

FERTILITY, IMMIGRATION, AND PUBLIC SUPPORT FOR PARENTING

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INTRODUCTION.....	2485
I. FERTILITY, RACE, AND FAMILY SUPPORT	2491
II. FERTILITY, IMMIGRATION, AND SUPPORT FOR CHILDREN	2496
III. THE SECOND DEMOGRAPHIC TRANSITION AND CONVERGING DESTINIES	2499
IV. DO CONVERGING FERTILITY RATES REFLECT A CONVERGENCE IN FAMILY VALUES?.....	2502
CONCLUSION.....	2505

INTRODUCTION

Do fertility rates converging by class reframe the debate about public support for parents and family care?

The debate about support for child-rearing in the United States has long foundered on the race and class divide. Since the Industrial Revolution, fertility has diverged by class with the well-off choosing to have fewer children while the working class has continued to have larger families.¹

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1. See, e.g., LINDA HIRSHMAN & JANE LARSON, *HARD BARGAINS: THE POLITICS OF SEX* 92 (1998); Jane Larson, "Women Understand So Little, They Call My Good Nature 'Deceit'": *A Feminist Rethinking of Seduction*, 93 COLUM. L. REV. 374, 392 (1993) (stating that the average number of children per family fell by approximately half between 1800 and 1900); Martha J. Bailey & Brad J. Hershbein, U.S. Fertility Rates and Childbearing, 1800 to 2010, at 2 (Sept. 2015) (draft manuscript), http://www-personal.umich.edu/~baileymj/OUP_fertility_9_30_15.pdf [<https://perma.cc/J3FL-VE4E>] ("The standard fertility rate timeseries . . . shows that American women reaching childbearing age around 1800 averaged around seven to eight live births during their reproductive years and that this number fell to between two and three children by 1930."). Figure 2 shows that the huge decline (more than half of the initial rate) occurred between 1855 and 1900—that is, after the beginning of the

Starting in the 1990s, the rates of unintended pregnancy diverged dramatically. Those who were 200 percent or more above the poverty line cut their unintended pregnancies rate in half, while those below the poverty line saw a substantial increase in the rates of unintended pregnancy,² increasing the perceptions of “irresponsible reproduction.”³

The moment for family law convergence is at hand—and the reason is a remarkable convergence in fertility rates. As this Essay shows, the fertility discourse of the last half century deals with the profound effects that come from the transformation of the economy and the place of modern families within it. Discussions of race and class have been an important—and, often, pernicious—part of a transformation in family values, as the upper-middle-class efforts to channel ever greater investment into children have increased economic inequality and contributed to racial, ideological, and gender division. We see the convergence in fertility rates as an indication that, at a practical level, a much larger part of the country is embracing the new family ethos we have labeled “blue”—that is, postponement in childbearing that facilitates greater investment in both men’s and women’s earning capacity. This ethos, at its core, accepts women’s critical role as wage earners and calls attention to the fact that societies cannot adequately support child-rearing without remaking the public infrastructure that supports family planning and care. Cultural values in the new regime reflect not just “family values” but also the larger demographic and economic trends that are remaking our society.

The modern story of family divergence—and of the “welfare queen” stereotype⁴—starts with the 1965 Moynihan Report, which described the increasing Black nonmarital birth rate as the result of a “tangle of pathology.”⁵ Later sociologists, with much less fanfare, described the results as the product of diverging fertility rates: married African Americans

industrialization. *Id.*; Gretchen Livingston, *Family Size Among Mothers* (May 7, 2015), <https://www.pewresearch.org/social-trends/2015/05/07/family-size-among-mothers/> [<https://perma.cc/4MXH-TU4A>] (“The more education a mother has, the fewer children she will have on average in her lifetime”). On the class divide, see Michael R. Haines, *The Population of the United States, 1790–1920* (Nat’l Bureau of Econ. Rsch., Historical Working Paper No. 56, 1994), https://www.nber.org/system/files/working_papers/h0056/h0056.pdf [<https://perma.cc/VZ5E-HKS2>].

2. GUTTMACHER INST., UNINTENDED PREGNANCY IN THE UNITED STATES (2019), <https://www.guttmacher.org/sites/default/files/factsheet/fb-unintended-pregnancy-us.pdf> [<https://perma.cc/YP8E-WH2P>].

3. See generally Linda C. McClain, “Irresponsible” Reproduction, 47 HASTINGS L.J. 339 (1996).

4. Catherine Powell & Camille Gear Rich, *The “Welfare Queen” Goes to the Polls: Race-Based Fractures in Gender Politics and Opportunities for Intersectional Coalitions*, 108 GEO. L.J. 105, 116 (2020).

5. See OFF. OF POL’Y PLAN. & RSCH., U.S. DEP’T OF LABOR, THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION (1965) [hereinafter THE MOYNIHAN REPORT], <https://web.stanford.edu/~mrosenfe/Moynihan%27s%20The%20Negro%20Family.pdf> [<https://perma.cc/UPP9-T596>].

embraced contraception earlier than unmarried women, contributing to a change in the population having children.⁶

A second divergence underlies differences between those who support immigration and those who do not, based in part on the latter's perception that white people will soon be a minority within the United States.⁷ Underlying this perception is not just increased immigration, but high birth rates among Latinx mothers. Latinx immigrants to the United States in fact have had higher fertility rates than Americans (including Latinx Americans) born in the United States.⁸ Their birth rates have also been higher than the women in their home countries who did not emigrate.⁹ By 2019, white people constituted less than 50 percent of children under the age of fifteen in the United States.¹⁰ In addition, while 14 percent of the U.S. population was foreign-born in 2017, 23 percent of all births were to immigrant women.¹¹ The high birth rates among Latinx mothers were a principal reason why overall U.S. population growth remained above replacement (that is, the U.S. fertility rate remained above 2.1 children for every woman of childbearing age), making the United States an outlier among developed countries.¹²

A third divergence involves class-based change in family formation. Demographers described a "second demographic transition" led by the developed world, characterized by falling overall fertility, a greater variety of household living arrangements, and a disconnection between marriage and reproduction.¹³ In the United States, conservative critics link these patterns to moral decay.¹⁴ Underlying the class-based divergences was an increased divergence in fertility timing. The average age of marriage and first birth for

6. See *infra* notes 53–58 and accompanying text.

7. See *infra* notes 79–83 and accompanying text.

8. Gretchen Livingston, *Hispanic Women No Longer Account for the Majority of Immigrant Births in the U.S.*, PEW RSCH. CTR. (Aug. 8, 2019), <https://www.pewresearch.org/fact-tank/2019/08/08/hispanic-women-no-longer-account-for-the-majority-of-immigrant-births-in-the-u-s/> [<https://perma.cc/R8W9-3LX7>].

9. STEVEN A. CAMAROTA, CTR. FOR IMMIGR. STUD., BIRTH RATES AMONG IMMIGRANTS IN AMERICA COMPARING FERTILITY IN THE U.S. AND HOME COUNTRIES (2005), <https://cis.org/sites/cis.org/files/articles/2005/back1105.pdf> [<https://perma.cc/KA3A-FWGJ>] (finding that immigrants have higher birth rates than women in their home countries).

10. William H. Frey, *Less than Half of US Children Under 15 Are White, Census Shows*, BROOKINGS INST. (June 24, 2019), <https://www.brookings.edu/research/less-than-half-of-us-children-under-15-are-white-census-shows/> [<https://perma.cc/423L-SG6Q>].

11. See Livingston, *supra* note 8.

12. In 1990, for example, American women had 2.1 children each compared to 1.4 in Spain and 1.5 in Germany. Caroline Sten Hartnett, *US Fertility Is Dropping. Here's Why Some Experts Saw It Coming*, THE CONVERSATION (May 30, 2018), <https://theconversation.com/us-fertility-is-dropping-heres-why-some-experts-saw-it-coming-97037> [<https://perma.cc/B9KC-CQ3L>].

13. See Ron Lesthaeghe, *The Second Demographic Transition: A Concise Overview of Its Development*, 111 PROC. NAT'L ACAD. SCIS. 18,112, 18,112–15 (2014) (comparing recent global declines in fertility with the "first demographic transition" that followed industrialization).

14. See generally Linda C. McClain, *The Other Marriage Equality Problem*, 93 B.U. L. REV. 921 (2013) (summarizing this debate and how it relates to the second demographic transition).

college graduates steadily increased.¹⁵ A later age of marriage lowered divorce rates, partly because of couples' greater maturity and partly because of assortative mating—those who waited longer to marry invested more in their careers and became more likely to marry similarly successful partners.¹⁶ During the same period, the average age of first birth for women who did not attend college remained the same.¹⁷ These changing fertility patterns contributed to a class divide that, over time, also became a cultural divide. The most economically prosperous and liberal areas of the country increasingly had lower overall fertility, less divorce, fewer teen births, and later ages of family formation than less prosperous (and more religious and conservative) areas of the country.¹⁸ The legal rift that followed has been described as a clash between “red families” and “blue families.”¹⁹

These differences in fertility patterns and management are now shrinking. Beginning with the Great Recession in 2008, fertility rates began to drop, driven to a large degree by changes in fertility for younger, poorer, and minority women.²⁰ They fell across the board for single, non-cohabiting women of all races. Rates have dropped dramatically for teens of all races, particularly Latinx teenagers.²¹ And the unintended pregnancy rates of

15. See KAY HYMOWITZ ET AL., KNOT YET: THE BENEFITS AND COSTS OF DELAYED MARRIAGE IN AMERICA 8 fig.IIA (2013), <http://nationalmarriageproject.org/wp-content/uploads/2013/03/KnotYet-FinalForWeb.pdf> [<https://perma.cc/6XC7-YQYT>].

