The Age of Marital Capacity: Reconsidering Civil Recognition of Adolescent Marriage

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Age at marriage has for decades been the strongest and most unequivocal predictor of marital failure. The likelihood of divorce nears 80 percent for those who marry in mid-adolescence, then drops steadily. Delaying marriage until the mid-twenties reduces one’s likelihood of divorce to 30 percent. Women who marry at age twenty-one or younger, moreover—and one in ten U.S. women do—experience worse mental and physical health, attain less education, and earn lower wages than those who marry later. Post-divorce, they and their children tend to endure even greater economic deprivation and instability than do never-married mothers, who will tend to invest more in market work and education.

While the social cost of early marriage is significant, U.S. policy disregards the hundreds of thousands of young people currently married or divorced, as well as those who may be contemplating early marriage. A comprehensive analysis of early marriage and its regulation is overdue, and I undertake it here.

I argue that an historic confluence of cultural and structural changes has simultaneously transformed the social function and meaning of modern marriage and prolonged the course of development to adulthood. I advance a new conception of “marital capacity” to redress the inadequacy of the current legal concept of consent. It recognizes adolescents’ and emerging adults’ cognitive abilities to understand and voluntarily consent to marriage, but also their psychosocial immaturity and incomplete acquisition of other abilities required to sustain modern marriage.

The median age at first marriage is rising, reflecting gradual social adaptation to these cultural and structural changes. Legal adaptation, however, has lagged. Even though law is only one of the structural influences on family formation, legal change bringing the marital age in line with the modern social institution will go far to alleviate the strain on individuals and cost to society imposed by early marriage.

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INTRODUCTION

In 2010, the U.S. Senate unanimously voted to enact the International Protecting Girls By Preventing Child Marriage Act of 2010. The bill aimed “to protect girls in developing countries through the prevention of child marriage,” and Secretary of State Hillary Clinton joined its drafters in denouncing “all cases of child marriage as child abuse.” The bill’s explicit target was marriage by individuals below a country’s legal minimum age, but its factual findings alluded to marriage by girls under eighteen.

The irony apparently lost on U.S. lawmakers who supported the bill is that child marriage is not limited to developing countries but is also a domestic practice—more than one in ten of all U.S. women surveyed in 2001-02 had married before age eighteen, with an estimated 9.4 million having married at age sixteen or younger. House members introduced another version of the bill, which was referred to the House Committee on Foreign Affairs. International Prevention of Child Marriage Act of 2010, H.R. 6521, 111th Cong. (2010). As of this writing, no further action on the reintroduced bill has been reported.


2 Id.


4 Id. at §§ 2-3. The bill declared countries with high rates of marriages by those under eighteen “high-prevalence areas for child marriage” and required the Department of State to provide status reports on the practice of child marriage, presumptively defining “child marriage” for reporting purposes to mean marriage by individuals under the age of eighteen if no legal minimum is stipulated by law. Id. at §§ 3, 7.

5 Yann Le Strat, et al., CHILD MARRIAGE IN THE UNITED STATES AND ITS ASSOCIATION WITH MENTAL HEALTH IN WOMEN, 128 PEDIATRICS 524, 526 (2011).
2010, more than one-half million U.S. teens were married, divorced, separated, or widowed.\textsuperscript{6}

What is surely the most familiar statistic of modern American family life—that nearly half of all marriages end in divorce—obsures significant and consistent variations in marital stability depending on the age at which people first marry. For decades now, age at marriage has been the most consistent and unequivocal predictor of marital failure.\textsuperscript{8} Of marriages entered at age twenty-five or later, fewer than 30\% end in divorce.\textsuperscript{9} Of marriages entered before age eighteen, on the other hand, nearly 70\% end in divorce.\textsuperscript{10} The earliest marriers, those adolescents who enter marriage in their mid-teens, experience marital failure rates closer to a sobering 80\%.\textsuperscript{11} Not until age twenty-two does marital stability improve significantly and marriage dissolution rates begin to level off, although marriages entered at later ages are more stable still.\textsuperscript{12}

The costs of child marriages (i.e., those entered before age eighteen) as well as early marriages more generally (i.e., those entered at age twenty-one or younger) extend beyond the likelihood of their dissolution. Early marriers are more likely than those who delay or avoid marriage to discontinue their formal educations prematurely, earn low wages, and live in poverty.\textsuperscript{13} Women who marry early


\textsuperscript{9} Heaton, \textit{supra} note ___ at 407.

\textsuperscript{10} Id. See also, Naomi Seiler, \textit{Is Teen Marriage a Solution?} (Center for Law and Social Policy, Washington, D.C.), Apr. 2002, at 7.

\textsuperscript{11} Seiler, \textit{supra} note ___, at 7; Heaton, \textit{supra} note ___, at 407 fig. 2.

\textsuperscript{12} See infra Part II.C.I.

develop more mental health problems and experience worse physical health than those who marry later. Following divorce, mothers (and their children) tend to suffer greater economic deprivation and instability than do their never-married counterparts.

I set out here to address early marriage—not only to draw attention to its costs, but also to explore the social factors that influence age at marriage, to gain a better understanding of the underlying causes of its historic failure rate, and through this better understanding, to propose legal reform informed by more than the simple empirical evidence of its failure.

I analyze the legal and social history of the marital age and its regulation, as well as research from social anthropology and the social and developmental sciences. I argue that an historic confluence of developments in cultural and structural factors that influence marriage has simultaneously transformed the social functions and meaning of modern marriage (increasing the relational capacities required to sustain it) and prolonged the course of development to adulthood (rendering adolescents and emerging adults—whose cognitive and psychological development we now know continues into the early twenties—even less likely to possess those requisite capacities).

To redress the inadequacy of our current legal framework, which conflates capacity to consent with capacity to perform, I advance a new conception of “marital capacity.” Marital capacity requires both capacity to consent and capacity to perform. To give legally valid consent, a person must possess the cognitive abilities to understand the basic nature of the marital obligation and to voluntarily agree to marry. To sustain the modern marriage, a person must possess core aspects of psychosocial maturity and other abilities. I demonstrate that young people have attained the former cognitive abilities by mid-adolescence (ages fifteen or sixteen), but that they will not attain the latter psychosocial maturity and other abilities until late adolescence/emerging adulthood (the early twenties). I argue that “marital capacity” requires the attainment of both.

421 (1999); Thomas E. Smith & Eugenia Hooker, Sex Differences in Marriage and Parenthood as Factors Impeding Educational Attainment, 59 SOC. INQUIRY 343 (1989).

14 Yann Le Strat, Caroline Dubertret, & Bernard Le Foll, Child Marriage in the United States and Its Association With Mental Health in Women, 128 PEDIATRICS 524, 527-28 (2011) (“[C]ontrolling for sociodemographic characteristics, child marriage was significantly associated with all lifetime mental disorders except pathological gambling and histrionic and dependent personality disorders.”).

15 Seiler, supra note __, at 8.
The median age at first marriage is rising, reflecting gradual social adaptation to these cultural and structural changes. Legal adaptation, however, has lagged. Law is only one of the structural influences on family formation. A legal structure that better corresponds to the nature and requirements of the modern social institution will, however, go far to alleviate the strain on individuals and cost to society imposed by early marriage. Law and legal institutions create and support civil marriage, using it as a tool to achieve socially desirable ends. State-supported privileges and other benefits linked to marriage, while difficult to quantify, are vast. Economic benefits alone total billions of dollars annually in direct federal and state payments, tax benefits, and workplace-based benefits. Whether marriage in general produces outcomes that justify the massive public investment in it is debatable. That early marriage does not is apparent. I thus urge reconsideration of state policies that give early marriages legal effect.

Part I provides historical, legal, and social context. It begins with the legal history of marital age regulation, which underscores the once-essential functions of marriage in society. It describes the current legal landscape, which has not strayed far from its common-law roots. It then examines the significant and interrelated influence on marriage, and age at marriage, of changing economic and cultural conditions. It turns to social anthropology for an integrative account of the evolution of the social functions of marriage and the meaning of marriage itself. These social changes have rendered marriage less essential to individuals’ economic survival and social acceptance, eliminated once-clearly defined spousal roles, making it necessary for individual couples to negotiate these, and increased individuals’ expectations of the marital relationship itself.

Part II examines the demographics of modern early marriage and the largely overlooked yet overwhelming empirical data that reveals its social costs. Laws universally require parents to consent to

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17 Anita Bernstein, *For and Against Marriage: A Revision*, 102 MICH. L. REV. 129, 166-69 (2003). Bernstein notes that “[t]he United States government subsidizes marriage through transfer payments and other supports that are not means tested. These payments constitute a reward that taxpayers as a group bestow on a class of individuals based solely on these persons’ being . . . married.” Id. at 167-68. Social Security transfer payments and Medicare benefits are just two examples of subsidies that reward marriage. Id.
the marriages of children younger than eighteen. Parental consent, however, safeguards child marriages against negative outcomes insufficiently (if at all). The same can be said for delaying marriage until eighteen, the near-universal age of legal majority. Improvements in marital stability and outcomes appear only when couples delay marrying until their early twenties.

Part III argues that the law has failed to keep pace with these significant social developments. I argue that the social changes chronicled in the previous Parts demonstrate that the psychosocial capacities to sustain a modern marriage have changed drastically over the last fifty years, while the cognitive capacity to understand and voluntarily consent to marry have remained essentially unchanged for centuries. I argue that the social and legal factors that once justified early marriage either no longer exist, or are sufficiently weak as to be outweighed by the state’s obligation to safeguard the general welfare by—at a minimum—abandoning unreasonable policies demonstrably in derogation of it. I briefly describe relevant aspects of adolescent cognitive and psychological development, which continues well into late adolescence and beyond, and the age-related attainment of marital capacity.

I conclude that states should return the presumptive age of consent to twenty-one, permit younger individuals to marry with judicial—not parental—consent, and withhold altogether legal recognition from marriages of adolescents younger than eighteen.

I. AGE AT FIRST MARRIAGE IN CONTEXT

This Part explores the influence of social context on age at first marriage. Scholars broadly characterize these contextual influences as structural (e.g. legal, economic, institutional) or cultural (e.g. religious tradition, social norms). Structural influences on

18 See infra notes ___ and accompanying text.
20 See, e.g., Andrew J. Cherlin, American Marriage in the Early Twenty-First Century, 15 THE FUTURE OF CHILDREN 33, 40 (Brookings Institution Press 2005) (observing that “[m]ost analysts would agree that both economic and cultural forces have been driving the changes in American family life over the past half-century. Analysts disagree about the relative weight of the two, but . . . both have been important.”) [hereinafter Marriage in the Early Twenty-First Century]. See also
family formation can be either economic (e.g., employment opportunities) or noneconomic (e.g., imbalances in sex ratios among marriageable individuals, legal requirements). Although each of these influences is conceptually distinct and affects empirical trends differently, they interrelate such that their effects on each other and on trends in family formation can sometimes be difficult to disentangle.\textsuperscript{21}

The legal context, for example, both shapes and reflects cultural norms. The next section examines the origins and evolution of the legal regulation of the marital age and its goals. It also discusses legal developments that have indirectly influenced trends in the age at first marriage. Yet the law has not been the only, nor likely the primary, contextual factor affecting the median age at which individuals first marry. Even during periods of no significant legal change, the median age at marriage has fluctuated. The subsequent sections, then, examine nonlegal influences on age at marriage, the most salient of which have included economic and cultural developments. Understanding both the legal and the nonlegal developments that have shaped large-scale trends in the age at which individuals marry illuminates the meaning and function of marriage in society. As its meaning and function have changed, moreover, so too have the individual characteristics and abilities required to enter and sustain marriage.

