

SUPPORTING FAMILIES IN A POST-*DOBBS* WORLD: POLITICS AND THE WINNER-TAKE-ALL- ECONOMY*

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*The pathway to stable and secure middle-class status involves two elements: the ability to postpone family formation to facilitate human capital investment and the ability to marshal the emotional and material resources needed to address children needs. Yet, the ability to meet the middle-class threshold for family investment is under assault as the class-based COVID-19 pandemic vulnerabilities and the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization* illustrate. While the *American Rescue Plan* demonstrates the federal government's considerable ability to address children's needs, *Dobbs* represents the judicial assault on federal power and the ongoing devolution in responsibility for family support from the federal government to the states, a devolution that increases regional, racial, and class-based inequality.*

This Article explains the three factors that exacerbate the regional differences. First, we show the development of a new federalism over the past half century that has granted states more authority, undercutting federal ability to establish a floor for available benefits such as health care. Second, we show that increased partisanship and the resulting single party control in many states contributes to the election of more extreme state legislators, with little accountability to voters. Third, we maintain that legislatures have become more responsive to well-funded national business and activist groups and less concerned about local needs.

This analysis turns the conventional justification for federalism—that, particularly in family law, smaller units of government are more in touch with local conditions and needs—on its head. Partisan polarization and the outsized influence of lobbying groups on state legislations suggest that the federal

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government may be better poised to advance family interests than the states. The nation has a collective interest in the well-being of its children, particularly as the importance of investment in human capital becomes increasingly important in an economy rewarding greater education and technological sophistication. The federal government is also better suited, for a variety of reasons, to coordinate the creation of a new family infrastructure. An era of greater inequality, rather than make smaller units of government more responsive to local conditions, makes them more susceptible to the influence of individuals and entities willing to spend near-unlimited sums of money to produce desired results. We use abortion as the lens of our analyses, rendering visible the intersectional nature of this state-sponsored violence: the misogyny of existing government policies (lack of contraception, coerced pregnancy, no support for resulting families), combined with class (wealthier women pay for their own abortions), race (Black women are more likely to have abortions), and the need for investment in children in the new economy.

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“When you say ‘social safety net’ in Texas, it sounds like a joke,” said D’Andra Willis of the Afiya Center, a North Texas reproductive justice group. “Everything they could have set up or increased to protect people if they really cared, they’re not doing it here.”¹

INTRODUCTION

The past half century has witnessed two transformations that have resulted in rising family insecurity. The first was the emergence of a new economic

1. *How the U.S. Supreme Court Abortion Ruling Is Already Affecting Texas*, TEX. TRIB. (June 28, 2022), https://www.texastribune.org/2022/06/24/texas-abortion-law-supreme-court-ruling/?utm_source=liveblogshare&utm_medium=social#edcdc99f-3111-4f66-b450-d09054386002 [https://perma.cc/LH5Y-FAG2].

model: the economy of the information age.² That new model has increased the importance of early investment in children, partly because—with the wholesale movement of mothers into the labor market—child care has become a more complex undertaking,³ and partly because—with the hollowing out of high-paying jobs in the middle of the American economy—the ability to acquire education and skills has become more critical to achieving middle-class status.⁴ Without the requisite public support for the human capital investment⁵ that starts with adequate nutrition and health care during pregnancy and continues through parental ability to supervise and support educational attainment, economic inequality is likely to increase. The pandemic highlighted these diverging destinies of families, emphasizing the class and race divide in the provision of family security.⁶

The second transformation is the changing role of government: partisan gridlock hamstrings the federal response to the new economy while greater policy polarization among the states increases regional, class, and race-based economic inequality.⁷ This greater “devolution” of policymaking authority to the states reverses the national uniformity that began with the New Deal.⁸ Greater state authority has also limited municipal autonomy, most visibly in

2. David Lyon, *From ‘Post-Industrialism’ to ‘Information Society’: A New Social Transformation?*, 20 SOCIO. 577, 577 (1986).

3. MAXINE EICHNER, *THE FREE MARKET FAMILY: HOW THE MARKET CRUSHED THE AMERICAN DREAM (AND HOW IT CAN BE RESTORED)* 17 (2020).

4. Lynn Price Cooke, *The Pathology of Patriarchy and Family Inequalities*, in *UNEQUAL FAMILY LIVES* 237, 241–47 (Naomi R. Cahn, June Carbone, Laurie Fields DeRose & W. Bradford Wilcox eds., 2018) (describing labor market polarization as a feature of industrial economies and changing women’s roles as a response).

5. By “human capital,” we mean the “knowledge, skills, and health that people accumulate throughout their lives, enabling them to realize their potential as productive members of society.” *About the Human Capital Project*, WORLD BANK, https://www.worldbank.org/en/publication/human-capital/brief/about-hcp?cid=GGH_e_hcpexternal_en_ext [<https://perma.cc/S359-TJRB>].

6. See, e.g., Maxine Eichner, *Free-Market Family Policy and the New Parental Rights Laws*, 101 N.C. L. REV. 1305, 1318 (2023); Caitlin Millat & Melissa Murray, *Education as Childcare*, 101 N.C. L. REV. 1463, 1465–66 (2023); Naomi Cahn, June Carbone & Nancy Levit, *Gender, Covid, and Care*, in *GENDER AND COVID* (Aziza Ahmed & Linda McClain eds.) (forthcoming 2023) (manuscript at 2) (on file with the North Carolina Law Review).

7. See Kate Andrias, *Separations of Wealth: Inequality and the Erosion of Checks and Balances*, 18 U. PA. J. CONST. L. 419, 432 (2015) (observing that “[w]ealth and partisanship are not unrelated . . . [i]ndeed, rising inequality, political scientists argue, is one important cause of hyper-polarization”); Kate Andrias & Benjamin I. Sachs, *Constructing Countervailing Power: Law and Organizing in an Era of Political Inequality*, 130 YALE L.J. 546, 563 (2021) (“[B]usiness organizations are dominant in both federal- and state-level politics. Indeed, the majority of organized, national political groups focus on economic issues, and of these, more than three-quarters represent business interests. Over three-fourths of lobbying expenditures are made on behalf of corporate America.”).

8. See Jennifer Karas Montez, *US State Polarization, Policymaking Power, and Population Health*, 98 MILBANK Q. 1033, 1037–38 (2020) [hereinafter Montez, *US State Polarization*].

the more conservative states, by restricting the ability of localities to meet the more diverse family needs of urban residents.⁹

The Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*¹⁰ illustrates both trends and provides a stellar example of why these trends are a threat to children's well-being. By returning the issue of abortion to the states, *Dobbs* continues the legislative and judicial trends that restrict the federal government's power to protect the decision-making power of vulnerable Americans.¹¹ At the same time, by removing constitutional protection for such an important health care option as abortion, the Court increased the need for government childrearing assistance—assistance that varies widely by state.¹² As those states most inclined to restrict abortion tend to provide the least assistance for children resulting from such restrictions,¹³ *Dobbs* will have the demonstrable consequence of substantially increasing inequality based on class, race, and region.

Disparities in access to abortion would matter less if the states restricting abortion provided robust public support for families, including contraceptive access, job opportunities, and support for childcare. The opposite, however, is true. As we will show in this Article, the states with the greatest restrictions on

9. Richard Briffault, *The Challenge of the New Preemption*, 70 STAN. L. REV. 1995, 1997–98 (2018); Nestor M. Davidson & Richard C. Schragger, *Do Local Governments Really Have Too Much Power? Understanding the National League of Cities' Principles of Home Rule for the 21st Century*, 100 N.C. L. REV. 1385, 1413–14 (2022) (describing how “local governments are being strangled by state law across literally dozens of policy areas,” including public health, paid sick leave and minimum wage enforcement); see also Jennifer Karas Montez, *Policy Polarization and Death in the United States*, 92 TEMP. L. REV. 889, 907–10 (2020) [hereinafter Montez, *Policy Polarization*]. *Romer v. Evans*, 517 U.S. 620 (1996), is an example of (what was at that point) a more conservative state trying to remove such autonomy. *Id.* at 631–33. In the post-*Dobbs* abortion context, municipalities seeking to use funds to ensure abortion access have been threatened by state officials. See, e.g., Jason Hancock, *St. Louis Argues Missouri Attorney General Can't Sue City Over Abortion Access Funding*, KCUR (Aug. 18, 2022), <https://www.kcur.org/politics-elections-and-government/2022-08-18/st-louis-argues-missouri-attorney-general-cant-sue-city-over-abortion-access-funding> [<https://perma.cc/DX5R-XABL>]. This is not to deny that the rural poverty rate is even higher than the urban rate, with the highest disparities in the South, and that the needs of each population differ. See *Rural Poverty & Well-Being*, U.S. DEP'T AGRIC. (Mar. 7, 2022), <https://www.ers.usda.gov/topics/rural-economy-population/rural-poverty-well-being/> [<https://perma.cc/E5D3-RCVH>]; *6 Charts That Illustrate the Divide Between Rural and Urban America*, PBS (Mar. 17, 2017), <https://www.pbs.org/newshour/nation/six-charts-illustrate-divide-rural-urban-america> [<https://perma.cc/D9F9-TL2H>].

10. 142 S. Ct. 2228 (2022).

11. *Id.* at 2243; see, e.g., Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 573–77 (2012) (limiting the ability of the federal government to insist that the states expand Medicaid coverage as a condition of federal eligibility).

12. Ending abortion might lead to an additional 180,000 premature births per year. Mary Kekatos, *More Than 150,000 Births Could Occur in the US Every Year Following the Reversal of Roe v. Wade, Report Predicts*, ABC NEWS (June 27, 2022, 3:47 PM), <https://abcnews.go.com/Health/150000-births-occur-year-reversal-roe-wade/story?id=85795552> [<https://perma.cc/G8V5-UVHU>]. For information on the variation in state policy, see *infra* Appendix A.

13. See *infra* Section III.A, Appendix A.

abortion provide less, not more, support for children.¹⁴ Parents everywhere need adequate health care before, during, and after pregnancy; affordable high-quality childcare; good schools, including pre-K and afterschool programs; secure housing and nutrition for themselves and their children; the ability to get needed education and training; and family-flexible work opportunities. The availability of almost all of these resources depends on the public infrastructure regulating employment, providing adequate funding for school and social services, and supporting a social safety net that fills in gaps for struggling families. Yet, even within states, the availability of these resources varies,¹⁵ locking some communities in poverty.

This Article does not merely remark on the existence of these patterns. Rather, the Article asks—and answers—*why* these patterns take hold and what can be done about them. We show that the increasing divergence among state policies providing public support for families involves the development of a New Federalism over the past half century.¹⁶ This New Federalism started with President Richard Nixon's efforts to decentralize decision-making and give more authority to states, with Nixon explicitly calling for the reversal of the trends associated with the New Deal that had increased federal power.¹⁷ The principal innovation in that era involved the use of block grants and revenue sharing to give states greater discretion in the spending of federal funds.¹⁸ Revenue sharing initially enjoyed at least some bipartisan support and gave states, which unlike the federal government must balance their budgets, a fiscal cushion during recessions.¹⁹ Today, however, efforts to redesign federalism are farther reaching and often seek to reduce governmental power more generally.²⁰ In this Article, we will focus on efforts to deny the federal government the power to ensure that all citizens have the ability to meet basic needs, such as health care,²¹ to concentrate power in state legislatures that, because of partisan

14. See *infra* Section III.A, Appendix A.

15. See *infra* Appendix A.

16. This New Federalism, which started with Richard Nixon, is a product of executive, legislative, and judicial actions. President Nixon's speech in 1969 is widely accepted as starting the New Federalism revolution. See Richard Nixon, President of the United States of America, *Address to the Nation on Domestic Programs* (Aug. 8, 1969), <https://www.presidency.ucsb.edu/documents/address-the-nation-domestic-programs> [https://perma.cc/4YBV-TV2]; Bruce Katz, *Nixon's New Federalism: 45 Years Later*, BROOKINGS INST. (Aug. 11, 2014), <https://www.brookings.edu/blog/the-avenue/2014/08/11/nixons-new-federalism-45-years-later/> [https://perma.cc/3LGA-EKEC].

17. Katz, *supra* note 16.

18. *Id.*

19. James K. Galbraith, Michael Lind & Martin J. Luby, *The Case for Revenue Sharing: Fiscal Equalization and the COVID-19 Recession*, UNIV. TEX. LYNDON B. JOHNSON SCH. PUB. AFFS. (Dec. 8, 2020), <https://lbj.utexas.edu/resiliency-toolkit/revenue-sharing> [https://perma.cc/AM5Z-UQ8A].

20. *Id.* (describing the restriction on revenue sharing and more recent efforts to reduce the size of government).

21. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 573–77 (2012); Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105, 2113–16

polarization and limited funding, have become more subject to the influence of business and other special interest lobbyists,²² and to uphold state power to impose results on more racially, ethnically, and socioeconomically diverse municipalities.²³ The result has increased regional disparities, with particularly negative consequences for poorer citizens in conservative states, as those states tend to restrict government support more generally.²⁴

We argue that the answers to what can be done ideally involve reconsidering the role of the federal government with respect to the protection of the family and the minimum conditions for social well-being in an era of growing inequality, but also, as a pragmatic matter, shining a spotlight on solutions at the state level. The conventional argument for federalism has been based on the idea of decentralization: smaller units of government are more in touch with local conditions and needs and—particularly in family law—better reflect cultural values that may vary across the country.²⁵ Now, however, these assumptions should be questioned. First, the nation en masse has an interest in the well-being of its children, particularly as the investment in human capital becomes increasingly important in an economy rewarding greater education and technological sophistication. The federal government is better suited, for a variety of reasons, to coordinate the creation of a new family infrastructure,²⁶

(codified as amended in scattered sections of 42 U.S.C.). See generally ADAM S. COHEN, SUPREME INEQUALITY (2020) (showing how the Supreme Court increasingly defers to state choices in the public welfare context).

22. Increased partisanship, which, in turn results in both in-group loyalty and outgroup distrust, has interactive effects, changing the nature of the candidate pool and those elected, and their objectives in office. See Cassandra Handan-Nader, Andrew C.W. Myers & Andrew B. Hall, *Polarization and State Legislative Elections* 1–2 (Stan. Inst. for Econ. Pol’y Rsch., Working Paper No. 22-05, 2022), <https://siepr.stanford.edu/publications/politics-and-media/polarization-and-state-legislative-elections> [https://perma.cc/4NE3-TWXX (staff-uploaded archive)] (click “View this Working Paper”). While we agree with Clare Huntington that many tenets of family law are converging, public policies on family support are diverging. Clare Huntington, *Pragmatic Family Law*, 136 HARV. L. REV. (forthcoming 2023) (manuscript at 11) (on file with the North Carolina Law Review).

23. On lobbying, see Andrias & Sachs, *supra* note 7. On state-local preemption, see Davidson & Schragger, *supra* note 9.

24. The impact is further enhanced by deregulatory efforts that increase the impact of predatory lending and business practices. See Tonya L. Brito, Kathryn A. Sabbeth, Jessica K. Steinberg & Lauren Sudeall, *Racial Capitalism in the Civil Courts*, 122 COLUM. L. REV. 1243, 1246–47 (2022) (describing how the resulting debt highlights how civil courts normalize, legitimize, and perpetuate the extraction of resources from poor, predominately Black communities and support the accumulation of white wealth).

25. Huntington, *supra* note 22 (manuscript at 9) (“But the core of family law has always been state law. This structure provides multiple opportunities for states to adopt widely divergent policies, as federalism can channel deeply felt partisanship.”).