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

17. See HYMOWITZ ET AL., *supra* note 15.

18. NAOMI CAHN & JUNE CARBONE, RED FAMILIES V. BLUE FAMILIES: LEGAL POLARIZATION AND THE CREATION OF CULTURE 2 (2010) (describing how family patterns correlate with different cultures in different parts of the United States and contribute to a divergence in family law doctrines regarding abortion, contraception, and custody). In discussing socioeconomic status, differences in family practices tend to correspond to educational differences, with college graduates adopting distinctly different patterns, including delayed marriage and childbearing and lower divorce rates, than high-school-only graduates. *Id.* at 39–40. In this Essay, we will accordingly use education as a marker of socioeconomic status.

19. *Id.* at ii, 1–2.

20. Lyman Stone, *Baby Bust: Fertility Is Declining the Most Among Minority Women*, INST. FOR FAM. STUD. (May 16, 2018), <https://ifstudies.org/blog/baby-bust-fertility-is-declining-the-most-among-minority-women> [<https://perma.cc/LTN4-6UDY>] (finding an overall American fertility rate of 1.76 per woman, the lowest in forty years, led by declining fertility rates among minority women).

21. The modern high for teen births came at the height of the baby boom in 1957, reaching 96.3 births per 1000 girls between the ages of fifteen and nineteen, falling to 61.8 by 1991, and then falling from 40.2 in 2008 to 16.7 by 2019. Amanda Barroso, *With a Potential 'Baby Bust' on the Horizon, Key Facts About Fertility in the U.S. Before the Pandemic*, PEW RSCH. CTR. (May 7, 2021), <https://www.pewresearch.org/fact-tank/2021/05/07/with-a-potential-baby-bust-on-the-horizon-key-facts-about-fertility-in-the-u-s-before-the-pandemic/> [<https://perma.cc/9MRL-ZP9T>]. In 1991, the birth rates for teenagers (ages 15–19) of all races was 61.8, while it was 16.7 in 2019. From 1991 to 2019, the birth rates for Latinx teenagers dropped from 104.6 to 25.3 and the birth rates for non-Latinx Black teenagers dropped from 118.2 to 25.8. See John Elfein, *Birth Rates Among U.S. Teenagers Aged 15–19 in Selected Years Between 1991 and 2019, by Ethnicity*, STATISTA (Apr. 23, 2021), <https://www.statista.com/statistics/222251/birth-rates-among-us-teenagers-aged-18-19-by-ethnic-origin/> [<https://perma.cc/LV7D-8AB6>]; MARTA ALVIRA-HAMMOND, NAT'L RSCH. CTR.

women below the poverty line, which had increased substantially from the mid-nineties to the mid-aughts, dropped.²² In recent decades, women with a college degree or higher have seen their fertility rates rise.²³ As a result, looking at completed fertility—that is, the total number of children born to each woman by the age of forty-four—educational differences have shrunk.²⁴ These fertility shifts persisted through the post-2008 recovery²⁵ and seem to have been exacerbated during the pandemic, setting the stage for a greater convergence in family patterns across race, region, and immigration status.²⁶ They also have laid the foundation for a new era of family law.

Family support from adoption of the Aid to Dependent Children program in the 1930s to the abolition of “welfare as we know it” in 1996 has been integral to a debate about “‘irresponsible’ reproduction.”²⁷ “Family caps,” policies that deny benefits for additional children born to mothers on public assistance, were designed to remove what supporters saw as the “perverse incentive for welfare mothers to have more babies in order to get money.”²⁸ In contrast, the adoption of European family allowances were often tied to pronatalist policies designed at least in part to encourage greater fertility.²⁹ Converging (and declining) fertility rates may increase political support for

ON HISPANIC CHILDREN & FAMILIES, HISPANIC WOMEN ARE HELPING DRIVE THE RECENT DECLINE IN THE U.S. FERTILITY RATE (2019), <https://www.hispanicresearchcenter.org/wp-content/uploads/2019/08/Hispanic-fertility-trends-1989-20171.pdf> [<https://perma.cc/T9DG-8LP5>] (finding that for Hispanic women, the “fertility rate fell by 31 percent from 2006 to 2017, compared to 5 percent for white women and 11 percent for black women”); *see also* BRADY E. HAMILTON, CTRS. FOR DISEASE CONTROL & PREVENTION, STATE TEEN BIRTH RATES BY RACE AND HISPANIC ORIGIN: UNITED STATES, 2017–2018, at 2 (2020), <https://www.cdc.gov/nchs/data/nvsr/nvsr69/NVSR69-6-508.pdf> [<https://perma.cc/SZ6N-872U>].

22. *See* GUTTMACHER INST., *supra* note 2.

23. BRADY E. HAMILTON, CTRS. FOR DISEASE CONTROL & PREVENTION, TOTAL FERTILITY RATES, BY MATERNAL EDUCATIONAL ATTAINMENT AND RACE AND HISPANIC ORIGIN: UNITED STATES, 2019, at 1, 5 (2021), <https://www.cdc.gov/nchs/data/nvsr/nvsr70/nvsr70-05-508.pdf> [<https://perma.cc/L4VB-5MEK>] (showing that in 2019 fertility rates continued to rise for women with a bachelor’s degree through a doctorate or professional degree while continuing to decline for others); *see also* Barroso, *supra* note 21.

24. In 2020, 80 percent of women with PhDs or professional degrees had children by the age of forty-four, in comparison to 88 percent of women with a high school degree or less. In 1994, in contrast, only 65 percent of women with PhDs or professional degrees had children compared to 88 percent of women with high school degrees or less. *See* Barroso, *supra* note 21.

25. *Id.* (observing that these changes were in place before the COVID-19 pandemic, which may further lower overall U.S. fertility rates).

26. *See* HAMILTON, *supra* note 23 (birth rates for 2019); JOYCE A. MARTIN ET AL., BIRTHS IN THE UNITED STATES, 2020 (2021), <https://www.cdc.gov/nchs/data/databriefs/db418.pdf> [<https://perma.cc/8U2L-XWEK>] (showing a decline in general fertility rate from 2019–2020, with decreases for non-Hispanic white, non-Hispanic Black, and Latinx women as well as for all age groups).

27. McClain, *supra* note 3, at 340.

28. Barbara Vobejda & Judith Havemann, *Doing the Math on the Welfare “Family Cap,”* WASH. POST (Mar. 30, 1997), <https://www.washingtonpost.com/wp-srv/politics/special/welfare/stories/wf033097.htm> [<https://perma.cc/Y4UA-7JJF>].

29. Leslie King, *Demographic Trends, Pronatalism, and Nationalist Ideologies in the Late Twentieth Century*, ETHNIC & RACIAL STUD., May 2002, at 367, 372 (observing that “[m]ost Western European countries have generous family benefits that were, prior to WWII, at least partially attached to pronatalist agendas”).

investing more in all families; the role of children in our society has changed from matters of individual family values to the foundation for liberal democracies.³⁰

The other change is among well-educated women, with Black women leading the way. Black married women have had substantially lower fertility rates than white married women since the 1980s.³¹ And the birth rates for unmarried Black women dropped sharply after 1969, while the birth rates for unmarried white women increased, dramatically reducing the difference between the two.³²

Both Black and white college graduate nonmarital birth rates are increasing.³³ In recent years, white college graduate birth rates have also increased, both within and outside of marriage. These changes may reflect both changing economic conditions and women's attitudes toward their biological clocks. The willingness to have children, alone if necessary, has become a sign of success rather than a sign of economic disadvantage.

This Essay examines how the convergence of fertility trends is likely to reset the debate about state support for child-rearing, against the background of an ongoing national conversation on supporting children and families, prompted most recently by the COVID-19 pandemic.³⁴ First, it reviews how past failures to embrace such policies often foundered on diverging fertility patterns and how this time may be different. Second, it considers how the changing patterns among well-educated women may affect traditional family law doctrines underlying custody and support. Third, it explores the relationship between immigration, xenophobic backlash, and fertility rates, considering whether these factors may change with converging fertility rates. Finally, it considers the implications of the foregoing for family law.

30. See LINDA C. MCCLAIN, *THE PLACE OF FAMILIES: FOSTERING CAPACITY, EQUALITY, AND RESPONSIBILITY* 155–90 (2006) (arguing that childhood investment is a matter of basic equality, justice, and capacity for citizenship).

31. Ta-Nehisi Coates, *Understanding Out-of-Wedlock Births in Black America: Revisiting the Controversial Moynihan Report*, ATLANTIC (June 21, 2013), <https://www.theatlantic.com/sexes/archive/2013/06/understanding-out-of-wedlock-births-in-black-america/277084/> [<https://perma.cc/V3D8-GB8Z>].

32. *Id.* For data through 2015, see *Births and Birth Rates to Unmarried Women in the United States, Selected Years 1940–2015*, NAT'L CTR. FOR HEALTH STAT., <https://www.cdc.gov/nchs/data-visualization/births-to-unmarried-women/index.htm> [<https://perma.cc/FXN9-WQ44>] (Sept. 14, 2017).

