TOO YOUNG FOR MARRIAGE BUT NOT FOR ABORTION: KEEPING TEENS IN THE "DRIVER'S SEAT OF THEIR LIVES" THROUGH THE INTENDED PURPOSE APPROACH TO THE SHIFTING OF AGE BOUNDARIES

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I. INTRODUCTION

In 2019, a headline in the *Boston Globe* querying whether a teen could be "[t]oo young to get married—but not to end a pregnancy?"[1] grabbed my

[1] Stephanie Ebbert, *Too Young to Get Married—But Not to End a Pregnancy?*, BOS. GLOBE (Apr. 6, 2019, 5:48 PM), https://www.bostonglobe.com/metro/2019/04/06/

attention. The article explored two bills pending before the Massachusetts legislature: one proposed raising the minimum age of marriage to eighteen with no exceptions, while the other proposed allowing teens of any age to self-consent to abortion.[2] The simultaneity of the bills raised the concern that encoding different age markers would send conflicting messages about when a teen "get[s] to make her own choices about her body, her health, [and] her future[.]"[3] The article noted that the law's tendency toward inconsistency in this domain is indicative of an "abiding discomfort with young women's sexuality" rooted in a tension between "our competing modern instincts," namely the desire to "protect vulnerable girls from predators and to empower strong girls to speak for themselves."[4] Although not the article's express focus, the simultaneity of the bills also unavoidably trip-wired the contentious question of whether the interests of teens can be adequately represented by their parents or the state when it comes to decision-making about abortion and marriage, or whether this exclusion fails to account for teens as autonomous, rights-bearing persons.

At first glance, the concurrence of these bills appears to be a classic example of what Mutcherson refers to as the law's "jumbled approach to doling out decision-making power to adolescents."[5] This impression was furthered by the fact that "some of the same Democrats [were] championing both bills."[6] Was it possible that they were promoting legal incoherence by pursuing competing ends, namely seeking to protect vulnerable girls by preventing them from marrying while simultaneously empowering them by treating them as legal adults in the abortion context? Or might there be a cogent basis for this distinction?

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too–young–get–married–but–not–end–pregnancy/40hgpwjmog8acJduFnpuTN/story.html [https://perma.cc/SBW2-KQZS].

[2] *Id.*

The bill to ban child marriage in Massachusetts (Bill H. 1478 and Bill S. 2294) was unanimously approved by the Senate on July 25, 2019, but it has not yet been approved by the House. *Massachusetts Senate Votes to Ban Child Marriage*, HUM. RTS. WATCH (July 26, 2019, 12:35 PM), https://www.hrw.org/news/2019/07/26/massachusetts–state–senate–votes–ban–child–marriage [https://perma.cc/8ELL-YUE9].

The proposed measure allowing all teens to self-consent to abortion was included in the 2019 Act to Remove Obstacles and Increase Access to Abortion (more commonly known as the Roe Act) by way of a repeal of MGL chap. 112, §12S, the state's parental consent law. Ultimately, as enacted, the Roe Act only repealed the parental consent requirement for teens ages sixteen and seventeen, leaving it in place for those under sixteen. Although disappointing to abortion rights advocates who had hoped for a complete repeal, they nonetheless celebrated the fact that "[w]ith this law, Massachusetts [became] the first state ever to legislatively remove a parental consent requirement as unnecessary." Carrie N. Baker, *Groundbreaking Massachusetts Abortion Law Repeals Parental Consent for Older Teens*, MS. MAG. (Dec. 29, 2020), https://msmagazine.com/2020/12/29/massachusetts–abortion–law–roe–act/ [https://perma.cc/9M74-7RWE].

[3] Ebbert, *supra* note 1.

[4] *Id.*

[5] Kimberly M. Mutcherson, *Whose Body Is It Anyway? An Updated Model of Healthcare Decision-Making Rights for Adolescents*, 14 CORNELL J. L. & PUB. POL'Y 251, 259 (2005).

[6] Ebbert, *supra* note 1.

In puzzling out this problem, I returned to an article I wrote in 2003, "Shifting Boundaries: Abortion, Criminal Culpability and the Indeterminate Status of Adolescents," in which I interrogated "two of the most contested issues with respect to determining where the boundary between childhood and adulthood should be drawn, namely, the abortion decision and the . . . treatment of juvenile offenders."[7] I was particularly troubled by what Beschle refers to as the "stereotypical conservative" position, which "call[s] for full application of adult penalties to adolescent criminals" while seeking to "deny the right of teenagers to make decisions in a wide variety of contexts, presumably on that grounds that one so young cannot be fully capable of making such significant choices."[8] Although seemingly illogical, according to Beschle, this use of different age markers could be understood as being in the service of two desired social outcomes, "a low incidence of youth crime and a strict adherence to traditional morality."[9]

I then felt compelled to confess my trepidation that I, too, was guilty of the same consequentialist thinking but with a "stereotypical liberal" twist, in that I supported an "expanded recognition of adolescents' rights in a wide range of civil contexts [including abortion], while defending a juvenile justice system that is based on the premise that an adolescent's choice to commit a crime is rendered less culpable because of the adolescent's age."[10] Drawing upon the work of developmental theorists, I concluded that a principled argument can in fact be made "for shifting the boundary between childhood and adulthood downward in the abortion context, while arguing against the trend towards treating adolescents as adults in the criminal context" based upon the distinction between decisions that are cognitive in nature and those that are highly influenced by psychosocial variables, such as vulnerability to peer pressure and propensity to risk-taking, which are highly salient in the criminal domain.[11]

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[7] J. Shoshanna Ehrlich, *Shifting Boundaries: Abortion, Criminal Culpability and the Indeterminate Legal Status of Adolescents*, 18 WIS. WOMEN'S L.J. 77, 81 (2003).

[8] *Id.* at 82 (quoting Donald L. Beschle, *The Juvenile Justice Counterrevolution: Responding to Cognitive Dissonance in the Law's View of the Decision-Making Capacities of Minors*, 48 EMORY L.J. 65, 67 (1999)).

[9] *Id.* at 82 (quoting Beschle, *supra* note 8, at 84).

Although not discussed in "Shifting Boundaries," it is important to recognize that this tough-on-crime approach was infused with racialized fears of juvenile "'superpredators' prowling inner-city gangs, bent on murder and mayhem." Clare Huntington & Elizabeth S. Scott, *Conceptualizing Legal Childhood in the Twenty-First Century*, 118 MICH. L. REV. 1371, 1388 (2020) (citation omitted). Identified primarily as youth of color, these teens were perceived of as "more mature, threatening, and deserving of harsh punishment than their white counterparts," which fueled the drive to punish them "not as children, but as criminals, who should be punished as such." *Id.*

[10] Ehrlich, *supra* note 7, at 83 (quoting Beschle, *supra* note 8, at 67).

[11] *Id.* at 116.

