes.⁶² Similarly, alimony is only useful where one spouse has earned an income sufficient to contribute to two households. Ultimately, focusing on marriage shows a failure to recognize the need to create a new infrastructure that would allow a larger portion of the population to be able to achieve the preconditions for stable, middle-class life. That is,

60. Catherine R. Albiston & Catherine L. Fisk, *Precarious Work and Precarious Welfare: How the Pandemic Reveals Fundamental Flaws of the U.S. Social Safety Net*, 42 BERKELEY J. EMP. & LAB. L. 257, 272 (2021) (summarizing literature and describing the growth of precarious employment).

61. “These programs draw lines around those who do and do not ‘deserve’ support based broadly on notions of faultlessness, reciprocity, and work effort.” Ariel Jurow Kleiman, *Inequality of Deservingness*, 23 J. CONTEMP. LEGAL ISSUES 235, 236 (2022).

62. *United States v. Windsor*, 570 U.S. 744, 772–74 (2013). And, as a pragmatic matter, there are downsides to marriage for anyone, including higher tax brackets, higher student loan payments, and higher car insurance rates. See Chris Butsch, *7 Financial Benefits of Marriage (and 4 Possible Drawbacks)*, MONEY UNDER 30, <https://www.moneyunder30.com/financial-benefits-of-marriage/> (Feb. 17, 2024); see also Naomi Cahn & Patricia Papernow, *Older Stepouples and the Knot*, FAM. CT. REV. (forthcoming 2025) (on file with authors); Roxanne Roberts, *For Older Women with Money, It's Yes to Love but 'I Don't' to Marriage*, WASH. POST (Jan. 16, 2024, 5:00 AM) <https://www.washingtonpost.com/business/2024/01/16/women-separate-money-love-second-marriages/>. For background on who has access to paid leave, see CONG. RSCH. SERV., PAID FAMILY AND MEDICAL LEAVE IN THE UNITED STATES 5 tbl.1 (2023), <https://sgp.fas.org/crs/misc/R44835.pdf> (showing that thirty-nine percent of management workers compared to fourteen percent of service workers had access to paid family leave).

middle-class marriage has its own rewards, dependent on work beyond minimum wage, but marriage does not produce a middle-class couple or even the preconditions for their children to succeed in the post-industrial era.

Not only are current economic benefits for marriage not as useful for those who are lower-income, but also needs-based transfers have a different goal. They focus on providing support, with a nudge towards working, rather than establishing the conditions that promote the kind of stability and investment that makes middle-class status—and lasting marriages—possible.⁶³

While legislatures have in some cases deliberately structured needs-based benefits to create greater incentives to marry, they have encountered a problem that Anne Alstott succinctly identifies: any benefits tied to marriage inevitably exclude those who cannot acquire the circumstances that make marriage successful. Perhaps the most pernicious of these efforts have been the elimination of needed programs on the theory that those in need could solve their own problems if they married. The effort “to end welfare as we know it” by eliminating the AFDC program provides perhaps the most dramatic example. Congress replaced AFDC with TANF, and two of its three primary objectives were tied to marriage: promoting marriage and preventing nonmarital births.⁶⁴

As a practical matter, the experience with TANF underscores the fate of numerous such efforts. The pretense that needy individuals could pull themselves out of poverty by doing the “right thing” has been more effective in justifying the elimination of needed, and often effective, benefits, than in promoting the desired behaviors. The reasons rest on the failure to address the preconditions that promote movement into the middle class.

For lower-income Americans, marriage may have a complex interaction with laws that use marital status as a category. That is true for the EITC, which provides benefits to low-income working families by

63. Anne Alstott noted in the mid-1990s that: “Marriage penalties are a virtually unavoidable characteristic of income transfers that tailor benefits to need. Although it is in theory possible to redesign income-tested transfer programs to avoid penalizing marriage, the necessary changes would compromise policy goals that many may find more important than marriage neutrality.” Anne L. Alstott, *The Earned Income Tax Credit and the Limitations of Tax-Based Welfare Reform*, 108 HARV. L. REV. 533, 560 (1995).

64. Naomi Cahn & June Carbone, *Uncoupling*, 53 ARIZ. ST. L.J. 1, 42 (2021); see Andrew Hammond, *Welfare and Federalism's Peril*, 92 WASH. L. REV. 1721, 1770 (2017) (describing the TANF program).

returning income to taxpayers up to a specified limit.⁶⁵ The maximum income eligibility for a single person with children is \$46,560, slightly less than the total for eligibility of a married couple, \$53,120.⁶⁶ Consider

65. *Tax Policy Center Briefing Book: Key Elements of the U.S. Tax System*, TAX POL'Y CTR., <https://www.taxpolicycenter.org/briefing-book/what-earned-income-tax-credit> (Jan. 2024). While most tax credits are not refundable, the EITC is. ELAINE MAAG, REFUNDABLE CREDITS: THE EARNED INCOME TAX CREDIT AND THE CHILD TAX CREDIT, TAX POL'Y CTR. 1 (Mar. 23, 2017), https://www.urban.org/sites/default/files/publication/89171/2001197-refundable-credits-the-earned-income-tax-credit-and-the-child-tax-credit_0.pdf.