A. Legal History of Marital Age Regulation

Legal regulation of marriage increased over the course of centuries, reflecting its growing importance as the primary social institution within the state.\textsuperscript{22} Laws regulating the marital age have thus frequently advanced familial and social interests altogether unrelated to the legal maturity of would-be marriers.\textsuperscript{23} The law has regulated marital behavior only imperfectly, however. Indeed, as long as there have been marital age regulations, noncompliant couples wishing to marry have nonetheless successfully skirted them.


\textsuperscript{21} Cherlin, \textit{Marriage in the Early Twenty-First Century}, at 40.

\textsuperscript{22} See infra notes ___ and accompanying text.

\textsuperscript{23} See infra notes ___ and accompanying text.
Its legal origins, and the societal interests they aimed to protect, indelibly shaped U.S. marriage and marital age law. U.S. law later adapted, of course, to the distinctive American milieu. Essential elements of its historical and legal elements remain, however. We turn now to those.

1. Canon Law and English Common and Early Statutory Law

Family formation in the Early Modern period was informal, and family structure fluid. Marriage existed, but it did so alongside polygamy, concubinage, easy divorce, and remarriage. Its terms remained relatively variable and flexible into the Middle Ages, its sole essential characteristic consisting of a privately negotiated property exchange between two families, with financial protection for the wife in case of divorce or her spouse’s death. Couples with no property married through even simpler private agreements, which were enforced only informally by their communities.

Marriage became a more clearly and rigidly defined institution when the Roman Catholic Church assumed regulation over it in the thirteenth century. Church canon law rendered marriages indissoluble, prohibited polygamy and incest, punished fornication and adultery, and declared nonmarital children illegitimate and ineligible to inherit property.

In the centuries that followed, however, the requirements for entering a valid marriage were neither widely understood by the public nor consistently implemented by the courts. The original canon law recognized the validity of “spousal” or contract marriages requiring only the present agreement of the couple, and introduced the Roman age of consent—fourteen for males and twelve for females. Together these doctrines diminished the importance of

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26 Id. at 30.
27 Id. at 30-31.
28 Id.
29 Id. at 31. See also, COTT, supra note __, at 5.
30 Additional formality requirements included publishing notices (known as “banns”) of the upcoming marriage in the weeks preceding the ceremony or, in the alternative, purchasing a license to marry.
31 T.E. James, THE AGE OF MAJORITY, 4 AM. J. OF LEG. HIST. 22, 31 (1960) (stating that “[d]epending on the age of puberty, the age of fourteen for males fixed
parental or guardian consent, which had been an essential aspect not only of medieval secular practice but also basic to the Roman law. The weakening of family and parental control over marriage led the propertied classes to resist these canonical introductions.

After the Protestant Reformation, marriage regulation came under civil (as opposed to purely religious) authority, but the English Parliament enacted no statutory changes to then-existing marriage law. The post-Reformation Church, on the other hand, sought to impose additional requirements on couples wishing to marry. It began to require public church ceremonies presided over by clergy, and formalized the need for parental consent to the marriages of persons than twenty-one. The ecclesiastical courts that retained jurisdiction over marriage litigation, however, continued to recognize the legal validity of informal, contract marriages that failed to comply with the new formality requirements.

By the seventeenth century, the public—especially the propertied elite—and clergy both increasingly regarded the church wedding, preceded by a series of public announcements (known as

by Justinian was generally followed throughout Western Europe, subject of course to the requisite consents by guardians and parents.

32 Lawrence Stone, Road to Divorce: England 1530-1987 54 (1990) [hereinafter, Road to Divorce].
33 Id.
35 Stone, Road to Divorce 54.
36 Stone, supra note __, at 32-33; Lemmings, supra note __, at 344. Under Roman Law, the age of majority had been fourteen for males, and twelve for females. James, supra note __, at 23-24. In France, royal edicts quickly addressed the failure of the 1563 Council of Trent to require parental consent prior to young persons’ marriages, requiring that any man under age thirty and any woman under age twenty-five obtain parental consent prior to marriage. Stone, Road to Divorce 80.
37 A contract marriage merely required the oral agreement, expressed in the present tense by a couple over the age of consent—fourteen for females, sixteen for males—in the presence of two witnesses. Stone, Road to Divorce 52; Stone, Family, Sex and Marriage 32-33; Bishop, supra note __, § 65, at 60 (“[B]y the canon law previous to the Council of Trent, . . . nothing need be added to this simple consent to constitute a perfect marriage.”). Bishop, §164, at 156, quoting Rose v. Clark, 8 Paige, 574. While the state might statutorily require compliance with certain formalities, marriage was believed to exist in a state of nature and thus preceded the state. Once a couple agreed to marry, theirs was a “marriage in the sight of God,” even “in the absence of all civil and religious institutions.” “[T]he law of nature enables all persons in whom no natural impediment exists, to intermarry by mere words of consent, whenever they please.” Bishop, supra note __, §68, at 62-63; § 144b.
“banns”) or the procurement of a marriage license, as essential to a establishing a valid marriage. The civil common law courts, which decided property claims, thus came to require a public church wedding before assigning full property and inheritance rights, treating contract marriages as valid but “irregular.”

Many couples—most notably minors wishing to marry against their parents’ wishes—began paying corrupt clergymen to secretly preside over and register marriage ceremonies. These “clandestine marriages,” despite noncompliance with formality requirements, were legally valid and binding (likely resulting from solemnization by church clergy). Thus unlike unsolemnized contract marriages, clandestine marriage conferred full property and inheritance rights.

As growing numbers of young people secretly married against their parents’ wishes, parents of the propertied classes anxious to control and pass on family property sought to reassert control of children’s marriages. They ultimately turned to Parliament to put an end to legal recognition of clandestine and contract marriages, and in 1753 it passed the “Act for the better preventing of clandestine marriages.” Among its stated purposes was the “prevent[ion of] marriages among the children of the social elite which were not sanctioned by their parents and other relations.”

Commonly known

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38 At the Council of Trent in 1563, the post-Reformation Catholic Church added the requirement of the public church ceremony presided over by a priest. STONE, FAMILY, SEX, AND MARRIAGE 31; STONE, ROAD TO DIVORCE 52-53.

39 After the Protestant Reformation, marriage regulation came under civil (as opposed to purely religious) authority, although marriage litigation remained within the jurisdiction of the ecclesiastical courts. STONE, FAMILY, SEX AND MARRIAGE 32; WITTE, supra note __, at 42-44.

40 STONE, FAMILY, SEX, AND MARRIAGE 32-34.

41 Numerous churches and neighborhoods, such as the Fleet in London, became infamous for their clergymen’s willingness to flout official requirements and perform marriage ceremonies for pay. STONE, FAMILY, SEX, AND MARRIAGE 33.

42 The oddity of recognizing as valid these otherwise-illegal marriages likely reflected the participation of clergy and the recording of the ceremonies in a registry. STONE, ROAD TO DIVORCE 96-130. The ecclesiastical courts instead focused enforcement and punishment efforts on clergy who performed the illegal ceremonies. STONE, FAMILY, SEX, AND MARRIAGE 32-33; Lemmings, supra note __, at 344.

43 STONE, FAMILY, SEX, AND MARRIAGE 32-34, plates 2-4.

44 Lemmings, supra note __, at 340. See also STONE, FAMILY, SEX, AND MARRIAGE 35.

45 Lemmings, supra note __, at 347. The Act gave parents an effective veto over the marriages of minors, with fathers’ rights having priority over mothers. The Act preferred fathers or testamentary guardians to mothers. And while minors
as Hardwicke’s Marriage Act, the measure stated basic English marriage law for nearly a century after its passage.\(^{46}\) Hardwicke’s Marriage Act declared altogether void both contract marriages and marriages entered by those under twenty-one absent parental consent.\(^{47}\) In doing so, it represented, according to one historian, a “uniquely authoritarian assertion of the economic and political interests of parents over their children, . . . and [an] unprecedented enforcement of parental and familial interest.”\(^{48}\)

Thus in the centuries leading up to the founding of the American colonies, English law reflected the importance of marriage as the institution by which families controlled property and wealth. Family and parental interest in controlling, or at least influencing, their children’s marriages naturally followed. Parents’—particularly fathers’—authority over their children as well as their property justified parental consent requirements. Because Church law dictated that only legitimate children could inherit, ensuring legitimacy became paramount. Only legally valid marriage could ensure legitimacy, moreover, which inclined officials to adopt rules that facilitated establishing validity.

2. American Colonies and Early States

could appeal the veto of a guardian or mother to the Court of Chancery, they could take no appeal from a paternal veto, though the father’s “refusal be ever so whimsical or selfish.” \(\text{Id. at 349, citing PARLIAMENTARY HISTORY, xv, 59 (Nugent, 14 May). See also W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND I, 438. Through this refusal to constrain fathers, Hardwicke’s Act recognized the economic interests of the family and reinforced paternal prerogative to make decisions affecting those interests. Lemmings, supra, at 345-50.}\)

\(^{46}\) STONE, ROAD TO DIVORCE 123.

\(^{47}\) By either dissenting to the bann or refusing to consent to the issuance of a license, parents who objected to a match could prevent a minor child’s marriage. Lemmings, supra note __, at 340.

\(^{48}\) \(\text{Id. at 341-42. Because Hardwicke’s Marriage Act explicitly required parental consent to the issuance of marriage licenses—but not banns—to minors, some commentators have sought to minimize the Act’s effect, concluding that “the parental consent requirement applied in only a small percentage of marriages.” See, e.g., Wardle, supra note __, at ___. It was in fact unnecessary for the Act to address banns, given that parental opposition to a bann sufficed to block the subsequent marriage (putting the community on notice of a potentially improper union in time to lodge objections was, in large part, the purpose of the publication requirement). In addition, the parental notification requirement preexisted Hardwicke’s Marriage Act, reflecting concern with underage marriage, by more than a century.}\)
The common law exported by Britain to its American colonies shaped early marriage laws, and the common-law’s influence endures today. The states have retained characteristics of early common law doctrine that include the relative ease with which couples can enter legally valid marriages, the presumption in favor of a marriage’s validity despite the presence of legal impediments or noncompliance with formalities, and the delegation of a gatekeeping function to parents whose children intend to marry despite having yet to attain the presumptive age of consent.

American colonial law was an evolving blend of English common law, statutory rules adopted by colonial assemblies, and domestic common law. The colonies all enacted marriage codes that mirrored English law, imposing similar formality requirements, preventing entry into “clandestine” or otherwise “unlawful” marriages, and extending to parents (especially fathers) the right to police their children’s marriages. Noncompliance, however, was common. Some couples may have resisted traditional religious and civic control over matrimony, others may have balked at the administrative costs of formalization, and still others in more sparsely settled regions may simply have lacked access to officials authorized


50 Set, e.g., SANFORD N. KATZ, FAMILY LAW IN AMERICA (2003); HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES (2d. ed. 1988). These early doctrines, however, responded to social and legal concerns of an historical context dramatically different from our own. Early parental consent requirements, for example, recognized parents’ historical rights to the labor and earnings of their children. Perhaps as importantly, parental consent requirements—by empowering parents to veto improvident marriages—reflected the importance of forming family alliances through marital unions in order to expand family wealth, and the presumption of a marriage’s validity reflected the importance of identifying legitimate heirs to preserve it. Although parental consent requirements endure, these justifications would hardly support their continued existence.