Developmental theorists generally concur that by fourteen most teens can make mature cognitive decisions, with abortion-focused studies concluding that the decisional processes of minors "'were comparable to the adults on all . . . measures of competence.'" Ehrlich, *supra* note 7, at 93 (quoting Bruce Ambuel, *Adolescents, Unintended*

I wondered whether developmental theories might again offer a principled basis for resolving the seeming incongruity of using different age markers for marriage and abortion decision-making. As I began my foray into the literature, I quickly realized that a growing and impassioned movement to end child marriage in the United States had transmuted this intellectual undertaking into one with critical policy implications. Having long advocated for the right of teens to make their own abortion decisions, I grew increasingly concerned that absent a coherent rationale for this seemingly jumbled approach, the marriage reform movement might well strengthen the position of anti-abortion activists who argue that teens have no business making the abortion decision without their parents' involvement given their perceived vulnerability and decisional incapacity.[12]

It soon became clear that a developmental approach was not particularly useful given the propinquity of the abortion and marriage decisions, which both entail choice-making about the formation of enduring and intimate family bonds and the resulting assumption of adult-like responsibilities. However, I concluded that one could instead make sense of this seemingly "jumbled approach to doling out decision-making power to adolescents"[13] by focusing on the shared end *purpose* of these laws, to "put young women in the driver's seat of their lives"[14] without falling into the consequentialist trap of age-shifting solely to achieve desired outcomes. As is argued in this Article, this harmony of purpose provides a principled basis for using different ages to demarcate the boundary between the legal worlds of adulthood and childhood with respect to marriage and abortion—a logic further buttressed by the constitutional distinction between the irretrievable loss of a protected right and its deferral until a future date.[15]

To set the stage for the central inquiry of this Article, Part II provides an historical overview of the marital and abortion rights of teens. It also briefly traces their evolving legal emergence as constitutional persons with rights claims that are not fully subsumed within the holism of the traditional family unit. Part III introduces the "intended purpose" framework as a way to make sense of the law's seeming incoherence when it comes to "doling out decision-making power to adolescents" in the marriage and abortion contexts.[16] Using this framework, it engages in a comparative analysis of the potential harms of setting the minimum age for both marriage and abortion decision-making at eighteen, arguing that the harm of forcing pregnant teens

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Pregnancy, and Abortion: The Struggle for a Compassionate Social Policy, 4 CURRENT DIRECTIONS IN PSYCH. SCI. 1, 3 (1995)).

[12] I am hardly alone in this trepidation. As discussed below in Part II, this concern has led some potentially likely allies to oppose these measures.

[13] Mutcherson, *supra* note 5.

[14] Ebbert, *supra* note 1. As discussed below in Part III, this approach is derived from Maya Manian's article, *Minors, Parents, and Minor Parents*, 81 MO. L. REV. 127 (2016).

[15] See below discussion of Bellotti v. Baird, 443 U.S. 622 (1979) and Moe v. Dinkins, 533 F. Supp 623 (1981) *infra* Parts III.B and III.C.

[16] Mutcherson, *supra* note 5.

to become mothers by fiat exacts a far greater toll than does requiring them to postpone entry into marriage until the age of majority. It further argues that raising the minimum marital age to eighteen without exception frees young women from some of the gendered harms associated with early marriage. Building upon this analysis, Part IV firmly establishes that the use of different age markers where abortion and marriage are concerned is not a "jumbled approach"[17] after all, and therefore any seeming incoherence does not justify raising the age of consent for abortion. In the concluding Part V, the Article reasserts the value of the intended purpose framework to help young women manage their lives without falling into the protectionist trap often associated with the marriage reform movement.

Before proceeding, it is worth noting the nomenclature used in this article. First, as Johnson-Dahl writes, the "term 'child marriage' itself is dangerous" as it "is not conscientious of youth empowerment."[18] Although recognizing the problematic nature of using the word "child" in this context, as it suggests immaturity and potentially reinforces the view that teens should not be treated as rights-bearing persons, this article nonetheless uses the term "child marriage" because it encapsulates the position of those seeking to bring about its end in the United States (and abroad). Second, although this language does not embrace the realities of transgender boys and young men, this Article will speak of girls, young women, and mothers rather than use more inclusive language in light of the deeply gendered nature of the applicable history and current concerns regarding early marriage, teen pregnancy, abortion, and parenthood.

II. HISTORIC OVERVIEW: CHILD MARRIAGE, ABORTION, AND THE EVOLVING RIGHTS OF CHILDREN AS RIGHTS-BEARING PERSONS

We begin our inquiry into the contemporary debate over whether a teen may be "too young to get married—but not to end a pregnancy"[19] with an historical overview of the evolving nature of child marriage, and then explore the more recent emergence of teens as subjects of legal regulation and contestation when it comes to abortion. From here, we broaden our lens to consider the gradual status change of children from non-juridical persons to rights-bearing individuals entitled to constitutional recognition as such.

Grounded in this historical mapping, this Part underscores the roots of the issue at the center of this Article: when it comes to marriage and abortion decision-making, can the interests of teens be adequately represented by their parents or the state, or does the exclusion of teens signify an abjuration

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[17] *Id.*

[18] Marie Johnson-Dahl, *Sixteen Candles on My Wedding Cake: Implications of Banning Child Marriage in America*, 2020 U. ILL. L. REV. 1045, 1089 (2020).

[19] Ebbert, *supra* note 1.

of their personhood? Casting a long shadow over this question, the historic view of children as subordinate members of a holistic family unit is in direct tension with the more contemporary conception of them as rights-bearing persons with an independent stake in their own futures. As I ultimately argue, the stakes are particularly high for the rights of pregnant teens seeking to avoid the imposition of motherhood by fiat.

A. Child Marriage

1. *Common Law Roots*

The practice of child marriage is firmly rooted in the United States' colonial past, when in conformity with English common law the minimum age of marriage was fixed at twelve for girls and fourteen for boys.[20] According to Syrett, while views about decisional capacity may have played some role in setting these ages, far more important was the belief that they "conformed to the time at which girls and boys have the 'Natural and Corporal Ability to perform the duty of Marriage.' "[21] Although otherwise debarred from the rights associated with adulthood until turning twenty-one, the common law age of majority, children just crossing the threshold of sexual maturity were deemed capable of binding themselves in marriage.[22] This seeming incongruity is readily explained by the moral channeling function of marriage, which served to direct awakening desires into "a proper site for sex and the reproduction of children."[23]

Somewhat surprisingly, given the hierarchical nature of the colonial family, whose interests were thought to be "inseparable and best represented by its patriarch,"[24] paternal consent was not initially a prerequisite for the marriage of a minor.[25] Gradually, however, colonial legislatures began encoding this requirement into law and teens lost the right to self-consent to marriage.[26] These measures were not intended for the protection of children; rather, they were prompted by "respect for authority and the orderly succes-

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[20] NICHOLAS L. SYRETT, AMERICAN CHILD BRIDE: A HISTORY OF MINORS AND MARRIAGE IN THE UNITED STATES 19 (2016). Syrett adds that children could "actually marry at the age of seven, but between the ages of seven and twelve/fourteen, the marriage would be considered imperfect or inchoate . . . A girl or boy could opt to leave an inchoate marriage, but only on reaching the age of twelve or fourteen and only if the couple had not consummated the marriage." *Id.* Much of this historical analysis draws from Syrett's excellent book, and I certainly owe him a tremendous debt of gratitude.

[21] *Id.* at 22 (quoting HENRY SWINBURNE, A TREATISE OF SPOUSALS, OR MATRIMONIAL CONTRACTS: WHEREIN ALL THE QUESTIONS RELATING TO THAT SUBJECT ARE INGENIOUSLY DEBATED AND RESOLVED 47 (1686)).

[22] *Id.* at 19.

[23] *Id.* at 22.

[24] MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 25 (1985).

[25] SYRETT, *supra* note 20, at 19.

[26] *Id.* at 23–27.

sion of the generations" as well as by the proprietary interests that fathers had in their children's services.[27] Considering that "the services or wages of a child over ten was one of the most valuable assets a man could have," the anticipated loss of this invaluable right through marriage was particularly consequential.[28]

2. *Enslaved Children*

These originating characteristics of early marriage were wholly inapposite when it came to enslaved children since, as duCille writes, the status of slaves "as personal property meant that their unions had no legal standing and were subject to disruption and dissolution at the will and whim of the masters who owned them."[29] The abject failure of slave owners to regard the enslaved as human beings rather than as chattel rendered moot both the sexual channeling function of early marriage and the parental consent requirement.