66. See MARGOT L. CRANDALL-HOLICK ET AL., CONG. RSCH. SERV., R43805, THE EARNED INCOME TAX CREDIT (EITC): HOW IT WORKS AND WHO RECEIVES IT 5–6 (2021), <https://sgp.fas.org/crs/misc/R43805.pdf> [<https://perma.cc/L3E6-ENKW>]. While one spouse's income might disqualify a dual-earning couple from eligibility for the EITC, “marriage can increase the EITC (a bonus) if a nonworking parent files jointly with a low-earning worker.” *Tax Policy Center Briefing Book: What Are Marriage Penalties and Bonuses?*, TAX POL'Y CTR., <https://www.taxpolicycenter.org/briefing-book/what-are-marriage-penalties-and-bonuses> [<https://perma.cc/QXM3-HH3X>] (May 2020); see also INTERNAL REV. SERV., EARNED INCOME AND EARNED INCOME TAX CREDIT (EITC) TABLES (2023), <https://www.irs.gov/credits-deductions/individuals/earned-income-tax-credit/earned-income-and-earned-income-tax-credit-eitc-tables#EITC%20Tables> (demonstrating the most updated numbers for the 2023 tax year); Press Release, U.S. Dep't of Treasury, Fact Sheet: The American Rescue Plan Will Deliver Immediate Economic Relief to Families (Mar. 18, 2021), <https://home.treasury.gov/news/featured-stories/fact-sheet-the-american-rescue-plan-will-deliver-immediate-economic-relief-to-families>. To be sure, as is true with the income tax itself, marriage may be a benefit; a married couple, where one person earns \$100,000 and would be ineligible as an individual, and a second person earns \$50,000, and would be eligible, is still able to receive the payment.

how the EITC addresses both single individuals and unmarried parents:⁶⁷

Unmarried		Married
Alex	Morgan	Alex & Morgan
\$10,000 of earned income	\$15,000 of earned income	\$25,000 of earned income
No children	1 child	1 child
\$1,502 EITC	\$3,618 EITC	\$3,618 EITC
Total EITC: \$5,120		Total EITC: \$3,618
EITC Marriage Penalty: \$1,502		

While the EITC provides higher benefits to two single lower-income people than two members of a lower-income married couple, its impact on work for spouses varies with gender and race.⁶⁸ Overall, at the time of introduction, the EITC was associated with an increase in mothers' work by approximately six percent.⁶⁹ The EITC is associated labor participation rates of men who are married, although not for married women.⁷⁰ For Black married women, who are more likely to be their

67. MARGOT L. CRANDALL-HOLICK & PATRICK A. LANDERS, CONG. RSCH. SERV., IN11843, THE EXPANDED CHILDLESS EITC AND MARRIAGE PENALTIES 2 (2022), <https://crsreports.congress.gov/product/pdf/IN/IN11843#:~:text=Historically%2C%20the%20EITC%20has%20been,was%20targeted%20to%20single%20parents> (using 2021 figures). The American Rescue Plan Act expanded the benefits available to childless individuals, meaning "a potentially larger credit reduction from marriage for some couples—reducing bonuses and increasing penalties associated with marriage." *Id.* at 4.

68. SAUL D. HOFFMAN & LAURENCE S. SEIDMAN, THE EARNED INCOME TAX CREDIT: ANTIPOVERTY EFFECTIVENESS AND LABOR MARKET EFFECTS 28 tbl.2.1 (1990). The EITC was originally seen as more pro-marriage than other public benefit programs, and it excluded single people (those without children). "Here was a policy aimed at a clientele with which many citizens sympathized: working families, including married-couple families, with modest incomes, who were often excluded from other income-transfer programs." *Id.* at 8.

69. Aparna Jayashankar et al., *EITC Increases Labor Force Participation Among Married Black Mothers*, FED. RESRV. BANK OF DALLAS (June 21, 2023), <https://www.dallasfed.org/cd/communities/2023/2305> ("Every \$1,000 increase in maximum EITC benefits boosts annual employment of single mothers by around 3 percent.")

70. *Id.*; see also Ariel Jurow Kleiman, *Low-End Regressivity*, 72 TAX L. REV. 1, 28 (2018) (noting that some families with children may have "secondary earners" that are incentivized to stay home to provide childcare).

households' primary breadwinner, the EITC is correlated with an increase in employment.⁷¹

Eligibility for long-term care through Medicaid requires a consideration of both spouses' income in order to determine either spouse's eligibility.⁷² Although there is some protection of assets and income of the "community spouse" (the one not seeking care), the set-aside does not protect all assets.⁷³ Third, consider the receipt of Childhood Disability Benefits, which, unlike Social Security, is not based on work history.⁷⁴ A spouse's income can change the benefits amount. The eligibility for ongoing Social Security benefits of a "disabled adult child," who began receiving such benefits because of a medical disability that began before the age of twenty-two, terminates upon marriage to a non-recipient.⁷⁵