52 Id. at 67. See also BISHOP, supra note __, § 43, at 40. Restating general legal principles as they existed in the nineteenth century, Joel Prentiss Bishop stated that a valid marriage required “1. An agreement; 2. according to the forms made necessary by the municipal law; 3. between a man and woman, both of whom are of sound mind; 4. of the requisite age; 5. capable of contracting marriage generally; 6. and with each other; 7. and capable of sexual intercourse. . . The failure of any one of them makes the marriage invalid.” Id.

53 Id. at 68.
to perform marriage ceremonies. Led by the judiciary, American law responded to noncompliant marriages by facilitating recognition of their validity. “Contract” or “irregular” marriage evolved into “common-law marriage,” and judges relaxed evidentiary requirements for demonstrating its existence.

Every state adopted the English age of legal majority, twenty-one, as the age of presumptive marital consent, where individuals’ marriages no longer required parental involvement. At the same time, most states failed explicitly to repudiate the English common-law ages of presumptive consent to marry—twelve for females and fourteen for males. Thus even though marriage statutes required parental consent to the marriages of individuals younger than twenty-one, so long as the individuals met the common-law age of presumptive consent, their marriages were valid unless the statutory language explicitly expressed legislative intent to invalidate the common law.

Beginning in the mid-nineteenth century, reformers began lobbying to raise the ages of both sexual and marital consent.

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54 Id. at 68-69.
55 Id. at 70.
56 Id. at 70, 79. Judges facilitated couples’ efforts to prove their marriages by “formally receiving into American common law the old rule that marriage could be presumed from the acknowledgements, cohabitation, and reputation of a couple.” Id. at 79. Statutorily-imposed formality requirements thus became “directory, not mandatory.” Id. at 74.
58 Id. at 106; English common law retained the Roman minimum age of marital consent—fourteen for males and twelve for females. BISHOP, supra note __, §§ 174-75, at 167-68; § 192 at 186-87 (noting that “[t]he consent of parents to the marriages of their minor children is not, at the common law, essential to the validity of such marriages.”) (internal citations omitted). They instead retained the less stringent common law rule, which imposed an impedimentum impeditivum—an obstruction or impediment to the celebration of the marriages of minors, but not an impedimentum dirimens—an impediment affecting the validity of such marriages once solemnized. The validity of a marriage required only “that the parties should be able to contract, willing to contract, and should contract.” GROSSBERG, supra, citing LAWRENCE FRIEDMAN, A HISTORY OF AMERICAN LAW 99.
59 FRIEDMAN, supra note __, at 99. The U.S. Supreme Court noted that the common law had long recognized the validity of informal marriages and held that, while “a statute may take away a common-law right; but there is always a presumption that the legislature has no such intention, unless it be plainly expressed.” Meister v. Moore, 96 U.S. 76, 79 (1877).
60 FRIEDMAN, supra note __ at 141.
Galvanized by the spread of venereal disease and a growing prostitution trade that employed young girls, they launched a broad “social purity movement” that advocated not only “premarital chastity and marital fidelity” but more broadly sought to instill “a more generalized sense of sexual restraint and self-control and stigmatized all forms of non-marital sexuality.”

Purity reformers also suggested that the children of young couples were prone to ill health, and questioned the mental capacity of young marriers, reasoning that the age of “majority is the law’s simple devise for securing mental maturity in the graver things of life.” Of the many decisions required of individuals, the reformers argued that marriage is “as serious a business as making a will or signing a deed.”

Most states responded by raising statutory ages of sexual and marital consent, though somewhat modestly. The majority, whose ages of sexual consent were between ten and twelve, raised them to somewhere between thirteen and sixteen, and many raised their ages of marital consent to sixteen for females and eighteen for males. The judiciary, however, continued to consider nonage (failure to reach a legally established minimum age) a less egregious impediment to marriage than other impediments such as bigamy or incest that rendered the resulting marriage altogether void. Judges thus treated underage marriages as fully valid once both parties had reached the age of consent, but voidable so long as either party remained underage.

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63 FRIEDMAN, supra note __ at 141, citing FRED S. HALL & BROOKE, AMERICAN MARRIAGE LAWS 18 (1916) (quoting incoming American Sociological Association president George Howard).

64 Ehrlich, supra note __, at 235; FRIEDMAN, supra note __ at 141-42.

65 Ehrlich, supra note __, at 235.

66 FRIEDMAN, supra note __ at 142.

67 Id. See also 1 JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF MARRIAGE AND DIVORCE, AND EVIDENCE IN MATRIMONIAL SUITS § 199, at 192 (3d ed., rev. & enl. 1859). At common law, however, if either party was below the age of seven, the resulting marriage was altogether void. Id. § 194, at 187-88.

68 Id. See, e.g., Robinson v. Kentucky, 212 S.W.3d 100, 103-04 (Ky. 2006) (holding marriage of thirteen-year-old girl to adult man was voidable, not void); 1 JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF MARRIAGE AND DIVORCE, AND EVIDENCE IN MATRIMONIAL SUITS § 199, at 192 (3d ed., rev. & enl.
State legislation thus gradually displaced elements of the common law, raising the common-law age of marital consent and ending recognition of common-law marriages. Both common-law doctrines persisted in most states into the twentieth century, however, and in a minority of states into the twenty-first. In Colorado, for example, one of a handful of states that continues to recognize common law marriage, a court seeking to establish the presumptive age of consent for a valid common-law marriage recently ruled that the “[t]he common law of England . . . shall be the rule of decision, and shall be considered as of full force until repealed by legislative authority.” Although the state statute establishes eighteen as the presumptive age of consent for marriage and permits individuals as young as sixteen to marry only with either parental or judicial consent, the court adopted the common law age of consent—twelve for females and fourteen for males—as the presumptive age of marital consent for common-law marriage.

3. Modern Regulation

Age twenty-one continued to be the universal age of legal majority and statutory age of marital capacity until the mid-twentieth century. Prompted by wartime needs, Congress lowered the draft age during World War II from twenty-one to eighteen. Legal restrictions

1859). At common law, however, if either party was below the age of seven, the resulting marriage was altogether void. Id. § 194, at 187-88.  
69 GROSSBERG, supra note __, at 101-02.  
70 GROSSBERG, supra note __, at 101-02.  
71 In re the Marriage of J.M.H., 143 P.3d 1116 (Colo. App. 2006) (holding that the common law age of consent for marriage was fourteen for males and twelve for females, and remanding the case to the trial court for an evidentiary hearing on the existence of a common-law marriage between a fifteen-year-old girl and her putative common-law adult spouse).  
72 Id. at 1118. See also, In re Pace, 989 P.2d 297, 298 (Kan.App. 1999) (stating that “[t]he common-law ages of consent are 14 for a male and 12 for a female[,] and that a] minor who has reached the age of consent does not need the consent of a parent to enter into a valid common-law marriage.”). Kansas later raised the state minimum age of consent by statute.  
73 WENDELL W. CULTICE, YOUTH’S BATTLE FOR THE BALLOT: A HISTORY OF VOTING AGE IN AMERICA 72 (1992). See also, AMERICAN LAW INSTITUTE, RESTATEMENT OF THE LAW 2D: CONTRACTS § 14, Reporter’s Note, Cmt. a. (1981) (“The impetus for the lowering of the age of majority probably came from the widespread draft of those under twenty-one and from the lowering of the voting age to eighteen.”).
that denied rights to eighteen- to twenty-year olds came under scrutiny soon thereafter. By the early 1970s, approximately half of the states had lowered their ages of marital consent to eighteen.

The Uniform Marriage and Divorce Act ["UMDA"], promulgated by the Commissioners on Uniform State Laws in 1970, captured the national trend. The UMDA’s marital age provisions proposed (1) setting eighteen as the presumptive age of marital consent; (2) permitting sixteen- and seventeen-year-olds to marry after obtaining either parental or judicial consent, and (3) permitting those younger than sixteen to marry after obtaining both parental and judicial consent. Judicial consent required a finding (1) that the minor had the capacity to assume the responsibilities of marriage and (2) that marriage was in the minor’s best interest. Failure to obtain the requisite parental and/or judicial consent rendered the resulting union voidable, but not automatically void.

The presumptive age of marital consent is now eighteen in all states but two—Nebraska, where it is nineteen, and Mississippi, where it is seventeen for males and fifteen for females. Every state permits adolescents younger than eighteen to marry with either parental or judicial consent, with most setting the minimum marital age at sixteen. Nearly forty states permit minors younger than

74 Advocates argued that if eighteen-year-olds were to bear obligations of adulthood, in particular wartime military service, they ought also to receive all the legal benefits of adulthood. Id. at 21-22.

75 Note, The Uniform Marriage and Divorce Act—Marital Age Provisions, 57 MINN. L. REV. 179, 187-88, nn. 43-44 (1972) (citing statutory provisions of states that had, by 1972, lowered the marriage age). In 1974 the Twenty-Sixth Amendment made eighteen the national voting age. U.S. CONST. Amend. XXVI.

76 UNIFORM MARRIAGE AND DIVORCE ACT (1970) (Rev. 1971) [hereinafter “UMDA”].

77 UMDA, supra note __, at § 203.

78 Id. at § 205.

79 Id. at § 208. Minors or their parents could bring suit to have the marriage declared invalid, but they retained the right to do so only until the minor reached the age at which he or she could marry without the required consent. Id.


sixteen to marry with both parental and judicial consent, or in case of pregnancy or birth of a child.  

Other legal developments have influenced, albeit less directly, age at marriage. Historically, couples facing unintended nonmarital pregnancy commonly faced intense pressure to marry in order to avoid the social and legal stigma that attended nonmarital sex and illegitimate birth. In a series of cases beginning in the 1960s, however, the U.S. Supreme Court steadily eroded states' abilities to criminalize or otherwise burden private, consensual sexual conduct. It also held unconstitutional the once-common impediments that stigmatized nonmarital children.

Modern law thus punishes neither nonmarital sex nor nonmarital birth, and premarital sex is nearly universal. For adolescents, nonmarital procreation has become much more common than procreation within marriage: in 2007, the overwhelming majority of adolescents who gave birth were unmarried—only 7% of 15-17 year-olds and 12% of 18-19 year-olds who gave birth did so within marriages.

The dismantling of the negative legal consequences of nonmarital sex was an important structural change that evinced an increasingly tolerant sexual culture and growing respect for individual liberty. Along with other significant social changes, it rendered marriage less compulsory, thus contributing to the principal development in family formation over the past half century—the erosion of marriage as the only acceptable locus for sex and childrearing. The sections that follow identify other significant contextual influences on family formation and age at marriage, examining first the role of changing economic opportunities, then the cultural developments that have fundamentally changed the function and very meaning of marriage in modern society.

82 Id. The statutes of thirty-seven states contain provisions allowing minors younger than sixteen to marry with approval or in case of pregnancy or childbirth.


84 See, e.g., Trimble v. Gordon, 430 U.S. 762, 776 (1977) (invalidating state law requiring a nonmarital child, as a condition of inheriting by intestate succession from a non-custodial biological father, to demonstrate that his or her parents married after the child’s birth).


86 Ventura, supra note __, at 3.

**B. Economic Influences on Age at First Marriage**

For Western men, economic independence has long been considered a prerequisite to marriage. Historically, economic context has influenced age at marriage, and empirical data reveals a consistently inverse relationship between the availability of economic opportunity for men and age at first marriage. Men have married at younger ages when greater economic opportunities have been available to them; when economic opportunities have been scarce, men take longer to reach the economic security deemed necessary to sustain marriage and thus marry later in life.