As for the normative purpose of marriage, it would be a farce to imagine there was any concern for ensuring that desire was channeled into a proper site for sex to protect the morality of enslaved girls, as they were the common targets of "sexual perversions and systemic violence and degradation" with "no right to refuse intercourse of any kind."[30] Slave masters' belief that they could "rightfully claim sexual access to the women they owned"[31] was underscored by the view of Black women in antebellum America as "a person governed almost entirely by her libido"—a "Jezebel character . . . [who] was the counterimage of the mid-nineteenth-century

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[27] *Id.* at 24–25.

[28] MARY ANN MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES 6 (1994).

[29] Ann duCille, *Blacks of the Marrying Kind: Marriage Rites and the Right to Marry in the Time of Slavery*, 29 J. OF FEMINIST CULTURAL STUD. 21, 25 (2018). *But see id.* at 24–25 (acknowledging ability of slaves to marry in early Puritan New England.)

Beyond this narrow time and place exception, it is important to recognize that "[s]lave 'marriages' happened with some frequency in spite of the fact that slaves had no legal standing and lacked the ability to enter into formal agreements," and thus "did not enjoy the rights and privileges that we commonly associate with marriage." Danne L. Johnson, *What's Love Got to Do with It? Interest-Convergence as a Lens to View State Ratification of Post-Emancipation Slave Marriages*, 36 NEW ENG. L. REV. 143, 160 (2014).

Although divested of formal legal significance, slave marriages were imbued with profound extra-legal meaning. As Tess Chakkalakal writes, "a slave-marriage was about the love between a man and a woman, and more: It also functioned as a form of nonviolent or passive resistance against the all-powerful, legalized system of slavery." TESS CHAKKALAKAL, NOVEL BONDAGE, SLAVERY, MARRIAGE, AND FREEDOM IN NINETEENTH–CENTURY AMERICA 4 (2011). For further detail, see also Darlene C. Goring, *The History of Slave Marriage in the United States*, 39 J. MARSHALL L. REV. 299 (2006); Tyler D. Parry, *Married in Slavery Time: Jumping the Broom in Atlantic Perspective*, 81 J. S. HIST. 273 (2015).

[30] duCille, *supra* note 29, at 31–32.

[31] SHARON BLOCK, RAPE AND SEXUAL POWER IN EARLY AMERICA 84 (2006).

ideal of the Victorian lady."[32] This belief was also reinforced by the reality that slave owners did not "[have] to fear the legal repercussions of a rape charge, which was practically unheard of though legally possible."[33]

A parental consent requirement would have, at best, been a chimerical requirement in a world where "the slave had no status as a person before the law" and slave unions had no standing before the law.[34] Such status was fundamentally incompatible with the absolute power that masters wielded over their slaves, including the ability to dissolve any union through the forced sale of either spouse.

3. *Echoes of the Past in Contemporary Debates Over Raising the Minimal Marital Age to Eighteen*

It is worth looking more closely at the colonial roots of child marriage in relationship to contemporary debates over whether the minimum age of marriage should be raised to eighteen without exception. As we will see, gendered age patterns for entry into marriage, the moral channeling function of marriage, and parental consent requirements all retain some salience today.

a. Gender Differences

Vestiges of the once legally-inscribed gendered differentials in the minimum age for marriage remain etched in today's marital practices.[35] At its core, as Syrett writes, the lower minimum age for girls reflected the normative belief that they "*should* marry earlier than boys,"[36] since marriage was thought to be the sole "end and aim of womanhood."[37] This age disjunction reflected the reality that the "transition between *girlhood* and *wifehood* was not as significant legally as was the transition between *boyhood* and *manhood*."[38] Syrett's use of language here is deliberate: marriage emancipated boys from the strictures of childhood and transformed them overnight into

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[32] DEBORAH WHITE, AR'N'T I A WOMAN?: FEMALE SLAVES IN THE PLANTATION SOUTH 29 (1985).

[33] BLOCK, *supra* note 31, at 65. Notably, "[n]o rape conviction against a white man, let alone a victim's owner, for raping an enslaved woman has been found between at least 1700 and the Civil War." *Id.*

[34] CHAKKALAKAL, *supra* note 29, at 3.

[35] According to a comprehensive 2020 analysis of state laws on minimum marriage age and exceptions, "Mississippi is the only state with a statute that expressly sets different exceptions to the minimum marriage age based on gender." TAHIRIH JUST. CTR., ANALYSIS OF STATE LAWS ON MINIMUM MARRIAGE AGE AND EXCEPTIONS PERMITTING MARRIAGE UNDER AGE 18 app. B-1 at 5 (2020), https://1ttls613brjl37btxk4eg60v–wpengine.netdna–ssl.com/wp–content/uploads/2020/08/50–state–appendices–with–detailed–scorecards–on–features–of–states%E2%80%99–minimum–marriage–age–laws.pdf [https://perma.cc/4A27-DDTH].

[36] SYRETT, *supra* note 20, at 16.

[37] *Id.* at 110.

[38] *Id.* at 17 (emphasis added).

men who were endowed with the legal rights that they otherwise would not possess until the age of majority.[39] Although, at least in theory, marriage also emancipated girls from the strictures of childhood, given coverture's dictate that a wife's "very being or legal existence" was suspended and merged into the person of her husband, the rights that would otherwise have vested in her as an emancipated child were instead conveyed to her husband.[40] In short, upon marriage, a girl effectively "moved seamlessly from dependent in one household to dependent in another," while boys left behind the world of childhood dependencies in favor of the presumptively autonomous world of adulthood.[41]

Although legally inscribed gendered age differences have all but been eliminated, the reality on the ground tells a different story, as the overwhelming majority of underage spouses are teen girls.[42] A critical question is thus whether the move to a gender-neutral legal regime has obviated the concern that plagued nineteenth-century women's rights activists (developed below), namely what they identified as an inherent imbalance of power between a youthful wife who is "ignorant of the world [and] ignorant of herself" and her older husband who is "mature in life—experienced not only in the world, but in the nature of his own soul, its needs, its capacities, infirmities and powers."[43]

Many contemporary proponents of raising the age of marriage to eighteen without exception remain deeply concerned about these power imbalances given a body of research indicating that marrying as a minor has negative impacts on young women across multiple domains, including educational outcomes, earning capacity, risk of domestic violence, and both physical and mental well-being. Compounding this dynamic, while marriage serves to emancipate a girl from her parents, it may not fully vest her with the legal rights that come with reaching the age of majority, such as the

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[39] In limited circumstances, rights may not vest until after the age of majority. A prime example is the right to "purchase, possess, and consume alcohol" which does not vest until age twenty-one. *See* Vivian E. Hamilton, *Adulthood in Law and Culture*, 91 TUL. L. REV. 55, 78 (2016). Additionally, as discussed below, there may be limitations on a married minor's right to engage in certain transactions, such as opening a bank account or signing a lease. Eligibility to run for political office may likewise be a deferred right. For example, under the federal constitution, U.S. senators must have attained the age of thirty under Article I, Section 3, cl. 3 and both the president and vice president must have attained the age of thirty-five pursuant to Article II, Section 1, cl. 5 and 6, respectively.

[40] 1 WILLIAM BLACKSTONE, COMMENTARIES *430.

[41] SYRETT, *supra* note 20, at 17.

[42] *See* TAHIRIH JUST. CTR., FALLING THROUGH THE CRACKS: HOW LAWS ALLOW CHILD MARRIAGE TO HAPPEN IN AMERICA TODAY 2–4 (2017), https://1ttls613brjl37btxk4eg60v–wpengine.netdna–ssl.com/wp–content/uploads/2017/08/TahirihChildMarriageReport–1.pdf. [https://perma.cc/4UML-G7BX].