26. See, e.g., Robert A. Schapiro, *States of Inequality: Fiscal Federalism, Unequal States, and Unequal People*, 108 CALIF. L. REV. 1531, 1580 (2020) (observing that “the vast inequality of resources among the states constitutes a substantial barrier to the federal government’s ability to guarantee adequate levels of education, health care, and other core commitments over time”).

when it is committed to doing so.²⁷ In this sense, promoting universal access to pre-K, family leave, and affordable childcare will be as important to the new era as land grant colleges, railroads, and a nationwide highway system were to the Industrial era.²⁸ Only the federal government can fund such investments and ensure that the benefits of those investments are broadly shared.²⁹

Second, an era of greater inequality, rather than making smaller units of government more responsive to local conditions, makes them more susceptible to the influence of individuals and entities willing to spend near-unlimited sums of money to produce desired results.³⁰ Political science evidence indicates that the developments we describe above—the combination of restricting reproductive rights and the underfunding of early childhood support—are broadly unpopular with the general public.³¹ As we will show, regional disparities have increased because of antidemocratic influences as much as, if not more than, differing regional values.³²

Third, the federal government has a distinct role to play in protecting the rights and interests of unpopular minorities and those seen as outgroups.³³ The federal role has become increasingly important in the face of ever greater gerrymandering and vote suppression efforts targeting minority voters and representation of their interests at the state level.

27. Consider the history of the pandemic-related child tax credit. *See, e.g.*, Jason DeParle, *The Expanded Child Tax Credit Is Gone. The Battle Over It Remains*, N.Y. TIMES (Nov. 25, 2022), <https://www.nytimes.com/2022/11/25/us/politics/child-tax-credit.html> [<https://perma.cc/J4T9-KPVT> (staff-uploaded, dark archive)].

28. June Carbone, *The Fight To Expand Education—Two Centuries Apart*, 71 FLA. L. REV. 164, 165 (2019).

29. Most states have balanced budget amendments preventing deficit spending while the federal government does not, and the federal government has a broader “revenue base and essentially unlimited borrowing capabilities,” giving it “much greater fiscal capacity than the states,” especially during downturns. Schapiro, *supra* note 26, at 1589.

30. *See, e.g.*, Miriam Seifter, *Countermajoritarian Legislatures*, 121 COLUM. L. REV. 1733, 1735 (2021) (observing that “state legislatures are typically a state’s least majoritarian branch” and that “[a]cross the nation, the vast majority of states in recent memory have had legislatures controlled by either a clear or probable minority party”).

31. *See* June Carbone & Naomi Cahn, *The Court’s Morality Play: The Punishment Lens, Sex, and Abortion*, 96 S. CAL. L. REV. (forthcoming 2023) (manuscript at 40) (on file with the North Carolina Law Review); FIRST FIVE YEARS FUND, EARLY CHILDHOOD EDUCATION: THE PUBLIC IS READY FOR ACTION 14–15 (2018), <https://www.ffyf.org/wp-content/uploads/2018/10/FFYF-Aggregate-Polling-Analysis.pdf> [<https://perma.cc/48VG-N5SG>].

32. *See, e.g.*, Monica Prasad, *OpEd: Republicans Play Dirty Because Republican Policies Are Unpopular*, 21 ECON. SOCIO. 36, 36 (2020) (arguing that Republicans resort to antidemocratic measures such as suppressing votes because their policies are unpopular). *See infra* Section III.B for further discussion.

33. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938); *Romer v. Evans*, 517 U.S. 620, 631–33 (1996); *see* Monica Hesse, *The Baffling Defense of Herschel Walker*, WASH. POST (Oct. 6, 2022, 4:06 PM), <https://www.washingtonpost.com/lifestyle/2022/10/06/herschel-walker-daily-beast-abortion-story-republican-response/> [<https://perma.cc/TJQ9-5YGC> (dark archive)] (addressing the need to protect out-groups).

This Article traces the divide in state policies supporting family security and gender equality, showing how states with abortion-care affirming policies are also more likely to have comprehensive programs supporting children and families. We use abortion as the lens of our analyses, rendering visible the intersectional nature of this state-sponsored violence: the misogyny of existing government policies (lack of contraception, coerced pregnancy, no support for resulting families), combined with class (wealthier women pay for their own abortions), race (Black women are more likely to have abortions), and the need for investment in children in the new economy (fewer unwanted children leads to better outcomes for children generally).³⁴

Part I of this Article discusses the needs of our new information economy, focusing on why fertility control is central to healthy families and full participation in the new economy. Part II turns to the devolution of decision-making from the federal government to the states, showing how *Dobbs* fits into this process. Part III shows how this devolution exacerbates inequality and provides an explanation for the partisan polarization that underlies, and reinforces, this devolution. The Conclusion analyzes the potential for federal and state efforts to support families.

I. CHANGING ECONOMIC ORGANIZATION AND CHANGING FAMILY NEEDS

At its height in the middle of the twentieth century, a mature industrial economy, tamed by the economic policies associated with the New Deal and the Great Society, had partially succeeded in limiting the power of those at the top, extending a broad measure of prosperity to a robust (primarily white)³⁵ middle

34. See *infra* notes 71–72 (finding concerning outcomes for children whose mothers were unable to obtain an abortion). In an analogous review, albeit of policies supporting women’s reproductive autonomy, Reva Siegel notes that

[a] jurisdiction may single out abortion as a means of protecting new life but do little to help women avoid unwanted pregnancy or to help women bring a wanted pregnancy to term. . . . [M]any prolife jurisdictions lead in policies that restrict women’s reproductive choices and lag in policies that support women’s reproductive choices. Comparing state policies in this way makes clear that the means a state employs to protect new life reflects views about sex and property, as well as life.

Reva Siegel, *ProChoiceLife: Asking Who Protects Life and How—And Why It Matters in Law and Politics*, 93 IND. L.J. 207, 209 (2018) (emphasis omitted).

35. The role of race is particularly complicated because of the regional distribution of minority groups in the United States. In 1950, for example, ten percent of the U.S. population identified as Black or African American, and half lived in eight states. MINWUYELET AZIMERAW, BLACK OR AFRICAN AMERICAN POPULATION IN THE UNITED STATES, THE WASHINGTON PRIMARY METROPOLITAN STATISTICAL AREA (PMSA), AND THE DISTRICT OF COLUMBIA FROM 1950 TO 2010, at 1 (2014), https://planning.dc.gov/sites/default/files/dc/sites/op/publication/attachments/Black%20Population%20in%20DC%20MSA%20and%20US%20-%20August%202014_2.pdf [https://perma.cc/Q449-WBLZ]. The areas of the United States today with the least upward mobility—and most

group, and reducing the regional differences that long characterized the United States.³⁶ These developments largely rested on the combination of a strong federal government, which funded regional economic development, and strong corporations, prodded by strong unions, that offered secure jobs paying a “male family wage” that could support families.³⁷ Starting with the Great Migration of Black people from the South to the rest of the country, increasing with the tight labor markets and greater unionization that came with World War II, and culminating in the antidiscrimination and antipoverty laws of the 1960s,³⁸ the gap in the racial income and wealth was starting to decrease.³⁹

concentrated areas of poverty—remain in the Deep South, particularly the area that runs from Virginia to Louisiana, but also include some rustbelt cities, such as Cleveland, Milwaukee, and Indianapolis. Mark Abadi, *This Map Shows Where Americans Have the Best Chances of Going from Poor to Rich*, BUS. INSIDER (Feb. 8, 2018), <https://www.businessinsider.com/income-inequality-upward-mobility-map-us-2018-2> [<https://perma.cc/6FGJ-Y8P7>]; see also Raj Chetty, Matthew O. Jackson, Theresa Kuchler, Johannes Stroebel, Nathaniel Hendren, Robert B. Fluegge, Sara Gong, Federico Gonzalez, Armelle Grondin, Matthew Jacob, Drew Johnston, Martin Koenen, Eduardo Laguna-Muggenburg, Florian Mudekereza, Tom Rutter, Nicolaj Thor, Wilbur Townsend, Ruby Zhang, Mike Bailey, Pablo Barberá, Monica Bhole & Nils Wernerfelt, *Social Capital I: Measurement and Associations with Economic Mobility*, 608 NATURE 108, 108–21 (2022). Chetty and others, who observe that upward mobility is due to the causal effects of childhood environment, add, “[e]conomic mobility varies dramatically across US cities. Some have upward-income mobility comparable to the most mobile countries in the world. Others have rates below that of any developed country. These geographical differences are correlated with five factors: segregation, income inequality, local school quality, social capital, and family structure.” Emmanuel Saez, Nathan Hendren, Patrick Kline & Raj Chetty, *Where Is the Land of Opportunity? Intergenerational Mobility in the US*, VOXEU (Feb. 4, 2014), <https://voxeu.org/article/where-land-opportunity-intergenerational-mobility-us> [<https://perma.cc/7ZWZ-3A55>]. In addition, on a national basis, the Black-white wealth gap remains greater than the gap in income, at six to one, which means that Black people have less of a cushion than white people to deal with economic downturns or an unexpected pregnancy. Ellora Derenoncourt, Chi Hyun Kim, Moritz Kuhn & Moritz Schularick, *Wealth of Two Nations: The U.S. Racial Wealth Gap, 1860-2020*, at 2–3 (Nat’l Bureau of Econ. Resch., Working Paper No. 30101, 2022), https://www.nber.org/system/files/working_papers/w30101/w30101.pdf [<https://perma.cc/LSZ5-8A5T>].

36. See Ronald Brownstein, *America Is Growing Apart, Possibly for Good*, ATLANTIC (June 24, 2022), <https://www.theatlantic.com/politics/archive/2022/06/red-and-blue-state-divide-is-growing-michael-podhorzer-newsletter/661377/> [<https://perma.cc/JQ8P-TYP9>] (dark archive)].

37. Naomi Cahn & June Carbone, *Uncoupling*, 53 ARIZ. ST. L.J. 1, 6 (2021) [hereinafter Cahn & Carbone, *Uncoupling*] (arguing that the economy of the information age has dismantled the industrial-era system that tethered family security to the male family wage, long-term employment, and stable marriage—disguising the state role in securing family well-being).

38. On the temporary recognition of rights for the poor, see COHEN, *supra* note 21, at xx–xxvi. See generally Naomi Cahn & June Carbone, *The Blue Family Constitution* (Univ. of Va. Sch. of L. Pub. L. & Legal Theory Paper No. 2022-44, 2023) [hereinafter Cahn & Carbone, *The Blue Family Constitution*], https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4161894# [<https://perma.cc/68VV-3RGC> (staff-uploaded archive)] (click “Download this Paper” or “Open PDF in Browser”) (discussing the impact of the recent overruling of *Roe v. Wade* on family formation based on class).

39. Abigail Thernstrom & Stephan Thernstrom, *Black Progress: How Far We’ve Come, and How Far We Have To Go*, BROOKINGS INST. (Mar. 1, 1998), <https://www.brookings.edu/articles/black-progress-how-far-weve-come-and-how-far-we-have-to-go/> [<https://perma.cc/X3PR-WLN8>]. See generally ROBERT D. PUTNAM, *THE UPSWING: HOW AMERICA CAME TOGETHER A CENTURY AGO*

The economic, political, and legal system that broadened access to the economic benefits of the industrial economy has since been systematically dismantled. The changes started with the emergence of an information-age economy that has replaced the secure employment of the industrial age with a bifurcated economy that provides well-paying jobs for the highly skilled—particularly in tech, finance, upper management, and professions like law and medicine—and an expanded and marginalized service sector that offers little security or opportunity for advancement.⁴⁰ It has also increased job insecurity, as predictable career ladders offering lifetime tenure, opportunities for advancement, and regular pay increases have become rarer.⁴¹

During the same period, however, opportunities for women expanded, with increased demand for the type of labor women have traditionally performed, such as teaching, nursing, and service sector employment.⁴² Women had greater opportunities as their educational levels increased and antidiscrimination laws opened the doors to occupations that had previously been reserved for men.⁴³

A new middle-class family strategy arose to channel the investment necessary to realize the new opportunities available in this system—and to cushion the greater insecurity the new system introduced.⁴⁴ In *Red Families v. Blue Families*, we described the new information-age strategy as follows: invest in girls as well as boys' income opportunities, delay family formation until the couple reaches a point of emotional maturity and economic independence, and then use egalitarian relationships based on reciprocity and trust to marshal the resources necessary for much greater investment in children.⁴⁵

AND HOW WE CAN DO SO AGAIN (2020) (analyzing societal trends that reverted the United States from an egalitarian society back to an individualistic society).

40. See Cooke, *supra* note 4, at 241–46 (showing similar trends across industrial economies); ARNE L. KALLEBERG, GOOD JOBS, BAD JOBS: THE RISE OF POLARIZED AND PRECARIOUS EMPLOYMENT SYSTEMS IN THE UNITED STATES, 1970S TO 2000S, at 12–18 (2011) (arguing that the information economy tends to produce more good jobs and bad jobs, hollowing out the center).

41. KALLEBERG, *supra* note 40, at 103–04 (indicating that while white-collar workers often switch jobs, blue-collar workers are more likely to experience involuntary layoffs with longer periods between jobs and long-term declines in income); Katherine V.W. Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 UCLA L. REV. 519, 544–48, 574 (2001) (summarizing evidence that shows declining job tenure and concluding that it understates the increased precarity of employment).

42. See Cahn & Carbone, *Uncoupling*, *supra* note 37, at 27–29 (describing growth in women's employment).

43. See *id.*

44. *Id.* at 34 (describing the emergence of a new middle-class strategy designed to provide a measure of family security at a time of greater employment instability).

45. See generally NAOMI CAHN & JUNE CARBONE, RED FAMILIES V. BLUE FAMILIES: LEGAL POLARIZATION AND THE CREATION OF CULTURE (2010) [hereinafter CAHN & CARBONE, RED FAMILIES V. BLUE FAMILIES] (discussing the importance of egalitarianism gender roles and the delay of family formation until both parents are financially prepared); Cahn & Carbone, *The Blue Family*

This new strategy rested on two components: the ability to delay family formation and the ability to use that delay to marshal the education, training, and experience necessary to acquire the resources (and appropriate partners) to manage the tradeoffs among work, family, and investment in children's needs.⁴⁶ The new system paid off for the upper middle class—the number of women attending college doubled in the sixties and increased by another fifty percent in the seventies.⁴⁷ The ability to choose when—and whether—to have children increased women's ability to complete their education, attend graduate school, and enter the professions. While half of women who were born in 1950 and attended college were married by the age of twenty-three, that number fell to thirty percent for similar women born seven years later.⁴⁸ 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 legal access to contraception was the single biggest factor in the change, with abortion playing a contributing role.⁴⁹ The ability to delay pregnancy produced a drop in young marriages that corresponded with a dramatic increase in women's educational accomplishments and later job prospects.⁵⁰ Moreover, the shift toward later ages of childrearing, while associated with women's greater economic independence, also produced greater family stability.⁵¹ Relationships between the mature and well educated have proved more stable; by the mid-nineties, college graduate divorce rates had returned to the college graduate divorce rates of the sixties

Constitution, *supra* note 38 (noting that individuals tend to wait until they are financially stable, then typically marry other financially stable individuals).

46. CAHN & CARBONE, RED FAMILIES V. BLUE FAMILIES, *supra* note 45, at 1; Cahn & Carbone, *The Blue Family Constitution*, *supra* note 38 (manuscript at 3).

47. Cahn & Carbone, *Uncoupling*, *supra* note 37, at 28.

48. Claudia Goldin & Lawrence F. Katz, *The Power of the Pill: Oral Contraceptives and Women's Career and Marriage*, 110 J. POL. ECON. 730, 748–51 (2002) (linking the ability to control reproduction to women's greater graduate school attendance).

49. *Id.* As they point out,

[u]ntil the late 1960s, single women who were below the age of majority and did not have parental consent were often denied access to the pill and other forms of contraception. Before the late 1960s, it was not legal in any state for a physician to prescribe an oral contraceptive to an unmarried minor without consent of her parents. But by 1972, on the heels of the Twenty-sixth Amendment (1971), the “age of majority” had been lowered to 18 years old in most states.