Before the nineteenth century, the ready availability of land in the expanding nation meant abundant economic opportunities for young men, who married relatively early in their twenties (although reliable, specific records documenting age at first marriage exist only as of the late nineteenth century). During this early period in the nation’s history, men outnumbered women. The imbalance in the sex ratio helps explain the even younger ages at which colonial and early American women apparently married. As the frontier disappeared and land became more scarce, young men took longer to gain economic security. The median age at first marriage climbed, reaching a peak around 1890 of ages twenty-six for men and twenty-two for women.

88 STONE, supra note __, at __.
92 Haines, supra note __, at 14-15
93 Id.
Industrialization created abundant employment opportunities for young men at the turn of the twentieth century, offering a new path to economic security. In the industrialized economy, advanced formal education was unnecessary to obtain well-paid work; only one out of three adults completed high school, and one out of sixteen graduated from college. Manufacturing accelerated in the years during and after World War II, economic opportunities continued to expand, and the median age of marriage again decreased. The age at first marriage fell most drastically in the economically prosperous period between World War II and 1960, when it reached a low of twenty-two for men and twenty for women.

After 1960, technological advances led to increased automation in manufacturing, and the demand for blue-collar labor declined. Domestic demand for labor declined further as the lower cost of labor abroad led to the exporting of manufacturing to other countries. Blue-collar laborers no longer commanded premium wages, and more women joined the paid workforce to help support their families, thus marking the decline of the (short-lived) single-earner “family wage” system.

Women’s participation in the paid labor force began making the economic opportunities available to them, in addition to those available to men, relevant factors in marital timing. Economic self-sufficiency made marriage less essential to women’s survival. Work in a service- and information-based economy was less likely to require physical strength than to require mental and social skills—

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95 Haines, supra note __, at 15-16.


98 U.S. Bureau of the Census, *Median Age at First Marriage, supra note __.*


100 Id.

101 Id.


103 Id.
aptitudes that did not differ by sex.104 Entry into the better-paying information-based professions for both men and women increasingly required higher levels—and thus more years—of education and training.105 More young people stayed in school into their early- and mid-twenties to complete their educations, and more postponed marriage and parenthood.106 The national median marital age again climbed, and it has done so steadily since 1960.107

Americans are marrying later in life now than they have at any time in the nation’s history. By 2009, the median age at marriage had reached an historic high—twenty-eight for men and twenty-six for women.108

The industrial and postindustrial economies wrought radical changes in both the nature of work and the composition of the workforce. Men’s work first moved outside of the home and into the factory, then economic necessity drew women too into the workforce. These changes have not only influenced the age at which men and women enter marriage, but they also necessarily interrelate with changes in the functioning of family life and the function, and meaning, of marriage itself.

C. Evolution of the Meaning and Function of Marriage

Cultural factors—social norms, moral values, religious traditions, etc.—are among those that shape the contexts in which individuals develop preferences and make life decisions.109 Social anthropologists have long agreed that marriage as we know it did not

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106 Arnett, Emerging Adulthood, at 478.
107 Median Age at First Marriage, supra. The median marriage age reached twenty-two in 1980—returning, after nearly a century, to its 1890 mark—and has continued upwards. Id.
108 Id.
evolve as a “natural” or innate human preference. To the contrary, marriage was a social invention that served to counteract behavior that characterized humans’ evolutionary heritage—the sexual wandering of males whose reproductive strategy was to maximize their fertility and impregnate as many women as possible. Because of women’s limited reproductive capacity and their own dependency during the extended period from childbirth through a child’s infancy and early childhood, men’s commitment to marriage benefited women and children by requiring men to support and protect them.

The precise nature and meaning of marriage, and the functions it performed in society, however, have evolved. The following subsections trace this evolution. They demonstrate that over time, marriage has become less essential to individuals and to society, that individuals’ expectations of marriage are higher and more difficult to meet, and that norms that have prevented individuals from exiting marriage are weaker than they have been since the Church formalized the institution in the thirteenth century.

1. Essential Functional Institution

After the Church established the contours of legal marriage, the social and legal institution it defined remained firmly entrenched for centuries. From the colonial era into the nineteenth century, American marriages, once formed, conformed to that institutional structure. The institutionalized marriage provided clearly defined and fixed marital roles for husbands and wives. The husband was the undisputed head of the household and its sole legal representative. His primary marital role was to support and supervise his wife and children. The wife’s separate legal personhood disappeared upon marriage, becoming subsumed into that of her husband through the doctrine of coverture. Her primary marital role was to provide her husband domestic services, maintain the home, and care for children.

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111 Id.
112 Id.
113 See supra notes ___ and accompanying text.
114 Cherlin, Deinstitutionalization of Marriage, at 851.
115 Id.
116 Id.
Marriage was the essential social institution through which families protected and passed on family property, the support of girls and women was transferred from their families of origin to their husbands, and couples produced offspring who would in turn inherit. 117 Thus institutionalized, this marriage-type clearly defined spouses’ respective roles and established the hierarchy within families. 118 Individuals entering marriage knew what was expected of them, and what they might reasonably expect. Divorce was all-but unavailable, and even had it been a legally available option, economic dependence on their husbands and other social pressures would have rendered it unfeasible, at least for most women.

That institutional marriages endured until the death of one of the spouses provides us little or no information about the quality of couples’ relationships. 119 Marital stability did not depend on relationship quality. Instead, powerful legal and cultural norms—the “forces of law, tradition, and religious belief,” 120 along with support provided by kinship networks, worked in concert to hold institutional marriages together. 121

2. The Rise of Companionship

The changing economic influences beginning in the early twentieth century discussed above—a rising industrial economy that drew men into wage labor and paid them a wage sufficient to support a family—produced the “single-earner, breadwinner-homemaker marriage” that reached its heyday in the 1950s. 122 The nature of income-earning had changed from the joint family work of

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117 Id.
118 Id.
119 Vannoy, supra note __, at 258.
120 Cherlin, Marriage in the Early Twenty-First Century, at 40.
121 Id.; Vannoy, supra note __, at 258.
122 Cherlin, Destructuralization of Marriage, at 851. This “traditional” marriage-type, however, was actually a short-lived mid-twentieth century aberration shaped by the confluence of a rising industrial economy and a post-War sociopolitical and economic context; at no other time in the nation’s history have families lived comfortably on the market wages of only one spouse, borne and raised as many children to adulthood, or married as young. ANDREW J. CHERLIN, THE MARRIAGE-GO-ROUND: THE STATE OF MARRIAGE AND THE FAMILY IN AMERICA TODAY 6 (2009) (surmising that “[w]e sometimes think of the 1950s as the era of the traditional family, perhaps because that’s as far back as our collective memory now reaches. But in truth it was the most unusual time for family life in the past century.”).
agricultural production to the husband’s wage labor, but each spouse’s role within marriage remained clearly defined. Marriages entailed a complementary division of labor.\textsuperscript{123} Husbands and wives could identify and measure marital success as each spouse’s performance of his/her defined role, and they derived marital satisfaction from performing their respective roles (breadwinner, homemaker, parents) well.\textsuperscript{124}

Perhaps because labor opportunities increasingly required families to move to urban communities and thus weakened close-by kinship networks, or perhaps because of the growing distinction between public/work and private/intimate life, husbands and wives increasingly encountered the need and opportunities for togetherness and emotional connection.\textsuperscript{125} Thus a clear division of labor was only one of the characteristics of this marriage-type. Husbands and wives increasingly expected to be each other’s companions—providing friendship, support, and romantic love—to an extent not contemplated by institutional marriage.\textsuperscript{126} Scholars labeled this emerging form of marriage “companionate marriage,” reflecting the growing importance of emotional connection, friendship, and romantic love to perceived marital success.\textsuperscript{127} The emphasis on the companionate aspect of marriage intensified over the course of the twentieth century.\textsuperscript{128}

In addition to the persistence of clearly defined, gendered marital roles, however, essential characteristics of institutional marriage and its function in society endured well into the mid-twentieth century. Most significantly, marriage itself remained the only acceptable context for sex, procreation, and family life more generally.\textsuperscript{129} Nonmarital cohabitation and childbearing continued to be relatively rare and confined to socioeconomically disadvantaged

\textsuperscript{123} Vannoy, \textit{supra} note __, at 252.
\textsuperscript{124} \textit{Id.}; Cherlin, \textit{Marriage in the Early Twenty-First Century}, at 40.
\textsuperscript{125} Vannoy, \textit{supra} note __, at 256.
\textsuperscript{126} Cherlin, \textit{Deinstitutionalization of Marriage}, at 851.
\textsuperscript{127} Sociologist Ernest Burgess coined the term in the mid-twentieth century. \textit{See}, \textit{e.g.}, \textit{ERNEST W. BURGESS \\& H.J. LOCKE, THE FAMILY: FROM INSTITUTION TO COMPANIONSHIP} (1945).
\textsuperscript{128} Cherlin, \textit{Deinstitutionalization of Marriage}, at 851.
\textsuperscript{129} \textit{Id.} at 852. Sociologist Stephanie Coontz noted that even entering the 1960s, “nothing seemed more obvious . . . than the preeminence of marriage in people’s lives and the permanence of the male breadwinner family.” \textit{STEPHANIE COONTZ, MARRIAGE, A HISTORY: FROM OBEDIENCE TO INTIMACY, OR HOW LOVE CONQUERED MARRIAGE} 243 (2005).
members of society. By mid-century, however, a number of social developments converged to make marriage less essential and marital roles less clear. By the late twentieth century, these changes had fundamentally transformed the nature and meaning of the marital relationship itself.

3. Negotiated Roles

The late 1950s and 1960s were a time of political and cultural ferment. Dissident political movements (e.g., the antiwar movement, the New Left, and the black, gay, and women’s rights movements) and the civil disobedience they utilized fed cultural disobedience, one of whose tenets was defiance of sexual norms. The birth control pill became widely available, enabling couples to separate sex from pregnancy and marriage. Nonmarital sex and cohabitation became more common and less stigmatized.

The definition of and expectations for marriage continued to evolve into the latter decades of the twentieth century. The well-defined boundaries of spousal roles began to blur. In a growing number of marriages, both the husband and the wife worked outside the home. Women continued to shoulder a disproportionate share of the housework and child care that had once been the near-exclusive purview of wives, but their husbands’ contributions increased steadily. Couples’ roles within the dual-earner household became more negotiable, flexible, and egalitarian.

Marriage gradually lost its instrumental value as the sole socially acceptable path to intimate relationships, economic security, and family life. Women’s entry into, and increasing equality in, the workforce has meant that marriage no longer functions as the sole

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130 Cherlin, Deinstitutionalization of Marriage, at 852; COONTZ, supra note __, at 263-64.
131 COONTZ, supra note __, at 263; COTT, supra note __, at 201.
132 COTT, supra note __, at 202.
133 Id.
134 Cherlin, Deinstitutionalization of Marriage, at 851-52.
path to their economic survival. Dual-earner couples have had to renegotiate the once-clearly-defined gender roles that made domestic duties solely the responsibility of women. The norms that defined for individuals their roles within marriage have all but disappeared, making the roles of husbands and wives flexible and negotiable. Research suggests that women’s and men’s expectations for role-sharing and equality within contemporary marriages significantly increased the level of tension in marriages.137

Performing their pre-defined roles (provider, homemaker) well was no longer enough to make couples satisfied in their marriage. Instead, their expectations of their marital relationships increased, and marriage became to be seen as primarily existing to secure personal fulfillment. No longer compelled by social or economic necessity to enter or remain in marriages, couples became less willing to find marital satisfaction in the gendered role-performance that once defined a satisfactory or good-enough marriage.138 Expectations of their marital relationships and their companions increased. Married individuals began to seek intimacy and self-fulfillment within their marriages, and the focus for locating marital satisfaction shifted “from role to self.”139 The primary bond of marriage evolved from the complementary division of labor to a bond of love and sentiment.140 And when it no longer performed this function, the destigmatizing and greater availability of divorce makes exit from unhappy marriages easier.141 The companionate, role-based marriages of the early- and mid-twentieth century thus evolved into what sociologists have termed the modern “individualized marriage.”142

While no longer essential to social acceptance or economic survival, marriage nonetheless remains central to many individuals’ self-identity, retaining for many its symbolic and personal value. If anything, these have increased as couples embrace the individualized

138 Id. at 853.
140 Vannoy, supra note __, at 252.
141 Paul R. Amato, Transformative Processes in Marriage: Some Thoughts from a Sociologist, 69 J. OF MARRIAGE & FAMILY 305, 309 (2007) (observing that spouses in modern marriages expect the marital relationship to fulfill their needs for personal growth and self-actualization, and that “[i]f the marital relationship no longer meets these needs, then spouses feel justified in jettisoning the relationship to seek out new partners who better meet these needs.”).
142 Cherlin, Deinstitutionalization of Marriage, at 852.
marriage as the cultural standard. Modern individualized marriage nonetheless challenges marital stability and success by normalizing expectations for marital relationships that are difficult to meet and sustain over time.