While marriage might decrease available benefits, this is not true of all anti-poverty programs. The Child Tax Credit ("CTC") is based on the number of children, and it phases out based on income.⁷⁶ The CTC was initially nonrefundable, available only to taxpayers with earned income, and with married taxpayers filing jointly, phasing out at less than twice the amount of a single taxpayer.⁷⁷ The 2021 American Rescue Plan did not include such a disparity between married and single individuals: instead, individuals earning up to \$75,000 and married couples with incomes up to \$150,000 were eligible for the Economic Impact Grant, a seemingly neutral approach.⁷⁸ Similarly, the CTC is available on a per

71. Jayashankar et al., *supra* note 69 ("While the EITC increases the employment of white and Black single mothers equally, it increases the employment of only married Black mothers (the effect on white mothers is statistically insignificant).").

72. SPOUSES OF MEDICAID LONG-TERM CARE RECIPIENTS, U.S. DEP'T OF HEALTH & HUM. SERV. 2 (Apr. 2005), https://aspe.hhs.gov/sites/default/files/migrated_legacy_files/41436/spouses.pdf.

73. *Spousal Impoverishment*, MEDICAID, <https://www.medicaid.gov/medicaid/eligibility/spousal-impoverishment/index.html> (last visited Mar. 29, 2024).

74. See BENEFITS FOR CHILDREN WITH DISABILITIES, SOC. SEC. ADMIN. 7 (2024), <https://www.ssa.gov/pubs/EN-05-10026.pdf>.

75. 42 U.S.C. §§ 402(d)(1)(D), (G) (2015); see Administrative Complaint and Request for Relief Under the Religious Freedom Restoration Act (RFRA) and the U.S. Constitution, Disability Rts. Educ. & Def. Fund 3 (Nov. 17, 2022).

76. Kleiman, *supra* note 61, at 240.

77. MARGOT L. CRANDALL-HOLICK, CONG. RSCH. SERV., R45124, THE CHILD TAX CREDIT: LEGISLATIVE HISTORY 1, 5 (2021), <https://crsreports.congress.gov/product/pdf/R/R45124>.

78. Press Release, U.S. Dep't of Treasury, *supra* note 66. There is some unfairness, in that a married couple, where one person earns \$100,000 and would be ineligible as an individual, and a second person earns \$50,000, and would be eligible, is still able to receive the payment. See *id.*

capita basis per child, rather than corresponding to the status of their parents.

B. Which Married Couples Benefit?

These programs, while important, are more limited in effect than the much more numerous and widespread benefits tied to middle-class marriage, such as Social Security or the estate and gift tax.⁷⁹

Most of the economic marriage benefits eulogized in *Windsor* have no application to those unable to reach middle-class status. Today's estate and gift tax unified exclusion of more than \$27 million for a married couple (\$13.61 million per spouse in 2024, which can be added together through portability) is useful to those with ability to leave an inheritance, and particularly useful to the ultra-wealthy.⁸⁰ Family and medical leave are only useful for people who have jobs that are covered under the law, and Social Security benefits workers and a family with a lower-earning spouse. Other marriage-based benefits are not useful to people who do not have jobs that allow them to add a spouse to their health insurance, receive unpaid time off to care for a spouse, or have equal earnings with their spouse, rendering a Social Security spousal benefit useless.

Second, even for some who are financially secure, marriage does not always bring benefits. For example, older couples, if they marry, may face the potential loss of some Social Security benefits including a marriage tax penalty for the Social Security benefits they do receive, greater taxation of home sales, and lesser eligibility for funding for long-term

79. The percentage of spouses claiming "auxiliary benefits," that is, benefits because they either had no earnings or a lower earnings record than their spouses, is decreasing for several reasons: women's and men's lifetime Social Security earnings are becoming more comparable, and marriage demographics mean that fewer women are eligible for spousal benefits. Howard M. Iams, *Married Women's Projected Retirement Benefits: An Update*, SOC. SEC. BULL. 17, 21 (2016).

80. Only ten percent of the population even has household wealth above \$1.623 million. See BRIANA SULLIVAN ET AL., U.S. CENSUS BUREAU, THE WEALTH OF HOUSEHOLDS: 2021, at 1 (2023), <https://www.census.gov/content/dam/Census/library/publications/2023/demo/p70br-183.pdf>; see also Andrew Van Dam, *How Inheritance Data Secretly Explains U.S. Inequality*, WASH. POST (Nov. 10, 2023, 6:00 AM), <https://www.washingtonpost.com/business/2023/11/10/inheritance-america-taxes-equality/> ("Folks in the bottom 50[%] of earners inherit at half the national rate, while those in the top 1 percent are twice as likely to inherit something."); Kate Dore, *IRS Bumps up Estate-Tax Exclusion to \$12.92 Million for 2023*, CNBC (Oct. 19, 2022, 3:06 PM), <https://www.cnbc.com/2022/10/19/irs-bumps-estate-tax-exclusion-to-12point92-million-for-2023.html>.

care—each significant factors affecting decisions by older couples on whether to marry.⁸¹