[43] ELIZABETH OAKES SMITH, WOMAN AND HER NEEDS 56 (1851). This book first appeared as a series of ten essays in the New York Tribune between 1850 and 1851. *See Elizabeth Oakes Smith*, Hist. Am. Women, https://www.womenhistoryblog.com/2011/04/elizabeth–oakes–smith.html (last visited Aug. 31, 2021) [https://perma.cc/8LCW-L35R].

ability to sign a lease or open a bank account.[44] Spouses may consequently enter the marital relationship with unequal legal standing, as the underage spouse may find herself in a position of dependency upon her husband to take care of matters that are out of her reach until the age of majority.

b. Moral Channeling Function

The moral channeling function of marriage makes itself felt today in the close association between the practice of child marriage and "conservative social values influenced by religiosity."[45] As in the past, marriage is considered the sole morally-sanctioned site for sexual expression, particularly for adolescent girls given the high premium placed on female virginity.[46]

c. The Parental Consent Requirement

The parental consent requirement was originally encoded into law to promote the authority and interests of parents rather than to protect the well-being of teens.[47] However, as Syrett writes, over the course of the late nineteenth and early twentieth centuries, some teens willfully manipulated the law to their own ends by entering into common law marriages or lying about their ages to obtain a marriage certificate.[48] Teens who married against the law were not only seeking to "legitimize their sexual activity but more radically to contest their very status as children."[49] While these contestations were not framed in the contemporary parlance of "children's rights," in an era in which reformers were increasingly using chronological age to define children as a separate category of being,[50] Syrett argues that teens' contestations be read "as the symptoms of discontent over these new norms."[51]

Although the nature of the challenge has shape-shifted, the contemporary debate over whether the marital age should be raised to eighteen without exception can also be read as a contestation over whose interests and rights should prevail when it comes to entry into marriage. Should teens have the right to make this decision for themselves free from the authority of their parents? If not, what place—if any—should consideration of a child's best interest play in the parental decision-making process, particularly if parents and their daughter disagree? Does she have any rights if her parents refuse to consent to a marriage that she wishes to enter, or if instead they seek to force her into an unwanted marriage? And what does it say about the

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[44] TAHIRIH JUST. CTR, *supra* note 42, at 5–6.
[45] SYRETT, *supra* note 20, at 263.
[46] anovora gima, *The Virgin Daughters*, YOUTUBE (Apr. 23, 2014), https://www.youtube.com/watch?v=0UyjKdjJY5k [https://perma.cc/T68Y-HDUZ]. *See generally* HANNE BLANK, VIRGIN: THE UNTOUCHED HISTORY (2007).
[47] SYRETT, *supra* note 20, at 24–25.
[48] *Id.* at 162–63.
[49] *Id*. at 162.
[50] *See id.* at 145.
[51] SYRETT, *supra* note 20, at 146.

precarious balance between parental authority, the duty of filial obedience, and the countervailing autonomy rights of teens if instead lawmakers were to step in and prohibit child marriage altogether?

4. *The Case for Reform*

Over the course of the second half of the nineteenth century, an array of social reformers began to sound the alarm about early marriage.[52] However, it was not the central focus of any single reform campaign; rather, the issue was folded into broader social change agendas, which served to invest child marriage with a highly particularized and socially contingent meaning.[53] We begin with an overview of what advocates associated with the health reform and the marriage and divorce reform movements had to say about the evils of early marriage, noting in particular the conservative impulses that informed their activism. We then focus on the uniquely girl-centered critique of early marriage advanced by women's rights activists. While concerned about the gendered inequalities of these marriages given the usual age disparity between the spouses—as likely compounded by vast differences in education, wealth, and worldly experiences—these activists' commitment to the cause also reflected a classed and raced conception of girlhood.

As active participants in the emergent "public dialogue about the role of sex and marriage in the lives of Americans," reform-minded health lecturers parlayed their scientific knowledge into a physiological critique of early marriage.[54] Rather than yoking marital readiness to the onset of puberty, these activists instead employed medical science to argue that early marriages "pos[ed] a biological threat to society."[55] Sounding the alarm, Dio Lewis, a homeopathist and traveling lecturer, warned that the "results of too early marriage are, in brief, stunted growth and impaired strength on the part of the male; delicate if not utterly bad health in the female; the premature old age or death of one or both, and a puny, sickly offspring."[56]

One can hear strong hints of the eugenic motifs that would emerge more forcefully in the early twentieth century in Lewis's prediction of unhealthy births due to the flawed characteristics of the parents.[57] Invoking similar concerns but with a racialized preoccupation, in his 1866 treatise *The Physiology of Marriage,* the renowned health educator Dr. William Alcott warned that early marriage would lead to the "premature physical decay of

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[52] *See id.* at 145–46.
[53] *See id.*
[54] *Id.* at 107.
[55] GROSSBERG, *supra* note 24, at 141–42.
[56] DIO LEWIS, CHASTITY; OR, OUR SECRET SINS 56 (1874).
[57] Regarding the American eugenics movement, *see generally* ADAM COHEN, IMBECILES: THE SUPREME COURT, AMERICAN EUGENICS, AND THE STERILIZATION OF CARRIE BUCK (2016); PAUL A. LOMBARDO, THREE GENERATIONS, NO IMBECILES: EUGENICS, THE SUPREME COURT, AND *Buck v. Bell* (2008); ALEXANDRA MINNA STERN, EUGENIC NATION: FAULTS AND FRONTIERS OF BETTER BREEDING IN MODERN AMERICA (2016).

the corporeal fabric" and thereby exacerbate the "continual deterioration of the race."[58]

Conservative marriage and divorce reformers of the era also spoke out against youthful marriages as part of their broader campaign to protect "the Family from attacks which threaten its stability."[59] Notably, they feared that the "fusion of the immigrant classes with *our people*"—with "our" clearly referencing the "native-born" population—posed a serious danger to the stability of the normative moral family.[60] They also sounded a warning bell over what they regarded as the pernicious influence of the burgeoning women's rights movement on family life, cautioning that if women were encouraged to cultivate a distinct and independent identity, they would stray from "the deepest meaning of [their] nature" to exclusively occupy the domestic realm.[61]

Perhaps most concerning to these reformers, however, were rising divorce rates, which they regarded as a major source of moral decline.[62] Here is where child marriage enters the picture, as children were considered particularly suspect on account of their "'unfitness . . . for the discharge of their marital obligations.'"[63] Marriage and divorce reformers thus advocated raising the minimum marriage ages "as an instrumental way of preventing divorces."[64] As Adams stresses, in characterizing children as "unfit" for marriage, these reformers sought to eradicate divorce in order to reinvigorate the marital family as the foundational moral unit of society.[65]

By contrast, women's rights reformers began pressing for an increase in the minimum marital ages during the antebellum era as part of their broader reform agenda.[66] As set out in the movement's founding document, the 1848 Declaration of Sentiments and Resolutions, their overarching goal was to dismantle the "absolute tyranny" that men had established over women.[67]

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[58] WILLIAM A. ALCOTT, THE PHYSIOLOGY OF MARRIAGE 23–24 (1866). In keeping with the conventions of the time, it can be assumed that when Alcott spoke of "the race," he was referring to Anglo-Saxons. *See* Adam Serwer, *'Anglo-Saxon' is What You Say When 'Whites Only' Is Too Inclusive*, THE ATLANTIC (Apr. 20, 2021), https://www.theatlantic.com/ideas/archive/2021/04/anglo-saxon-what-you-say-when-whites-only-too-inclusive/618646/ [HTTPS://PERMA.CC/59L5-LSH8].