33. Elizabeth Wildsmith et al., *Dramatic Increase in the Proportion of Births Outside of Marriage in the United States from 1990 to 2016*, CHILD TRENDS (Aug. 8, 2018), <https://www.childtrends.org/publications/dramatic-increase-in-percentage-of-births-outside-marriage-among-whites-hispanics-and-women-with-higher-education-levels> [<https://perma.cc/SJT6-4DCR>] (describing how in 2016 the nonmarital birth rates for Black female college graduates had risen to 33 percent in comparison with 7 percent for white female college graduates and 20 percent for Latinx female college graduates).

34. See, e.g., Dana Thomson et al., *Lessons from the Expanded Child Tax Credit Can Strengthen Other Safety Net Programs*, CHILD TRENDS (Aug. 4, 2021), <https://www.childtrends.org/blog/lessons-from-the-expanded-child-tax-credit-can-strengthen-other-safety-net-programs> [<https://perma.cc/Z6GW-G8PH>].

I. FERTILITY, RACE, AND FAMILY SUPPORT

The modern recognition of diverging demographic destinies arguably started with the infamous 1965 Moynihan Report (“Report”).³⁵ The Report purported to call attention to diverging white-Black family patterns, but what it actually discovered was a growing fertility divide associated with the first stages of deindustrialization in the United States.

At the time of the Report, Daniel Patrick Moynihan, then a future U.S. senator from New York whose father deserted his own family, was an ambitious young assistant secretary of labor who wished to catch President Lyndon Johnson’s attention.³⁶ The Report declared: “At the heart of the deterioration of the fabric of Negro society is the deterioration of the Negro family. . . . [U]nless this damage [to the family] is repaired, all the effort to end discrimination and poverty and injustice will come to little.”³⁷

The Report proved inflammatory, as it described Black families in terms of a “Tangle of Pathology.”³⁸ Moynihan was accused of “blaming the victim” for suggesting that female-headed households contributed to Black poverty and discrimination.³⁹ His litany of the ills of “matriarchy” rankles to this day.

Moynihan’s statistics showed a glaring racial divide in family life. Divorce rates did not differ by race in 1940, but Moynihan observed that, by 1964, the nonwhite divorce rate exceeded the white divorce rate by 40 percent.⁴⁰ The Black nonmarital birth rate had grown from 16.8 percent to 23.6 percent, while for white people, the rate increased from 2 to 3.07 percent.⁴¹ Taken together, that meant that Black children were significantly more likely than white children to grow up in a single-family household. The Report acknowledged, however, that one reason for the size of the increase was that middle-class Black families had embraced contraceptives while poorer Black people had not. Moynihan observed that middle-class Black people had fewer children than middle-class white people at the same time that Black people with less education had more children at younger ages than their white counterparts.⁴² The Report concluded that the Black middle class placed “a higher premium on family stability and the conserving of family resources than does the white middle-class family.”⁴³ While Moynihan

35. See THE MOYNIHAN REPORT, *supra* note 5.

36. See JAMES T. PATTERSON, FREEDOM IS NOT ENOUGH: THE MOYNIHAN REPORT AND AMERICA’S STRUGGLE OVER BLACK FAMILY LIFE—FROM LBJ TO OBAMA 22 (2010) (questioning whether Moynihan sought self-promotion or policy influence).

37. THE MOYNIHAN REPORT, *supra* note 5, at 5.

38. That was the title of Chapter IV. *Id.* at 29.

39. William Ryan, *Savage Discovery*, 201 NATION 380, 380–84 (1965); see also Douglas S. Massey & Robert J. Sampson, *Moynihan Redux: Legacies and Lessons*, 621 ANNALS AM. ACAD. POL. & SOC. SCI. 6, 9 (2009) (“Young black militants and newly self-aware feminists joined in the rising tide of vilification, and Moynihan was widely pilloried not only as a racist, but a sexist to boot.”).

40. THE MOYNIHAN REPORT, *supra* note 5, at 5–14.

41. *Id.*

42. *Id.* at 29.

43. *Id.* at 6.

focused on statistics, the basic math is as follows: if middle-class families were having fewer children, while poorer families were not, the percentage of Black children raised in poor families would increase.⁴⁴

Indeed, sociologist Donna Franklin, writing later in the twentieth century, noted that taking the entire U.S. population into account, those most likely to be childless were “[B]lack women, born in the Northeast, married at older ages, college-educated living in urban areas, and married to professional or white collar workers.”⁴⁵ Franklin concluded that these “bifurcated” fertility rates increased the percentage of children born to the unmarried and the poor.⁴⁶ The Moynihan Report, the controversy it generated, and the statistics showing increasing percentages of Black children born to the poor and the unmarried each helped to racialize the policy debates of the next half century. These debates framed a fertility discourse that assumed that the major problem was too many children born to the “wrong” people.⁴⁷

Over the course of the 1970s, the desire to curb the fertility of unmarried Black women shaped two major issues. The first was contraceptive access. Remarkably, Congress passed Title X,⁴⁸ a federal family planning initiative, with a unanimous vote in the Senate and an overwhelming vote in the House. President Richard Nixon signed it into law in 1970. Part of the reason for the overwhelming support was that Republican voters supported the measure even more strongly than Democrats.⁴⁹ In southern states, support was often tied to racist arguments about controlling the growth of the Black population—indeed, Alabama was the first state to establish a tax-supported birth control program.⁵⁰ The politicians of the era, including both Presidents Johnson and Nixon, saw population control as important to economic growth and, at the time the legislation was adopted, women were pressing for greater control of their reproductive lives.⁵¹ Empirical studies comparing counties that were receiving federal funds with those that did not suggest that the programs had their desired effect: “[The programs] reduced overall fertility

44. See generally DONNA FRANKLIN, ENSURING INEQUALITY: THE STRUCTURAL TRANSFORMATION OF THE AMERICAN FAMILY (1997).

45. *Id.* at 199.

46. *Id.*

47. See *id.* at 180 (noting that “Black welfare mothers were set up as examples of a decline in values, promiscuous sexual behavior, and a weakened commitment to work and responsible living,” and quoting the chair of the House Ways and Means Committee as noting that welfare reform would no longer provide rewards “for doing the wrong thing”). Of course, the racialization of public welfare programs was not new. In a 1931 survey of mothers’ pension programs by the U.S. Children’s Bureau, 96 percent of the recipients were white, and 3 percent were Black (1 percent were of “other races”). See CAROLYN MOEHLING, MOTHERS’ PENSIONS AND FEMALE HEADSHIP 6–7 (2002), <https://economics.yale.edu/sites/default/files/files/Workshops-Seminars/Labor-Public/moehling-021004.pdf> [<https://perma.cc/PF2E-65VK>]; Joy Milligan, *Subsidizing Segregation*, 104 VA. L. REV. 847, 930 (2018).

48. 42 U.S.C. §§ 300–300a-6.

49. Martha J. Bailey, *Fifty Years of Family Planning: New Evidence on the Long-Run Effects of Increasing Access to Contraception*, 2013 BROOKINGS PAPERS ON ECON. ACTIVITY 341.

50. LINDA GORDON, THE MORAL PROPERTY OF WOMEN: A HISTORY OF BIRTH CONTROL POLITICS IN AMERICA 290 (2007).

51. *Id.* at 289.

rates in the counties they served by around 2 percent, and among poorer patients (on the presumption that they were their only beneficiaries) by 20 to 30 percent within a decade.”⁵²

During the same period, however, family support foundered. The major federal program assisting children was Aid to Families with Dependent Children (AFDC). Adopted during the thirties (and called Aid to Dependent Children in that era), the program was originally intended to benefit children “who had been deprived of parental support or care by reason of the death, continual absence from home, or physical or mental incapacity of a parent.”⁵³

The program treated mothers as dependent on a partner’s income to care for their children and provided assistance so the mothers could continue to raise their children on their own. The legislation permitted states to adopt other eligibility requirements, and many states enacted “moral character” requirements that excluded unmarried women from benefits.⁵⁴ By the 1960s, however, most of the requirements based on marital status had given way, and the percentage of beneficiaries who were widows had fallen from 43 percent in 1937 to 7 percent by 1961.⁵⁵ The U.S. Supreme Court, relying on congressional intent, invalidated some of the remaining moral restrictions, holding that “it is simply inconceivable . . . that [a state] . . . is free to discourage immorality and illegitimacy by the device of absolute disqualification of needy children.”⁵⁶ Congress, frustrated by the Supreme Court’s liberalization of AFDC eligibility, rising welfare rolls, and increasing Black nonmarital birth rates, responded by beefing up child support enforcement.⁵⁷ The states, to retain their AFDC funding, had to establish child support collection agencies that met federal standards.⁵⁸ These agencies had a mandate to establish paternity and collect payments from supposedly “deadbeat dads,” who were seen as having deserted their children,⁵⁹ in order to reimburse public coffers for the cost of the AFDC support.

Congress in the 1970s also recognized the other half of the changing family picture—the need to support mothers’ workplace participation—by enacting the Comprehensive Child Development Act (CCDA). The CCDA would have funded a national program on childcare, where the poorest

52. Bailey, *supra* note 49, at 377.

53. JUNE CARBONE, *FROM PARTNERS TO PARENTS* 201 (2000).

54. *Id.*

55. *Id.* at 202.