Accordingly, the state-supported system simultaneously creates enormous benefits for many who are married, reinforcing class privilege and rewarding work, while also creating new (albeit more limited) benefits for the less well-off that are not tied to marriage. While those on the right focus on the latter and wish to incentivize marriage, and those on the left may seek to end marriage benefits, these critiques are both misguided (given the impossibility of truly marriage-neutral benefits)⁸² and counterproductive (especially reforms that seek to incentivize marriage to end poverty). The economic support “disproportionately benefit[s] the upper-middle class; its members have the stable jobs that lead to pensions and Social Security, and the well-off increasingly marry each other and invest even more in their offspring.”⁸³

Indeed, public support for marriage is bifurcated. While the same laws apply to all regardless of income, in effect, however, there are two distinct systems that differ in substance, purpose, and procedure.⁸⁴ More

81. Richard L. Kaplan, *Preferencing Nonmarriage in Later Years*, 99 WASH. U. L. REV. 1957, 1961–63, 1966–67, 1972 (2022). Indeed, “a former president of the National Academy of Elder Law Attorneys cited the potential costs of long-term care as the *main* reason that older couples avoid marriage.” *Id.* at 1972.

82. *But see* Hemel, *supra* note 27, at 702. On the potentially conflicting goals on child welfare policy, see Jacob Goldin & Ariel Jurow Kleiman, *Whose Child Is This? Improving Child-Claiming Rules in Safety-Net Programs*, 131 YALE L. J. 1719, 1726–27 (2022). Goldin and Kleiman note that the goals of channeling benefits to someone who will promote the child’s interests might sacrifice some inclusivity:

Consider a child-claiming rule that permits anyone to claim a child for a particular benefit as long as no one else does so. This “hands-off” design of the child-claiming rules would maximize inclusivity by ensuring that each child may be claimed by someone. It would also maximize potential claimants’ flexibility to decide among themselves who claims a child and thereby accommodates the diverse caregiving arrangements that families adopt. The rule does nothing, however, to ensure that benefits are channeled to the individual most likely to spend funds in a manner that promotes the child’s well-being.

Id.

83. See Naomi Cahn, *The Golden Years, Gray Divorce, Pink Caretaking, and Green Money*, 52 FAM. L.Q. 57, 61 (2018).

84. tenBroek wrote:

[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

than sixty years ago, Jacobus tenBroek distinguished between a public and a private system. An alternative way of conceptualizing the difference is instead between one that supports the families of those who have achieved economic self-sufficiency, conditioning receipt on wealth and work, with a parallel second system for those who receive needs-based assistance, who do not—or cannot—work.⁸⁵ While marriage may bring the same affinity-based benefits that recognize attachment, public welfare law distinguishes between the meaning of marriage for rich and poor.⁸⁶

III. POLITICAL DIVISIONS ABOUT MARRIAGE

A telling marker of political identity is the answer to the following question: are people poor because they do not work as hard or because they have faced more difficult circumstances in life? Republicans are substantially more likely than Democrats to say it is because poor people do not work as hard.⁸⁷ Cultural critics echo this sentiment suggesting that culture, rather than economic differences, explains the persistence of poverty. Even mainstream critics, such as Ron Haskins and Isabel Sawhill, advocate the “success sequence” for avoiding poverty: finish high school, get a full-time job, and get married before

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).

85. Cahn & Carbone, *supra* note 39, at 519–20.

86. tenBroek wrote:

[T]he family law of the poor reflects a different conception of the marital rights and duties relating to property and support. . . . [The spouses] are viewed rather as a single, integrated entity, having a single, undivided, and unseparated interest in a common pool of family resources derived from the income and property of both spouses In the family law of the poor, the unitary theory of marriage is not a proposition about the moral, sociological, or psychological integrity of the union; nor is it the positing of a goal aimed at the strengthening of family life. It is a device for minimizing the public cost of supporting the poor by tapping what would otherwise be the separate property or income of one spouse for the support of the other.

Jacobus tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status: Pt. III*, 17 STAN. L. REV. 614, 624 (1965).

87. *Most Americans Point to Circumstances, Not Work Ethic, for Why People Are Rich or Poor*, PEW RSCH. CTR. (Mar. 2, 2020), <https://www.pewresearch.org/politics/2020/03/02/most-americans-point-to-circumstances-not-work-ethic-as-reasons-people-are-rich-or-poor/>.

having children.⁸⁸ And, in fact, an empirical study indicates that ninety-seven percent of those who follow the sequence are not poor by the time they reach the ages of twenty-eight to thirty-four.⁸⁹ The statistics, however, do not establish causal relationships. Children from better-off families have greater ability to graduate from high school, obtain a full-time job, and access the resources that permit postponing pregnancy and childbirth.⁹⁰ Moreover, high-school graduates without a college degree who do marry have become more likely to divorce, in part because of the greater difficulty in obtaining stable employment.⁹¹ It turns out that children who have a parent with a college degree, whatever their family circumstances, are less likely as a whole to grow up in poverty than children in married families.⁹²