[59] Michele Adams, *Women's Rights and Wedding Bells: 19th-Century Pro-Family Rhetoric and (Re)Enforcement of the Gender Status Quo*, 28 J. FAM. ISSUES 501, 513 (2007) (citing John L. Sewall, *Annual Report of the National League for the Protection of the Family* (1915)).

[60] *Id.* (citing Samuel W. Dike, The Effect of Lax Divorce Legislation Upon the Stability of American Institutions, Speech to the American Social Science Association (Sept. 8, 1881)) (emphasis added).

[61] *Id.* at 517 (citing SAMUEL W. DIKE, SOME ASPECTS OF THE DIVORCE QUESTION 169-190 (1884)).

[62] *See generally* GLENDA RILEY, DIVORCE: AN AMERICAN TRADITION (1991).

[63] SYRETT, *supra* note 20, at 128.

[64] *Id.*

[65] Adams, *supra* note 59, at 512.

[66] *See* ELIZABETH CADY STANTON, DECLARATION OF SENTIMENTS AND RESOLUTIONS 1 (1848).

[67] *Id.*

Rewriting the rules of marriage, with its construction of women as "civilly dead" as a matter of law, was an important plank in their overall platform.[68] Capturing marriage's subordinating force, Susan B. Anthony declared that it

> has ever been a one-sided matter, resting most unequally between the sexes. By it man gains all; woman loses all; tyrant law and lust reign supreme with him; meek submission and ready obedience alone befit her . . . woman has never been thought of other than as a piece of property . . . She must accept marriage as man proffers it, or not at all.[69]

Moored in this view of marriage as an arrangement that vested husbands with "an injurious and unnatural superiority" over their wives, women's rights activists targeted early marriage as a source of unremitting harm to girls.[70]

Although she was not the only women's rights activist to speak out against child marriage, Elizabeth Oakes Smith was, as Syrett writes, "by far the most articulate opponent of early marriage in the women's rights movement and certainly the one to devote the most energy to arguing against the practice."[71] Like other feminists of her day, Oakes was highly critical of marriage as it then existed, characterizing it as a form of bondage merging a woman's identity into the person of her husband, thus rendering her "legally dead."[72] Nonetheless, she also believed that if the relationship were based upon a relative position of equality (although not a sameness of identity) between the sexes, a marriage could partake of its "natural and harmonious state."[73] However, this possibility required fostering female independence, individuality, and dignity so that women were not regarded as mere adjuncts to their husbands.[74]

As Oakes argued, this equal vision of marriage was currently impossible due to the strictures of coverture coupled with the belief "forced upon" girls "at every step of life" that marriage was the sole "end and aim of womanhood."[75] She contended that boys were "placed in all the best positions to develop [their] whole being, morally, intellectually, and physically," while girls were "moulded into the feminine shape by interminable teachings, ceaseless checks, and the denial of all trains of thinking which

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[68] *Id.*

[69] ELIZABETH CADY STANTON, EIGHTY YEARS AND MORE: REMINISCENCES 1815-1897, at Chapter XIV (1898) (ebook), https://www.gutenberg.org/files/11982/11982-h/11982-h.htm [https://perma.cc/AV7S-BLBV].

[70] Lucy Stone & Henry Blackwell, *Marriage Protest*, TEACHING AM. HIST., https://teachingamericanhistory.org/library/document/marriage–protest/ [https://perma.cc/C2JD-ENW7].

[71] SYRETT, *supra* note 20, at 110.

[72] OAKES SMITH, *supra* note 43, at 72.

[73] *Id.*

[74] *See id.*

[75] *Id.* at 42.

might aid her to regard herself as a being of innate dignity, of earnest aspiration, choiceful affection, or elective passion."[76] In effect, the anticipation of becoming what Oakes referred to derisively as "baby wives" and "girl mothers" who were but "necessary appendage[s]" to their husbands served to defraud girls of a girlhood in which they could gradually "grow and blossom."[77]

Oakes's concern over the lost opportunity to enjoy girlhood was, as Syrett astutely points out, deeply infused with class-based assumptions.[78] While making clear that "early marriage could be detrimental for working-class girls," he emphasizes that "it was the daughters of the bourgeois or professional class who might have the most to lose by marrying young, because they had greater access to the protection afforded by childhood and youth as stages of life."[79] While certainly a worthwhile objective, preserving girlhood as "the stage of life where [girls] might be educated, have fun, and preserve their innocence" was a far more salient consideration for young women who enjoyed the privileges and protections of class and race.[80]

In addition to robbing girls of their girlhood, Oakes insisted that marriage's requisite gendered molding forged an inequality between spouses beyond that resulting from coverture. Noting that the immaturity of youth disqualified children from entering into binding commercial contracts, she strenuously objected to the fact that a girl, who is "so immature in judgment, that her opinions are treated with about as much deference as a doll's would be," could bind herself in marriage to a man who is "mature in life."[81] She consequently attributed "[h]alf the miseries that arise in the marriage relation" to the inherent inequality resulting from these age disparities.[82] She thus "*insist[ed] that the marriage contract be put upon the same base with other contracts*. In other words, there should be equality—the parties should be of age—and no girl should be considered competent to enter into such contract, unless she has reached her majority in law."[83]

Building upon the goal of rescuing girlhood from the ill effects of early marriage, one other reform effort to raise the minimum marital age merits attention here as its animating concerns retain some resonance today. Progressive Era reformers of the late nineteenth and early twentieth centuries sought to demarcate the world of children from that of adults based upon a changing middle-class conception of childhood as a distinct phase of life, during which children were to be protected from the responsibilities and

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[76] *Id.* at 41.
[77] *Id.* at 41–42.
[78] SYRETT, *supra* note 20, at 102.
[79] *Id.*
[80] *Id.*
[81] OAKES SMITH, *supra* note 43, at 56.
[82] *Id.* at 57.
[83] *Id.*

cares of adulthood.[84] In accordance with this view, states began to enact measures erecting protective borders around the "tender" years, including mandatory school attendance requirements, child labor laws, and the juvenile court system.[85]

Against this backdrop, reformers paid increasing attention to raising the minimum age of marriage as a further means of protecting children from the premature assumption of adult responsibilities.[86] These efforts were closely linked to the growing effort to police female sexuality: while race and class privilege generally insulated middle-class girls from public scrutiny, there was mounting concern that working-class girls had lowered moral standards and were accordingly at risk of becoming sexual delinquents whose behavior was "analogous to that of the ultimate female outsider, the prostitute."[87] Progressive Era reformers thus increasingly came to regard early marriage as "a back door into illicit sexuality" in contradistinction to the earlier view that it served a normative channeling function for awakening desire.[88] And while reformers regarded these marriages as primarily benefiting older men, particularly since marriage enabled them to avoid prosecution for statutory rape, they may have also hoped that raising the minimum marital age would reinscribe expected standards of youthful female behavior in addition to reining in predatory men.[89]

The cumulative impact of the reformers' cautions about the harmful impact of early marriage, particularly for girls, ultimately bore considerable fruit. Starting in the second half of the nineteenth century, states began amending their laws to raise "both the established minimum marriageable ages and the ages below which children required parental consent," trends that accelerated in the final decade of that century and the first decades of the twentieth.[90] However, as discussed below, these reforms fell far short of ending child marriage in the United States: not only did some states fail to establish a minimum age floor for marriage, others also built in a number of

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[84] *See generally* Steven Mintz, Huck's Raft: A History of American Childhood (2004); Viviana A. Zelizer, Pricing the Priceless Child: The Changing Social Value of Children 70–71 (1985) (discussing reformers' reframing of children's rights, place in the family, and labor force).