II. EARLY MARRIAGE IN THE MODERN UNITED STATES

Despite the nationwide shift toward delayed marriage, 2010 U.S. census data reported 520,000 married or previously married adolescents aged fifteen to nineteen. And more than twenty-five percent of women and fifteen percent of men will marry before age twenty-three. Those who marry early contravene the strong national trend towards increased cohabitation, delayed entry into marriage, and declining marriage overall. This Part surveys research that identifies common characteristics of earlier marriers, and research that examines the outcomes of their marriages. This research makes evident that the individual and social costs of early marriage are enormous.

A. Demographics of Today’s Early Marriers

A number of structural and cultural factors correlate with demographic differences in age at marriage. Parents’ socioeconomic status and educational attainment predict early marriage: nearly thirty percent of women without a college-educated parent marry early, as opposed to sixteen percent of women with a college-educated parent. Researchers have posited that these young people may be less likely to receive economic support from their parents, to attend college, and to perceive attractive options outside of marriage. Early marriage is thus concentrated in poorer Southern

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143 Cherlin, Deinstitutionalization of Marriage, at 855.
145 Median Age at First Marriage, supra note ___.
146 Uecker, supra note ___, at 38.
147 Id.
148 Uecker, supra note ___, at 38.
and nonmetropolitan regions of the country. The children of early marriages were also more likely to enter early marriages themselves.

In *Red Families v. Blue Families*, law and family scholars Naomi Cahn and June Carbone analyzed empirical research on families across the nation and found the highest rates of marriage overall and younger ages of entry into marriage in states whose citizens tend towards social conservatism and greater religiosity. Level of religious commitment as well as one’s specific religious tradition both influence marriage timing. Judeo-Christian religious denominations in general support marriage and marital childbearing, while discouraging nonmarital sexuality. Denominations differ, however, in the emphasis they place on marriage and familism generally. Conservative Protestants and Latter-Day Saints (Mormons) embrace a theology that views marriage as sacred and essential to spiritual salvation. Many evangelical denominations, in addition to adopting a strong promarriage orientation, actively discourage premarital sex and cohabitation. These denominations also embrace traditional gender roles, encouraging women to invest time and labor in their families within the context of marriage, deemphasizing or discouraging their labor force participation, and advocating deference to male authority within the home. When combined with strong pronatalist orientations, these teachings incline young women

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150 *Id.*

151 NAOMI CAHN AND JUNE CARBONE, *RED FAMILIES V. BLUE FAMILIES: LEGAL POLARIZATION AND THE CREATION OF CULTURE* 2-3 (2010) (discussing the opposition of conservative/religious parents to making the morning-after pill available to those younger than eighteen, and concluding that “[r]ed families would accordingly like to reinforce parental control over wayward teens and make it harder to escape the consequences of improvident conduct.”).

152 Religious traditions place different types of emphasis on familism, which, according to some scholars, influences adherents’ marriage patterns. Xiaohe Xu, Clark D. Hudspeth, & John P. Bartkowski, *The Timing of First Marriage: Are There Religious Variations?*, 26 J. FAM. ISSUES 584 (2005). Conservative Protestants and Mormons are the most likely to marry early.


155 *Id.*

156 *Id.* at 594.
towards marriage, childbearing, and domestic pursuits rather than education and workforce participation.\(^{157}\)

More than forty-two percent of women raised as conservative Protestants married early, closely followed by Mormon women.\(^{158}\) Along with committed adherents of other religious traditions, members of these religious groups marry earlier than mainline Protestants, Catholics, Jews, and the religiously unaffiliated.\(^{159}\) Adolescents who attend school with higher proportions of religiously conservatively peers, irrespective of their individual religious characteristics, are also more likely to marry early.\(^{160}\)

Early marriage also varies by race and sex.\(^{161}\) White and Latina women are the most likely to marry early, and nearly thirty percent marry before age twenty-three.\(^{162}\) Among men, Latinos marry early at the highest rates, with nearly twenty-five percent married before twenty-three, followed by white men at sixteen percent.\(^{163}\) African-American women and men both were the least likely to marry early (almost certainly due to the lower marriage rates overall among African Americans), with eleven percent of women and nine percent of men marrying before twenty-three.\(^{164}\)

B. The Costs of Early Marriage

Married individuals generally have greater financial, social, and psychological resources than the unmarried.\(^{165}\) They experience lower rates of chronic illness and physical limitation, and enjoy

\(^{157}\) Id.

\(^{158}\) Uecker, supra note __, at 32 & Table 2.2.

\(^{159}\) Id. at 609-10. Although Catholicism has historically included a strong pro-marriage orientation, recent studies suggest that the Church’s influence over American Catholics’ decisions about sex, marriage, and procreation has waned. Id. at 590 (citing studies).

\(^{160}\) Uecker, supra note __, at 82, Table 3.4.


\(^{162}\) Id.

\(^{163}\) Id.

\(^{164}\) Id.

greater longevity. Husbands tend to derive greater overall health benefits from marriage than do their wives, and at least some measure of the benefits that women derive stems from structural gender inequities. In other words, the health of married women “improves because they are married to health insurance: their lower-paying jobs, and their inferior access to employment-based medical insurance, keep them away from the health care resources given more generously to working men.” Some researchers, moreover, have found evidence of a selection effect, suggesting that marriage itself does not confer greater well-being but instead that individuals with greater well-being pre-marriage are more likely to attract marriage partners and sustain marriages.

A large and growing body of research identifies social costs associated with early marriage. There is little evidence of offsetting benefits.

For individuals to benefit from marriage, moreover, their

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169 See, e.g., Arne Mastekaasa, Marriage and Psychological Well-Being: Some Evidence on Selection into Marriage, 54 J. of Marriage & Fam. 901 (1992), and Alois S. Stutzer & Bruno S. Frey, Does Marriage Make People Happy, or Do Happy People Get Married?, 35 J. of Socio-Economics 326 (2006) (finding that part of the association between marriage and mental health is due to selection, as those with better mental health are also more likely to marry). But cf. Kathleen A. Lamb, Gary R. Lee, & Alfred DeMaris, Union Formation and Depression: Selection and Relationship Effects, 65 J. of Marriage & Family 953 (2003) (finding no evidence of a selection effect with respect to depression, education, employment, income, or physical disability).

170 See infra Parts II.B.1-4. Research to date generally supports the conclusion that marrying “early can lead to added stress and disadvantage, and ultimately poor health, because important socioeconomic resources may be forfeited (e.g., education).” Dupre & Meadows, supra note __ at 626.

171 See, e.g., Seiler, supra note __ at 8 (noting, in an article published in 2002, that an analysis of the economic effects of marriage focusing “exclusively on teens is not available.”). One recent longitudinal study compared pregnant seventeen-year-olds who married at any point within the sixteen years following
marriages must remain intact. Early marriages are unlikely to do so.\textsuperscript{172} The following sections examine the costs of early marriages.

1. \textit{Family Instability and Divorce}

For decades, age at marriage has been the most consistent and unequivocal predictor of marital failure.\textsuperscript{173} Indeed, “[a]ge at marriage is one of the strongest and most consistent predictors of marital stability ever found by social science research.”\textsuperscript{174} Marriages in general have mediocre chances of enduring—altogether, about half of all marriages will end in divorce.\textsuperscript{175} Early marriages, however, are significantly more likely to fail than are marriages entered later. Of marriages entered at age twenty-five or later, fewer than 30% end in divorce.\textsuperscript{176} Of marriages entered before age eighteen, on the other
hand, nearly 70% end in divorce.\(^{177}\) The earliest marriers, those adolescents who enter marriage in their mid-teens, experience marital failure rates closer to a sobering 80%.\(^{178}\) Not until age twenty-two does marital stability improve significantly and marriage dissolution rates begin to level off, although marriages entered at later ages are more stable still.\(^{179}\) Delaying marriage by even a single year can thus significantly reduce the odds of dissolution.

A closer examination of the divorce rate over the last several decades reveals the significance of age at marriage on marital stability: The divorce rate increased through the 1970s until 1980, leveled off for a couple of years, and has since declined modestly. Over the same period, the median age at marriage steadily increased. If it had not, the divorce rate would have increased rather than decreased. In other words, “[a]ll of the decline in dissolution can be accounted for by the rising age at marriage.”\(^{180}\)

If divorce left family members more or less in the same position they would have been in had the couple never married, the high dissolution rate of early marriage might cause less consternation. Mental health studies have shown, however, that the negative psychological effects of divorce are greater than the positive effects of entering marriage.\(^{181}\) And for unwed mothers who marry then divorce, moreover, the risk of poverty is higher than it is for their counterparts who never marry.\(^{182}\)

2. **Lost Educational Attainment and Future Poverty**


\(^{178}\) Seiler, *supra* note __, at 7; Heaton, *supra* note __, at 407 fig. 2.

\(^{179}\) Heaton, *supra* note __ at 407. While age at marriage correlates with marital instability for both white and African-American women, there is evidence that the correlation is stronger for white women. For white women, marrying during adolescence results in a 55 percent higher risk of marital disruption than marrying between ages 23-29; for African-American women, the risk of disruption is 40% higher than marrying between 23-29. Megan M. Sweeney & Julie A. Phillips, *Understanding Racial Differences in Marital Disruption: Recent Trends and Explanations*, 66 J. of MARRIAGE & FAMILY 639, 645, Table 2 (2004).

\(^{180}\) Heaton, *supra* note __, at 401.


\(^{182}\) Seiler, *supra* note __, at 8. (citations omitted)
Teen marriage and lower educational attainment correlate. Women who marry before age nineteen are fifty percent more likely to drop out of high school, and they are four times less likely to complete college.\textsuperscript{183} The correlation between educational attainment and income is so robust and unambiguous that it hardly bears repeating.\textsuperscript{184}

Teen mothers who married between conception and childbirth were less likely to ever return to school than teen mothers who did not marry.\textsuperscript{185} Teen mothers who marry are more likely to have a rapid second birth than are teen mothers who do not marry; they are also likely to have more children overall.\textsuperscript{186} Both closely-spaced births and having two or more children are associated with lower educational attainment.\textsuperscript{187}

Higher educational attainment, moreover, seems to have a protective effect against marital instability, and that protective effect has grown significantly in recent decades. Among whites, having at least 16 years of education (compared to having less than 12 years) reduced the odds of marital disruption by 39 percent in 1990-94, compared with an 8 percent reduction in 1970-79.\textsuperscript{188}

Early marriage also correlates with future poverty. Researchers have only recently begun to study causality in the context of teen marriage. Economist Gordon Dahl recently published a study of more than 140,000 early adolescent marriages (those involving women who were younger than sixteen when they married) found that early marriages have had a strong negative effect on future

\textsuperscript{183} Dahl, \textit{supra} note __, at 691; D. Klepinger et al., \textit{How Does Adolescent Fertility Affect the Human Capital and Wages of Young Women?} 34 \textit{J. of Hum. Resources} 421 (1999); D. Ribar, \textit{Teenage Fertility and High School Completion}, 76 \textit{Rev. of Econ. \& Statistics} 413 (1994).