The drumbeat, that marriage will solve society's ills, has ebbed and flowed in the almost sixty years since the Moynihan Report.⁹³ It is becoming a drumbeat again, with books from Brad Wilcox and Melissa Kearny, and op-eds from prominent columnists, among others.⁹⁴ In a

88. Bryan Caplan, *What Does the Success Sequence Mean?*, INST. FOR FAM. STUD. (Feb. 25, 2021), <https://ifstudies.org/blog/what-does-the-success-sequence-mean>; W. Bradford Wilcox et al., *Education Choice and the Success Sequence: Adapted Remarks from The Heritage Foundation's 2017 Antipoverty Forum* (Sept. 12, 2018), <https://www.heritage.org/education/report/education-choice-and-the-success-sequence-adapted-remarks-the-heritage-foundations>.

89. Caplan, *supra* note 88 ("97% of Millennials who follow what has been called the 'success sequence'—that is, who get at least a high school degree, work, and then marry before having any children, in that order—are not poor by the time they reach their prime young adult years (ages [twenty-eight to thirty-four]).").

90. See, e.g., Richard V. Reeves & Joanna Venator, *Sex, Contraception, or Abortion? Explaining Class Gaps in Unintended Childbearing*, BROOKINGS (Feb. 26, 2015), <https://www.brookings.edu/research/sex-contraception-or-abortion-explaining-class-gaps-in-unintended-childbearing/>; Naomi Cahn & June Carbone, *Supporting Families in a Post-Dobbs World: Politics and the Winner-Take-All-Economy*, 101 N.C. L. REV. 1549 (2023).

91. See Brown et al., *supra* note 21, at 1914, 1917.

92. Eleanor Brown, June Carbone & Naomi Cahn, *Marriage Is Not as Effective an Anti-Poverty Strategy as You've Been Led to Believe*, CONVERSATION (Feb. 21, 2024, 8:19 AM), <https://theconversation.com/marriage-is-not-as-effective-an-anti-poverty-strategy-as-youve-been-led-to-believe-218682>.

93. See generally OFF. POL'Y PLAN. & RSCH., U.S. DEPT. OF LAB., THE MOYNIHAN REPORT: THE NEGRO FAMILY: A CASE FOR NATIONAL ACTION (1965), <https://www.dol.gov/general/aboutdol/history/webid-moynihan> [<http://www.blackpast.org/?q=primary/moynihan-report-1965>] (advocating for federal action in stabilizing the nuclear family structure for African-American families in light of the Civil Rights movement of the mid-twentieth century).

94. See e.g., David Brooks, Opinion, *To Be Happy, Marriage Matters More than Career*, N.Y. TIMES (Aug. 17, 2023), <https://www.nytimes.com/2023/08/17/opinion/marriage-happiness-career.html>; Kristof, *supra* note 8. But see Jessica Grose, Opinion, *Good Marriages Are Good. Bad Marriages Are, Well, Bad*, N.Y. TIMES (Jan. 31, 2024), <https://www.nytimes.com/2024/01/31/opinion/marriage-luxury-beliefs.html>; Lyz Lenz, Opinion, *Women Are Divorcing – and Finally Finding Happiness*, WASH. POST (Feb. 28,

2023 paper, The Heritage Foundation rued the decreasing marriage, and increasing nonmarital child, rates.⁹⁵ While recognizing that there were many causes, the authors singled out “welfare programs explicitly designed to help low-income families” as “likely making the problem much worse . . . the American welfare state is, on the whole, egregiously anti-marriage.”⁹⁶ The paper identified twenty-six states with marriage penalties in their preschool programs, such as states that provide free preschool for families with a certain income level, but do not increase that level based on a parent’s marriage.⁹⁷

A 2024 book titled *Get Married: Why Americans Must Defy the Elites, Forge Strong Families, and Save Civilization* argues that children in cohabiting families face many more problems than children in married families.⁹⁸ As Brad Wilcox, the book’s author, explained to the Independent Women’s Forum: “I think we’ve seen since the [1960s], basically government policy, welfare policy, penalizing marriage, and often being a replacement for a husband financially as well. And so that’s one reason too, that there’s been an erosion of marriage in many working class and poor communities since the 1960s.”⁹⁹

These critiques, however, conflate three separate issues. The first combines policies that discouraged cohabitation and marriage (such as AFDC rules that deemed the income of “a man in the house” available to

2024, 6:00 AM), <https://www.washingtonpost.com/opinions/2024/02/28/lyz-lenz-this-american-ex-wife-divorce/>.

95. See Benjamin Paris & Jamie Hall, *How Welfare Programs Discourage Marriage: The Case of Pre-K Education Subsidies*, CTR. FOR HEALTH & WELFARE POL’Y 1 (2023), <https://www.heritage.org/sites/default/files/2023-02/BG3742.pdf>.

96. *Id.* at 1–2.

97. *Id.* at 3–4.

98. BRAD WILCOX, *GET MARRIED: WHY AMERICANS MUST DEFEY THE ELITES, FORGE STRONG FAMILIES, AND SAVE CIVILIZATION*, at xii–xiii (2024).