[85] *See* J. Shoshanna Ehrlich, Regulating Desire: From the Virtuous Maiden to the Purity Princess 62 (2014); Martha Minow, *Rights for the Next Generation: A Feminist Approach to Children's Rights*, 9 Harv. Women's L.J. 1, 8–10 (1986).

[86] Grossberg, *supra* note 24, at 142.

[87] Ruth M. Alexander, The "Girl Problem": Female Sexual Delinquency in New York, 1900–1930 34 (1998). *See also* Ehrlich, *supra* note 85, at 61–85 (discussing Progressive Era reformers' response to concerns about young women's sexuality); Mary E. Odem, Delinquent Daughters: Protecting and Policing Adolescent Female Sexuality in the United States, 1885–1920 (1995); Cheryl D. Hicks, Talk with You Like a Woman: African American Women, Justice, and Reform in New York, 1890–1935 (2010).

[88] *See* Syrett, *supra* note 20, at 178.

[89] *Id.* at 175–78.

[90] *Id.* at 130–35, 181.

statutory exceptions, such as allowing minors to marry with parental and/or judicial consent.[91]

B. The Abortion Rights of Teens

1. *The Invisibility of Teens as Legal Subjects in the Pre-*Roe *Era*

When it comes to abortion and teens, the formal legal and social history spans a far shorter period as compared to marriage. Accordingly, this discussion is considerably briefer than that of the historical treatment of child marriage. Of course, this is not to say that teens did not have abortions in the era prior to the Supreme Court's landmark *Roe v. Wade* decision in 1973;[92] however, they did not come into focus as distinct subjects of legal regulation until after *Roe.* Before taking a look at their emergence as a distinct legal subject vis-à-vis the right to abortion, it is worth stepping back for a moment to consider an earlier categorization of women who aborted—a conceptual framework put forth by anti-abortion physicians, which may have implicitly encompassed teens.

The legal history of abortion does not, of course, begin with *Roe* but reaches back to the colonial era's adoption of the British common law, pursuant to which the termination of a pregnancy was not considered a crime prior to quickening (the time when a pregnant woman first feels fetal movement).[93] This framework would change over the second half of the nineteenth century when "regular" doctors (meaning those who had graduated from an approved medical school) launched a successful national crusade to make abortion a strict statutory crime.[94] While not preoccupied with age distinctions per se, these crusaders were aghast by the fact that married women who were most like them—namely white, Protestant, middle-class, and "native" born—were increasingly turning to abortion to control the size of their families.[95] In addition to chastising the aborting matron for breaching her "divinely ordained duty . . . to bring forth living children,"[96] the anti-abortion physicians also "deployed racialized arguments to persuade their colleagues and the public at large that abortion by 'their' women" posed a direct threat to Anglo-Saxon political and cultural hegemony.[97] Dr. Horatio

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[91] Tahirih Just. Ctr., *supra* note 42, at 2.

[92] *See generally* Roe v. Wade, 410 U.S. 113 (1973).

[93] James C. Mohr, Abortion in America: The Origins and Evolution of National Policy, 1800–1900 3 (1978).

[94] *See* J. Shoshanna Ehrlich & Alesha E. Doan, Abortion Regret: The New Attack on Reproductive Freedom 6–8, 13–15 (2019).

[95] *See id.* at 25–27.

[96] *Id.* at 15.

[97] *Id.* at 24–25. Although today we do not typically divide whiteness into distinct racial subcategories, Beisel and Kay explain that as European immigration rates rose in the later part of the nineteenth century, "native" Anglo-Saxons came to regard "the Irish and Germans, and later the Jews, Italians, and Slavs . . . as members of inferior races who were unfit for self-government and a threat to the republic." Nicola Beisel & Tamara

Storer, the leading anti-abortion physician, declared that "the future destiny of the nation" depended upon the "loins" of "our own women."[98]

When it came to unmarried women, a cohort that presumably included a greater proportion of minors, these crusaders certainly did not condone their abortion decisions but expressed a modicum of sympathy for those who sought to "destroy the fruits of illicit pleasure, under the vain hope of preserving their reputation by this unnatural and guilty sacrifice."[99] In contrast to the holy duty of the married "native" matron to reproduce to prevent the nation from being swallowed up by "people of foreign origin, with far less intelligence,"[100] the anti-abortion physicians did not link the national well-being to the reproduction of those who indulged in illicit pleasure. It was not until the post-*Roe* period that teens *qua* teens, as distinct from an undifferentiated class of unmarried women, moved into the spotlight as a distinctive target of legal regulation.

2. *Teens as a Target of Restrictive Laws in the Post-Roe Era*

Although anti-abortion activists began to mobilize in the pre-*Roe* era in response to the growing push for the liberalization of state abortion laws during the prior decade,[101] the decision served to galvanize the "pro-life" movement.[102] Hoping to limit *Roe*'s impact, activists pressed states to enact restrictive laws.[103] Given the long-standing legal distinction between adults and children, teens were an easy early target for regulation, as were poor women: abortion foes argued that "parents have both the right to know of [their minor daughter's] proposed abortion and the responsibility to assist their child in making such a decision."[104] Somewhat ironically, the generally liberal state of Massachusetts was one of the first in the nation to enact a parental consent law.[105] Other states soon followed suit by requiring teens seeking an abortion to first obtain the consent of or give notice to their parents.[106]

Kay, *Abortion, Race, and Gender in Nineteenth-Century America*, 69 AM. SOC. REV. 498, 501 (2004). For further discussion, *see* EHRLICH & DOAN, *supra* note 94, at 24–31.

[98] HORATIO ROBINSON STORER, WHY NOT? A BOOK FOR EVERY WOMAN 85 (1866).

[99] EHRLICH & DOAN, *supra* note 94, at 5.

[100] NATHAN ALLEN, POPULATION: ITS LAW OF INCREASE 5–6 (1870).

[101] KRISTIN LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD 127 (1984).

[102] *Id.* at 144.

[103] *See* EHRLICH & DOAN, *supra* note 94, at 42–43.

[104] Brief for Catholic League for Religious and Civil Rights et al. as Amici Curiae Supporting Appellants, Bellotti v. Baird, 443 U.S. 622 (1979) (No. 78–329), 1979 WL 199887, at *31.

[105] Martha Bebinger, *Massachusetts May Drop Requirement That Minors Get Permission For Abortion*, NPR (Jan. 2, 2020, 7:20 AM), https://www.npr.org/sections/health–shots/2020/01/02/789966125/massachusetts–may–drop–requirement–that–minors–get–permission–for–abortion [https://perma.cc/B8K8-YGKD].

[106] *Parental Involvement in Minors' Abortions*, GUTTMACHER INST. (Mar. 1, 2022), https://www.guttmacher.org/state-policy/explore/parental-involvement-minors-abortions [HTTPS://PERMA.CC/C6JQ-AHL4].

Pro-choice advocates promptly challenged these laws in federal court on the ground that they divested teens of their constitutional right to decide for themselves whether to carry a pregnancy to term based on *Roe*'s promise of decisional privacy.[107] Undergirding these challenges was the concern that, once informed of their daughter's intended abortion, parents might seek to veto her decision "for insubstantial personal reasons unrelated to her welfare"[108] or "insist upon the continuation of [her] pregnancy simply as a punishment,"[109] thus leaving her to contend with the "disastrous" consequences of an unwanted pregnancy.[110]

3. *Challenging the Constitutionality of Parental Consent Mandates*

Within three years of *Roe*, the Supreme Court would be called upon to determine whether parental involvement mandates were constitutionally valid.[111] In entering these tumultuous waters, the Court had to navigate the surging anti-*Roe* backlash within the charged context of competing "visions of childhood, and of the parent-child relationship." [112] To ground this discussion, as well as the below discussion of *Moe v. Dinkins*,[113] the leading marital rights case, we now consider the evolving and still-uncertain constitutional status of minors within the traditional holism of the family unit, in which their autonomy has long been "effectively subsumed by parental authority."[114] We return to a more detailed discussion of the minors' abortion rights cases below.