\textsuperscript{185} Seiler, \textit{supra} note __, at 8-9, citing study reported in Steven D. McLaughlin et al., \textit{The Effects of the Sequencing of Marriage and First Birth During Adolescence}, 18 \textit{Fam. Planning Perspectives} 1 (1986).

\textsuperscript{186} Seiler, \textit{supra} note __, at 8. Teen mothers who marry are 40 percent more likely than those who do not marry to have a second birth within two years of the first birth. Deborah Kalmuss & P. Namerow, \textit{Subsequent Childbearing Among Teenage Mothers: The Determinants of a Closely Spaced Second Birth}, 26 \textit{Family Planning Perspectives} 149 (1994).

\textsuperscript{187} Dianne Scott-Jones, \textit{Educational Levels of Adolescent Childbearers at First and Second Births}, 99 \textit{Am. J. of Educ.}, Table 2 (1991).

\textsuperscript{188} Sweeney & Phillips, \textit{supra} note __, at 645. The protective effect of higher education is even greater for African Americans, for whom having 16 or more years of schooling was associated with a 75 percent reduction in the odds of disruption in 1990-94, versus 19 percent in 1970-79. \textit{Id.}
poverty, and that this effect is not due to self selection. The negative effect of early marriage is stronger even than the sizable negative effect of failing to complete high school; women who dropped out of school were eleven percentage points more likely to be poor when older.

3. Negative Effects on Women’s Mental and Physical Health

In 2011, researchers published the results of the first national study of the effect of child marriage (i.e., before age eighteen) on adult mental health. The study found U.S. child marriages linked to a range of psychiatric disorders—indeed, “child marriage was significantly associated with all lifetime mental disorders except pathological gambling and histrionic and dependent personality disorders.” The most prevalent disorders were major depressive disorder, nicotine dependence, and specific phobias, but the researchers found the strongest association with antisocial personality disorder—the risk for women who married as children was nearly three times as high as that of adult marriers.

In another analysis of the association between relationship status and mental health of young adults, the group that reported the highest depressive symptoms comprised those who married at age eighteen or younger. The age group with the lowest levels of depressive symptoms comprised those who first married at age twenty-two or older.

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190 Id. at 691, 705-06.
191 Id. at 705-06.
193 Id. at 528. The study found the strongest association with antisocial personality disorder—the risk for women who married as children was nearly three times as high as that of adult marriers. Id. at 527.
194 Id. at 527.
195 Uecker, supra note __, at 170-71, Table 5.2, Bivariate Associations Between Relationship Status and Mental Health.
196 Id. at 169-70. Those who were engaged to be married reported levels of depressive symptoms comparable to those who first married at age twenty-two or older. Id. More young adults who have ever been married, however, report that
Researchers have also found adolescent marriage correlated with worsened physical health for women.\textsuperscript{197} Women who married at age eighteen or younger had a 23 percent greater risk of disease onset than those who married later and also suffered higher rates of heart attack, diabetes, cancer, and stroke.\textsuperscript{198} The study's authors found the negative impact of early marriage on women's health unsurprising, “given that these females may forfeit important health resources and often face a greater likelihood of divorce.”\textsuperscript{199} The study found no evidence that early marriage worsened the physical health of men who married early.\textsuperscript{200}

Research uncovered no studies comparing the rates or types of intimate violence experienced by young married and unmarried women. The U.S. Department of Justice has reported, however, that women aged 16-24 experience the highest rates of violence at the hands of their intimate partners, including assaults, rape, robbery, and murder.\textsuperscript{201} This data raises concerns that when women in this age group marry, it becomes more difficult for them to exit violent relationships.

4. Negative Effects on Children’s Developmental Outcomes

Numerous studies have compared the developmental outcomes of children born to young mothers and those born to adult

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\textsuperscript{198} Id. at 636.

\textsuperscript{199} Id. Dupre and Meadows also posited that female earlier marriers may be more likely to have psychological disorders that predispose them to illness. Id. Strat et al.'s study sought to more precisely isolate the effect of child marriage on the development of mental disorders by including in their analyses only those psychiatric disorders with an age at onset later than the age at first marriage. Strat et al., \textit{supra note }\textsuperscript{200}, at 527.

\textsuperscript{200} Id.

mothers. Studies have not, however, isolated the developmental outcomes of children born to early marriers. Nearly half of all women who married before eighteen were also likely to be pregnant (48 percent, compared to 3 percent of women who married as adults). Research has consistently shown that the children of mothers who begin childbearing at a young age have increased risks of various adverse outcomes. The elevated risks extend to children born later in the mother’s life, and include behavior problems and educational underachievement. The risk of adverse outcomes continue into adulthood, and include a greater likelihood of poverty, unemployment, and becoming young parents themselves.

Since these data do not isolate the mothers’ marital status, it is possible that the children of young married mothers fare better than the norm. Indeed, researchers posit that other factors that tend to coexist alongside early parenthood may contribute to adverse children’s outcomes. For example, “women who initiate childbearing at young ages are more likely to experience disorder in the process of family formation, . . . [and] the stress associated with structural disadvantage and family disruption increases the likelihood of the mother’s own antisocial behavior, especially drug use.”

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203 Le Strat et al., supra note __, at 526.

204 Pogarsky, et al., supra note __, at 333.


207 Id.

208 J.B. Hardy, et al., Like Mother, Like Child: Intergenerational Patterns of Age at First Birth and Associations with Childhood and Adolescent Characteristics and Adult Outcomes in the Second Generation, 34 DEV. PSYCHOLOGY 1220 (1998).

209 Pogarsky et al., supra note __, at 333.

210 Id.
Children of young mothers raised in intact marital families may escape the negative effects of these associated factors.

At the same time, early marriers experience many of the same associated factors that may contribute to adverse outcomes for children: They are less likely to complete high school and attain the social and human capital needed for financial security, experience higher levels of family dissolution, and exhibit ineffective parenting styles. All of these factors—reduced parental educational attainment, \textsuperscript{211} economic disadvantage, \textsuperscript{212} family disruption (including changes in parent figures and caregivers), \textsuperscript{213} and poor parenting styles\textsuperscript{214}—increase the likelihood of negative outcomes for children of young mothers.

\section*{III. Regulatory Lag: The Incompatibility of Modern Adolescence and Modern Marriage}

That the median age at first marriage is higher now than at any other time in the nation’s history reflects adaptation to changing social contexts. Some young people will nonetheless want to marry, will obtain (if they are under the age of presumptive consent) their parents’ or judicial consent, and will marry with predictably poor results.

The empirical evidence of the costs of early marriages alone should prompt rethinking of current policy extending them civil and legal recognition. Yet the law recognizes adolescents’ decision-making competence in other arguably analogous contexts, such as abortion.\textsuperscript{215} Denying young individuals the ability to marry based solely on the empirical evidence is arguably justified; it would fail, however, to provide a principled justification for the different treatment of young people in the marital than in analogous decision-making contexts.

\begin{footnotesize}
\begin{enumerate}
\item Thornberry et al., \textit{supra} note \textsuperscript{\_\_}.
\item Id.
\item See, \textit{e.g.}, Bellotti v. Baird, 443 U.S. 622 (1979) (extending to minors the right to terminate a pregnancy but upholding parental consent laws with the provision that a judicial by-pass procedure be available).
\end{enumerate}
\end{footnotesize}
This Part argues that marital capacity is different: sustaining the modern marriage requires not only the decisional capacity required for valid legal consent, but also a variety of psychosocial and other adult capacities that young people will not have reliably acquired until their early twenties. A principled distinction thus exists between adolescents’ marital capacity and other decision-making capacities. I argue that adolescents and emerging adults lack the former, even while they may possess the latter.

A. Reconceptualizing Marital Capacity

Marriage law has essentially adopted from the law of contracts the concept of legal consent. For a valid contract, an individual must have the cognitive capacity to understand the nature of an agreement and to enter it willingly. That the individual is unlikely to successfully perform the contract will not invalidate it.

I argue that, in light of the evidence of the previous Parts, and in light of what is known about adolescent cognitive development (relevant aspects of which I summarize below), adolescents and emerging adults simultaneously have the cognitive ability to give what would amount to legally valid consent to marriage. They lack, however, the capacity to “perform” the contract. I conclude that both of these are required for “marital capacity,” and both ought to be required for a valid marriage.

1. Capacity to Consent to Marriage

Freely given consent has long been the sine qua non for contracting a valid marriage. U.S. marriage law derives from contract law three basic requirements for determining the validity of consent—legal capacity, mental or cognitive competence, and voluntariness (i.e., the absence of duress or undue influence).

216 To consent is “[t]o agree to a proposal, request, etc. . . . Voluntarily to accede to or acquiesce in what another proposes or desires; to agree, comply, yield.” OXFORD ENGLISH DICTIONARY (2d ed. 1989, Oxford Univ. Press), online version December 2011, available at http://www.oed.com/view/Entry/39518.

217 See AMERICAN LAW INSTITUTE, RESTATEMENT OF THE LAW 2D: CONTRACTS, VOL. 1 §§12-16, 174-77, and Cmts. (1981) (defining capacity as “the legal power which a normal person would have under the same circumstances,”
First, the law uses “legal capacity” as a proxy for competence—it deems certain categories of individuals presumptively incompetent to enter binding contracts and thus without legal power to do so. Historically, “married women, infants, and . . . [the] ‘mentally ill’ had limited or no capacity to contract. Minors are deemed to have gained the needed maturity and competence upon reaching a categorical age of majority. Until then, however, minors (as well as the mentally ill) presumptively lacked the requisite mental competence. Married women lacked legal personhood and could take no legal action in their own name or without their husbands’ concurrence; marriage rendered husbands and wives “one person in the law,” and a wife’s legal personhood was “incorporated and consolidated into that of the husband.” Children and the mentally ill, of course, presumptively lacked the judgment and understanding to enter an agreement to which the law would bind them. Contract (and marriage) law allowed that both might gain/regain competence, and upon doing so, could elect to either ratify or disaffirm the agreement entered during the period of incompetence.

Asking whether an individual or category of individuals has “legal capacity” begs the question before us. Legal capacity represents a categorical judgment about the attainment of the requisite decision-making competence and maturity; this section, however, is questioning whether the current judgment respecting legal capacity is appropriate. We thus turn to the second and third requirements for valid consent—mental/cognitive competence and voluntariness.