56. *King v. Smith*, 392 U.S. 309, 326 (1968); see also Serena Mayeri, *Marital Supremacy and the Constitution of the Nonmarital Family*, 103 CALIF. L. REV. 1277, 1298 (2015) (“[T]he substitute father regulations had been enacted . . . as part of a political program targeted specifically at curtailing African Americans’ right to receive public assistance.”). Subsequently, however, the Court upheld home visits in *Wyman v. James*, 400 U.S. 309 (1971), and the legitimacy of family caps in *Dandridge v. Williams*, 397 U.S. 471 (1970).

57. CARBONE, *supra* note 53, at 157.

58. *Id.*

59. Ann Cammett, *Deadbeat Dads & Welfare Queens: How Metaphor Shapes Poverty Law*, 34 B.C. J.L. & SOC. JUST. 233, 238 (2014) (“The image of the Deadbeat Dad also slowly emerged as a racialized trope: an uncaring Black father unwilling to pull his weight, often with multiple families, who expects taxpayers to carry his burden.”).

children could receive free services and others could receive services on a sliding scale.⁶⁰ The Senate successfully passed the bill with a vote of 63–17, with broad bipartisan support. Yet, President Nixon vetoed it, referring to the “fiscal irresponsibility, administrative unworkability, and family-weakening implications of the system it envisions.”⁶¹ That effectively ended federal efforts to provide comprehensive early child support.

Over the next twenty years, Congress and the Reagan administration undermined support for family planning efforts,⁶² family support, and women’s workplace participation, culminating with the abolition of “welfare as we know it”—through the AFDC program—during the Clinton administration.⁶³ In 1996, Congress abolished the program entirely, replacing it with Temporary Assistance for Needy Families (TANF).⁶⁴ The shift from AFDC to TANF eliminated cash payments to needy families as an entitlement and set time limits for benefits.⁶⁵ Congress changed the program funding to block grants, left administration to the states, and did not guarantee benefits for the eligible. Instead, the states were given incentives to cut expenditures, with no promise that the program would reach all of those it was designed to help (including needy families) or that it would provide meaningful support, such as affordable childcare, to those enrolled.⁶⁶ Though TANF claimed to promote childbearing within marriage, it did more to promote the idea that “responsible motherhood” meant not having more children than a parent could support without government assistance than to increase marriage rates.⁶⁷

Professor Linda Gordon writes that much of the popular discussion fueling the welfare backlash that led to the abolition of AFDC relied on “the mistaken assumption that teenage fertility rates were rising.”⁶⁸ In fact, overall teen birth rates had steadily declined and, “contrary to widespread misimpression,

60. Deborah Dinner, *The Universal Childcare Debate: Rights Mobilization, Social Policy, and the Dynamics of Feminist Activism, 1966–1974*, 28 *LAW & HIST. REV.* 577, 614 (2010).

61. RICHARD NIXON, PRESIDENT OF THE U.S., VETO MESSAGE—ECONOMIC OPPORTUNITY AMENDMENTS OF 1971, S. DOC. NO. 92-48, at 3 (1st Sess. 1971).

62. GORDON, *supra* note 50, at 336 (“Antiabortion forces in the 1980s and 1990s consistently worked to cut public funding for birth control. During the Reagan and Bush Sr. presidencies, Title X funding for birth control (in real dollars) fell by 72 percent and total public funding by 27 percent, while the costs of contraception grew faster than inflation.”).

63. See, e.g., Alana Semuels, *The End of Welfare as We Know It*, ATLANTIC (Apr. 1, 2016), <https://www.theatlantic.com/business/archive/2016/04/the-end-of-welfare-as-we-know-it/476322/> [<https://perma.cc/CE8V-CUEM>]. This was something Nixon had been unable to do. See Jill Quadagno, *Race, Class, and Gender in the U.S. Welfare State: Nixon’s Failed Family Assistance Plan*, 55 *AM. SOCIO. REV.* 11, 15 (1990).

64. 42 U.S.C. §§ 301–1397; see Andrew Hammond, *Welfare and Federalism’s Peril*, 92 *WASH. L. REV.* 1721, 1770 (2017) (describing program).

65. Hammond, *supra* note 64, at 1732.

66. *Id.*

67. See Maxine Eichner, *The Privatized American Family*, 93 *NOTRE DAME L. REV.* 213, 257 (2017) (treating the adoption of TANF as the triumph of neoliberal ideology).

68. GORDON, *supra* note 50, at 347.

the decline was steeper among blacks than among whites.”⁶⁹ She observes that two reasons contributed to the misimpression: (1) the fact that “adult births were falling even more than teenage births” and (2) the fact that the percentage of teen births taking place outside of marriage “had increased from 17 percent in 1970 to 79 percent in 1998.”⁷⁰ The result created alarm about a teen pregnancy crisis attributed to a decline in the moral fabric of the country.⁷¹

The Brookings Institution notes that misimpressions about fertility hold with particular force for “African Americans, who are disproportionately represented on the welfare rolls, and whose non-marital ratio went from 23.3 percent in 1960 to an alarming 69.1 percent in 1999.”⁷² Some social conservatives still insist that the availability of state benefits such as AFDC was a major factor in the change, creating incentives for unmarried women to have more children.⁷³

Yet, while the correlations between the generosity of welfare benefits and the nonmarital birth rates continue to be debated, the perception that unmarried women’s *fertility rates* increased because of welfare availability is wrong. As the Brookings commentary observes, “the birth rate of unmarried black women actually dropped by one quarter” between 1960 and 1999.⁷⁴ Despite this, the *percentage* of nonmarital births relative to marital births rose in large part because the birth rate of married Black women dropped dramatically while the marriage rate declined by over 40 percent.⁷⁵ Government benefits did not increase the birth rates of unmarried women, as welfare critics like to claim.

69. *Id.* at 348.

70. *Id.*

71. *Id.* at 347 (stating that “alarm about teenage pregnancy and out-of-wedlock childbearing supported the condemnation of welfare and an ‘underclass’ who allegedly lacked good moral values and work ethic”).

72. Paul Offner, *Reducing Non-Marital Births*, BROOKINGS INST. (Aug. 1, 2001), <https://www.brookings.edu/research/reducing-non-marital-births/> [<https://perma.cc/Y9EL-XDSW>].

73. Willis Krumholz, *Family Breakdown and America’s Welfare System*, INST. FOR FAM. STUD. (Oct. 7, 2019), <https://ifstudies.org/blog/family-breakdown-and-americas-welfare-system> [<https://perma.cc/6HAZ-ENVQ>] (“One contributor to family breakdown, which soon spread to the poor and working-class white family, may have been welfare expansion.”). In a report opposing President Biden’s welfare proposals, the Heritage Foundation stated: “Most studies of the AFDC system before welfare reform reached similar conclusions. States with higher monthly AFDC benefits had higher levels of out-of-wedlock births as a share of all births within the state.” Jamie Bryan Hall & Robert Rector, *Congress Should Reject Efforts to Restore “Welfare as We Knew It” by Expanding Child Credits*, HERITAGE FOUND. (Feb. 19, 2021), <https://www.heritage.org/welfare/report/congress-should-reject-efforts-restore-welfare-we-knew-it-expanding-child-credits> [<https://perma.cc/6RZL-2J63>].

74. See Offner, *supra* note 72, at 2.

75. See generally *id.* In 1960, 30 percent of all brides gave birth within eight and a half months of the nuptials—the shotgun marriage disguised a high rate of unmarried pregnancy. By 1999, women generally had stopped marrying solely because of a pregnancy and poor Black women had become much less likely to marry at all, but the rate at which unmarried women became pregnant had fallen substantially.

These controversies arose contemporaneously with the large-scale movement of the mothers of young children into the workplace, the declining employment prospects for blue collar men, and the beginnings of deep-seated cultural divisions about women's roles.⁷⁶ The conviction that the wrong people were having too many children for the wrong reasons contributed to the lack of public support for greater family assistance at a time ripe for rethinking the public infrastructure for all families.

II. FERTILITY, IMMIGRATION, AND SUPPORT FOR CHILDREN

White nationalist and anti-immigrant rhetoric in the United States often conjures up images of an invasion of foreign migrants overwhelming our borders.⁷⁷ In 2021, Fox News's Tucker Carlson was even using the term "replacement theory" to insist that "the Democratic Party is trying to replace the current electorate, the voters now casting ballots, with new people, more obedient voters from the third world."⁷⁸ These perceptions increase support for white nationalist politicians,⁷⁹ and they contribute to negative perceptions of public schools⁸⁰ and social programs.⁸¹

One of the factors fueling these sentiments is the perception that immigration is out of control. Surveys in France, Germany, Italy, Sweden, the United Kingdom, and the United States find that the share of immigrants is perceived to be "at least twice as high as it actually is."⁸² More sophisticated studies indicate that perceptions of immigration are tied to a combination of immigrants' places of origin (e.g., more favorable views of

76. CAHN & CARBONE, *supra* note 18, at 39–45, 51 (describing women's greater economic independence, changing family roles, and moral backlash).

77. See, e.g., Christina Iturralde, *Rhetoric and Violence: Understanding Incidents of Hate Against Latinos*, 12 N.Y.C. L. REV. 417, 421 (2009) ("It is particularly troubling that many of their published reports use pictures and images of Latinos crossing the border and the border itself, and claim an invasion by immigrants from Latin America."); David Frum, *If Liberals Won't Enforce Borders, Fascists Will*, ATLANTIC (Apr. 2019), <https://www.theatlantic.com/magazine/archive/2019/04/david-frum-how-much-immigration-is-too-much/583252/> [<https://perma.cc/QAA4-9MTB>] (discussing President Trump's manipulation of the imagery of the caravan of migrants approaching the Mexican border in 2018).