C. Parents, Children, and the State: The Evolving Nature of the Constitutional Triangle[115]

Bridging our historical overview and the following discussion of the contemporary contestations over the decisional rights of teens, we now trace their gradual emergence over the course of the nineteenth century as distinct individuals with a claim to both protection and juridical personhood. As

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[107] *See* J. Shoshanna Ehrlich, *Journey Through the Courts: Minors, Abortion and the Quest for Reproductive Fairness*, 10 YALE J.L. & FEMINISM 1, 1 (1988).

[108] Brief for Planned Parenthood Federation of America, Inc. et al. as Amici Curiae Supporting Appellant, Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52 (1976) (No. 74–1151), 1975 WL 171452, at *21.

[109] *Id.* at 18.

[110] *Id.* at 16.

[111] Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 52–54 (1976).

[112] *See* Janet L. Dolgin, *The Fate of Childhood: Legal Models of Children and the Parent-Child Relationship*, 61 ALB. L. REV. 345, 374 (1997).

[113] Moe v. Dinkins, 669 F.2d 67 (2d Cir. 1982).

[114] Dolgin, *supra* note 112, at 370.

[115] As Rosenbury writes, when it comes to disputes that arise within the context of the family, it can be useful to envision the contest as a triangle with "parents, children and the state" standing at each of its three points. Laura A. Rosenbury, *Between Home and School,* 155 U. PA. L. REV. 833, 833 (2007).

Huntington and Scott write, prior to the Progressive Era, "the state's involvement in family life was limited,"[116] and parents (especially fathers) had near-complete authority over their children.[117] In turn, children owed a reciprocal duty of obedience.[118] Enfolded into the patriarchal family as subordinate members of hierarchical domestic units, children thus lacked a distinct legal identity. Consequently, they had no cognizable ground for asserting a rights violation or a claim to protection from parental harm. As with marriage, these lines of authority and obedience were torn asunder in the context of slavery as adults and children alike were required to submit to the will of the slave owner, thus rendering meaningless the idea that parents had formal legal authority over their children.[119]

1. *The Protection of Children: Progressive Era Reforms*

The tight holism of the domestic unit began to break down in the Progressive Era when, as Huntington and Scott write, reformers "zealously invoked the state's authority as *parens patriae* to fashion a new government role as protector of children from parental abuse and neglect and from the consequences of their own wayward behavior."[120] Grounded in emerging middle-class understandings of children as innocent and vulnerable beings, these reformers were eager to carve out a distinct legal space for children by advocating for child labor laws, mandatory school attendance, and a separate juvenile court system to shelter children from the harsh realities of the adult world.[121] By enhancing the supervisory authority of the state over families, these reforms cut into the near-absolute legal authority that most parents (but not enslaved parents) had traditionally enjoyed over their children. Notably, poor and immigrant families, who were often disparaged for "failing to raise their children to be law-abiding American citizens," were far more likely than middle-class households to come under the supervisory control of the state.[122]

The Supreme Court, however, soon made clear that the state's regulatory authority over the family was firmly circumscribed by the custodial authority of parents. Famously, in the 1925 case *Pierce v. Society of Sisters*,

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[116] Huntington & Scott, *supra* note 9, at 1380.

[117] *See id.*

[118] *See* GROSSBERG, *supra* note 24, at 6–9; Huntington & Scott, *supra* note 9, at 1380–82; JOHN DEMOS, A LITTLE COMMONWEALTH: FAMILY LIFE IN PLYMOUTH COUNTY 100–01 (1970).

[119] duCille, *supra* note 29, at 27.

[120] Huntington & Scott, *supra* note 9, at 1381.

[121] *See generally* ZELIZER, *supra* note 84, at 56–72 (describing children's rights and child labor advocacy in the late nineteenth and early twentieth centuries); EHRLICH, *supra* note 85, at 62–67 (exploring the emergence of the juvenile court movement).

[122] Huntington & Scott, *supra* note 9, at 1382. For a discussion of "social benevolence" versus "social control" perspectives, *see generally* Clay Gish, *Rescuing the 'Waifs and Strays' of the City: The Western Emigration Program of the Children's Aid Society*, 33 J. SOC. HIST. 121, 121–38 (1999).

which involved a challenge to an Oregon law prohibiting the teaching of any subject except in English, the Court ruled that parents have a protected liberty interest under the Fourteenth Amendment "to direct the upbringing and education of children under their control."[123] Elaborating on the primacy of parents, it stressed that "the child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[124]

The accommodation of the rights of parents with the supervisory authority of the state resulted in a new regulatory framework within which, as Huntington and Scott explain,

> [A]uthority over children resided either in their parents, grounded in parents' constitutionally protected liberty interest, or in the state, acting as *parens patriae* to protect individual children . . . The interests of parents and the state were understood to conflict; disputes were zero-sum, centering on whether the state, in seeking to override parental authority on a particular issue, excessively burdened parental authority in light of the state's purpose. In making this determination, courts balanced the importance of the state's interest in protecting children from harm and promoting child wellbeing against the extent of the intrusion on parental rights.[125]

Clearly missing here was any conception of children as autonomous rights-bearing persons with a cognizable interest in their own wellbeing and futures. It would take well over a century before their elision from the existing constitutional framework would be challenged.

2. *The Emergence of Children as Juridical Persons*

Inspired by the civil and women's rights movements, a children's rights movement emerged in the second half of the twentieth century. Challenging the legal subordination and invisibility of children, rights activists argued that the law had long

> justified treating people of color and white women as property . . . because of their perceived inferiority. Our perception of children's inferiority likewise permits us to ignore children's legal claims . . . By denying children legal personhood and standing, we refuse to entertain and hear their claims. We thus continue to exclude children from redress for injustice just as historically we excluded white women and people of color.[126]

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[123] Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925).
[124] *Id.*
[125] Huntington & Scott, *supra* note 9, at 1383–84.
[126] Wendy Anton Fitzgerald, *Maturity, Difference, and Mystery: Children's Perspectives and the Law*, 36 ARIZ. L. REV. 11, 16 (1994).

In short, reformers took direct aim at the long-standing convention that the interests of children were "aligned with those of their parents or served by the state's paternalistic oversight."[127]

The tension over whether the interests of teens can be adequately represented by their parents or the state, or whether this elision constitutes a refusal to hear their claims, is at the heart of the debate over their decisional rights in the context of both marriage and abortion. To lay the foundation for the central inquiry of this Article, we briefly consider two foundational cases that address the legal positionality of teens as rights-bearing individuals.