Id. at 732.

50. See KAY HYMOWITZ, JASON S. CARROLL, W. BRADFORD WILCOX & KELLEEN KAY, THE NAT'L CAMPAIGN TO PREVENT TEEN AND UNPLANNED PREGNANCY, THE RELATE INST. & THE NAT'L MARRIAGE PROJECT AT THE UNIV. OF VA., 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> [<https://perma.cc/E8FN-4QEW>].

51. See Cahn & Carbone, *The Blue Family Constitution*, *supra* note 38 (manuscript at 9) (discussing the lower divorce rate for college graduates who have children later in life); CAHN & CARBONE, RED FAMILIES V. BLUE FAMILIES, *supra* note 45, at 13–14 (discussing the role of later age of marriage in promoting family stability).

(before adoption of no-fault divorce), while continuing to rise for the less educated.⁵² Women who did not attend college would see a more gradual increase in the age of the first birth that leveled off after the early nineties.⁵³ Their family stability has never returned to the levels at midcentury.⁵⁴

Both aspects of the economic order have been beyond the reach of much of the population. Women's reproductive liberty became an essential element of a system that ultimately remade the family by channeling greater investment into children.⁵⁵ But this system depends on reliable access to contraception in a country where, at least until the adoption of the Affordable Care Act ("ACA"), approximately half of all pregnancies were unintended.⁵⁶ Poorer women are more likely to have unintended pregnancies, and access to health care coverage with contraception is key: "When the Affordable Care Act mandated insurance coverage for contraception, the unintended pregnancy rate dropped from 44.7 to 37.9 [percent]."⁵⁷ The lack of effective contraceptive access for those near the poverty line has been a major factor in the skewing of class-based family formation strategies.

Class has also been a major factor in access to the resources that provide a foundation for children's success. The United States ranks at the bottom of developed countries in terms of child poverty,⁵⁸ intergenerational mobility remains flat, and the likelihood of going to college shortly after high school is highly related to family income.⁵⁹ These figures reflect poor parents' lack of access to the benefits better-off families enjoy, such as paid family leave,

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

53. Women who did not attend college would not see a similar delay in marriage for another twenty years. See generally Claudia Goldin, *The Long Road to the Fast Track: Career and Family*, *ANNALS AM. ACAD. POL. & SOC. SCI.* 20 (2004) (discussing the career and family outcomes of college graduate women between 1900 and 1990); cf. HYMOWITZ ET AL., *supra* note 50.

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

55. See Cahn & Carbone, *The Blue Family Constitution*, *supra* note 38 (manuscript at 3) ("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.")

56. Michelle Oberman, *What Will and Won't Happen When Abortion Is Banned*, *J.L. & BIOSCIENCE* 1, 5 (2022).

57. *Id.* at 6.

58. EICHNER, *supra* note 3, at 131–32.

59. Richard V. Reeves & Eleanor Krause, *Raj Chetty in 14 Charts: Big Findings on Opportunity and Mobility We Should All Know*, *BROOKINGS INST.* (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/> [<https://perma.cc/WQ78-WRX5>].

affordable child care, and flexible work arrangements.⁶⁰ As a result, the benefits of the new family model are beyond the reach of a large part of the population.⁶¹

These results have been subject to withering critiques. Martha Fineman describes the societal failure to provide for children's and other caretaking needs as part of the "privatization of dependence," that is, as a system that provides for the care of children, the ill, and the elderly through use of private family resources.⁶² Maxine Eichner has called it "the free market family" and explains how it "crushed the American dream" by denying families what they need to thrive.⁶³ In accordance with this neoliberal ethos, "citizens are constituted primarily as individual market actors' who must generally 'seek their [own] welfare in the market.'"⁶⁴ Yet, the well-off can realize the benefits of the new family model in part because they enjoy greater access to publicly subsidized health care, employer-provided family leave, and good public schools than other parts of the population. Their success and the success of their children reflect this, becoming self-fulfilling prophecies.

Within this context, abortion is a fallback and a lifeline.⁶⁵ In the period immediately after *Roe v. Wade*,⁶⁶ abortion contributed to well-off women's ability to stay in school and begin careers.⁶⁷ Over time, increased contraceptive

60. EICHNER, *supra* note 3, at 92–95 (describing the lack of a childcare infrastructure in the United States); see Jason Jackson & Aziza Ahmed, *The Public/Private Distinction in Public Health: The Case of Covid-19*, 90 FORDHAM L. REV. 2541, 2541–42 (2022).

61. See generally JUNE CARBONE & NAOMI CAHN, MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY (2014) [hereinafter CARBONE & CAHN, MARRIAGE MARKETS] (examining the economic forces that have affected the relationship stability of families, particularly working-class families).

62. See Martha L.A. Fineman, *Masking Dependency: The Political Role of Family Rhetoric*, 81 VA. L. REV. 2181, 2187 (1995) (discussing how in the American state, "[d]ependency, 'naturally' assigned to the family, is privatized"); Jennifer S. Hendricks, *Essentially a Mother*, 13 WM. & MARY J. WOMEN & L. 429, 464 (2007) (describing legal regulation of the family as "a system that privatizes dependence, placing responsibility for caretaking on the family rather than the state"); Melissa Murray & Caitlin Millat, *Pandemics, Privatization, and the Family*, 96 NYU L. REV. ONLINE 106, 110 (2021) (describing caretaking, including during the pandemic, "as a private matter that families should solve independently, using their own resources").

63. See EICHNER, *supra* note 3, at 4; DANA SUSKIND, PARENT NATION 18 (2022) (identifying "the mythic idea of American individualism" as contrary to the needs of children, while societal help is what will provide the requisite support).

64. Abbye Atkinson, *Rethinking Credit as Social Provision*, 71 STAN. L. REV. 1093, 1122 (2019) (alteration in original) (quoting John Myles, *How To Design a "Liberal" Welfare State: A Comparison of Canada and the United States*, 32 SOC. POL'Y & ADMIN. 341, 344 (1998)).

65. Maryn McKenna, *Roe Stood for 49 Years. It Revolutionized Life for Women*, WIRED (June 24, 2022, 10:31 AM), <https://www.wired.com/story/roe-overtuned-supreme-court-dobbs-abortion-rights-revolutionized-life-for-women/> [https://perma.cc/SF4S-GJLC].

66. 410 U.S. 113 (1973).

67. Goldin and Katz found that legal access to contraception played the more critical role in the initial delay in marriage, but that abortion contributed to the effect. Goldin & Katz, *supra* note 48, at 755–58.

usage has reduced abortions for the well-off.⁶⁸ Today, those who seek abortions are more likely to be living below the poverty line, already have children, and be in the midst of a disruptive life event, such as a job loss or breakup of a relationship.⁶⁹ Multiple studies show correlations between abortion access and women's economic futures, and there is some evidence of causation.⁷⁰ The Turnaway Study, which began in 2008, followed 1,000 women who had sought an abortion over a five-year period.⁷¹ Compared to those who received an abortion, women who gave birth after being "turned away" because they were up to three weeks beyond their state's gestational limit were almost four times more likely to have a household income below the federal poverty limit, three times more likely to be unemployed, and more likely to have lower credit scores and higher debt than those in the control groups who were able to obtain abortions.⁷² The turned away women's children were also more likely to be living in poverty than the children born to women who were able to choose the timing of their births.⁷³

68. Richard V. Reeves & Joanna Venator, *Sex, Contraception, or Abortion? Explaining Class Gaps in Unintended Childbearing*, BROOKINGS INST. (Feb. 26, 2015), <https://www.brookings.edu/research/sex-contraception-or-abortion-explaining-class-gaps-in-unintended-childbearing/> [https://perma.cc/W2DZ-AH9A] (noting that low-income women are both less likely to use contraception and to have an abortion than wealthier women).

69. Isabel V. Sawhill & Morgan Welch, *The End of Roe Will Create More Inequality of Opportunity for Children*, BROOKINGS INST. (June 30, 2022), <https://www.brookings.edu/blog/up-front/2022/06/30/the-end-of-roe-will-create-more-inequality-of-opportunity-for-children> [https://perma.cc/82LJ-RSS8]. While the proportion of women receiving abortions in 1995 was twenty-nine percent, today it is forty-four percent; in 1995, fifty-two percent of those seeking abortions were higher-income, and that number is now twenty-five percent. Jean Yi, *Where Americans Stand on Abortion, in 5 Charts*, FIVETHIRTYEIGHT (May 6, 2022), <https://fivethirtyeight.com/features/where-americans-stand-on-abortion-in-5-charts/> [https://perma.cc/6ANN-C9XD].

70. Anna Bernstein & Kelly Jones, *The Economic Effects of Abortion Access: A Review of the Evidence*, INST. FOR WOMEN'S POL'Y RSCH. (July 18, 2019), <https://iwpr.org/iwpr-issues/reproductive-health/the-economic-effects-of-abortion-access-a-review-of-the-evidence/> [https://perma.cc/XFX9-PUDW].

71. Sarah Miller, Laura R. Wherry & Diana Greene Foster, *What Happens After an Abortion Denial? A Review of Results from the Turnaway Study*, 110 AM. ECON. ASS'N PAPERS & PROC. 226, 226 (2020). See generally DIANA GREEN FOSTER, *THE TURNAWAY STUDY* (2020) [hereinafter FOSTER, *THE TURNAWAY STUDY*] (chronicling the experience of just under 1,000 women who sought an abortion over a ten-year period across twenty-one states).

72. FOSTER, *THE TURNAWAY STUDY*, *supra* note 71, at 18–19. The participants fell into three categories: (1) those who were up to three weeks beyond the jurisdiction's gestational limit for obtaining an abortion, (2) those up to two weeks under the gestational limits who were actually able to obtain an abortion, and (3) those who received an abortion during their first trimester. Miller et al., *supra* note 71, at 226–27; Diana Greene Foster, M. Antonia Biggs, Lauren Ralph, Caitlin Gerdts, Sarah Roberts & Maria Glymour, *Socioeconomic Outcomes of Women Who Receive and Women Who Are Denied Wanted Abortions*, 108 AM. J. PUB. HEALTH 407, 409–10 (2018). The research team followed up for five years. *Id.* at 408.

73. Margaret Talbot, *The Study That Debunks Most Anti-abortion Arguments*, NEW YORKER (July 7, 2020), <https://www.newyorker.com/books/under-review/the-study-that-debunks-most-anti-abortion-arguments> [https://perma.cc/D8P9-VTQC (dark archive)].

For these women, abortion does not hold the line on the nonmarital birth or the pregnancy that disrupts educational and job opportunities. Instead, it offers a lifeline to women who have difficulty meeting the needs of their existing families. Abortion restrictions after *Dobbs* may lead to another 75,000 births per year, and these births are likely to be heavily concentrated among the poor.⁷⁴ The factors that have increased inequality in the United States—the failure to provide either comprehensive access to reproductive choice or comprehensive support for the resulting children—are likely to increase post-*Dobbs*.

II. DEVOLUTION AND *DOBBS*

The Supreme Court's 2022 decision in *Dobbs* represents the most recent iteration of a devolution of decision-making back to the states. This devolution involves two components. The first started with President Richard Nixon when he coined the term "The New Federalism" and argued for decentralizing decision-making to give additional authority to state and local governments.⁷⁵ In the more than half-century since, the states have acquired greater power to reject federal initiatives or implement them in ways that undercut federal objectives, resulting in variation in policies and outcomes among the states.⁷⁶ This New Federalism has given the states greater ability to refuse to support vulnerable families, even when Congress has appropriate funds that would assist them in doing so.⁷⁷

The second aspect of this New Federalism involves the erosion of civil and reproductive rights once guaranteed under the Constitution. While this erosion of the protection and enforcement of civil rights involves a variety of

74. Dylan Scott, *The End of Roe Will Mean More Children Living in Poverty*, VOX (June 24, 2022, 10:53 AM), <https://www.vox.com/policy-and-politics/23057032/supreme-court-abortion-rights-roe-v-wade-state-aid> [<https://perma.cc/8DHL-97YH>].

75. Nixon stated that, "[a]fter a third of a century of power flowing from the people and the states to Washington, it is time for a New Federalism in which power, funds, and responsibility will flow from Washington to the states and to the people." Katz, *supra* note 16.

76. In the absence of partisan polarization or big-dollar funders pushing particular agendas, the public often agrees on more prosaic family law issues and pragmatic solutions. Indeed, as we note below, red states that have voted on Medicaid expansion have overwhelmingly approved it. Mississippi defeated a personhood amendment several years ago, and Kansans voted to retain protection for the right to an abortion. For a discussion of the areas of convergence and the difficulties of applying "reductionist partisan labels," see Huntington, *supra* note 22 (manuscript at 2–5). Some of this convergence results from Supreme Court opinions, such as the marital/nonmarital distinction. See Katharine K. Baker, *Making Some Sense of the Constitutional Family*, 72 WASH. U. J.L. & POL'Y (forthcoming 2023) (manuscript at 1–2). Yet this convergence has not occurred on a range of policies, including both state-based programs, (such as abortion and transgender care) and with respect to federal programs, as this Article shows and as we discussed in CAHN & CARBONE, RED FAMILIES V. BLUE FAMILIES, *supra* note 45, at 11–12.

77. See Andrew Hammond, *Welfare and Federalism's Peril*, 92 WASH. L. REV. 1721, 1722–24 (2017) (describing diversion of federally provided funds); see also *infra* at notes 90–93 and accompanying text.

situations,⁷⁸ in this Article, we focus only on the *Dobbs* decision because it illustrates the impact of the evisceration of a federally guaranteed minimum level of protection on reproductive rights and the family.

A. *Devolution and Positive Rights*

While the United States has never embraced a regime of positive rights,⁷⁹ the era from the New Deal through the Great Society witnessed dramatic increases in federal spending that raised the floor for many families.⁸⁰ That era has been described as a period of “cooperative federalism.”⁸¹ Social scientists describe it as a change from a system of “coordinate” (or “dual”) federalism, in which the federal government and the states acted relatively independently, to one of “cooperative” activities, “in which there is much more sharing of fiscal functions and greater interplay among levels of government in the management and funding of public programs.”⁸² The result was greater public spending and greater federal control of that spending.⁸³ In addition, social scientists emphasize that while state and localities are often effective at allocating public goods such as education and police services, centralized efforts are more effective in providing assistance to the poor because of local opposition.⁸⁴

President Nixon pushed back against what was seen at the time as growing federal power. One of his signature achievements along these lines was revenue

78. The Supreme Court has eroded civil rights in a number of arenas, including, for example, employment law. See Naomi Cahn, June Carbone & Nancy Levit, *Gender and the Tournament: Reinventing Antidiscrimination Law in an Age of Inequality*, 96 TEX. L. REV. 425, 436–44 (2017). And, as other contributions to this symposium show, the pandemic has prompted scrutiny of protections for housing (eviction) and food.

79. On the absence of positive rights, see, for example, *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 37 (1973) (rejecting the argument that education “is a fundamental right or liberty”); Anne C. Dailey, *Children’s Constitutional Rights*, 95 MINN. L. REV. 2099, 2168 n.282 (2011) (“[T]he Supreme Court soon made clear that in the United States adults do not have affirmative constitutional rights to basic social necessities.”); Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1808 (2005) (“Our Constitution does not directly address fundamental issues of distributive fairness involving, for example, rights to nutrition, housing, education, and health care.”).

80. Michael E. Parrish, *The Great Depression, the New Deal, and the American Legal Order*, 59 WASH. L. REV. 723, 727 (1984) (“For the first time, the national government became the chief custodian of both economic security and social justice for all citizens.”).