78. *What Is White Replacement Theory?: Explaining the White Supremacist Rhetoric*, NPR (Sept. 26, 2021, 7:54 AM), <https://www.npr.org/2021/09/26/1040756471/what-is-white-replacement-theory-explaining-the-white-supremacist-rhetoric> [<https://perma.cc/9T2U-FVYT>].

79. Empirical studies produce mixed results. See SERGEI GURIEV & ELIAS PAPAIOANNOU, THE POLITICAL ECONOMY OF POPULISM 67 (2020), https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/programs/senior.fellows/20-21/populism_oct2020.pdf [<https://perma.cc/AX6W-GX9Z>].

80. According to a 2015 report, 41 percent of the public indicated that increased immigration has made their schools worse. PEW RSCH. CTR., MODERN IMMIGRATION WAVE BRINGS 59 MILLION TO U.S., DRIVING POPULATION GROWTH AND CHANGE THROUGH 2065, at 58 (2015), https://www.pewresearch.org/hispanic/wp-content/uploads/sites/5/2015/09/2015-09-28_modern-immigration-wave_REPORT.pdf [<https://perma.cc/9A2C-8NCW>].

81. In 2015, 41 percent responded that immigrants are a burden because "they take our jobs, housing and health care," though this is a reduction from 1994, when 63 percent said immigrants were a burden. *Id.* at 54.

82. Alberto Alesina et al., *Immigration and Redistribution* 12 (Nat'l Bureau of Econ. Rsch., Working Paper No. 24,733, 2019).

Asian and European immigrants than of Latinx immigrants),⁸³ the speed of immigration,⁸⁴ and a perception of loss of ground, economically and demographically, by the native-born population. A nativist anti-immigrant group, for example, warned that the United States is “overpopulated” and that the three causes of the “biggest U.S. population boom ever” are low “native fertility,” “immigration,” and high “immigrant fertility.”⁸⁵ Now, linking low native fertility with “overpopulation” belies the group’s true fear: “overpopulation” by the wrong people.⁸⁶ Researchers have explored the link between these three factors in fueling racial anxiety, nativist sentiment, and populist politics. *The Wall Street Journal*, for example, conducted a survey linking support for President Donald Trump in 2016 to communities experiencing rapid diversification, particularly in the Midwest⁸⁷: voters said they are “worried illegal immigrants are crowding schools and unfairly tapping public assistance, problems they believe Mr. Trump would fix.”⁸⁸

The role of immigration differs regionally, and the regional differences may cloak national trends. But in many localities, the change in school population becomes symbolic of this change. In Arcadia, Wisconsin, for example, the Latinx portion of the population went from 3 percent to 35 percent between 2000 and 2014. During the same period, one of the town’s elementary schools went from almost all white to 73 percent Latinx.⁸⁹ “We were hit like a tsunami,” said Arcadia Elementary School Principal Paul Halverson, describing the change in his town of 3000 people.⁹⁰ Similarly, following Hurricane Katrina, the Latinx population of New Orleans grew dramatically at a time when the city’s overall population had fallen to 80 percent of its pre-storm population. At one point, then Mayor Ray Nagin asked business leaders how to prevent the city from being “overrun by Mexican workers.”⁹¹ And by 2013, Jefferson Parish Public Schools

83. PEW RSCH. CTR., *supra* note 80, at 14.

84. Olga Khazan, *A Surprising Reason to Worry About Low Birth Rates*, ATLANTIC (May 26, 2018), <https://www.theatlantic.com/health/archive/2018/05/a-surprising-reason-to-worry-about-low-birth-rates/561308/> [<https://perma.cc/88RD-RXE8>]; *see also* Janet Adamy & Paul Overberg, *Places Most Unsettled by Rapid Demographic Change Are Drawn to Donald Trump*, WALL ST. J. (Nov. 1, 2016), <https://www.wsj.com/articles/places-most-unsettled-by-rapid-demographic-change-go-for-donald-trump-1478010940> [<https://perma.cc/MC5T-L28L>] (finding that while large cities received the largest number of immigrants, those cities were already diverse and it was the areas of the country that diversified most rapidly and recently that showed the largest shifts toward populism).

85. Iturralde, *supra* note 77, at 422.

86. The Southern Poverty Law Center describes the group, NumbersUSA, as a racist anti-immigrant advocacy organization that opposes both legal and illegal immigration. Heidi Beirich, *The Nativist Lobby: Three Faces of Intolerance*, S. POVERTY L. CTR. (Feb. 1, 2009), <https://www.splcenter.org/20090131/nativist-lobby-three-faces-intolerance> [<https://perma.cc/8Z37-WCTQ>].

87. Adamy & Overberg, *supra* note 84.

88. *Id.*

89. *Id.*

90. *Id.*

91. Andy Grimm, *Hispanic Immigration Post-Katrina Finding Permanent Roots in Metro New Orleans*, TIMES-PICAYUNE/NEW ORLEANS ADVOC. (July 18, 2019, 2:11 PM),

experienced a 40 percent increase in English as a Second Language learners.⁹²

Throughout American history, these types of changes have tended to undermine support for public spending. Professors Claudia Goldin and Lawrence Katz found, in their history of American education, that “[g]reater social cohesion, intergenerational propinquity, and community stability” increased support for publicly funded education.⁹³ They explained that smaller and more homogeneous communities with more stable populations, with multiple generations living nearby, were more likely to vote for the taxes necessary to support public schools.⁹⁴

In recent years, the focus on schools overstates the effect of immigration. Latinx immigration peaked in 2005 and has fallen steadily since then.⁹⁵ The Latinx population is still growing as a percentage of the American population, but “births overtook immigration as the main driver of [Latinx] population growth after 2000”⁹⁶ and the significance of births over immigration accelerated after 2010.⁹⁷

Latinx fertility was thus an important factor in the perception of an immigration “tsunami.” In the period from the mid-1980s to the early 2000s, Latinx birth rates were not only higher than white birth rates, but they increased over the course of the 1990s, averaging over three births per woman at a time when white birth rates had fallen below replacement level fertility.⁹⁸ In California, for example, more than half of all schoolchildren were Latinx in 2010, even though the Latinx population was a little less than a third of the state’s adults.⁹⁹ For the United States as a whole, approximately a quarter of all children under seventeen are Latinx, in comparison with 18

https://www.nola.com/news/article_ddb9794b-8bd7-5be8-8d55-6669024d3cb3.html
[<https://perma.cc/N7YX-H5NR>].

92. *Id.*

93. CLAUDIA GOLDIN & LAWRENCE F. KATZ, *THE RACE BETWEEN EDUCATION AND TECHNOLOGY* 209 (2008).

94. *Id.*; see also Bradley W. Joondeph, *The Good, the Bad, and the Ugly: An Empirical Analysis of Litigation-Prompted School Finance Reform*, 35 SANTA CLARA L. REV. 763, 822–23 (1995) (arguing that school finance reform of the type prompted by *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971), reduced public support for school funding).

95. Jens Manuel Krogstad & Mark Hugo Lopez, *Hispanic Nativity Shift: U.S. Births Drive Population Growth as Immigration Stalls*, PEW RSCH. CTR. (Apr. 29, 2015), <https://www.pewresearch.org/hispanic/2014/04/29/hispanic-nativity-shift/> [<https://perma.cc/VUL5-TBHY>].

96. *Id.*

97. Jens Manuel Krogstad & Luis Noe-Bustamante, *Key Facts About U.S. Latinos for National Hispanic Heritage Month*, PEW. RSCH. CTR. (Sept. 9, 2021), <https://www.pewresearch.org/fact-tank/2021/09/09/key-facts-about-u-s-latinos-for-national-hispanic-heritage-month/> [<https://perma.cc/73XT-548C>].

98. Lyman Stone, *Babies vs. Immigrants: Must We Really Choose?*, INST. FOR FAM. STUD. (Nov. 26, 2019), <https://ifstudies.org/blog/babies-vs-immigrants-must-we-really-choose> [<https://perma.cc/GF5Z-98VK>].

99. Carol Morello & Dan Balz, *More than Half of California Children Latino, Census Shows*, WASH. POST (Mar. 8, 2011), https://www.washingtonpost.com/local/more-than-half-of-california-children-latino-census-shows/2011/03/08/ABqwuSP_story.html [<https://perma.cc/R36Z-W4G3>].

percent of adults.¹⁰⁰ Latinx Americans' younger average ages together with higher overall fertility rates and rapid increases in areas of high labor demand have contributed to the perception of an immigration tsunami and to white reluctance to fund expanded investment in education and early childhood.