99. Inez Feltscher Stepman & Brad Wilcox, *Brad Wilcox – On Fatherhood, Happiness, and the Class Divide Over Family Formation*, INDEP. WOMEN’S F. (June 22, 2022), <https://www.iwf.org/2022/06/22/brad-wilcox-on-fatherhood-happiness-family>. Wilcox continued:

So I was talking for instance to a working class, white family in Virginia, not too long ago. Very traditional in some ways. He was working as an IT tech, she was at home with their two young kids. But it came out in the interview that they were not married. I was like, what’s going on here? And they said, we actually had sat down at the kitchen table and crunched the numbers, because she was on Medicaid for herself and their two kids because his company did not provide health insurance. And so they’d figured out that they got married, they’d lose access to Medicaid coverage for her and for the two kids. So they were just cohabiting rather than getting married.

Id.

the custodial parent)¹⁰⁰ with ones that discourage only marriage.¹⁰¹ It is important to note that two cohabiting parents differ from a single parent in numerous ways.

Second, the critique conflates cohabiting couples who would like to marry but fear losing benefits with couples who have chosen not to marry for other reasons. Cohabiting couples are not married for multiple reasons.¹⁰² While some may be calculating the impact of marriage on their Medicaid benefits, others, as we have argued elsewhere, may have very reasonable concerns about violence, mental illness, substance abuse, volatile behavior, and income¹⁰³—concerns that make commitment, whether within marriage or without, a risky enterprise.

The third, and most fundamental, problem with the critique is the suggestion that marriage, rather than access to preconditions like universal healthcare and other systemic changes discussed in the next

100. *King v. Smith*, 392 U.S. 309, 313–14 (1968) (striking down “man in the house” rules); *cf. generally* *Wyman v. James*, 400 U.S. 309 (1971) (upholding home visits). *See also* Cahn & Carbone, *The Blue Family Constitution*, *supra* note 39, at 522, 524–25 (discussing the aforementioned cases).

101. *See, e.g.*, Brad Wilcox, *The Surprisingly Simple Ways to Incentivize Marriage*, INST. FOR FAM. STUD. (Feb. 3, 2022), <https://ifstudies.org/blog/the-surprisingly-simple-ways-to-incentivize-marriage>.

102. *See* Fenaba R. Addo & Sharon Sassler, *Financial Arrangements and Relationship Quality in Low-Income Couples*, 59 FAM. REL. 408, 411 (2010) (finding that married couples are more likely to pool income, and that income pooling corresponds to relationship quality); June Carbone & Naomi Cahn, *Nonmarriage*, 76 MD. L. REV. 55, 99–105 (2016) (describing how unmarried relationships differ from married ones).

103. *See* ERIKA HARREL ET AL., U.S. DEP’T OF JUST., BUREAU OF JUST. STAT., SPECIAL REPORT: HOUSEHOLD POVERTY AND NONFATAL VIOLENT VICTIMIZATION, 2008–2012, at 1–3, 10 (2014) (reporting statistics from surveys conducted in 2008–2012, with a self-reporting incidence and finding that the rate of IPV for individuals in households below the federal poverty was almost double the rate for those in households with 101–200% of the federal poverty level and almost four times the rate for those in households above 400% of the federal poverty level); Avanti Adhia & Joshua Jeong, *Fathers’ Perpetration of Intimate Partner Violence and Parenting During Early Childhood: Results from the Fragile Families and Child Wellbeing Study*, 96 CHILD ABUSE & NEGLECT: THE INT’L J. 1, 2–4 tbl.1, 6 (2019) (studying incidents reported by mothers of intimate partner violence—defined to include physical, sexual, psychological, and economic abuse). Only about thirty-three percent of mothers interviewed did not report IPV when their children were one and three. *Id.* at 4 tbl.1.; Young-Mee Kim & Sung-il Cho, *Socioeconomic Status, Work-life Conflict, and Mental Health*, 63 AM. J. IND. MED. 703, 703 (2020) (“People of the lowest SES are estimated to be two to three times as likely to have a mental disorder than are those with the highest SES.”); *see also* JANE C. MURPHY & JANA B. SINGER, *DIVORCED FROM REALITY: RETHINKING FAMILY DISPUTE RESOLUTION* 62–64 (2015) (observing that the couples who do not voluntarily establish working two-parent relationships are disproportionately plagued by domestic violence, substance abuse, and multi-partner parenting—ultimately undermining judicial efforts).

section, is the solution to the problem.¹⁰⁴ Reconceiving the importance of universal benefits is the critical step in rationalizing the relationship between marriage and benefit design.

IV. RECONSTRUCTING SECURITY AND STABILITY

What is needed instead is rethinking benefits from the ground up. That involves: 1) investment in human capital to ensure the preconditions for employability and stable relationships; and 2) addressing the gaps in private market employment, which requires ensuring individuals have the ability to retool, get through periods of unemployment, illness, or car breakdowns and lack of childcare (the kind of expenses that undermine employability), and provide a secure foundation for children.