81. See, e.g., *New York v. United States*, 505 U.S. 144, 167 (1992) (“[W]here Congress has the authority to regulate private activity under the Commerce Clause, we have recognized Congress’ power to offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation. This arrangement . . . has been termed ‘a program of cooperative federalism.’”).

82. John Joseph Wallis & Wallace E. Oates, *The Impact of the New Deal on American Federalism*, in *THE DEFINING MOMENT: THE GREAT DEPRESSION AND THE AMERICAN ECONOMY IN THE TWENTIETH CENTURY* 156 (Michael D. Bordo, Claudia Goldin & Eugene N. White eds., 1998).

83. *Id.*

84. *Id.* at 177 (proving assistance to the poor requires a more substantial central presence in part because of mobility out of jurisdictions providing more redistributive services).

sharing.⁸⁵ The federal government, which, unlike the states, does not have to balance its budget, would generate funds to be distributed to the states, who could spend them with fewer strings attached.⁸⁶

The movement to limit federal authority gathered steam under the Reagan administration as the political right sought to “repeal the New Deal”⁸⁷ by cutting back on federal activities and undermining federal protections for the union movement, which had been the mainstay of the Democratic Party.⁸⁸ The movement has continued with the Roberts Court, which has strengthened the ability of the states to reject federal initiatives that would benefit more vulnerable residents.⁸⁹

The welfare reform movement, which culminated in the abolition of the Aid for Families with Dependent Children (“AFDC”) program and its replacement with Temporary Assistance to Needy Families (“TANF”), provides a prime example of New Federalism in action.⁹⁰ While Congress federalized old-age assistance, it administered aid to mothers through a cooperative federal-state system.⁹¹ The southern states had effectively resisted the expansion of benefits by insisting on “moral requirements” that disproportionately disadvantaged Black mothers.⁹² In the sixties, however, at

85. Nixon was also responsible for major changes on the Supreme Court, which reversed the Court’s brief movement towards moving beyond rational basis for poverty. *See generally* COHEN, *supra* note 21 (surveying significant Supreme Court rulings since the Nixon administration).

86. June Carbone, Nancy Levit & Naomi Cahn, *Failure To Shore Up State Budgets May Hit Women’s Wallets Especially Hard*, CONVERSATION (Sept. 29, 2020), <https://theconversation.com/failure-to-shore-up-state-budgets-may-hit-womens-wallets-especially-hard-145524> [https://perma.cc/RX8T-GV6L].

87. *See generally* TIMOTHY J. CONLAN, FROM NEW FEDERALISM TO DEVOLUTION: TWENTY-FIVE YEARS OF INTERGOVERNMENTAL REFORM (1998) (describing how the stated objectives of Republican reformers evolved from rationalizing and decentralizing an activist government, to rolling back the welfare state, to replacing it altogether).

88. *See, e.g.*, Andrias & Sachs, *supra* note 7, at 566 (citing “estimates that membership in the federated mass-membership organizations built in the Progressive and New Deal Eras dropped by sixty percent between 1974 and 1994”); *id.* at 568 (stating that since the 1970s, “the labor movement’s size and power have declined considerably” and that “unions now represent only about six percent of employees in the private sector and ten percent of the labor force overall”); *see also* Elliot Mincberg, *How Trump Judges Are Trying To Repeal the New Deal*, PEOPLE FOR AM. WAY (Dec. 20, 2019), <https://www.pfaw.org/blog-posts/how-trump-judges-are-trying-to-repeal-the-new-deal/> [https://perma.cc/CWJ2-2U9N] (describing more recent efforts to create a federal judiciary committed to reversing New Deal worker protections and other rights).

89. *See, e.g.*, Nat’l Fed’n of Indep. Bus. v. Sebelius, 567 U.S. 519, 575–76 (2012) (striking down efforts to compel states to adopt Medicaid expansion).

90. Hammond, *supra* note 77, at 1722–24.

91. JUNE CARBONE, FROM PARTNERS TO PARENTS: THE SECOND REVOLUTION IN FAMILY LAW 201–10 (2000) (describing operation of the program).

92. *See* Brief for NAACP Legal Defense and Educational Fund as Amicus Curiae Supporting Petitioners at 18–19, *Levy v. Louisiana*, 391 U.S. 68 (1967) (No. 508), 1968 WL 112827 (observing that 95.8% of those affected by restrictions on the eligibility of nonmarital children in Louisiana were Black); Cahn & Carbone, *The Blue Family Constitution*, *supra* note 38 (manuscript at 75–80) (discussing moral worthiness); *see also* Serena Mayeri, *Marital Supremacy and the Constitution of the Nonmarital*

the height of the civil rights movement and federal power, the Supreme Court struck down many of these state-imposed restrictions.⁹³ But, by the seventies, however, a more conservative Supreme Court reviewed state restrictions with less scrutiny, increasing state discretion in the administration of the program.⁹⁴

The shift from AFDC to TANF in the nineties radically changed the nature of the program, with its “cooperative federalist structure” giving way to block grants that drastically increased state discretion.⁹⁵ Andrew Hammond describes the results of this “devolution” as “sobering,” concluding that TANF is less effective than AFDC because many states have relatively weak commitments to welfare services and have diverted TANF funds to meet other state funding gaps.⁹⁶

This devolution of power, not just over basic needs but over the administration of federal funds specifically designed to benefit the needy, undercuts any kind of national support for children.⁹⁷ If this simply meant that states had greater leeway in focusing funds on areas of greatest need, it might increase the effectiveness of government interventions. Instead, as we will discuss below, it increases the ability of state officials to divert resources away from the poor and politically powerless to state officials’ preferred activities.⁹⁸ The combination of weaker federal constitutional rights and more ideologically driven state policies effectively locks many families in poverty.

B. *Dobbs and the Dismantling of “Negative” Rights*

Dobbs represents the other side of this devolution: the dismantling of federal rights to be free from government interference in reproductive choices.⁹⁹

Family, 103 CALIF. L. REV. 1277, 1297 (2015) (discussing the race-based origins of many of the restrictions).

93. See, e.g., *King v. Smith*, 392 U.S. 309, 316 (1968).

94. See *Wyman v. James*, 400 U.S. 309, 319–24 (1971) (upholding a New York law that required that social service workers remain in “close contact” with those on public assistance and direct that recipient to “be visited as frequently” as necessary, even when the visits were arbitrary and intrusive); *Maher v. Roe*, 432 U.S. 464, 473–75 (1977) (upholding Connecticut’s decision not to fund nontherapeutic abortions, emphasizing that the state had no obligation to fund any healthcare); *Harris v. McRae*, 448 U.S. 297, 326–27 (1980) (upholding the constitutionality of the Hyde Amendment, which prohibited the use of federal funds to pay for any abortions but left the states free to use state funds for abortion if they chose).

95. Hammond, *supra* note 77, at 1722.

96. *Id.* at 1722–23. Hammond also notes that the devolution made TANF less effective as a countercyclical fiscal measure because state budgets take a substantial hit during a recession, and states experience more pressure to divert funds from the poor to other spending priorities. *Id.*

97. See Montez, *US State Polarization*, *supra* note 8, at 1037–39.

98. For a particularly egregious example, see Neil MacFarquhar, *Mississippi Welfare Scandal Spreads Well Beyond Brett Favre*, N.Y. TIMES (Sept. 22, 2022), <https://www.nytimes.com/2022/09/22/us/brett-favre-welfare-mississippi.html> [<https://perma.cc/WF/X5-BGRY> (dark archive)] (describing how, in one of the biggest corruption cases in Mississippi history, state officials treated TANF funds as a “slush fund for pet projects and personal gain”).

99. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2283–85 (2022).

It amplifies the effect of fiscal devolution by removing a constitutional right that has over time become increasingly important for precisely those women who lack access to the resources necessary to support children.¹⁰⁰ *Dobbs* undercuts the promise of a federal floor ensuring a minimum national foundation for women's well-being in at least three ways. First, the methodology of the decision attempts to freeze constitutional rights in the circumstances of the nineteenth century, making constitutional jurisprudence largely irrelevant to reproductive needs. Second, the decision celebrates the primacy of the states in reproductive decision-making. Third, the opinion erases women from view, minimizing the impact of pregnancy on women and their place in society.

First, the *Dobbs* Court's articulation of originalism¹⁰¹ rejects the premise that the Constitution could protect a modern concept of liberty tied to the very impact of pregnancy in 2022 rather than the very different impacts of pregnancy in the 1860s.¹⁰² Instead, recognizing that the Fourteenth Amendment protects

100. See Lynn M. Paltrow, Lisa H. Harris & Mary Faith Marshall, *Beyond Abortion: The Consequences of Overturning Roe*, 22 AM. J. BIOETHICS 3, 3 n.1 (2022) ("We recognize that not all people with the capacity for pregnancy identify as women and that the gender binary itself contributes to systems of discrimination and control. We use the terms 'women' and 'pregnant people/persons' in recognition of the fact that all people are entitled to dignity, equality and fairness regardless of gender identity, capacity for pregnancy, or stage of pregnancy.")

101. Anthony P. Picadio, *In Scalia's Wake: The Future of the Second Amendment Under an Originalist Supreme Court Majority*, TRANSPARTISAN REV. (July 19, 2021), <https://transpartisanreview.org/scalia-one/> [<https://perma.cc/K32Q-ZJ6G>] (observing that "Neil Gorsuch, Brett Kavanaugh, and Amy Coney-Barrett each stated during their confirmation hearings and elsewhere that they were originalists," and that Justices Thomas and Alito have embraced originalism in other contexts). Other originalists have argued that originalism does not depend on the interpretation that the drafters would have adopted in the nineteenth century, but rather on the text of the constitutional provision at issue, which in this case would be the unenumerated rights implicit in the concept of ordered liberty. See, e.g., Steven G. Calabresi & Livia Fine, *Two Cheers for Professor Balkin's Originalism*, 103 NW. U. L. REV. 663, 669 (2009) ("What judges must be faithful to is the enacted law, not the expectations of the parties who wrote the law. . . . [I]t is the text of the Fourteenth Amendment that was ratified in 1868."); cf. David H. Gans, *Reproductive Originalism: Why the Fourteenth Amendment's Original Meaning Protects the Right to Abortion*, 75 SMU L. REV. F. 191, 208 (2022) (maintaining that the Fourteenth Amendment, in accordance with an originalist approach, should not be bounded by the state laws in existence at the time of its passage but rather interpreted in terms of the Amendment's purpose of limiting the impact of the restrictive laws in existence at the time of its adoption).

102. The dissent tartly observed

[t]he lone rationale for what the majority does today is that the right to elect an abortion is not "deeply rooted in history" The same could be said, though, of most of the rights the majority claims it is not tampering with. . . . So one of two things must be true. Either the majority does not really believe in its own reasoning. Or if it does, all rights that have no history stretching back to the mid-19th century are insecure.

Dobbs, 142 S. Ct. at 2319 (Breyer, Sotomayor & Kagan, JJ., dissenting); cf. Gans, *supra* note 101, at 208–09 (describing the proponents of nineteenth-century laws banning abortion before quickening as basing their arguments primarily on the desire to control women for reasons inconsistent with the guarantees of the Fourteenth Amendment).

abortion requires one of two possible approaches: a living Constitution at odds with originalism or a textualist approach of the type Justice Gorsuch adopted in *Bostock v. Clayton County*.¹⁰³

Second, the *Dobbs* Court explicitly affirmed the primacy of the states in abortion.¹⁰⁴ The last paragraph of the opinion states that the “Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion. . . . We . . . return that authority to the people and their elected representatives.”¹⁰⁵ Justice Kavanaugh, concurring in the opinion, insisted that on the issue of abortion, the “Constitution is neutral and leaves the issue for the people and their elected representatives to resolve through the democratic process in the States or Congress.”¹⁰⁶ The majority, including the concurrence, thus stated unequivocally that they would not review the actions of states choosing to limit abortion (leaving open the question of whether they would affirm congressional action to protect, or ban, abortion on a national basis).¹⁰⁷

Third, the majority opinion dismissed women’s interests in reproductive autonomy, and failed to recognize both the connection between decisions about pregnancy and bodily integrity and the impact of childbearing on the life outcomes of women and their families.¹⁰⁸ The majority opinion devoted a mere paragraph to addressing the impact of abortion restrictions on pregnant women at all, and nowhere did the Court recognize the significant personal and bodily intrusion of forcing people to carry pregnancies to term.¹⁰⁹ The dissent, in contrast, emphasized that *Dobbs* holds that a state can force a woman to give

103. 140 S. Ct. 1731 (2020) (concluding that discrimination on the basis of “sex” includes discrimination on the basis of the sex of a person’s partner or the presentation of a sexual identity that is different from the one assigned at birth); see Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265, 267 (2020) (discussing “textualisms”). Gorsuch’s approach in *Bostock* reflects the type of textual analysis advocated by Calabresi & Fine, *supra* note 101, and Gans, *supra* note 101. That is, one that interprets the words used rather than legislative intent or circumstances in existence at the time of enactment.

104. *Dobbs*, 142 S. Ct. at 2284.

105. *Id.*

106. *Id.* at 2305.

107. These statements do, however, leave open the possibility of congressional action, including a national ban on abortion. At the same time, they do not necessarily support a congressional effort to codify *Roe*. See William H. Hurd, *Does Congress Have the Constitutional Authority To Codify Roe?*, BLOOMBERG L. (May 17, 2022, 4:00 AM), <https://news.bloomberglaw.com/us-law-week/does-congress-have-the-constitutional-authority-to-codify-roe> [<https://perma.cc/6VZV-A6YH> (dark archive)]; Isaac Chotiner, *How the Supreme Court Could Approach Federal Laws Upholding—Or Banning—Abortion*, NEW YORKER (June 28, 2022), <https://www.newyorker.com/news/q-and-a/how-the-supreme-court-could-approach-federal-laws-upholding-or-banning-abortion> [<https://perma.cc/U34H-4Y77> (dark archive)].

108. The Editorial Board of the *New York Times* referred to the opinion’s “blithe dismissal of women’s dignity and equality.” *The Ruling Overturning Roe Is an Insult to Women and the Judicial System*, N.Y. TIMES (June 24, 2022), <https://www.nytimes.com/2022/06/24/opinion/dobbs-ruling-roe-v-wade.html> [<https://perma.cc/8DML-TZ4T> (staff-uploaded, dark archive)].

109. *Dobbs*, 142 S. Ct at 2258–59.

birth and “can thus transform what, when freely undertaken, is a wonder into what, when forced, may be a nightmare.”¹¹⁰ The dissent explained that some states had already passed draconian laws in anticipation of the *Dobbs* ruling, and that some contain no exceptions for rape or incest—“[u]nder those laws, a woman will have to bear her rapist’s child or a young girl her father’s—no matter if doing so will destroy her life.”¹¹¹ Thus, it concluded that the states will be able to dictate morality to the pregnant and coerce the pregnant to give birth to an unwanted child.¹¹²

Perhaps the most disingenuous part of the *Dobbs* majority opinion, however, was its failure to acknowledge the effects of devolution on the impact of having a child.¹¹³ The majority cited amicus briefs claiming that “modern developments” had made childbearing easier because of laws banning pregnancy discrimination, providing for leave for pregnancy and childbirth, assisting with the costs of childbirth, and providing “safe havens” where children can be dropped off anonymously for adoption before dismissing.¹¹⁴ The dissent responded to these “modern developments” with incredulity, particularly in light of the majority’s insistence on trusting these issues to the states.¹¹⁵ *Dobbs* arose in Mississippi and the dissent observed that

[s]ixty-two percent of pregnancies in Mississippi are unplanned, yet Mississippi does not require insurance to cover contraceptives and prohibits educators from demonstrating proper contraceptive use. The state neither bans pregnancy discrimination nor requires provision of paid parental leave. It has strict eligibility requirements for Medicaid and nutrition assistance, leaving many women and families without basic medical care or enough food.¹¹⁶

While the dissent acknowledged that Mississippi was particularly bad, it also pointed out that public health professionals have documented the way that states with restrictive abortion policies also tend to be the states investing the least in women’s and children’s health.¹¹⁷ This occurs, in part, because while the federal government covers the cost of pregnancy, it does not necessarily cover the cost of health care before or after pregnancy, and even if the services are

110. *Id.* at 2317 (Breyer, Sotomayor & Kagan, JJ., dissenting).