The second requirement for valid consent is mental competence; the standard of competence required does not present a

\footnotesize{\text{thus contemplating both legal capacity and mental competency) [hereinafter RESTATEMENT OF CONTRACTS].}}

\footnotesize{\text{\textsuperscript{218} Id.}}

\footnotesize{\text{\textsuperscript{219} Id. at § 12, Cmt. b. Contract law distinguishes incompetence due to pathological mental illness from age-related immaturity. Thus in discussing the “wide variety of types” of mental incompetency, the RESTATEMENT includes “congenital deficiencies in intelligence, the mental deterioration of old age, the effects of brain damage caused by accident or organic disease, and mental illnesses evidenced by such symptoms as delusions, hallucinations, delirium, confusion and depression.” Id. at § 15 Cmt. b.}}

\footnotesize{\text{\textsuperscript{220} Elizabeth Scott, The Legal Construction of Adolescence, 29 HOFSTRA L. REV. 547, 560 (2000).}}

\footnotesize{\text{\textsuperscript{221} WILLIAM BLACKSTONE, 1 COMMENTARIES *442-43.}}

\footnotesize{\text{\textsuperscript{222} RESTATEMENT OF CONTRACTS § 12. See also, Hunt v. Hunt, 412 S.W.2d 7 (Tenn. Ct. App. 1965) (holding that a person who lacks mental competence at the time marriage entered may nonetheless ratify the decision to marry upon regaining competence and by doing so validate the marriage).}}
high bar for validity. Instead, courts have held that individuals possess the requisite mental capacity to contract marriage so long as they “understand the rights, duties, and responsibilities of marriage at the time of the marriage contract.”

Finally, consent to marriage must be voluntary—i.e., given absent duress or undue influence. “Duress” induces a person to manifest assent to a contract as a result of a threat that leaves her no reasonable alternative. “Undue influence” results in a person’s manifesting assent to a contract because of the use of unfair persuasion by someone in position to dominate the person, or in a position of trust. As is the case with nonage, however, a person who enters a marriage under duress or due to undue influence may choose later to either invalidate or ratify and thus ratify the marriage contract.

In one sense, then, defining valid consent is straightforward and requires simply understanding the nature of marriage and the marital obligation and agreeing to it absent coercion. In another, free consent in general, and free consent to marriage in particular, is far from straightforward. Individuals do not make decisions within analytical vacuums. Instead, decisions occur within a specific social context—community norms and expectations may shape preferences and influence individuals’ resulting decisions. They also may be influenced by more direct persuasion. The line between influence, persuasion, and coercion is not a sharply defined one. Section III.B., infra, examines the age-related attainment of the capacity to consent.

2. Capacity to Sustain

It is one thing to make a marital commitment; it is another to keep it. Some functional aspects of the marital family have remained largely unchanged—couples generally share a household, bear and raise children, and assume obligations of financial support. I argue that the confluence of several of the structural and cultural

224 RESTATEMENT OF CONTRACTS §§ 175-77.
225 Id.
226 Id. at §§ 175-77. General contract law provides that if the other party to the transaction induced the assent, the contract is voidable, but if a third party induced the assent without the knowledge of the other party to the transaction, who has in good faith relied on the contract, the contract is valid. Id. Courts deciding the validity of marriages allegedly entered under duress or undue influence have not applied this exception, however.
227 See supra notes __ and accompanying text.
developments detailed above, however, have fundamentally altered modern marriage and the capacities required of couples to sustain them. These developments have rendered modern marriages more difficult to sustain than at any time in history.

The financial obligation to support one’s family is itself not a new development. Economic changes have altered the manner by which couples are likely to achieve financial security. First, the disappearance of the family wage frequently requires both members of the marital couple to participate in the workforce. And second, virtually all non-menial jobs require “credentials” of some sort—generally a college degree.228 Young people with only a high school education are likely to experience “several years of career instability characterized by periods of unemployment and a series of dead-end, minimum-wage jobs.” 229 The financial instability linked to low educational attainment, moreover, not only decreases the ability to comfortably support a family, it also increases the likelihood of marital dissolution.230

Today, couples expect to find in their marriage partners a soulmate with whom they will share intimacy, romantic love, and personal growth and fulfillment. They are increasingly equals who must negotiate work, household, and childrearing in an egalitarian manner.231 In order for modern marriages to last, partners must have the flexibility and willingness to “continually negotiate the bargain and invest in the joint enterprise on an intimate, interpersonal level.” 232 Meeting these expectations requires ongoing open and

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228 Marilyn J. Montgomery & James E. Cote, College as a Transition to Adulthood, in BLACKWELL HANDBOOK OF ADOLESCENCE 149, 156 (Gerald R. Adams & Michael D. Berzonsky, eds. 2003). On average, an individual with a bachelor’s degree has between 20 and 40 percent higher earnings than a high school graduate. Id.


230 See supra note __ and accompanying text.

231 One study comparing the reasons given by couples for their divorces between 1949 and 1996 in the Netherlands found that “[t]he reasons for divorce seem to have shifted from behavioral problems to relational problems.” Paul M. DeGraaf & Matthias Kalmijn, Divorce Motives in a Period of Rising Divorce: Evidence from a Dutch Life-History Survey, 27 J. OF FAM. ISSUES 483, 501-03 (2006). Thus couples have become less likely to cite behaviors such as violence or infidelity as causes for their divorce, and more likely to cite dissatisfaction with their relationships—growing apart, receiving insufficient attention, inability to talk to one another, etc. Women also increasingly cite dissatisfaction with the division of household labor. Id.

232 Vannoy, supra note __, at 258.
mature communication and significant effort. This ongoing effort “calls for a level of personal responsibility and skill that perhaps only a small minority of men and women achieved in the past.”

Individuals are much more likely to achieve this capacity, according to scholars who study psychology and culture,

[w]hen people are secure in their unique identities as individuals beyond societal roles, including gender roles, [because then they are able to] interact in productive work and love relationships . . . [and] exhibit greater capacity for both autonomy from and intimacy with others and are able to commit themselves to projects and people.234

It is important, moreover, for the life course to allow individuals to “develop personal identities and a sense of self-worth before they enter marriages.”235 Achieving “greater awareness of self and other as individuals and greater skill in personal communication” may lead to higher rates of marital success and lower rates of dissolution.236 In light of the failure of nearly half of all marriages, and the inevitable fact that not all marriages that survive intact are happy ones, it is reasonable to conclude that only a minority of all modern marriages “succeed.”

B. The Age-Related Attainment of Marital Capacity

The following subsections draw on research in the developmental sciences to identify the age or age range by which individuals will have reliably attained each aspect of marital capacity—the cognitive and decision-making capacities required to voluntarily consent to marriage, and the relational capacities required to sustain it.

1. Cognitive Maturity in Adolescence and Capacity to Consent

233 Vannoy, supra note __, at 258-59.
234 Id. at 252.
235 Id. at 263.
236 Id.
This subsection aims to identify the age or age range by which young people have the capacity to “understand the rights, duties, and responsibilities of marriage” and in light of that understanding, determine also whether they are able to make a voluntary choice to enter marriage.

In previous work, I have summarized in some detail research in developmental neuroscience and psychology that has begun to explain the development of adolescents’ decision-making capacities. Cognitive capacity, including learning and reasoning from facts and information processing, improves more or less linearly throughout childhood, reaching adult-like levels by mid-adolescence. Researchers have consistently found “the logical reasoning and basic information-processing abilities of 16-year-olds” to be “comparable to . . . [or] essentially indistinguishable” from those of adults. By mid-adolescence, thinking processes are adult-like. According to developmental psychologist David Moshman, “[n]o theorist or researcher has ever identified a form or level of thinking routine among adults that is rarely seen in adolescents.”

By ages fifteen or sixteen, adolescents have attained adult-like cognitive-processing capacities. In other words, they are as able as are adults to acquire, retain, and retrieve relevant information and apply to that information reasoning processes that lead to justifiable conclusions. They can understand the nature of marriage and its requirements, and they have the ability to make a rational decision whether to marry or not.

An individual’s manifestation of assent is invalid if given involuntarily. Indeed, one might argue that assent to marriage in spite of the slim chances of relationship success itself renders the typical young person’s consent to marriage less than voluntary. The second argument must fail, however. Although it is arguably true that the adolescent’s/emerging adult’s decision to marry must be irrational (in light of its near-inevitable failure), the decisional defect exhibited by adolescents here does not differ significantly from the same defect

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239 Laurence Steinberg et al., Are Adolescents Less Mature Than Adults?: Minors’ Access to Abortion, the Juvenile Death Penalty, and the Alleged APA “Flip-Flop,” 6 AM. PSYCH. 583, 590-92 (2009) [hereinafter Steinberg et al., Less Mature Than Adults?].
240 Steinberg, Adolescent Risk-Taking, supra note __, at 80.
241 Moshman, supra note ___, at 24.
242 RESTATEMENT OF CONTRACTS §§ 175-77.
demonstrated by adults on the verge of marrying. Studies have shown, for example, that even when they know the statistical likelihood of marital failure to be around fifty percent, adults estimated the likelihood of their marriages succeeding to approach 100 percent. Given that the belief in the exceptionalism of one’s impending union is characteristic of adults, the presence of the same characteristic in adolescent marital decision making is insufficient to justify recharacterizing as involuntary their consent. To do so would subject adolescents to a higher standard of rationality in decision making than that to which the state currently holds adults.

The real-world contexts in which adolescents usually make decisions, however, can drastically affect the quality of their decision making. Their capacities are more susceptible than are adults’ to being confounded by the real-world contexts in which they make decisions. Studies found that contexts that predictably compromise adolescent decision making include those requiring them to make decisions “in the heat of passion, in the presence of peers, on the spur of the moment, in unfamiliar situations, . . . [and] when behavioral inhibition is required for good outcomes.” In other words, adolescents tend to make bad decisions in emotionally charged or pressured situations, and they struggle to control impulses that lead to undesirable behavior.

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243 Reyna & Farley, supra note __, at 1; Margo Gardner & Laurence Steinberg, Peer Influence on Risk Taking, Risk Preference, and Risky Decision Making in Adolescence and Adulthood: An Experimental Study, 41 DEV. PSYCH. 625, 625 (2005). Cognitive researchers have referred to this as the “competence-performance distinction.” Jennifer L. Woolard, et al., Theoretical and Methodological Issues in Studying Children’s Capacities in Legal Contexts, 20 L. & HUMAN BEHAVIOR 219, 220 (1996) (internal citations omitted). Consistent with these observations, studies demonstrate that not all cognitive processes mature by mid-adolescence. Some processes, such as certain aspects of working memory, continue to specialize and develop into adulthood. Luna, et al., supra note __ at 1367-68 (suggesting that all components of working memory mature by around age nineteen). Working memory is involved in the voluntary control of behavior (including the ability to filter irrelevant information and suppress inappropriate actions) and other complex mental abilities. Id.

244 Id. See also, Eric Amsel et al., Anticipating and Avoiding Regret as a Model of Adolescent Decision-Making, in The Development of Judgment and Decision Making in Children and Adolescents 119, 120 (Janis E. Jacobs & Paul A. Klaczynski eds., 2005).

245 Reyna & Farley, supra note __, at 1. Valerie F. Reyna & Frank Farley, Is the Teen Brain Too RATIONAL?, 17 SCIENTIFIC AMERICAN 60 (2007). Even though they do not generally misperceive risks (if anything, studies have tended to show that adolescents and adults both overestimate risk), adolescents tend to weight and value benefits more heavily than risks, as compared to adults. Researchers advance a number of theories, some related to cognition and some grounded in neural
decisions quickly or under time pressure, when they are highly emotional or stressed, when they are in unfamiliar situations, or when they are subjected to external or peer pressure, adolescents’ decision making suffers.

Some adolescents will consider whether to marry under unpressured, considered circumstances, but many will not. Adolescents may be pressured to marry by their older adult partners, parents, or other authority figures (such as religious leaders). Couples faced with unintentional pregnancy may be pressured to marry by parents or partners.