Economist Peter Lindert, in a comprehensive global review of social spending, has two important findings for the redefinition project. First, he concludes that social spending should be uncoupled from the workplace.¹⁰⁵ In today's economy, he observes that employment-based provisions become "regressive instruments of state taxation and control" while universal provisions better promote "transparency and equity."¹⁰⁶ Second, he recommends investing more in the young, with a "cradle to career" strategy.¹⁰⁷ "For any given total public social spending," he concludes, "investing in child development, not least pre-school children, is more pro-growth and pro-equality than spending the same amount" on other programs;¹⁰⁸ that is, "[t]he earlier the expenditure, the better."¹⁰⁹ Lindert adds that the returns on investment in early childhood come from greater parenting time as well as from spending on early childhood education.¹¹⁰ Perhaps most notably, Lindert devotes almost no energy to marriage as a factor in the design of twenty-first century social spending.

Indeed, marriage itself is irrelevant to eligibility for some needs-based benefits; some programs instead use the number of people in a

104. See Kristof, *supra* note 8; Brown et al., *supra* note 21. But see Melissa S. Kearney & Riley Wilson, *Male Earnings, Marriageable Men, and Nonmarital Fertility: Evidence from the Fracking Boom* 31–32 (Nat'l Bureau of Econ. Rsch., Working Paper No. 23408, 2017), https://www.nber.org/system/files/working_papers/w23408/w23408.pdf.

105. PETER H. LINDERT, MAKING SOCIAL SPENDING WORK 19 (2021)

106. *Id.* at 17.

107. *Id.* at 19.

108. *Id.* at 18.

109. *Id.* at 19.

110. *Id.* at 18–19.

household to determine eligibility.¹¹¹ These present different problems: in terms of design, classifications based on the number of people in a household, particularly when programs do not distinguish based on number of dependent children or older people, may distort need. Young children or aged parents may have different, and potentially more economically-intensive, needs than other adults or even teens, and where programs are designed, for example, to ensure that children have the proper foundation for productive adulthood, it is the children's needs that should be primary. That is, a number-of-residents test may be inadequate to account for the full set of government support required.¹¹² Consequently, any analysis of the role and structure of benefits must acknowledge that, in today's society, a large part of the population does not yet have, or otherwise lacks, the ability to achieve the preconditions for economic security and stability—regardless of partnership status or the number of people in a household.

Instead, moving forward requires investing in children and their parents, with quality childcare, universal preschool, paid family leave and corresponding family-friendly workplaces, and healthcare.¹¹³ Healthcare is a precondition to productive participation in society and should be justified on that exact ground. Only universal healthcare policies, and not marriage, can make access to healthcare universal. Universal healthcare may also increase marriage rates for a variety of reasons that go beyond removing the financial disincentives for Medicaid families.

111. The poverty threshold, which is primarily used for statistical purposes to count the number of people in poverty, classifies family units based on size, but distinguishes households further based on the existence of other adults and “related” children under the age of eighteen. *Poverty Thresholds*, U.S. CENSUS BUREAU, <https://www.census.gov/topics/income-poverty/poverty.html> (last visited Mar. 29, 2024). By contrast, the poverty guidelines used to determine eligibility for a series of programs are simply based on the number of people in a household, without accounting for age. *HHS Poverty Guidelines for 2024*, OFF. ASSISTANT SEC. PLAN. & EVALUATION (Jan. 17, 2024), <https://aspe.hhs.gov/topics/poverty-economic-mobility/poverty-guidelines>. The HHS poverty guidelines are used in a number of programs, including Head Start, SNAP, and CHIP, although they are not used for TANF or SSI, among other programs. *Id.* The relationship status of any adults in the household is irrelevant for both the threshold and the guidelines (and the many programs that rely on the guidelines). *Id.*; see also *Poverty Thresholds*, *supra*.

112. For a qualified defense of relying solely on residency for purposes of directing benefits to children, see Goldin & Kleiman, *supra* note 82, at 1767–71.

113. Singlehood deserves its own support. Bella DePaulo, *For the First Time in My Lifetime, Signs of Real Progress for Single People*, MEDIUM (Dec. 21, 2022), <https://belladepaulo.medium.com/for-the-first-time-in-my-lifetime-signs-of-real-progress-for-single-people-3aec83bdcca9>.

Investing in early childhood education will help prepare children for school,¹¹⁴ leading to better educational outcomes for them.¹¹⁵ It will also provide care for children so their parents can enter the workforce. Providing high-quality preschool helps parents participate in the workforce, as Washington, D.C. found when it implemented a universal preschool program: the labor force participation rate of mothers with children under five increased by twelve percentage points.¹¹⁶

Beyond providing better opportunities for children with respect to education and care, is a universal basic income guarantee. Martin Luther King, Jr. espoused such a guarantee, Richard Nixon proposed his Family Assistance Plan, and numerous legal scholars have also supported its implementation.¹¹⁷ As an alternative, expanding the CTC would cut the child poverty rate and provide stability to families to weather job crises or economic downturns.¹¹⁸ This lesson was brought home through the pandemic CTC. The American Rescue Plan increased the amount of the credit and expanded its coverage to include families with no earned income,¹¹⁹ and the child poverty rate, after accounting for benefits and taxes, dropped to its lowest rate ever: 5.2%.¹²⁰ After the tax credits and other covid relief programs ended, the child poverty rate more than doubled, to 12.4%.¹²¹ If just the CTC had continued, without any of the

114. Andres S. Bustamente et al., *High-Quality Early Child Care and Education: The Gift that Lasts a Lifetime*, BROOKINGS (Nov. 4, 2021), <https://www.brookings.edu/blog/education-plus-development/2021/11/04/high-quality-early-child-care-and-education-the-gift-that-lasts-a-lifetime/>.