111. *Id.* at 2318.

112. *Id.*

113. See Sonia M. Suter & Naomi Cahn, *The Disembodied Pregnant Person*, NAT’L L.J. (July 1, 2022), <https://www.bloomberglaw.com/home> [<https://perma.cc/THN5-ZCQK> (staff-uploaded, dark archive)] (search for article using Bloomberg Law’s search engine and download article).

114. *Dobbs*, 142 S. Ct. at 2259.

115. *Id.* at 2339–40 (Breyer, Sotomayor & Kagan, JJ., dissenting).

116. *Id.* The dissent uses statistics from Mississippi because the case arose there.

117. *Id.* at 2338–40 (“[A] ban on abortions increases maternal mortality by 21 percent, with white women facing a 13 percent increase in maternal mortality while black women face a 33 percent increase.”).

covered, the provider may be far away.¹¹⁸ In addition, the dissent emphasized that, contrary to the majority's rosy picture, women still experienced pregnancy discrimination,¹¹⁹ and that paid family leave was unavailable to the population most in need of it: "Only 20 percent of private-sector workers have access to paid family leave, including a mere 8 percent of workers in the bottom quartile of wage earners."¹²⁰ Even the safe haven laws touted by the majority do not necessarily insulate those dropping the children off from prosecution for child abandonment.¹²¹

What neither the *Dobbs* majority nor the dissent discussed, however, is that these gaps in the public's provision of support for children are a function of the long-term movement towards state devolution.¹²²

III. REGIONS AND POLICIES

The effect of *Dobbs*, considered in light of the removal of both a federal constitutional guarantee of reproductive rights *and* devolution to the states of the responsibility to care for the resulting children, exacerbates inequality in the United States on the basis of gender, class, race, and region. It denies those who may become pregnant the right to make their own decisions about pregnancies that may endanger their lives, the well-being of the children they already have, and the families they hope to have in the future. At the same time, Supreme Court decisions like *NFIB v. Sebelius*¹²³ have undercut federal efforts to channel greater resources to parents who may be struggling to provide for the children they have.¹²⁴

Some of the biggest disparities among the states involve access to health care. Though the *Dobbs* majority identified the ACA¹²⁵ as one of the changes improving women's ability to manage pregnancy, the opinion did not mention that the Supreme Court had undercut federal efforts to ensure universal health care coverage.¹²⁶ As a result, approximately twenty percent of the states continue to deny their residents the benefits of the Medicaid expansion portion

118. *Id.*

119. *Id.*

120. *Id.* at 2239–40.

121. CHILD WELFARE INFO. GATEWAY & CHILD.'S BUREAU, INFANT STATE HAVEN LAWS 4 (2021), <https://www.childwelfare.gov/pubPDFs/safehaven.pdf> [<https://perma.cc/A4EW-EGPZ>].

122. *See supra* Section II.A; *infra* Section III.B.

123. 567 U.S. 519 (2012).

124. *Id.* at 575–85, 633–44 (discussing the invalidation of the Medicaid expansion portion of the ACA).

125. *Dobbs*, 142 S. Ct. at 2259 n.44.

126. *Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 575–76. Nor did Justice Alito mention that he, along with three other conservatives on the Court at the time, would have declared the entire act unconstitutional. *Id.*

of the ACA despite the widespread popularity of the benefits.¹²⁷ Virtually all of the states that have not expanded Medicaid access to cover those at 138% of the poverty line are states that restrict abortion.¹²⁸ That means a lack of coverage for those who would be eligible in other states for pre- and postpregnancy health care that contributes to family well-being—and for the contraception that would prevent the high rate of unintended pregnancy among the poor and near poor.¹²⁹

Differences in state policies thus drive not only access to abortion but the ability to provide for the resulting children.

A. *Red v. Blue Policies*

States might decrease inequality by promoting gender equality and reproductive autonomy, investing in children and their families, and providing economic security. Each of those policies is determined both by federal and state-level regulation.¹³⁰ The landscape of which states provide economic security closely mirrors the states most likely to protect access to abortion.¹³¹

Indeed, consider a state-by-state comparison of policies that support families, and corresponding indicia of women’s and children’s health outcomes. Analysis reveals “a central paradox” that the reddest states, as indicated by those with the most restrictions on abortions, (1) “invest the least in the well-being of women, children, and families; and (2) mothers, infants, and children in these high-restriction, low-investment states have the worst health outcomes.”¹³² In addition, “the unintended pregnancy rate is highest among the states with the most restrictive abortion policies.”¹³³

127. Erin Brantley & Sara Rosenbaum, *Ballot Initiatives Have Brought Medicaid Eligibility to Many but Cannot Solve the Coverage Gap*, HEALTH AFFS. (June 23, 2021), <https://www.healthaffairs.org/doi/10.1377/forefront.20210617.992286> [https://perma.cc/5TY4-CA9N].

128. See, e.g., Rachel Treisman, *States with the Toughest Abortion Laws Have the Weakest Maternal Supports, Data Shows*, NPR (Aug. 18, 2022), <https://www.npr.org/2022/08/18/1111344810/abortion-ban-states-social-safety-net-health-outcomes> [https://perma.cc/T4E5-38W2].

129. Usha Ranji, Ivette Gomez, Alina Salganicoff, Carrie Rosenzweig, Rebecca Kellenberg & Kathy Gifford, *Medicaid Coverage of Family Planning Benefits: Findings from a 2021 State Survey*, KAISER FAM. FOUND. (Feb. 17, 2022), <https://www.kff.org/womens-health-policy/report/medicaid-coverage-of-family-planning-benefits-findings-from-a-2021-state-survey/> [https://perma.cc/USM9-SNJV].

130. For example, Medicaid is a federal-state partnership. See *Financial Management*, MEDICAID, <https://www.medicaid.gov/medicaid/financial-management/index.html> [https://perma.cc/5YFC-YEMM].

131. That is a core argument of this Article. For further details, see *infra* Appendix A.

132. Brief of 547 Deans, Chairs, Scholars and Public Health Professionals et al. as Amici Curiae Supporting Respondents at 23, *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022) (No. 19-1392) [hereinafter Brief of 547 Deans et al.].

133. *Id.* at 24; see Emily Badger, Margot Sanger-Katz & Claire Cain Miller, *States with Abortion Bans Are Among Least Supportive for Mothers and Children*, N.Y. TIMES (July 28, 2022), <https://www.nytimes.com/2022/07/28/upshot/abortion-bans-states-social-services.html> [https://perma.cc/TN8C-89VK (staff-uploaded, dark archive)]; Naomi Cahn, *In States Where Abortion Is Banned, Children and Families Already Face an Uphill Battle*, CONVERSATION (Sept. 15, 2022, 8:22 AM),

The table in Appendix A is an alphabetical listing of states with information about paid family leave, paid sick leave, and minimum wage rates as well as policies on Medicaid coverage and monthly TANF benefits.¹³⁴ Family-friendly policies also include those ranging from pre-pregnancy contraceptive access to pregnancy support to new family services to living wages.¹³⁵ Not a single one of the trigger states¹³⁶ provides paid family or sick leave.¹³⁷ Most of them do not provide TANF to women who are pregnant with their first child. And, when it comes to pass-through of child support amounts received on behalf of those who are public welfare recipients, few of the abortion-restriction states do so, while compared to the percentage of abortion-access states that do.¹³⁸ In another metric of state support for children, based on measures of children's well-being and total expenditures per child,¹³⁹ the states that restrict abortion rank among the worst in the country for the well-being of their children, while those that enable abortion access have higher levels of expenditures and child well-being.¹⁴⁰ States that have fewer restrictions on abortion access also tend to have more policies and programs that help families, have more parity in median earnings for men and women, and have better health and well-being outcomes for women and children.¹⁴¹

<https://theconversation.com/in-states-where-abortion-is-banned-children-and-families-already-face-an-uphill-battle-187817> [<https://perma.cc/DH7A-YY6U>] (state comparison).

134. Raising the minimum wage correlates with a number of health effects including a reduction in infant mortality, the risk of low birth weight and preterm birth, adolescent fertility, smoking, body mass index, and heart disease mortality among working-age adults. Montez, *Policy Polarization*, *supra* note 9, at 903.

135. Some of these policies are addressed *infra* Appendix A.

136. Trigger states had enacted legislation designed to restrict abortion if the Supreme Court issued a decision overturning the right to an abortion. Naomi Cahn, *What Triggers the 'Trigger Laws' That Could Ban Abortions?*, CONVERSATION (June 24, 2022, 12:06 PM), <https://theconversation.com/what-triggers-the-trigger-laws-that-could-ban-abortions-184361> [<https://perma.cc/3K56-J9XK>] [hereinafter Cahn, *What Triggers the 'Trigger Laws'*].

137. See Badger et al., *supra* note 133. Mandated paid leave has been linked to increases in maternal attachment to the labor force, reduced poverty rates after childbirth, increased breastfeeding, and consequently improved birth outcomes and infant health. See Montez, *Policy Polarization*, *supra* note 9, at 903.

138. See GOOD+FOUNDATION & ASPEN INST., PAYING SUPPORT TO FAMILIES: CHILD SUPPORT POLICY FACT SHEET 3–4, https://www.aspeninstitute.org/wp-content/uploads/2020/09/ChildSupport_Distribution.pdf [<https://perma.cc/TG4Q-MBYD>].

139. The child well-being component included “16 indicators of economic, educational, health, and community well-being, including the share of children in poverty, reading and math proficiency, low birth weight, and teen births, among others,” while the total spending per child included “areas of economic support, education, health, and community/infrastructure (e.g., parks and libraries).” Sawhill & Welch, *supra* note 69.

140. *Id.*; see also Badger et al., *supra* note 133; JOINT ECON. COMM. DEMOCRATS, STATES THAT MOST RESTRICT ACCESS TO ABORTION HAVE WORSE ECONOMIC CONDITIONS FOR FAMILIES 6 (2022), https://www.jec.senate.gov/public/_cache/files/7c06b70e-3700-4d36-8449-004882b359dc/stat-e-abortion-fact-sheet-final.pdf [<https://perma.cc/CH7M-4DTU>].

141. JOINT ECON. COMM. DEMOCRATS, *supra* note 140, at 1–5.

Mississippi, the state which enacted the law upheld by *Dobbs*, is a poster child for abortion-restriction states. As the *Dobbs* litigation was occurring, Mississippi had the lowest rate of planned pregnancy in the country,¹⁴² and has the highest rate of childhood poverty in the country.¹⁴³ It also has the second highest overall poverty rate in the country.¹⁴⁴ Only three of the thirteen trigger states¹⁴⁵ are located in the top half of states with the lowest poverty rates (Utah, North Dakota, and Wyoming).¹⁴⁶ Mississippi is also ranked near the bottom for hunger and food insecurity, and it has one of the highest teen birth rates in the country.¹⁴⁷ On overall child well-being, based on state data on economics, education, health, family, and community, Mississippi is the lowest-ranked state.¹⁴⁸ Similarly, Mississippi ranked last on the 2022 Commonwealth Fund Scorecard, which includes questions on access to health care and the response to, and management of, the pandemic.¹⁴⁹ Mississippi is joined at the bottom by Oklahoma, which has an abortion ban, and West Virginia, where an abortion ban is expected soon.¹⁵⁰ Moreover, Mississippi had rejected additional federal funding available through the American Rescue Plan¹⁵¹ that would have provided one year's worth of Medicaid coverage to women after giving birth, despite the fact that Mississippi has some of the highest maternal death rates in

142. Brief of 547 Deans et al., *supra* note 132, at 24.

143. *Percent of Children Under 18 Years Below Poverty Level in the Past 12 Months (for Whom Poverty Status Is Determined)*, U.S. CENSUS BUREAU (2021), <https://www.census.gov/acs/www/data/data-tables-and-tools/ranking-tables/> [<https://perma.cc/63TS-GS97> (staff-uploaded archive)] (navigate to Table ID 1704 and click on the hyperlink).

144. *Percent of People Below Poverty Level in the Past 12 Months (for Whom Poverty Status Is Determined)*, U.S. CENSUS BUREAU (2021), <https://www.census.gov/acs/www/data/data-tables-and-tools/ranking-tables/> [<https://perma.cc/V6B5-5QLN> (staff-uploaded archive)] [hereinafter *2021 Poverty Line Tables*] (navigate to Table ID 1701 and click on the hyperlink) (Louisiana is the only state with a higher poverty level).

145. Elizabeth Wolfe, *13 States Have Passed So-Called 'Trigger Laws' Bans Designed To Go into Effect If Roe v. Wade Is Overturned*, CNN (May 3, 2022, 3:00 PM), <https://www.cnn.com/2022/05/03/us/state-abortion-trigger-laws-roe-v-wade-overturned/index.html> [<https://perma.cc/NF3K-J65S>].

146. *2021 Poverty Line Tables*, *supra* note 144.

147. *Mississippi*, TALK POVERTY (2020), <https://talkpoverty.org/state-year-report/mississippi-2020-report/> [<https://perma.cc/999H-PU6M>].

148. ANNIE E. CASEY FOUND., *2021 KIDS COUNT DATA BOOK: STATE TRENDS IN CHILD WELL-BEING 18* (2021), <https://assets.aecf.org/m/resourcedoc/aecf-2021kidscountdatabook-2021.pdf> [<https://perma.cc/JH49-K5MB>].

149. David C. Radley, Jesse C. Baumgartner & Sara R. Collins, *2022 Scorecard on State Health System Performance*, COMMONWEALTH FUND (June 16, 2022), <https://www.commonwealthfund.org/publications/scorecard/2022/jun/2022-scorecard-state-health-system-performance> [<https://perma.cc/M3FJ-JT7R>].

150. *Tracking the States Where Abortion Is Now Banned*, N.Y. TIMES (Feb. 10, 2023, 5:00 PM), <https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html> [<https://perma.cc/5X26-6FAZ> (staff-uploaded, dark archive)].

151. *Medicaid Postpartum Coverage Extension Tracker*, KAISER FAM. FOUND. (Dec. 8, 2022), <https://www.kff.org/medicaid/issue-brief/medicaid-postpartum-coverage-extension-tracker/> [<https://perma.cc/ZTJ7-4G96>].

the country, and eighty-six percent of pregnancy related deaths in the state are due to postpartum complications.¹⁵²

By contrast, Hawaii, Massachusetts, and Connecticut are the top three states on the Scorecard; in all of them, abortion is legally protected.¹⁵³ The maternal mortality rate in Mississippi is 20.8 maternal deaths per 100,000 births; it is 8.4 in Massachusetts.¹⁵⁴

In terms of policies that support families, consider the ACA's efforts to expand Medicaid to cover adults with income up to 133% of the federal poverty level.¹⁵⁵ Ten states have not adopted the expansion: Alabama, Florida, Georgia, Kansas, Mississippi, North Carolina, South Carolina, South Dakota, Tennessee, Texas, Wisconsin, and Wyoming.¹⁵⁶ Six of these states have either a full ban on abortion or a ban after six weeks in place (Florida, Kansas, South Carolina, and Wyoming do not).¹⁵⁷ Or, consider that, as the Appendix shows, the eleven states with paid family leave, which allows parents to take time off at the birth of a child, are not among the states banning abortion.¹⁵⁸

A Brookings Institution study of the states that are most child-friendly, based on state expenditures per child and children's overall well-being, found that, in the top ten states, only one had an abortion trigger ban, while, for the bottom ten, nine either had a trigger ban or other restriction.¹⁵⁹ Of the thirty-three jurisdictions that have recently developed guaranteed income programs, fewer than five are in abortion-restrictive states.¹⁶⁰

152. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2339–40 (2022) (Breyer, Sotomayor & Kagan, JJ. dissenting). Finally, in March 2023, Mississippi Republican Governor Tate Reeves signed legislation enabling the state to receive federal funding designed to provide a full year of Medicaid coverage for women after they give birth, calling it part of a “new pro-life agenda.” *Mississippi Governor OKs Longer Postpartum Medicaid Coverage*, MISS. PUB. BROAD. (Mar. 17, 2023), <https://www.mpbonline.org/blogs/news/mississippi-governor-oks-longer-postpartum-medicaid-coverage/#:~:text=News-,Mississippi%20Republican%20Gov.,months%20of%20postpartum%20Medicaid%20coverage> [https://perma.cc/5R8G-57NJ]. The new agenda comes, however, only as federal funds provided as part of the COVID-inspired American Rescue Plan were set to expire and it does not exclude expansion of the broader Medicaid program to cover low-income workers without health insurance.