That may be changing, however. Latinx immigration has fallen steadily, and Asian people now constitute the largest group of immigrants coming to the United States.¹⁰¹ Moreover, while overall U.S. fertility fell by 15 percent between 2007 and 2018, Latinx fertility fell by 31 percent.¹⁰² Even with less Latinx immigration and converging fertility rates, however, the majority of the population in the United States is expected to be Latinx by 2045.¹⁰³ In the meantime, American support for a more diverse future has increased.¹⁰⁴

III. THE SECOND DEMOGRAPHIC TRANSITION AND CONVERGING DESTINIES

Sociologists and demographers have focused attention on fertility in quite different ways from the popular discourse, defining a first and “second demographic transition (SDT).”¹⁰⁵ The first demographic transition, which was associated with industrialization, took place in the United States beginning in the 1840s through the early 1900s, when “mortality and fertility declined and investment in child quality grew” in the United States and other western industrialized countries.¹⁰⁶ The SDT, associated with the rise of the information age and greater employment opportunities for women, predicts “sustained sub-replacement fertility, a multitude of living arrangements other than marriage, and the disconnection between marriage and procreation.”¹⁰⁷

In the United States, two questions arise regarding the SDT: (1) does it apply to the United States at all, and (2) to the extent it does, does it contribute to growing family-based inequality? The recent drop in fertility in the United

100. *Child Population, by Race/Ethnicity*, KIDS DATA, <https://www.kidsdata.org/topic/33/child-population-race/pie#fmt=144&loc=2,1&tf=110&ch=7,11,726,10,72,9,73,87&pdist=73> [<https://perma.cc/RVF8-Y2UD>] (last visited Apr. 2, 2022).

101. Stone, *supra* note 98.

102. *Id.*

103. *Id.*

104. Abby Budiman, *Americans Are More Positive About the Long-Term Rise in U.S. Racial and Ethnic Diversity than in 2016*, PEW RSCH. CTR. (Oct. 1, 2020), <https://www.pewresearch.org/fact-tank/2020/10/01/americans-are-more-positive-about-the-long-term-rise-in-u-s-racial-and-ethnic-diversity-than-in-2016/> [<https://perma.cc/LP7G-KD3B>] (reporting that Pew's public opinion polling shows that the share of Americans who view the long-term growth of racial and ethnic diversity as good for the United States is higher in 2020 than it was in 2016).

105. Ron Lesthaeghe and Dirk Jan van de Kaa originated the term in 1986. Ron Lesthaeghe & Dirk Jan van de Kaa, *Twee demografische transitie's?*, in BEVOLKING: GROEI EN KRIMP 9 (1986). The most cited statement of the concept came a year later. Dirk Jan van de Kaa, *Europe's Second Demographic Transition*, POPULATION BULL., Mar. 1987, at 3. For a later summary, see Lesthaeghe, *supra* note 13, at 18, 112–15.

106. Sara McLanahan, *Diverging Destinies: How Children Are Faring Under the Second Demographic Transition*, 41 DEMOGRAPHY 607, 607 (2004).

107. Batool Zaidi & S. Philip Morgan, *The Second Demographic Transition Theory: A Review and Appraisal*, 43 ANN. REV. SOC. 473, 474 (2017).

States answers the first question—U.S. fertility patterns now look like Northern Europe’s, though the United States varies internally with the more prosperous and secular regions corresponding most closely to SDT patterns.¹⁰⁸

Sociologist Sara McLanahan posed the second question—whether the SDT explained “diverging destinies”; she associated the emergence of class-based differences in family form with the SDT in 2004.¹⁰⁹ McLanahan focused on four factors underlying the new system: “feminism, new birth control technologies, changes in the labor market, and welfare policies.”¹¹⁰ In short, educated women took advantage of new employment opportunities by using contraception to plan family formation, investing more in their own earning capacity, and forging more cooperative and reciprocal parenting partnerships that provided a foundation for success in the new economy.¹¹¹ In the meantime, the new system, which facilitated the upper middle class’s hyperinvestment in children, remained beyond the reach of a large part of the population.¹¹²

Indeed, much of what McLanahan describes is a product not just of lower fertility or differences in marriage and divorce rates, but in the timing and control of fertility. For college graduates, the median age of a mother at first birth has gone up steadily and, by 2010, was close to age thirty.¹¹³ In contrast, for high school graduates who do not complete college, the average age of first birth declined between 1990 and 2010, remaining under the age of twenty-five.¹¹⁴ The differences in income associated with a delay in marriage are substantial for college graduates, as the later the age of marriage, the higher women’s incomes.¹¹⁵ For those who do not graduate from college, by contrast, the increases in income associated with a delay in family formation are more modest.¹¹⁶

108. Compare Ron J. Lesthaeghe & Lisa Neidert, *The Second Demographic Transition in the United States: Exception or Textbook Example?*, 32 POPULATION & DEV. REV. 669, 670 (2006) (describing how American fertility rates were higher than European rates in 2006), with Stone, *supra* note 20 (showing that today’s American fertility rates are similar to those Lesthaeghe and Neidert associated with the second demographic transition).

109. McLanahan, *supra* note 106, at 607 (referring to diverging destinies).

110. *Id.* at 617.

111. We described the emergence of this new middle class family strategy as “blue marriage.” CAHN & CARBONE, *supra* note 18, at 1–2, 121–22. In contrast, some European commentators present a more negative view of the SDT, associating the “autonomy of women” with “the demise of Germany as a vibrant nation, by arguing that giving women autonomy and allowing them to choose whether to have children or not and at what age, has led to sub-replacement fertility.” José Brunner, *Liberal Laws v. the Law of Large Numbers, or How Demographic Rhetoric Arouses Anxiety (in Germany)*, 2 LAW & ETHICS HUM. RTS. 1, 3 (2008).

112. See JUNE CARBONE & NAOMI CAHN, MARRIAGE MARKETS 118–22 (2014).

113. See HYMOWITZ ET AL., *supra* note 15, at 8 fig.IIA. The median age of first marriage and first birth has continued to increase for college graduates. For those with less education, the median age of marriage has continued to go up, but the median age of first birth levels off after 1990 and now occurs at a younger age than the median age of marriage. *Id.* at 8.

114. *Id.* at 8 fig.II.C.

115. *Id.* at 15 fig.7.

116. *Id.*

The issue of timing is not merely a matter of career investment, however. It also involves contraceptive usage. The Guttmacher Institute reports, for example, that between 1990 and 2008, the unintended pregnancy rate grew by approximately 40 percent for women below the poverty line, while the rate was cut in half for those with incomes 200 percent or more above the poverty line.¹¹⁷ During this period, effective contraceptive use became much more systematic, with family doctors prescribing the birth control pill to adolescents not just to prevent pregnancy, but also to control acne and menstrual cramps.¹¹⁸ Moreover, more effective—albeit controversial—birth control methods became available.¹¹⁹ For those with regular health-care access, contraceptive use became more likely to precede the beginning of sexual activity.

Ethnographic work—asking young women to keep weekly diaries describing their relationships—sheds further light on pregnancies, suggesting that the characteristics of the male partners, rather than the woman’s characteristics, are major factors in determining which women become pregnant.¹²⁰ This work demonstrates that more violent men are more likely to father children and less likely to be good bets for continuing involvement with the resulting children than less violent partners.¹²¹ In addition, such partners often undermine birth control use.

These findings indicate that some of the regional and class disparities that arose in the United States over family formation correlate with the adoption of a new system: investment in women’s as well as men’s income-earning capacity, delay in family formation to realize the benefits of that investment, and more companionate rather than hierarchical relationships dependent on reciprocity and trust.¹²² All of these factors depend on a framework that systematizes women’s control of their own sexuality early in life and provides support for later child-rearing when prospective parents are better able to assume responsibility for child-rearing. This new system has become

117. See GUTTMACHER INST., *supra* note 2.

118. Traci C. Johnson, *Birth Control: Benefits Beyond Pregnancy Prevention*, WEBMD (Oct. 14, 2020), <http://www.webmd.com/sex/birth-control/features/other-reasons-to-take-the-pill> [<https://perma.cc/G5J9-S483>].

119. COMM. ON ADOLESCENT HEALTH CARE, AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, COUNSELING ADOLESCENTS ABOUT CONTRACEPTION (2017), <https://www.acog.org/-/media/project/acog/acogorg/clinical/files/committee-opinion/articles/2017/08/counseling-adolescents-about-contraception.pdf> [<https://perma.cc/654N-UA9Y>] (discussing effectiveness of long-acting-reversible contraceptives (LARCs)). LARCs are controversial because of claims of coercion in promoting their use. See, e.g., Olivia Cappello, *Powerful Contraception, Complicated Programs: Preventing Coercive Promotion of Long-Acting Reversible Contraceptives*, 24 GUTTMACHER POL’Y REV. 36 (2021), https://www.guttmacher.org/sites/default/files/article_files/gpr2403621.pdf [<https://perma.cc/TTE2-LJVQ>].

120. See generally Jennifer S. Barber et al., *The Relationship Context of Young Pregnancies*, 35 LAW & INEQ. 175 (2017); Jennifer S. Barber et al., *The Dynamics of Intimate Partner Violence and the Risk of Pregnancy During the Transition to Adulthood*, 83 AM. SOCIO. REV. 1020 (2018) [hereinafter *The Dynamics of Intimate Partner Violence*].

121. *The Dynamics of Intimate Partner Violence*, *supra* note 120, at 1043.

122. CAHN & CARBONE, *supra* note 18, at 110–18 (describing the new egalitarian relationship terms).

part of the emerging upper-middle-class family system; it has also been beyond the reach of a large share of the population—in part because of the failure to provide systematic access to birth control, good employment, and investment in children.