115. NAOMI CAHN, JUNE CARBONE & NANCY LEVIT, *FAIR SHAKE: WOMEN AND THE FIGHT TO BUILD A JUST ECONOMY* (forthcoming 2024) (on file with authors); see also Bustamente, *supra* note 114.

116. Bryce Covert, *How Universal Free Preschool in DC Helped Bring Moms Back to Work*, VOX (Sept. 26, 2018, 9:50 AM), <https://www.vox.com/identities/2018/9/26/17902864/preschool-benefits-working-mothers-parents>.

117. See, e.g., Miranda Perry Fleischer & Daniel Hemel, *The Architecture of a Basic Income*, 87 U. CHI. L. REV. 625, 634–36 (2020) (contrasting public welfare from universal basic income, noting that issues of need or “deservedness” are irrelevant, and the program is delivered as cash (or its equivalent) with no strings attached); see also Michael Tubbs, *How We Can Make Martin Luther King Jr.’s Dream of Ending Poverty a Reality*, TIME (Jan. 16, 2023, 7:00 AM), <https://time.com/6247310/martin-luther-king-jr-guaranteed-income/>.

118. See MAXINE EICHNER, *THE FREE-MARKET FAMILY: HOW THE MARKET CRUSHED THE AMERICAN DREAM (AND HOW IT CAN BE RESTORED)* 202–03 (2020).

119. Goldin & Kleiman, *supra* note 82, at 1730–31; *The Child Tax Credit*, WHITE HOUSE, <https://www.whitehouse.gov/child-tax-credit/#:~:text=It%20has%20gone%20from%20%24%20C000,of%20the%20Child%20Tax%20Credit> (last visited Mar. 29, 2024).

120. Catherine Rampell, Opinion, *We Let Child Poverty Soar Last Year. We Could Choose Differently*, WASH. POST. (Sept. 12, 2023, 1:34 PM), <https://www.washingtonpost.com/opinions/2023/09/12/biden-child-tax-credit-poverty-doubled/>.

121. *Id.*

other covid relief programs, the poverty rate would have been 8.4%.¹²² Other countries have child allowances that are similar to the expanded CTC,¹²³ and cash transfers have a variety of reinforcing benefits, including a positive impact on babies' brain development.¹²⁴ While critics worry that the money will be spent on unnecessary items, actual implementation of the universal basic income shows otherwise.

CONCLUSION

Focusing on how to make the preconditions for family and economic security universal instead of asking how to fill in the gaps of a private system would make marriage less important—but it might also increase the incidence of stable two-parent families. The current debate is asking the wrong questions. It is mired in an old mode of analysis that assumes that the employment system provides secure employment sufficient to meet family needs to anyone who works hard enough, and that the State's role can be limited to supplying gap fillers and limited welfare payments for those who fall through the cracks of the private system. Today, the more precarious employment system in fact requires much more government support—whether in the form of education, retraining assistance, health insurance, job subsidies, or food assistance—to enter and remain in the middle class. Pretending otherwise reifies class divisions and marriage is one of them. It is a consequence, not a cause, of the inability of large parts of the population to reach middle-class status—and the current provision of greater benefits to the married is a consequence of a political economy dictated by the baby boomers—a group for whom access to good jobs and marriage was more readily available. The old pathway into middle-class status, the success sequence, is gone. Graduating from high school and going to work immediately after, if it involves entry into low-skilled, insecure employment, may derail acquisition of the needed intellectual capital that makes stable family life possible. Marriage without the preconditions is a recipe for either impoverishment or divorce or both, absent a trust fund or extended family support. Ironically, the prerequisites for middle-class status—education, stable income, skill

122. Press Release, Sharon Parrott, President, Ctr. on Budget & Pol'y Priorities, Record Rise in Poverty Highlights Importance of Child Tax Credit (Sept. 12, 2023), <https://www.cbpp.org/press/statements/record-rise-in-poverty-highlights-importance-of-child-tax-credit-health-coverage>.

123. See e.g., EICHNER, *supra* note 118, at 21–22 (discussing Finland).

124. Jason DeParle, *Cash Aid to Poor Mothers Increases Brain Activity in Babies, Study Finds*, N.Y. TIMES (Jan. 24, 2022), <https://www.nytimes.com/2022/01/24/us/politics/child-tax-credit-brain-function.html>.

acquisition, contraception—have also become the prerequisites for relationships.