153. Radley et al., *supra* note 149; *Tracking the States Where Abortion Is Now Banned*, *supra* note 150.

154. *Maternal Mortality Rate by State 2023*, WORLD POPULATION REV. (2022), <https://worldpopulationreview.com/state-rankings/maternal-mortality-rate-by-state> [https://perma.cc/4UBU-QS2F] (deaths for every 100,000 pregnancies).

155. See Patient Protection and Affordable Care Act, Pub. L. No. 111-148 § 2001(a)(1)(C), 124 Stat. 119, 271 (codified at 42 U.S.C. § 1396a(a)(10)(A)(i)(VIII) (2010)); see *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 585 (2012).

156. *Status of State Medicaid Expansion Decisions: Interactive Map*, KAISER FAM. FOUND. (Mar. 27, 2023), <https://www.kff.org/medicaid/issue-brief/status-of-state-medicaid-expansion-decisions-interactive-map> [https://perma.cc/76AM-N5RC].

157. *Tracking the States Where Abortion Is Now Banned*, *supra* note 150.

158. See *infra* Appendix A.

159. Sawhill & Welch, *supra* note 69.

160. Jason Lalljee, *33 Basic and Guaranteed Income Programs Where Cities and States Give Direct Payments to Residents, No Strings Attached*, BUS. INSIDER (Dec. 16, 2021, 5:17 PM),

B. *Why Are Family-Well-Being Policies Blocked?*

The question to which we now turn is *why* those states have not adopted family-supportive policies¹⁶¹ and fall behind on other health and quality of life measures.¹⁶² That is, what is the explanation for these patterns of intense polarization on issues that seem to involve common-sense policies of improving the lives of families. In analyzing these patterns, it appears that political ideology is blocking concrete support for families, yet a mere appeal to “political ideology” does not explain the continuing entrenchment—and growth—of these antifamily policies or the reasons for the divergence of ideologies.

Three factors may provide an explanation. First, the New Federalism has become a reality over the past fifty years, giving states greater autonomy in dealing with reproductive issues and maternal and children’s health.¹⁶³ *Dobbs* signaled the removal of a federal floor for reproductive rights, and at the same time the states have greater ability to block federal assistance for the vulnerable; this means that the states can and do vary more among each other than they did in the middle of the twentieth century when the federal government guaranteed greater uniformity.¹⁶⁴

Second, policy differences between the states have increased with greater partisan polarization.¹⁶⁵ At least part of the reason is that current state voting

<https://www.businessinsider.com/how-many-ubi-guaranteed-basic-income-programs-us-cities-states-2021-12#compton-california-1> [<https://perma.cc/237S-VLYA>].

161. “For too long, those who advocate restricting abortion have claimed the moral high ground by calling themselves prolife,” but their mortality rates and lack of family support belie that label. Siegel, *supra* note 34, at 232.

162. *See, e.g.*, Jennifer Montez, *Deregulation, Devolution, and State Preemption Laws’ Impact on US Mortality Trends*, 107 AM. J. PUB. HEALTH 1749, 1749–50 (2017), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5637688/> [<https://perma.cc/34YP-TJJPV>] [hereinafter Montez, *Deregulation*] (contrasting the growing disparities in mortality rates in Mississippi and New York, and noting state policies such as tobacco taxes and ACA coverage explain a significant part of the disparities); Douglas A. Wolf, Jennifer Karas Montez & Shannon M. Monnat, *U.S. State Preemption Laws and Working-Age Mortality*, AM. J. PREVENTIVE MED. 681, 686 (2022) (arguing that state preemption laws that remove local authority to enact health-promoting legislation, such as minimum wage increases, are a significant threat to population health).

163. Jennifer Karas Montez, Jason Beckfield, Julene Kemp Cooney, Jacob M. Grumbach, Mark D. Hayward, Huseyin Zeyd Koytak, Steven H. Woolf & Anna Zajacova, *US State Policies, Politics, and Life Expectancy*, 98 MILBANK Q. 668, 674 fig.2 (2020) [hereinafter Montez et al., *US State Policies*] (showing increases in policy differences among the states).

164. *See, e.g.*, Montez, *Deregulation*, *supra* note 162, at 1749–50 (noting the greater disparities in state policies since the eighties). *See generally* CONLAN, *supra* note 87 (timing the beginning of the shift in the seventies).

165. Montez, *Deregulation*, *supra* note 162, at 1749–50; Montez et al., *US State Policies*, *supra* note 163. The greater partisan polarization translates into increasingly hostile judgments of members of the opposing party. Shanto Iyengar, Yphtach Lelkes, Matthew Levendusky, Neil Malhotra & Sean J. Westwood, *The Origins and Consequences of Affective Polarization in the United States*, 22 ANN. REV. POL. SCI. 129, 130 (2019).

systems, including partisan gerrymandering and identity-based voting, contribute to the selection of more extreme candidates within each party.¹⁶⁶

Third, rising income inequality increases the impact of money in politics generally, enhancing the influence of lobbyists and national, agenda-driven organizations that may be insensitive to local needs.¹⁶⁷ Taken together, these three factors explain why states are moving apart on high profile issues such as abortion—and more prosaic issues such as economic support for families.

1. New Federalism and State Autonomy

Starting with the first factor, the effects of the “The New Federalism,” it is useful to go back to the traditional justifications for federalism itself—promoting “state autonomy,” diffusing power, promoting choice, protecting individual rights, creating “laboratories of democracy,” and promoting opportunities for citizen participation.¹⁶⁸ Particularly in the context of reproductive rights and diverging measures of childhood well-being, however, there is little reason to believe that giving states greater autonomy¹⁶⁹ accomplishes any of these objectives.

At one point, federalism was, as Justice Brandeis argued, associated with innovation.¹⁷⁰ Republican Mitt Romney, for example, as Governor of Massachusetts, implemented a state health plan that became a model for the ACA,¹⁷¹ and no-fault divorce reform in California in the late sixties prompted

166. See, e.g., Michael S. Kang, *Sore Loser Laws and Democratic Contestation*, 99 GEO. L.J. 1013, 1022–23 (2011) (observing that the major political parties have been nominating more ideologically extreme candidates); Handan-Nader et al., *supra* note 22, at 31 (exploring the changing dynamics of state primaries and the advantages of more extreme candidates). On the increasing ideology of state policies, see *American Policy Is Splitting, State by State, into Two Blocs*, ECONOMIST (Sept. 3, 2022), <https://www.economist.com/interactive/briefing/2022/09/03/american-policy-is-splitting-state-by-state-into-two-blocs> [<https://perma.cc/A8B9-AQTG>].

167. See *supra* notes 165–66 and accompanying text; *infra* notes 168–71 and accompanying text.

168. Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1261 (2009); see *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory.”). For a nuanced (and critical) account of federalism in family law, noting its limits, see Erez Aloni, *The Puzzle of Family Law Pluralism*, 39 HARV. J.L. & GENDER 317, 323–26 (2016).

169. On climate change, however, states may be achieving these objectives. See, e.g., Brad Plumer, *California Approves a Wave of Aggressive New Climate Measures*, N.Y. TIMES (Sept. 29, 2022), <https://www.nytimes.com/2022/09/01/climate/california-lawmakers-climate-legislation.html> [<https://perma.cc/VG28-9ZVA> (staff-uploaded, dark archive)]. We should acknowledge that the current federalism in abortion is preferable to national uniformity in the form of an abortion ban, which would be undesirable, so careful lines need to be drawn.

170. *New State Ice Co.*, 285 U.S. at 311 (Brandeis, J., dissenting).

171. See Ryan Lizza, *Romney’s Dilemma*, NEW YORKER (May 30, 2011), <http://www.newyorker.com/magazine/2011/06/06/romneys-dilemma> [<https://perma.cc/8V3Y-9PSD> (dark archive)].

subsequent reform in all fifty states.¹⁷² Still, the various reforms reflected regional cultural differences with some states, like California, banning all consideration of fault, while other states simply added no-fault grounds, such as a period of separation, to fault grounds that remained in effect.¹⁷³

Today, however, state politics increasingly reflects the polarized national debate rather than local priorities, and the democracy labs of the states produce counterproductive results for families.¹⁷⁴ One reason is that devolution magnifies the resource differences between the states.¹⁷⁵ The Supreme Court's decision allowing states to opt out of Medicaid expansion,¹⁷⁶ for example, creates more incentives for poor states than rich states to forego the expanded coverage—and the poorer states that have chosen to opt out also tend to be conservative states relatively more opposed to assistance for low-income people as a matter of policy.¹⁷⁷ Underscoring these effects is the fact that conservative states tend to be more likely than liberal states not simply to have more conservative policies at the state level, but to preempt local initiatives.¹⁷⁸ Within this context, the history of shielding the states from the exercise of federal power has often empowered “state tyranny,” as some states have used freedom from federal oversight or mandates to deny their citizens access to basic benefits such as health care or to reinforce racial hierarchies.¹⁷⁹

More power for the states at the expense of the federal government may also mean more power for the states at the expense of localities. Social scientist Jennifer Montez, for example, in comparing Mississippi to New York, points

172. See, e.g., Michelle L. Evans, Note, *Wrongs Committed During a Marriage: The Child That No Area of the Law Wants To Adopt*, 66 WASH. & LEE L. REV. 465, 474 (2009) (observing that after California enacted the first “no-fault” law in 1969, it inspired similar changes elsewhere, and by the mid-1980s, all fifty states had reformed their divorce laws).

173. *Id.*; see, e.g., IDAHO CODE § 32-603 (LEXIS through Ch. 20 from the 2023 Reg. Sess. and effective as of Mar. 8, 2023); MASS. GEN. LAWS ANN. ch. 208, § 1 (Westlaw through the 2022 2nd Ann. Sess.).

174. See Alan I. Abramowitz & Steven Webster, *The Rise of Negative Partisanship and the Nationalization of U.S. Elections in the 21st Century*, 41 ELECTORAL STUD. 12, 15–17, 18–19 (2016) (maintaining that since the 1980s, negative partisanship has led to party loyalty and straight-ticket voting being dramatically more pronounced than before, which has in turn “nationalized” state and local elections); see also *infra* note 183 and accompanying text.

175. See, e.g., Schapiro, *supra* note 26, at 1580, 1589 (describing “the vast inequality of resources among the states,” and observing how such inequalities are exacerbated during economic downturns in the absence of federal assistance).

176. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 587 (2012).

177. Schapiro, *supra* note 26, at 1577. Schapiro, while documenting the greater relative costs of Medicaid expansion for poorer states, also notes that opposition to adoption falls almost exclusively along party lines. *Id.* at 1576, n.206.

178. Montez, *Deregulation*, *supra* note 162, 1749–50.

179. Schapiro, *supra* note 26, at 1553 (“Limiting the power of the national government in the name of federalism can serve to license local tyranny. States and localities have subjected minorities in their midst to oppressive measures, while invoking principles of federalism as a shield from federal intervention.”).

out that Mississippi, unlike New York, has preempted local governments' ability to address paid sick days, a higher minimum wage,¹⁸⁰ stricter firearm regulations, and even a requirement that calorie counts be posted at restaurants.¹⁸¹ The actual effects of these issues may be sensitive to regional differences and, as Montez concludes, may disproportionately affect the well-being of poor residents.¹⁸² In today's era of partisan polarization, local politics has been nationalized, and state officials seek to implement what are often nationally directed policies at the expense of differing local preferences.¹⁸³

2. Polarization and State Officials

The second factor underlying the increasing divergence among the states is the election of more extreme state officials, which is a result of and contribution to increased political polarization. Law professor Michael Kang observes that today's polarization stems from the partisan realignment that followed the civil rights movement, and that this has made the major political parties more ideologically homogeneous.¹⁸⁴ These major political parties often adopt diametrically opposed policies that equate, for example, increased public spending with support for poorer residents who are more likely to be racial minorities and the targets of political attacks.¹⁸⁵ Researchers have found that

180. Montez et al., *US State Policies*, *supra* note 163, at 673 (observing that preemption of local minimum- or living-wage laws provides the leading example of state preemption and that at least twenty-five states have passed statutes preventing local authorities from mandating differing minimum wages higher than the state minimum for private employers).

181. Montez, *Deregulation*, *supra* note 162.

182. *See id.*

183. *See* Richard C. Schragger, *The Attack on American Cities*, 96 TEX. L. REV. 1163, 1228 (2018) (commenting on the "nationalization of local politics" and explaining that this means that the "give-and-take of intrastate compromise politics is less likely to occur"); *see also* Naomi Cahn, *The Political Language of Parental Rights: Abortion, Gender-Affirming Care, and Critical Race Theory* (Univ. of Va. Sch. of L., Pub. L. & Legal Theory Paper No. 2023-19, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4365970 [<https://perma.cc/BQP8-CTSP> (staff-uploaded archive)] (click "Download this Paper" or "Open PDF in Browser") (discussing how national groups have weaponized the rhetoric of "parental rights" to affect policies at the state level).

184. Kang, *supra* note 166, at 1022.

185. *See* Jennifer McCoy & Benjamin Press, *What Happens When Democracies Become Perniciously Polarized?*, CARNEGIE ENDOWMENT (Jan. 18, 2022), <https://carnegieendowment.org/2022/01/18/what-happens-when-democracies-become-perniciously-polarized-pub-86190> [<https://perma.cc/37TL-GUQB>] (observing that "the three-decade-old trend of partisan sorting, in which the two parties reinforce urban-rural, religious-secular, and racial-ethnic cleavages rather than promote cross-cutting cleavages" contributes to "voters perceiving the opposing party in negative terms and as a growing threat to the nation" and that the strength of identity politics means that politicians can "exploit insecurities surrounding [whites'] loss of status"). Other scholars explain that while redistributive policies, such as the family support we discuss in this Article, tend to stem "the tide of polarization," once polarization takes hold, such societies tend to oppose "redistribution that would benefit their adversaries as well as themselves." Thomas Edsall, *America Has Split, and It's Now in Very Dangerous Territory*, N.Y. TIMES (Jan. 26, 2022), <https://www.nytimes.com/2022/01/26/opinion/covid-biden-trump-polarization.html>

those who most perceive a “status threat” by adopting such policies were also more likely to vote for conservative candidates¹⁸⁶ and to oppose policies that benefit groups that they see as undeserving.¹⁸⁷ These groups tend to both oppose abortion rights¹⁸⁸ and to favor legislators committed to reducing the size of government, even when the voters might themselves benefit from more generous state policies.¹⁸⁹

Partisan gerrymandering that reduces the number of contested legislative districts contributes to the election of more extreme candidates.¹⁹⁰ Over the past thirty years, increasingly extreme candidates at the state level have become more likely to seek office, to win primaries, and lose less frequently in general

[<https://perma.cc/Y7DG-F543> (staff-uploaded, dark archive)] (observing that “economic, racial and social liberalism have become highly correlated across partisan subconstituencies”); *see also Deep Divisions in Americans’ Views of Nation’s Racial History—And How To Address It*, PEW RSCH. CTR. (Aug. 12, 2021), <https://www.pewresearch.org/politics/2021/08/12/deep-divisions-in-americans-views-of-nations-racial-history-and-how-to-address-it/> [<https://perma.cc/U5M5-AZGM>] (discussing the partisan divisiveness of racial injustice).