IV. DO CONVERGING FERTILITY RATES REFLECT A CONVERGENCE IN FAMILY VALUES?

Today, the larger question is whether the convergence in fertility patterns, particularly by race, class, and ethnicity, involves a greater embrace of the values underlying what we have termed “blue families”—that is, a postponement in family formation that corresponds to women’s greater workforce participation and that is designed to facilitate greater investment in children.

In 2021, the media focused on the U.S. birth rate, which fell to its lowest level ever.¹²³ The completed fertility rate, which measures the average number of children that a woman will have, tells a slightly different story. In 1800, the average woman would have had seven children; it dropped to two children in 1940, rose to 3.5 in 1960, and then dropped to its lowest of 1.77 in 1980, which is comparable to today’s birth rate.¹²⁴ And fewer women, regardless of educational level, are having children as teens or in their early twenties.¹²⁵ As recently as twenty-five years ago, women with bachelor’s degrees or more were less likely to become mothers; the gap in birth rates by the education level of the mother is closing.¹²⁶ Moreover, even newer research has found that the nonmarital birth rate for college grads has increased, projecting that 18 to 27 percent of first births to college-educated women in their thirties will be to nonmarital mothers,¹²⁷ though many of these births are to women either pre-college or during college.¹²⁸

123. See, e.g., Sabrina Tavernise, *The U.S. Birthrate Has Dropped Again. The Pandemic May Be Accelerating the Decline*, N.Y. TIMES (May 5, 2021), <https://www.nytimes.com/2021/05/05/us-us-birthrate-falls-covid.html> [<https://perma.cc/ZN4P-P44N>]; Leslie Root, *Opinion, Why We Shouldn't Worry About Falling Birthrates*, WASH. POST (June 2, 2021), <https://www.washingtonpost.com/opinions/2021/06/02/why-we-shouldnt-worry-about-falling-birthrates/> [<https://perma.cc/U3NW-GXLL>]; see also BRADY E. HAMILTON ET AL., CTDS. FOR DISEASE CONTROL & PREVENTION, BIRTHS: PROVISIONAL DATA FOR 2020, at 2 (2021), <https://www.cdc.gov/nchs/data/vsrr/vsrr012-508.pdf> [<https://perma.cc/GB7N-9PQU>] (providing long-term U.S. birth rate data).

124. Aaron O’Neill, *Total Fertility Rate of the United States from 1800 to 2020*, STATISTA (Feb. 17, 2021), <https://www.statista.com/statistics/1033027/fertility-rate-us-1800-2020/> [<https://perma.cc/R2TB-R6KF>].

125. See Barroso, *supra* note 21.

126. *Id.*

127. See Andrew J. Cherlin, *Rising Nonmarital First Childbearing Among College-Educated Women: Evidence from Three National Studies*, PROC. OF THE NAT’L ACAD. OF SCI. OF THE U.S. (Sept. 7, 2021), <https://www.pnas.org/content/118/37/e2109016118> [<https://perma.cc/EJ2H-2AQZ>].

128. *Id.* app. fig.S2. This study defines the group of “college graduates” to include both women who had graduated from college before the birth of the child and women who graduate from college after a child’s birth. The group of women who attend college later in life tends to be systematically different from the group of women who attend college directly after high school. See JACQUELINE E. KING, AM. COUNCIL ON EDUC. CTR. FOR POL’Y ANALYSIS, GENDER

Behind the decline is a complicated story of immigration, race, contraception, and economics. Foreign-born women—whether Hispanic, Black, white, or Asian—have higher birth rates than U.S.-born women.¹²⁹ In 2000, the foreign-born Hispanic birth rate was 109.7 babies per 1000 women who are between fifteen and forty-four years old, the highest of all foreign-born women; U.S.-born Hispanics also had the highest birth rates, but their rate was 77.4 per 1000 women. Foreign-born Hispanic births accounted for almost 60 percent of the births of all immigrants. By 2017, the Hispanic birth rate for both immigrants and American-born mothers had fallen by more than 20 percent.¹³⁰

As for contraception, one place to see the impact is the teenage birth rate, which has declined from eighty-nine per 1000 teens in 1960 to approximately forty per 1000 in 2005¹³¹ to a record low of 16.6 in 2019.¹³² The decline reflects both a decrease in sex for girls and women between the ages of fifteen and nineteen and an increase in contraceptive use in that age group.¹³³ Indeed, just from 2005 to 2013, the usage rate of long-acting reversible contraceptives for teens seeking Title X services increased from 0.4 percent to 7.1 percent.¹³⁴ Births to women in their twenties also fell by 28 percent from 2007 to 2021.¹³⁵ And the unintended pregnancy rate has been declining, particularly for poor women.¹³⁶ The Affordable Care Act,¹³⁷ which classified contraception with other preventive care services, is

EQUITY IN HIGHER EDUCATION: 2010 (2010). White people and Asian people, for example, are more likely than Black people to attend college at younger ages. *See id.* at 9 tbl.1.

129. Livingston, *supra* note 8.

130. *Id.*

131. See Bianca Faccio & Heather Wasik, *Teen Birth Rates Are Declining, but the Job Is Not Done*, CHILD TRENDS (May 5, 2015), <https://www.childtrends.org/indicators/teen-births> [<https://perma.cc/C863-EX5G>].

132. See HAMILTON, *supra* note 21, at 2; JOYCE A. MARTIN ET AL., CTRS. FOR DISEASE CONTROL & PREVENTION, BIRTHS: FINAL DATA FOR 2019, at 48 (2021), <https://www.cdc.gov/nchs/data/nvsr/nvsr70/nvsr70-02-508.pdf> [<https://perma.cc/8UWE-489L>]. To be sure, teens are also less likely to be married.

133. Gretchen Livingston & Deja Thomas, *Why Is the Teen Birth Rate Falling?*, PEW RSCH. CTR. (Aug. 2, 2019), <https://www.pewresearch.org/fact-tank/2019/08/02/why-is-the-teen-birth-rate-falling/> [<https://perma.cc/PD84-BKXA>].

134. Lisa Romero et al., *Vital Signs: Trends in Use of Long-Acting Reversible Contraception Among Teens Aged 15–19 Years Seeking Contraceptive Services—United States, 2005–2013*, 64 MORBIDITY & MORTALITY WKLY. REP. 363 (2015), <https://www.cdc.gov/mmwr/pdf/wk/mm6413.pdf> [<https://perma.cc/JS7Q-8UL9>].

135. Sabrina Tavernise et al., *Why American Women Everywhere Are Delaying Motherhood*, N.Y. TIMES (June 16, 2021), <https://www.nytimes.com/2021/06/16/us/declining-birthrate-motherhood.html> [<https://perma.cc/33AX-7BX6>].

136. See Courtney Vinopal, *The U.S. Birth Rate Began Dropping Years Before the Pandemic. Here's Why*, PBS (May 13, 2021), <https://www.pbs.org/newshour/nation/how-the-coronavirus-pandemic-has-changed-the-way-americans-think-about-pregnancy> [<https://perma.cc/B2ZQ-VTYL>]; Lawrence B. Finer & Mia R. Zolna, *Declines in Unintended Pregnancy in the United States, 2008–2011*, 374 NEW ENG. J. MED. 843, 847 fig.1 (2016), <https://www.nejm.org/doi/pdf/10.1056/NEJMsa1506575?articleTools=true> [<https://perma.cc/8LDK-83LR>] (showing a drop from 51 percent to 45 percent from 2008 to 2011).

137. Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of the U.S.C.).

associated with lower birth rates and higher rates of women filling prescriptions for birth control.¹³⁸

These rates correspond with economic vitality. In larger urban counties with the highest increases in jobs and population since the 2008–2009 recession, birth rates have fallen twice as quickly as in the smaller, rural counties that have had a slower recovery.¹³⁹ Yet, due to numerous factors, interpreting birth rates is complex.¹⁴⁰ Women may be postponing childbearing both because of greater economic stress and because of greater investment in future opportunities. *The New York Times* reported:

In more than two dozen interviews with young women in Phoenix and Denver, some said they felt they could not afford a baby. They cited the costs of childcare and housing, and sometimes student debt. Many also said they wanted to get their careers set first and expressed satisfaction that they were exerting control over their fertility—and their lives—in a way their mothers had not.¹⁴¹

In addition, in countries where women feel they have to choose between work and family, fertility levels appear to be lower.¹⁴² Conversely, policies that increase economic well-being appear to be correlated with higher fertility rates.¹⁴³

McLanahan argued that both rich and poor children benefited from the first demographic transition’s increased investment in children¹⁴⁴—in contrast

138. Clara Murez, *Obamacare’s Birth Control Coverage May Have Reduced Unplanned Pregnancies*, U.S. NEWS (Nov. 10, 2020, 8:39 AM), <https://www.usnews.com/news/health-news/articles/2020-11-10/obamacares-birth-control-coverage-may-have-reduced-unplanned-pregnancies> [<https://perma.cc/F8M4-KMK2>].

139. Tavernise et al., *supra* note 135.

140. Even for the most highly educated, there may be diverging rates of dates of first birth by race. See Natalie Nitsche & Hannah Brückner, *High and Higher: Fertility of Black and White Women with College and Postgraduate Education in the United States 2* (Vienna Inst. of Demography, Working Paper No. 07, 2018), <https://www.econstor.eu/bitstream/10419/207050/1/1025574591.pdf> [<https://perma.cc/5XR8-U2BZ>].