Even though some adolescents will consider marriage under stressful situations, it is a decision-making context that differs, for example, from impulsive and peer-influenced decision to commit a crime, or even engage in sexual activity itself. Instead, entering marriage is generally the sort of considered decision that researchers have found adolescents capable of making even under less-than-ideal conditions. Researchers analyzing the decision-making processes of adolescent girls confronted with unintended pregnancies, for example, found that those aged “fourteen to seventeen appear to be similar to legal adults in both cognitive competence and volition . . . [and] remain competent decision makers when facing an emotionally challenging real world decision.”

Research thus suggests that adolescents, by ages fifteen or sixteen, have the presumptive capacity to consent to marry. There are undoubtedly cases where duress or undue influence have rendered their consent involuntary. That factors exist in individual cases that would legally vitiate or invalidate expressed consent does not, however, extinguish adolescents’ presumptive capacity to give what qualifies as legally valid consent.

2. Psychosocial Development, the Prolonged Life Course to Adulthood, and Incapacity to Sustain Modern Marriage

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development itself, to explain this. See Luna et al., Maturation of Cognitive Processes, supra note __, at 258; Fischhoff, supra note __ at 19-20.

246 At least two-thirds of U.S. adolescents have had sex by 12th grade. Lisa J. Crockett, et al., in BLACKWELL HANDBOOK OF ADOLESCENCE 371, 373 (Gerald R. Adams & Michael D. Berzonsky, eds. 2003).

In light of the empirical evidence of the instability and costs of early marriage, the appropriate inquiry in this section might not be whether adolescents and emerging adults are capable of sustaining marriage, but instead why it is that they are not. I argue that the answer lies at the historical confluence of cultural, structural, and developmental factors that together articulate the social and individual context in which today’s young people enter and endeavor to sustain marriage. The previous section argued that adolescents have the cognitive capacity to consent to marriage. This section argues that they lack other capacities required to sustain the modern marriage.

For individuals who marry before age twenty-two, the odds of sustaining marriage are significantly worse than they are for those who delay marriage to age twenty-two. Delaying marriage even further continues to increase marital stability, but the gains of delay lessen thereafter.248 Neither attaining age eighteen, the near-universal age of majority and of presumptive marital capacity, nor obtaining the consent of parents and/or judges (a requirement universally imposed on those individuals seeking to marry prior to reaching eighteen) have an observable effect on marital stability. Only delay, along with a number of factors integrally associated with it, reliably increases marital stability.

Why are marriages entered before the early twenties so much less stable than those entered later? First, developmental scientists have amassed evidence that individuals do not reach psychosocial maturity until their early twenties. Psychologist Jeffrey Arnett has identified the period from age 18 to 25 as what is now widely acknowledged to be a distinct developmental period in the modern life course, and which he has termed “emerging adulthood.”249

Developmental neuroscientists have begun to explain the neurological bases for the coexistence of adolescent cognitive maturity and socio-emotional immaturity. They have begun developing a neurologically-based model primarily oriented around the development in two neural systems of the brain: that associated with cognitive control, and that associated with socio-emotional maturity. The core insight of this dual systems model is that these two neural

248 See supra notes ___ and accompanying text.

systems develop along different timelines. This temporal disjunction has the potential to explain adolescents’ impulsivity and poor decision making in some contexts despite their improved cognitive ability, as well as other aspects of adolescent psychology and behavior.

As discussed above, adolescents’ basic cognitive abilities are mature by age sixteen, giving them the capacity to process information and make rational decisions. But a heightened sensitivity to rewards that increases and peaks around mid-adolescence inclines them towards risk taking, sensation seeking, and impulsivity. These inclinations may dominate or overwhelm their cognitive processes and shape their behaviors, especially in situations triggering heightened emotion or pressure. Adolescents’ susceptibility to the confounding influence of heightened reward salience on their decision making begins to decline after mid-adolescence, however, while their abilities to exercise cognitive control increases, ultimately reaching mature levels in their twenties.

Most adolescents and emerging adults actively engage in a period of identity exploration most evident in the contexts of work, worldviews, and intimate relationships. First theorized by Erik Erikson, identity formation is a gradual process that occurs most intensely during adolescence. During this period, individuals’ beliefs, commitments and relationships tend to be in flux as they “actively explor[e] possibilities for self-definition, which may require

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251 See infra notes __, and accompanying text. For slightly different accounts of the dual systems model, see Casey et al., *supra* note __; Geier & Luna, *supra* note __. See also, Catherine Sebastian et al., *Social Brain Development and the Affective Consequences of Ostracism in Adolescence*, 72 BRAIN & COGNITION 134, 138 (2010) (discussing aspects of the dual systems model).


254 Arnett, *Emerging Adulthood*, at 473.
questioning or rejecting previously held beliefs.”

In the late 1960s, Erikson observed that the period of identity formation was prolonged in industrialized societies, and psychologists now believe that most identity development continues through late adolescence and into the twenties. Following a period of exploration, individuals ideally reach identity achievement, a more stable (though not unchanging) identity status whereby they commit to personal, occupational, and ideological choices. Some studies have found that both females and emerging adults who do not attend college progress towards identity achievement somewhat faster than others. Even for noncollege adolescents and emerging adults and for females, however, the majority have not reached identity achievement by age twenty-one, and researchers have only recently begun conducting studies of identity achievement beyond this age.

This research has significant implications for adolescents’ and emerging adults’ capacity to sustain marriage. Modern marriage places demands on relationship skills and require emotional maturity that were not required to sustain the marriages of the past. Indeed, the changed meaning and function of marriage requires a level of maturity not achieved until the early twenties. Modern marriages are thus likely to endure only “[i]f the ‘typical’ life course allows and encourages individuals to develop personal identities and a sense of self-worth before they enter marriages . . . and if young marrieds achieve greater awareness of self and other as individuals and greater skill in personal communication.”

Finally, adolescents will not have attained the postsecondary education or work experience increasingly required to obtain well-paying work in an information/technology-based post-industrial


257 ARNETT, ADOLESCENCE AND EMERGING ADULTHOOD 175.


259 See L.J. Lytle et al., Adolescent Female Identity Development, 36 SEX ROLES 175 (1997).


261 Vannoy, supra note __, at 263.
economy.\footnote{Jeffrey Jensen Arnett, Emerging Adulthood: A Theory of Development from the Late Teens Through the Twenties, 55 AMER. PSYCHOLOGIST 469, 478 (2000); Vondracek & Porfeli, supra note __, at 120.} Low-paying work and occupational instability hinders the ability to support a family. The higher levels of education required in order to obtain entry into better-paying work has contributed to young people’s postponing marriage and childbearing.\footnote{Id. at 478.}

Research on adolescent development thus suggests that, in light of ongoing psychological and brain development, as well as the relatively prolonged life course to adulthood in the postindustrial society, young individuals do not attain marital capacity until their early twenties. The empirical evidence of marital instability of marriages entered earlier supports this conclusion. The rising age of marriage, falling rates of adolescent childbearing, and growing investment in education all reflect appropriate adaptation to the modern cultural and economic context. The law, however, has yet to similarly adapt.

C. Raising the Age of Presumptive Marital Capacity

Through a single statutory adjustment—raising the age at which individuals may marry—legislators could reduce the percentage of marriages ending in divorce, improve women’s mental and physical health, and elevate women’s and children’s socioeconomic status.

1. Policy Considerations

Public support of marriage is costly. State and federal government subsidizes marital families, which receive billions of dollars annually in direct and indirect benefits.\footnote{Bernstein, supra note __.} Divorce, too, is costly. Particularly for mothers who have foregone education and work experience within marriages, post-divorce life is more difficult than never-married life. At least some will turn to the state for public assistance to help support their families.

There is a growing body of evidence that young people do not achieve marital capacity until overwhelming empirical evidence
that early marriage ultimately harms the individuals who marry, especially women, at best do not benefit children, and impose significant costs on society.

To avoid the worst of these social costs, state should consider raising the presumptive age of marital capacity to twenty-one or twenty-two. Empirical evidence suggests that delaying marriage to twenty-two would result in the most effective increase in stability. While stability continues to improve every year after age twenty-two, it does so at a much slower rate. At the same time, a number of age-related rights already accrue at twenty-one. Given its current existence as a marker of maturity, then, there might be less political resistance to having the right to marry also accrue at twenty-one.

States would do well to remove altogether statutory exceptions allowing adolescents younger than eighteen to marry. Again, however, given that age eighteen is currently the age of legal majority in most states and thus a marker of adult entitlement, there may be less public resistance to a policy change that retained eighteen as the minimum marital age, but that required young people between 18-21 must obtain judicial (not parental) approval before obtaining a marriage license. Parental approval has provided little or no safeguard against the instability of early marriages. Statutes might thus impose clearer (and higher) standards for judicial approval.

2. Constitutional Considerations

For young people wanting to marry, state regulations denying them that ability constrains their liberty. After the Supreme Court explicitly declared marriage to be a fundamentally protected right, young couples challenged the age-based regulations imposed by several states as unconstitutional infringements on their right to marry. None of these challenges succeeded, however, and the courts have universally found marital age restrictions to be constitutionally acceptable. Age restrictions, courts have reasoned, do not deny couples the right to marry but instead merely delay their entry into marriage and thus do not constitute the sort of substantial interference with the fundamental right to marry that the Supreme Court has held impermissible.

265 Every state has set age twenty-one as the legal drinking age, for example.
266 See Loving v. Virginia, __ U.S. __ (1967); Zablocki v. Redhail, __ U.S. __ (197__).
267 See, e.g., Moe v. Dinkins, __ N.Y. __.
268 Moe v. Dinkins; Zablocki v. Redhail.
States remain free to extend greater liberties than those minimally required by the constitution, and as discussed above, many states have done so. The statutes that allow adolescents to marry, however, are not constitutionally compelled.

The right to direct the upbringing and education of one’s children has also been deemed fundamental. Parents retain this right until their children reach the age of majority, although the state’s role as *parens patriae* justifies widespread measures (e.g., compulsory education requirements) aimed at ensuring the well-being of minors. Provisions requiring minors to obtain parental consent prior to marrying thus reflect respect for deference to parental authority; but they also delegate to parents the task of ensuring the adequate maturity of those minors wishing to marry. As I have argued above, the empirical evidence makes clear that this delegation is—at best—an unsuccessful one.

**Conclusion**

In the preindustrial economy, marriage served pragmatic ends—ensuring economic survival through combined spousal effort, ideally aided by the labor of children. Expectations of the marital relationship were similarly pragmatic. The structural and cultural changes of postindustrial society have forced fundamental change on the institution of marriage: Economic security increasingly requires extended formal education; increased gender equality and the availability of market work has eliminated the inevitability of women’s economic dependence on marriage; divorce makes available a relatively destigmatized exit from unsuccessful unions; and cultural changes have raised the expectations of marital relationship, rendering it an intense intimate relationship, and substantially more difficult to sustain than in the past.

The steady rise in the median age at first marriage to what are now historic highs for both men and women evinces popular acknowledgement of, and adaptation to, the new social context of marriage. The continued existence of too-early marriages, however, unnecessarily imposes significant costs—on early marriers, their children, and society. The state does well to respect individuals’ life choices, even when improvident. When those choices impose sufficiently high costs on others, however, the state and its legal institutions abrogate their proper roles by failing to respond appropriately. The high costs imposed by early marriage requires a

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269 Pierce v. Soc’y of Sisters; Wisconsin v. Yoder; Prince v. Massachusetts.
legal response through which the law, too, adapts to the new social context within which its members enter and endeavor to sustain marriage.