186. Diana C. Mutz, *Status Threat, Not Economic Hardship, Explains the 2016 Presidential Vote*, 115 PNAS E4330, E4330 (2018); *see also* Robert P. Jones, *Trump Can’t Reverse the Decline of White Christian America*, ATLANTIC (July 4, 2018), <https://www.theatlantic.com/politics/archive/2017/07/robert-jones-white-christian-america/532587/> [<https://perma.cc/9NV6-V7RQ> (dark archive)] (documenting demographic decline in the number of white Christian Americans).

187. Christians are more likely than others to perceive a status threat from changing American demographics, *see* Jones, *supra* note 186, and are more likely than others to blame poverty on a person’s moral failings rather than on circumstances beyond their control. Julie Zauzmer, *Christians Are More than Twice as Likely To Blame a Person’s Poverty on Lack of Effort*, WASH. POST (Aug. 3, 2017, 7:00 AM), <https://www.washingtonpost.com/news/acts-of-faith/wp/2017/08/03/christians-are-more-than-twice-as-likely-to-blame-a-persons-poverty-on-lack-of-effort/> [<https://perma.cc/AY54-XXMX> (dark archive)]. Republicans are also more likely to hold such views. PEW RSCH. CTR., *LOW APPROVAL OF TRUMP’S TRANSITION BUT OUTLOOK FOR HIS PRESIDENCY IMPROVES* 40 (2016), <https://www.pewresearch.org/politics/wp-content/uploads/sites/4/2016/12/12-08-16-December-political-release.pdf> [<https://perma.cc/RZ52-4QEW>]; *see also* Chauncy DeVega, *So Much for Christian Charity: Evangelicals Blame the Poor for Poverty, Which Makes Them a Lot Like Other Republicans*, SALON (Aug. 10, 2017, 4:59 AM), <https://www.salon.com/2017/08/10/so-much-for-christian-charity-evangelicals-blame-the-poor-for-poverty-which-makes-them-a-lot-like-other-republicans/> [<https://perma.cc/GRR6-F25X>] (explaining the overlap between Christian and Republican views toward poverty).

188. *See Public Opinion on Abortion*, PEW RSCH. CTR. (May 17, 2022), <https://www.pewresearch.org/religion/fact-sheet/public-opinion-on-abortion/> [<https://perma.cc/82P6-XBF4>] (showing that seventy-four percent of white evangelicals say that abortion should be illegal in all or most cases).

189. *See* Edsall, *supra* note 185 (observing that in polarized societies, groups oppose “redistribution that would benefit their adversaries as well as themselves”); Zauzmer, *supra* note 187 (explaining that white Christians are more likely to see poverty as a product of a person’s moral failing); *see also* Peter Kivisto, *The Politics of Cruelty*, 60 SOCIO. Q. 191, 197–98 (2019) (observing that Christian nationalism and white grievance overlap, with those who score high on the Christian nationalism scale being more likely to believe that Christian identity is threatened by academics, cultural elites, secularists, and Muslims, both at home and abroad).

190. Kang, *supra* note 166, at 1022–23.

elections.¹⁹¹ Particularly in safe districts, they also face limited competition in general elections.¹⁹² In a district in which the primary election effectively guarantees victory in the general election, candidates may fear challenges from more extreme candidates in their own party more than they value the need to win over moderate voters in the general election.¹⁹³ In addition, given the typically low turnout in primary elections, more activist or single-issue voters have a greater influence in primaries than general elections.¹⁹⁴ These trends are particularly important in the context of reproductive policy and family support. Abortion, which was not a partisan issue at the time of the *Roe* decision,¹⁹⁵ has become a marker of political identity,¹⁹⁶ and thus divisions between the states over the issue are intensifying.¹⁹⁷ At the same time, legislators, particularly on issues related to abortion, have been more extreme than their constituents.¹⁹⁸

191. Edsall, *supra* note 185 (describing the scholarly analyses showing that “ideological extremists [have] an advantage in both parties’ primaries” and that the “the pool of people that run for office is increasingly extreme”).

192. Handan-Nader et al., *supra* note 22, at 12–16.

193. Steve Coll, *Building a Better Democracy*, NEW YORKER (Jan. 9, 2013), <http://www.newyorker.com/online/blogs/comment/2013/01/ending-gerrymandering-and-building-a-better-democracy.html> [<https://perma.cc/Z87Y-TLEC> (dark archive)] (“[B]ecause many . . . run in super-safe conservative districts, Republican congressional candidates often fear radical-right primary challengers more than the Democrats they will face in the general election.”); *see also* SETH E. MASKET, NO MIDDLE GROUND: HOW INFORMAL PARTY ORGANIZATIONS CONTROL NOMINATIONS AND POLARIZE LEGISLATURES 1–3 (2009) (describing how party activists tend to be more ideologically driven than mainstream party members, how they dominate primaries, and how, in California, Republican activists have “primaried” Republican legislators who vote for tax increases, contributing to the election of more ideologically extreme legislators).

194. Handan-Nader et al., *supra* note 22, at 31 (“[T]here is an important advantage for more-extreme candidates in contested primary elections. . . . With low levels of information and low rates of entry, it seems likely that parties and interest groups have large effects on influencing who chooses to seek office, whether they face opponents in the primary, and whether they win nomination.”).

195. Daniel K. Williams, *The GOP’s Abortion Strategy: Why Pro-Choice Republicans Became Pro-Life in the 1970s*, 23 J. POL’Y HIST. 513, 513, 534 n.1 (2001) (showing that Republicans were slightly more pro-choice than Democrats during some polls in the seventies and the two parties overall had similar views on abortion).

196. *See id.* at 513. Partisan differences became more pronounced during the seventies. *Id.*

197. Rebecca J. Mercier, Mara Buchbinder & Amy Bryant, *TRAP Laws and the Invisible Labor of US Abortion Providers*, 26 CRIT. PUB. HEALTH 77–79 (2016) (noting differences among states in targeted regulation of abortion providers’ laws).

198. *See* Geoffrey C. Layman, Thomas M. Carsey & Juliana Menasce Horowitz, *Party Polarization in American Politics: Characteristics, Causes, and Consequences*, 9 ANN. REV. POL. SCI. 83, 104 (2006) (explaining that increased polarization among party activists is a likely cause of both mass and elite polarization); Ted G. Jelen & Clyde Wilcox, *Causes and Consequences of Public Attitudes Toward Abortion: A Review and Research Agenda*, 56 POL. RSCH. Q. 489, 495 (2003) (explaining that characteristics of legislators, not the characteristics of voters in the district, best predicted votes on abortion-related issues).

3. National Policy Agendas

The final factor increasing the state divergence is the role of national organizations in pushing policy agendas.¹⁹⁹ Richard Schragger observes that state preemption policies, for example, reflect “legislative capture.”²⁰⁰ State legislators are poorly paid, have limited staff, and often work part-time.²⁰¹ As a result, they depend heavily on lobbyists who push particular agendas and supply draft bills, information, and campaign funding.²⁰² These lobbyists may represent particular industries that seek to avoid regulation, such as tobacco and gun manufacturers, and specific bills may be written and promoted by national lobbying groups.²⁰³ Moreover, state legislatures, in some cases because of partisan gerrymandering, are often more ideologically driven than state-wide or local elected officials, who may represent different constituencies and feel greater political pressure to improve the lives of their constituents.²⁰⁴ What this means is that devolution may produce policies less responsive to citizen needs, particularly the needs of the least powerful, and reduce accountability for the often counterproductive consequences.²⁰⁵

These results may further drive state-level polarization in policies, with states like Mississippi actively embracing both the restriction of reproductive rights and the refusal to adopt policies that would make pregnancy safer and the lives of the resulting children more promising.²⁰⁶ The results compound racial,

199. See, e.g., LYDIA BEAN & MARESA STRANO, PUNCHING DOWN: HOW STATES ARE SUPPRESSING LOCAL DEMOCRACY 12 (2019), https://d1y8sb8igg2f8e.cloudfront.net/documents/Punching_Down_2019-07-11_205724.pdf [<https://perma.cc/B5DQ-6BMN>] (“Most GOP legislators are elected with the indispensable support of socially conservative interest groups and special interests with strong deregulation agendas. These interest groups further supply policy advice and expertise to state lawmakers who are often under-resourced, underinformed, overextended, and, therefore, susceptible to assistance.”).

200. Schragger, *supra* note 183, at 1228.

201. *Id.*

202. *Id.* (observing that legislators “depend heavily on interested parties to provide them with information” and further “supply advice and expertise” and model legislation and funding).

203. *Id.* at 1170. See generally Andrias & Sachs, *supra* note 7 (discussing the size and scope of business lobbying). Additionally, “[t]he pro-business lobby has radically transformed state law over the past decade. Forming an alliance with business groups and conservative donors through the American Legislative Exchange Council (ALEC), movement conservatives have successfully lobbied for uniform, pro-business lawmaking throughout the states, enabled by opaque state governments and inexperienced, underfunded legislators.” Andrew Elmore, *Labor’s New Localism*, 95 S. CAL. L. REV. 253, 264 (2021). “[I]t is not just the money spent, but also other questionable lobbying tactics that gives cause for concern.” Matteo Gatti & Chrystin Ondersma, *Stakeholder Syndrome: Does Stakeholderism Derail Effective Protections for Weaker Constituencies?*, 100 N.C. L. REV. 167, 214 (2021).

204. Schragger, *supra* note 183, at 1230.

205. See Edsall, *supra* note 185 (describing researchers who find that the consequence of greater partisan polarization is a reduced willingness to vote for the other party, limiting “voters’ willingness to hold candidates accountable for poor performance and to vote across party lines to select higher-quality candidates”).

206. See *supra* Section III.A; see *infra* Appendix A.

regional, and class-based inequalities. Montez found that state policies negatively impact the life prospects of women and the less educated more so than men and the better educated.²⁰⁷ To evaluate these differences, Montez used a scoring of state policies based on liberalism or conservatism, where liberal “was defined as expanding state power for economic regulation and redistribution or for protecting marginalized groups, or restricting state power for punishing deviant social behavior; conservative was defined as the opposite.”²⁰⁸ She found that greater ideological polarization at the state level did not just produce more extreme rhetoric or symbolic actions, but influenced legislation, even when such actions had predictably negative impacts on state residents.²⁰⁹ Today, these policies, taken collectively, have had very dramatic real world consequences on peoples’ lives and their counterproductive effects seem only to drive further polarization.²¹⁰

CONCLUSION

The differing state approaches to family support create vicious cycles and virtuous cycles: one set of states supports the highly educated modernist economy and invests in public support for children, while the other doubles down on class inequalities and hierarchies. Yet each of these approaches can exist in a democracy where there is no federal constitutional support for abortion and no positive rights to antipoverty policies, and partisan politics preclude moving forward.

This analysis suggests that federal action is critical to protecting the rights of the marginalized. That federal action could come from any of the three branches. Federal COVID-related stimulus efforts, for example, cut child poverty in half in 2021.²¹¹ *Roe v. Wade* meant that, even as states restricted abortion rights, abortion remained legal as a federal matter, and the federal ACA’s promise of Medicaid expansion saw greater reductions in maternal deaths in the states that adopted it.²¹² Devolution, rather than an opportunity for greater local autonomy, has simply increased the influence of well-funded, ideologically motivated forces.

207. Montez et al., *US State Policies*, *supra* note 163, at 688–90.

208. *Id.* at 676.

209. *See id.* at 688–90.

210. *Id.* at 673; *see also* Edsall, *supra* note 185 (concluding that while redistributive policies that better people’s lives reduce polarization, once conditions worsen, voters oppose measures that would better conditions if they are perceived as benefitting out groups).

211. *New HHS Report Highlights How Antipoverty Efforts from the Administration Reduced Poverty in 2021*, U.S. DEP’T HEALTH & HUM. SERVS. (Feb. 10, 2022), <https://www.hhs.gov/about/news/2022/02/10/new-hhs-report-highlights-how-antipoverty-efforts-administration-reduced-poverty-2021.html> [<https://perma.cc/K5FY-KNFL>].

212. Erica L. Eliason, *Adoption of Medicaid Expansion Is Associated with Lower Maternal Mortality*, 30 WOMEN’S HEALTH ISSUES 147, 150 (2020).

On the other hand, given the reality of devolution and federal gridlock, states are an increasingly important focus. The reasons for the diverging policy approaches mean that working with state legislatures,²¹³ mobilizing voters, and electing different candidates can have an impact—one that, at least in the short term, will increase state differences but may, in the long term, influence federal policy to support reproductive autonomy and families.

213. See Gatti & Ondersma, *supra* note 203, at 213–14 (noting that some corporations do lobby for “progressive” causes). State legislatures have become increasingly powerful in a variety of areas, potentially including federal elections. Nick Corasaniti, *Why Little-Noticed State Legislative Races Could Be Hugely Consequential*, N.Y. TIMES (Oct. 20, 2022), <https://www.nytimes.com/2022/10/10/us/politics/supreme-court-state-legislature-elections.html> [https://perma.cc/82AQ-KL9G (staff-uploaded, dark archive)].

Appendix A: All States, All Measures²¹⁴

	Early Entry Into Prenatal Care Ranking	Early Entry Into Prenatal Care Data	Infant Mortality Rate Ranking	Infant Mortality Rate Data
United States		77.1%		5.60
Alabama	47	71.8%	47	7.89
Alaska	35	75.0%	13	4.81
Arizona	42	73.2%	20	5.24
Arkansas	50	68.4%	39	6.9
California	4	85.0%	3	4.06
Colorado	28	77.4%	12	4.74
Connecticut	7	84.1%	8	4.42
Delaware	20	78.8%	33	6.22
D.C.	49	74.9%	n/a	6.01
Florida	37	69.5%	31	n/a
Georgia	38	74.8%	42	6.89
Hawaii	32	75.9%	17	5.06
Idaho	19	79.0%	7	4.39
Illinois	26	77.6%	22	5.52
Indiana	41	73.8%	36	6.53
Iowa	13	81.1%	16	5.03
Kansas	8	82.8%	25	5.69
Kentucky	18	79.0%	15	5.00
Louisiana	39	74.6%	48	8.07
Maine	2	85.6%	19	5.23
Maryland	46	72.0%	30	5.91
Massachusetts	6	84.4%	2	3.59

214. The fourteen states with the most restrictive abortion laws are Alabama, Arkansas, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, and Texas. Brief of 547 Deans et al., *supra* note 132, at 25. The trigger states are Arkansas, Idaho, Kentucky, Louisiana, Mississippi, Missouri, North Dakota, Oklahoma, South Dakota, Tennessee, Texas, Utah, and Wyoming. See Cahn, *What Triggers the 'Trigger Laws,' supra* note 136 (noting that state laws are in flux). These measures capture a specific point in time, and may well have changed since that time.