141. Tavernise et al., *supra* note 135.

142. LAURIE DEROSE & LYMAN STONE, INST. FOR FAM. STUD., MORE WORK, FEWER BABIES: WHAT DOES WORKISM HAVE TO DO WITH FALLING FERTILITY? 7 (2021), <https://ifstudies.org/ifs-admin/resources/reports/ifs-workismreport-final-031721.pdf> [<https://perma.cc/8FCD-WG79>]; Lyman Stone & Laurie DeRose, *What Workism Is Doing to Parents*, ATLANTIC (May 5, 2021), <https://www.theatlantic.com/ideas/archive/2021/05/what-workism-doing-would-be-parents/618789/> [<https://perma.cc/4JKZ-TE4C>]. The study found overall that, in countries where individuals valued family over work, fertility tended to be higher. It also found that women who both embraced a traditional gender ideology and valued family over work had the most children. DEROSE & STONE, *supra*, at 14 fig.7.

143. See, e.g., Fergus Cumming & Lisa Dettling, *Monetary Policy and Birth Rates: The Effect of Mortgage Rate Pass-Through on Fertility* (Bank of Eng., Working Paper No. 835, 2019), <https://www.bankofengland.co.uk/-/media/boe/files/working-paper/2019/monetary-policy-and-birth-rates-the-effect-of-mortgage-rate-pass-through-on-fertility.pdf> [<https://perma.cc/L7QH-UH8Z>] (finding that “a 1 percentage point reduction in the monetary policy rate—which decreased mortgage payments by 12 percent on average—leads to a 5 percent increase in the birth rate among families”); Ramesh Ponnuru, Opinion, *Can Americans Be Encouraged to Have More Babies?: Make the U.S. More Livable*, BLOOMBERG (May 11, 2021, 9:00 AM), <https://www.bloomberg.com/opinion/articles/2021-05-11/can-americans-be-encouraged-to-have-more-babies> [<https://perma.cc/ZC5H-QBJB>].

144. Cumming & Dettling, *supra* note 143, at 60.

with the SDT, which she argued increased inequality. What McLanahan did not explain is that it took more than a century for the benefits of the first demographic transition to spread from the upper middle class to the rest of society and that this only happened because of the state's role in promoting unionization and benefits programs. Expanded unionization raised the male family wage, which allowed the working class to realize the benefits of greater maternal investment in children, and expanded workplace regulations reduced mortality.¹⁴⁵ State provision of unemployment compensation, Social Security, disability, Medicare and Medicaid, and other benefits offset the instability and insecurity of wage labor.¹⁴⁶

CONCLUSION

The information age is effecting a transformation of the family on a scale comparable to the changes associated with industrialization.¹⁴⁷ Scholars have mapped the global reductions in fertility, a leading indicator of the changes,¹⁴⁸ but have not to date agreed on the causes or the broader societal implications.¹⁴⁹ Instead, family scholars have posited that declining fertility reflects a cultural shift toward “self-actualization”¹⁵⁰ and that fertility falls because of “workism.”¹⁵¹ Yet, the critics attributing declining fertility to these causes have failed to explain the increasing convergence in fertility rates or their interaction with the economic changes.

The fertility declines in the early years of both the first and second demographic transitions were associated with greater investment in children, as the upper middle classes of the nineteenth and twentieth centuries dealt with economic changes by adopting new family strategies that both limited the number of children and gave their children advantages in more

145. See Naomi Cahn & June Carbone, *Uncoupling*, 53 ARIZ. ST. L.J. 1, 23 (2020) (describing the growth of unionization and the corresponding increase in job security). For a description of the high rates of workplace injuries preceding the union era, see *id.* at 9, 12 n.70.

146. See *id.* at 37–38; June Carbone, *The Fight to Expand Education—Two Centuries Apart*, 71 FLA. L. REV. 164, 167 (2019) (describing the expansion of free secondary education during the nineteenth and early twentieth centuries).

147. Cahn & Carbone, *supra* note 145, at 26–27 (describing how just “as the industrial age destabilized the sources of stability in the agrarian age, so too has the information age dismantled the family wage [system] of the industrial era” replacing it with a new system that rewards those who can marshal the resources to invest in children).

148. Zaidi & Morgan, *supra* note 107, at 474.

149. See, e.g., June Carbone, *A Consumer Guide to Empirical Family Law*, 95 NOTRE DAME L. REV. 1593, 1616 (2020) (observing that the “problem with both the SDT and the European feminists’ response is that it does little to explain the class-based family divisions in the United States”).

150. *Id.* at 1597 (summarizing literature).

151. See DE ROSE & STONE, *supra* note 142, at 3. DeRose and Stone describe “workism” as the “rise of ‘work-focused’ value sets and life courses” that mean “that achieving work-family balance isn’t just about employment norms adjusting to the growing complexity of individual aspirations. It can also mean that many men and women find their preferred balance to be more work and less family.” *Id.*

competitive economies.¹⁵² These strategies, which were beyond the reach of the working class, produced greater inequality as greater investment in children increased adult opportunities. Reductions in fertility in both eras were associated with changes in adult roles that contributed to wealth acquisition, more intensive parental engagement with children, more effective reproductive control, greater educational opportunities from early childhood onward, and greater assistance in gaining the experience, training, and retraining that make adults “employable.”¹⁵³

Family support needs to be rebuilt on the terms of the new economy, an economy that depends on women’s—as well as men’s—market labor and that requires a new infrastructure to extend the benefits of the new system to all families. This new system rests on a series of elements. First, family planning is an imperative. It is a system that is most effective when contraceptive information and access is systematically made available to teens before they become sexually active. The Affordable Care Act has helped address contraceptive affordability; universal access and encouragement is the next step, and that step requires stronger protection from intimate partner violence.

Second, the nuclear family is no longer a necessary or sufficient measure to protect childhood well-being. Parents, acting on their own, cannot solve the problem of economic—and childhood—inequality.¹⁵⁴

Third, a critical period for investment is early childhood.¹⁵⁵ Well-off parents have been able to realize the advantages of the SDT by intensive cultivation of their children, which requires increased parenting in the first year of life, affordable high-quality early childhood care, and universal pre-K.¹⁵⁶ Universal early childhood education is today’s equivalent of free secondary education in the nineteenth century.¹⁵⁷

Fourth, support for the transition to adulthood requires rethinking the pipelines to employment opportunities. Adults who finish school can no longer depend on completing their educations and walking into jobs that

152. Compare MARY P. RYAN, *CRADLE OF THE MIDDLE CLASS: THE FAMILY IN ONEIDA COUNTY, NEW YORK, 1790–1865*, at 184–85 (1981) (describing how middle-class status required greater moral instruction and supervision of the young in nineteenth-century Utica, New York), with CAHN & CARBONE, *supra* note 18, at 1–2, 121–22 (describing the blue family model as an upper-middle-class adaption to the new economy).

153. Cahn & Carbone, *supra* note 145, at 34–36 (describing how “employability” has replaced employment as a necessary element in family security). “Employability” refers to the ability not just to have a job, but acquisition of the skills and experience to be able to get the next job if the first one does not work out. *Id.*

154. See Solangel Maldonado, *Parental Social Capital and Educational Inequality*, 90 FORDHAM L. REV. 2599 (2022).

155. Sneha Elango et al., *Early Childhood Education 6* (Nat’l Bureau of Econ. Rsch., Working Paper No. 21,766, 2015), <http://www.nber.org/papers/w21766.pdf> [<https://perma.cc/ERS8-E7CN>].

156. See Maxine Eichner, *COVID-19 and the Perils of Free-Market Parenting: Why It Is Past Time for the United States to Install Government Supports for Families*, 90 FORDHAM L. REV. 2509 (2022).

157. CARBONE, *supra* note 53, at 164.

provide lifetime tenure. Instead, “employability” requires the ability to gain new skills, return to school, and if necessary, move to new locations.¹⁵⁸

Fifth, providing for the elderly. Elder care, like childcare, remains part of a gendered assignment of family responsibilities. Today, it is increasingly commercialized, dependent on immigrant caretakers, and unaffordable for many.¹⁵⁹ Greater systematic provision of care is needed.

Taken together, these and other measures require providing a new family infrastructure built on the new model that we have termed “blue” and that others have called the SDT. It is important to recognize that this model is not just about the changing fertility rates—nor is it solely caused by, or concerned with, the changing roles of women—though those changes certainly are a necessary part of gender justice. Instead, it is about a fundamental change in the economic organization of society, which has eliminated many well-paid routine jobs and increased the rewards, both individual and societal, for greater human capital investment. These changes, by increasing the demand and compensation for many services women have traditionally performed, have increased the opportunity costs involved in providing childcare and thus contribute to falling fertility. The only solution that can extend the benefits of the new system to a larger portion of society requires rethinking the infrastructure underlying investment in children. The future of our society depends on it.

158. Cahn & Carbone, *supra* note 145, at 34–37.

159. See The Ezra Klein Show, *Every 8 Seconds, An American Turns 65. How Do We Care for Everyone?*, N.Y. TIMES (Dec. 7, 2021), <https://www.nytimes.com/2021/12/07/opinion/ezra-klein-podcast-ai-jen-poo.html> [<https://perma.cc/F5VV-K444>]; Naomi Cahn, Clare Huntington & Elizabeth Scott, *Family Law for the One-Hundred-Year Life*, YALE L.J. (forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4038989 [<https://perma.cc/9SA3-5HYG>].