	Early Entry Into Prenatal Care Ranking	Early Entry Into Prenatal Care Data	Infant Mortality Rate Ranking	Infant Mortality Rate Data
Michigan	16	79.8%	35	6.33
Minnesota	11	81.8%	9	4.47
Mississippi	21	78.3%	49	9.07
Missouri	25	77.6%	32	6.10
Montana	34	75.3%	10	4.63
Nebraska	23	78.1%	14	4.95
Nevada	43	73.1%	24	5.63
New Hampshire	3	85.3%	1	3.07
New Jersey	31	76.5%	6	4.30
New Mexico	48	69.6%	23	5.61
New York	14	80.7%	5	4.26
North Carolina	36	74.9%	38	6.80
North Dakota	22	78.1%	46	7.35
Ohio	33	75.4%	41	6.97
Oklahoma	44	72.8%	45	7.08
Oregon	12	81.2%	11	4.69
Pennsylvania	29	77.3%	28	5.85
Rhode Island	5	84.9%	26	5.80
South Carolina	45	72.0%	40	6.97
South Dakota	30	76.8%	37	6.68
Tennessee	40	74.2%	44	7.06
Texas	51	67.0%	21	5.49
Utah	10	82.1%	18	5.13
Vermont	1	89.5%	NA	NA
Virginia	15	79.9%	27	5.82
Washington	27	77.5%	4	4.14
West Virginia	17	79.2%	34	6.31
Wisconsin	9	82.5%	29	5.85
Wyoming	24	77.8%	43	7.00

	Low Birthweight Ranking	Low Birthweight Births Data	Young Child Poverty (Ages 0–5) Ranking	Young Children in Poverty (Ages 0–5) Data
United States		8.3%		18%
Alabama	49	10.5%	46	24%
Alaska	1	6.3%	20	16%
Arizona	15	7.4%	38	21%
Arkansas	38	9.2%	48	26%
California	11	7.1%	21	16%
Colorado	42	9.4%	7	11%
Connecticut	20	7.8%	18	15%
Delaware	43	9.4%	28	17%
D.C.	47	8.7%	33	20%
Florida	34	9.9%	36	18%
Georgia	48	10.0%	37	20%
Hawaii	26	8.4%	6	11%
Idaho	8	6.9%	23	17%
Illinois	28	8.4%	30	18%
Indiana	24	8.2%	26	17%
Iowa	6	6.8%	15	15%
Kansas	18	7.6%	25	17%
Kentucky	32	8.7%	47	26%
Louisiana	50	10.8%	50	28%
Maine	14	7.4%	29	18%
Maryland	33	8.7%	9	12%
Massachusetts	16	7.6%	8	12%
Michigan	35	8.7%	35	19%
Minnesota	9	6.9%	4	11%
Mississippi	51	12.3%	51	31%
Missouri	37	8.8%	32	18%
Montana	12	7.3%	16	15%

	Low Birthweight Ranking	Low Birthweight Births Data	Young Child Poverty (Ages 0–5) Ranking	Young Children in Poverty (Ages 0–5) Data
Nebraska	17	7.6%	12	13%
Nevada	36	8.8%	31	18%
New Hampshire	2	6.4%	1	7%
New Jersey	22	7.9%	13	13%
New Mexico	40	9.3%	49	28%
New York	23	8.1%	34	19%
North Carolina	41	9.3%	43	22%
North Dakota	7	6.8%	2	10%
Ohio	31	8.6%	40	21%
Oklahoma	25	8.2%	41	22%
Oregon	5	6.7%	11	13%
Pennsylvania	30	8.4%	27	17%
Rhode Island	21	7.8%	22	16%
South Carolina	45	9.8%	45	22%
South Dakota	10	7.0%	24	17%
Tennessee	39	9.2%	42	22%
Texas	27	8.4%	39	21%
Utah	13	7.4%	5	11%
Vermont	4	6.6%	3	11%
Virginia	29	8.4%	14	14%
Washington	3	6.4%	10	13%
West Virginia	44	9.8%	44	22%
Wisconsin	19	7.6%	17	15%
Wyoming	46	9.8%	19	15%

	Children with 2+ Adverse Childhood Experiences (ACEs) Ranking	Children with 2+ Adverse Childhood Experiences (ACEs) Data	State Provides Medicaid Coverage for Working Age Adults with Incomes Up to 138% FPL
United States		18%	Yes: 38 states + DC No: 12 states
Alabama	29	21%	No
Alaska	47	26%	Yes
Arizona	38	22%	Yes
Arkansas	51	29%	Yes
California	4	15%	Yes
Colorado	20	19%	Yes
Connecticut	5	15%	Yes
Delaware	30	21%	Yes
D.C.	43	23%	Yes
Florida	17	18%	No
Georgia	39	22%	No
Hawaii	7	16%	Yes
Idaho	31	21%	Yes
Illinois	8	16%	Yes
Indiana	32	21%	Yes
Iowa	23	20%	Yes
Kansas	24	20%	No
Kentucky	40	22%	Yes
Louisiana	44	23%	Yes
Maine	25	20%	Yes
Maryland	9	16%	Yes
Massachusetts	2	14%	Yes
Michigan	33	21%	Yes
Minnesota	10	16%	Yes
Mississippi	41	22%	No
Missouri	11	16%	Yes

	Children with 2+ Adverse Childhood Experiences (ACEs) Ranking	Children with 2+ Adverse Childhood Experiences (ACEs) Data	State Provides Medicaid Coverage for Working Age Adults with Incomes Up to 138% FPL
Montana	48	26%	Yes
Nebraska	21	19%	Yes
Nevada	26	20%	Yes
New Hampshire	12	16%	Yes
New Jersey	1	13%	Yes
New Mexico	49	26%	Yes
New York	3	14%	Yes
North Carolina	6	15%	No
North Dakota	34	21%	Yes
Ohio	42	22%	Yes
Oklahoma	45	25%	Yes
Oregon	35	21%	Yes
Pennsylvania	18	18%	Yes
Rhode Island	19	18%	Yes
South Carolina	36	21%	No
South Dakota	37	21%	No
Tennessee	27	20%	No
Texas	22	19%	No
Utah	15	17%	Yes
Vermont	28	20%	Yes
Virginia	13	16%	Yes
Washington	14	16%	Yes
West Virginia	46	25%	Yes
Wisconsin	16	17%	No
Wyoming	50	26%	No

	State Provides Expanded Medicaid Family Planning Coverage	Maximum Medicaid Income Eligibility Limit for Pregnant Women	Maximum Medicaid Income Eligibility for Parents
United States	Yes: 27 states No: 23 states + DC	200%	138%
Alabama	Yes	146%	18%
Alaska	No	205%	138%
Arizona	No	161%	138%
Arkansas	No	21%	138%
California	Yes	322%	138%
Colorado	No	265%	138%
Connecticut	Yes	263%	160%
Delaware	No	217%	138%
D.C.	No	324%	221%
Florida	Yes	196%	31%
Georgia	Yes	225%	35%
Hawaii	No	196%	138%
Idaho	No	138%	138%
Illinois	No	213%	138%
Indiana	Yes	213%	138%
Iowa	No	380%	138%
Kansas	No	171%	38%
Kentucky	No	200%	138%
Louisiana	Yes	21%	138%
Maine	Yes	214%	138%
Maryland	Yes	264%	138%
Massachusetts	No	205%	138%
Michigan	No	200%	138%
Minnesota	Yes	283%	138%
Mississippi	Yes	199%	25%
Missouri	No	305%	138%

	State Provides Expanded Medicaid Family Planning Coverage	Maximum Medicaid Income Eligibility Limit for Pregnant Women	Maximum Medicaid Income Eligibility for Parents
Montana	Yes	162%	138%
Nebraska	No	202%	138%
Nevada	No	165%	138%
New Hampshire	Yes	201%	138%
New Jersey	Yes	205%	138%
New Mexico	Yes	255%	138%
New York	Yes	223%	138%
North Carolina	Yes	201%	41%
North Dakota	No	162%	138%
Ohio	No	205%	138%
Oklahoma	Yes	210%	138%
Oregon	Yes	190%	138%
Pennsylvania	Yes	220%	138%
Rhode Island	Yes	258%	138%
South Carolina	Yes	199%	67%
South Dakota	No	138%	48%
Tennessee	No	255%	93%
Texas	Yes	207%	17%
Utah	No	144%	138%
Vermont	No	213%	138%
Virginia	Yes	205%	138%
Washington	Yes	198%	138%
West Virginia	No	305%	138%
Wisconsin	Yes	306%	100%
Wyoming	Yes	159%	52%

	Maximum Medicaid Income Eligibility Level for Children	Percent of Women Eligible for WIC Who Receive Benefits	Percent of Infants Up to Age 1 Whose Families Receive TANF Benefits	Monthly TANF Benefits for a Family of Three
United States	255%	69%	21.7%	\$492
Alabama	317%	70%	14.6%	\$215
Alaska	208%	72%	21.0%	\$923
Arizona	203%	61%	5.2%	\$278
Arkansas	216%	67%	5.8%	\$204
California	266%	73%	71.9%	\$878
Colorado	265%	60%	28.4%	\$508
Connecticut	323%	57%	39.0%	\$698
Delaware	217%	64%	35.6%	\$338
D.C.	324%	57%	88.2%	\$658
Florida	215%	72%	8.3%	\$303
Georgia	252%	65%	2.9%	\$280
Hawaii	313%	70%	23.4%	\$610
Idaho	190%	60%	2.7%	\$309
Illinois	318%	59%	5.3%	\$533
Indiana	255%	70%	4.8%	\$288
Iowa	380%	81%	26.2%	\$426
Kansas	232%	53%	17.5%	\$429
Kentucky	218%	73%	18.8%	\$262
Louisiana	255%	65%	4.7%	\$240
Maine	213%	75%	14.8%	\$610
Maryland	322%	80%	44.8%	\$727
Massachusetts	305%	74%	65.5%	\$633
Michigan	217%	75%	9.7%	\$492
Minnesota	288%	76%	27.4%	\$632
Mississippi	214%	73%	8.6%	\$170
Missouri	305%	74%	16.1%	\$292
Montana	266%	60%	29.9%	\$588

	Maximum Medicaid Income Eligibility Level for Children	Percent of Women Eligible for WIC Who Receive Benefits	Percent of Infants Up to Age 1 Whose Families Receive TANF Benefits	Monthly TANF Benefits for a Family of Three
Nebraska	218%	56%	20.4%	\$468
Nevada	205%	59%	16.3%	\$386
New Hampshire	323%	44%	40.9%	\$1086
New Jersey	355%	64%	13.2%	\$559
New Mexico	305%	54%	32.1%	\$447
New York	405%	73%	45.1%	\$789
North Carolina	216%	73%	4.7%	\$272
North Dakota	175%	54%	13.5%	\$486
Ohio	211%	65%	28.3%	\$505
Oklahoma	210%	77%	12.0%	\$292
Oregon	305%	77%	27.3%	\$506
Pennsylvania	319%	68%	41.1%	\$421
Rhode Island	266%	54%	28.0%	\$554
South Carolina	213%	67%	15.5%	\$299
South Dakota	209%	65%	10.8%	\$615
Tennessee	255%	69%	23.1%	\$277
Texas	206%	74%	5.9%	\$303
Utah	205%	52%	16.0%	\$498
Vermont	317%	76%	32.5%	\$699
Virginia	205%	56%	14.3%	\$508
Washington	317%	60%	19.1%	\$569
West Virginia	305%	80%	9.8%	\$340
Wisconsin	306%	66%	22.6%	\$653
Wyoming	205%	68%	4.0%	\$712

	Pregnant Women Eligible for TANF if No Other Child	Minimum Wage Rate
United States	State provides benefit within the 1st trimester or month of medical verification: 10	\$7.25
Alabama	No	none
Alaska	Yes, eligible at 7 months pregnant	\$10.34
Arizona	No	\$12.80
Arkansas	No	\$11
California	Yes, eligible at 4 months pregnant	\$15
Colorado	Yes, eligible from month of medical verification	\$12.56
Connecticut	Yes, eligible at 1 month pregnant	\$13
Delaware	Yes, eligible at 9 months pregnant	\$10.50
D.C.	Yes, eligible at 5 months pregnant	\$16.10
Florida	Yes, eligible at 9 months pregnant	\$10
Georgia	No	\$5.15
Hawaii	Yes, eligible at 9 months pregnant	\$10.10
Idaho	Yes, eligible at 7 months pregnant	\$7.25
Illinois	Yes, eligible at 1 month pregnant	\$12
Indiana	No	\$7.25
Iowa	No	\$7.25
Kansas	Yes, eligible at 1 month pregnant	\$7.25
Kentucky	No	\$7.25
Louisiana	Yes, eligible at 6 months pregnant	none
Maine	Yes, eligible at 7 months pregnant	\$12.75
Maryland	Yes, eligible at 1 month pregnant	\$12.5
Massachusetts	Yes, eligible at 1 month pregnant	\$14.25
Michigan	Yes, eligible at 1 month pregnant	\$9.87
Minnesota	Yes, eligible at 1 month pregnant	\$10.33
Mississippi	No	none
Missouri	No	\$11.15
Montana	Yes, eligible at 7 months pregnant	\$9.20
Nebraska	Yes, eligible at 7 months pregnant	\$9

	Pregnant Women Eligible for TANF if No Other Child	Minimum Wage Rate
Nevada	Yes, eligible at 6 months pregnant	\$9.75
New Hampshire	No	\$7.25
New Jersey	No	\$13
New Mexico	Yes, eligible at 7 months pregnant	\$11.50
New York	Yes, eligible from month of medical verification	\$13.20; \$15 (Long Island, Westchester, NYC)
North Carolina	No	\$7.25
North Dakota	Yes, eligible at 6 months pregnant	\$7.25
Ohio	Yes, eligible at 6 months pregnant	\$9.30
Oklahoma	No	\$7.25
Oregon	Yes, eligible at 8 months pregnant	\$12.75
Pennsylvania	Yes, eligible at 1 month pregnant	\$7.25
Rhode Island	Yes, eligible at 7 months pregnant	\$12.25
South Carolina	No	none
South Dakota	No	\$9.95
Tennessee	Yes, eligible at 6 months pregnant	none
Texas	No	\$7.25
Utah	Yes, eligible at 7 months pregnant	\$7.25
Vermont	Yes, eligible at 9 months pregnant	\$12.55
Virginia	No	\$11
Washington	Yes, eligible at 1 month pregnant	\$14.49
West Virginia	No	\$8.75
Wisconsin	Yes, eligible at 6 months pregnant	\$7.25
Wyoming	No	\$5.15

	Paid Family Leave	Paid Sick Leave
United States		
Alabama	No	No
Alaska	No	No
Arizona	No	Yes
Arkansas	No	No
California	Yes	Yes
Colorado	Yes	Yes
Connecticut	Yes	Yes
Delaware	No	No
D.C.	Yes	Yes
Florida	No	No
Georgia	No	No
Hawaii	No	No
Idaho	No	No
Illinois	No	No
Indiana	No	No
Iowa	No	No
Kansas	No	No
Kentucky	No	No
Louisiana	No	No
Maine	No	Yes
Maryland	Yes	Yes
Massachusetts	Yes	Yes
Michigan	No	Yes
Minnesota	No	No
Mississippi	No	No
Missouri	No	No
Montana	No	No
Nebraska	No	No
Nevada	No	Yes
New Hampshire	No	No
New Jersey	Yes	Yes

	Paid Family Leave	Paid Sick Leave
New Mexico	No	Yes
New York	Yes	Yes
North Carolina	No	No
North Dakota	No	No
Ohio	No	No
Oklahoma	No	No
Oregon	Yes	Yes
Pennsylvania	No	No
Rhode Island	Yes	Yes
South Carolina	No	No
South Dakota	No	No
Tennessee	No	No
Texas	No	No
Utah	No	No
Vermont	No	Yes
Virginia	No	No
Washington	Yes	Yes
West Virginia	No	No
Wisconsin	No	No
Wyoming	No	No