In the landmark 1969 case *Tinker v. Des Moines*, which involved a First Amendment challenge to the suspension of high school students for wearing black armbands to school to protest the Vietnam War, the Supreme Court ruled that students are "'persons' under our Constitution . . . [who] are possessed of fundamental rights which the State must respect."[128] Rejecting the state's argument that the ban was necessary to maintain order in the school, the Court stressed that "in the absence of a specific showing of constitutionally valid reasons to regulate their speech," the students could not be "confined to the expression of those sentiments that are officially approved," but were instead free to express their individual views.[129]

Importantly, *Tinker* did not involve a conflict between the protesting students and their parents, which—as we will soon see—is a far more freighted terrain.[130] The possibility that children might have a different position than that of their parents in the context of a dispute between parents and the state was first raised by Justice Douglas in his renowned partial dissent in *Wisconsin v. Yoder*.[131] This case involved a successful challenge by Amish parents to their convictions on freedom-of-religion grounds for refusing to send their children to school after the eighth grade in violation of the state's mandatory school-attendance law requiring that children remain in school until the age of sixteen.[132] Since the challenged law subjected parents "to prosecution . . . for failing to cause their children to attend school," the majority insisted that "it [was] their right of free exercise, not that of their children" that was at stake in the case.[133] Accordingly, it proceeded to treat this case as a straightforward conflict between the rights of parents to "[direct] the rearing of their offspring" and the "power of a State . . . to impose reasonable regulations for the control and duration of basic education."[134]

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[127] Huntington & Scott, *supra* note 9, at 1392.
[128] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969).
[129] *Id.*
[130] In fact, the petitioning students and their parents agreed on the "wearing of black armbands [and other actions] during the holiday season," as a way to "publicize their objections to the hostilities in Vietnam." *Id.* at 504.
[131] Wisconsin v. Yoder, 406 U.S. 205, 241 (1972) (Douglas, J., dissenting).
[132] *Id.* at 207.
[133] *Id.* at 230–31.
[134] *Id.* at 213.

Justice Douglas sharply reproved the majority for this framing of the dispute. In what is generally regarded as the earliest articulation of the view that children should be considered as rights-bearing persons, rather than legally invisible subjects whose choices are "nonexistent, or to be rightly displaced by the choices of their parents,"[135] he critiqued his fellow Justices for assuming that

> the only interests at stake in the case are those of the Amish parents on the one hand, and those of the State on the other. The difficulty with this approach is that . . . the parents are seeking to vindicate not only their own free exercise claims, but also those of their high-school-age children . . . if the parents in this case are allowed a religious exemption, the inevitable effect is to impose the parents' notions of religious duty upon their children.[136]

In a move aimed at the very heart of the historic construction of the holistic and hierarchical family unit, Douglas asserted that

> where the child is mature enough to express potentially conflicting desires, it would be an invasion of the child's rights to permit such an imposition without canvassing his views . . . And, if an Amish child desires to attend high school, and is mature enough to have that desire respected, the State may well be able to override the parents' religiously motivated objections.[137]

With this history in mind, we turn to the contemporary debate over the extent to which the wishes of minors should prevail over the interests of their parents and/or the state when making decisions about both marriage and abortion.

III. PUTTING YOUNG WOMEN IN THE DRIVER'S SEAT OF THEIR LIVES

As we have just seen, during the second half of the twentieth century, the Supreme Court recast children as rights-bearing individuals under the Constitution. This shift destabilized the existing legal framework in which "authority over children resided either in their parents . . . or in the state, acting as *parens patriae* to protect individual children,"[138] with no cognition of children as entitled to any authority over the self. Nonetheless, this move should not be read as granting them adult status, particularly in the context of disputes *between* parents and children. As exemplified by the *Tinker* decision, the Supreme Court has expressed willingness to view children through

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[135] Dolgin, *supra* note 112, at 374.
[136] *Yoder*, 406 U.S. at 241–42 (Douglas, J., dissenting).
[137] *Id.* at 242.
[138] Huntington & Scott, *supra* note 9, at 1383.

"an ideology that valorizes equality and autonomous individuality" in some contexts.[139] However, as Dolgin writes, it has taken a cautious approach when "redefining children within families, reaffirming a traditional model of the family more often than disparaging or replacing that model."[140]

Here, in the yet-unresolved tension between conflicting impulses to "preserve childhood as a distinct status, representative of traditional, loving families" and to "liberate children . . . from social hierarchies that define traditional family relationships,"[141] we enter the contested domain of the decision-making rights of teens when it comes to abortion and marriage. As noted in the introduction in Part I, developmental theory[142] is inapposite here given the proximity of the marriage and abortion decisions. In pondering whether there might be another approach to reconciling the ostensible dissonance of a legal regime with different age requirements for marriage and abortion, I kept returning to the claim of the proponents of the two Massachusetts bills: that the *intended purpose* of each was to "put young women in the driver's seat of their lives."[143] I argue here that the intended purpose approach provides a cogent and well-supported rationale for encoding different age markers for marriage and abortion, discrediting the view that this approach is jumbled.

A. The "Intended Purpose" Approach to Legal Transparency and Coherence

In "Minors, Parents, and Minor Parents,"[144] Manian argues that although a superficial review of the law's grant of limited decisional autonomy to teens who choose abortion, compared with the vesting of adult rights in those who instead choose motherhood, "suggests conflict and incoherence, a closer look at the reality of minor parents' parental rights unmasks a perverse coherence to the law."[145] While the law may appear to favor teens who choose motherhood over abortion by empowering them to make this deci-

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[139] Dolgin, *supra* note 112, at 367.

[140] *Id.* at 373.

[141] *Id.* at 374.

[142] Mutcherson, *supra* note 5, at 268, 287. *See generally* Larry Cunningham, *A Question of Capacity: Towards a Comprehensive and Consistent Vision of Children and Their Status Under Law*, 10 U.C. DAVIS J. JUV. L. & POL'Y 275 (2006); Elizabeth S. Scott, *The Legal Construction of Adolescence*, 29 HOFSTRA L. REV. 547 (2000); Jennifer Rosato Perea, *Let's Get Real: Quilting a Principled Approach to Adolescent Empowerment in Adolescent Health Care Decision-Making*, 51 DEPAUL L. REV. 769 (2020).

[143] Ebbert, *supra* note 1.

[144] Manian, *supra* note 14, at 204.

[145] *Id.* at 131. As Manian writes, in focusing on the "law's apparently conflicting approaches to teenage reproductive decision-making," scholars have typically overlooked the "common ground" of "punishing female adolescent sexual transgression of purity norms." *Id.* at 130, 133. By way of a true confession, I am indeed one of those scholars. *See, e.g.*, J. SHOSHANNA EHRLICH, WHO DECIDES?: THE ABORTION RIGHTS OF TEENS (2006); J. Shoshanna Ehrlich, *Minors as Medical Decision Makers: The Pretextual Reasoning of the Court in the Abortion Cases*, 7 MICH. J. GENDER & L. 65, 90–99 (2000).

sion on their own, this autonomous decision-making is offset by the systemic disregard of their rights as parents based on the "normative view that minor parents should *not* possess parental rights,"[146] a belief that is especially trenchant if they are "from poor communities and, in particular, racial minorities."[147] Manian thus persuasively argues that the law "undermines adolescents' rights, whichever path of pregnancy resolution they choose"[148] as a "means to punish female teenage sexuality and enforce gender norms."[149] In short, coherence is lodged in this "common ground" of disciplining "female adolescent sexual transgression of purity norms,"[150] be it through teens' limited decisional autonomy or the reality that teen parents are "at an especially high risk of oversight by the child welfare system and, therefore, of having the state remove their children from their custody."[151]

Manian's "common ground" approach offers an invaluable analytical framework for assessing whether there is a principled basis for using different age markers for teens' decision-making rights when it comes to marriage and abortion. In this Article, we need not consider the perversity of this coherence; as argued here, the common intended purpose of "put[ting] young women in the driver's seat of their lives"[152] categorically validates the use of different age markers for marriage and abortion. Moreover, as we will see, it does so without relying on the protectionist language that is common in the contemporary marital reform movement.

B. The "Grave and Indelible" Harms of Subordinating the Decisional Rights of Teens Over Their Pregnancies to the Authority of Their Parents

We begin our discussion of the importance of empowering teens to make the abortion decision free of the involvement or knowledge of their parents by considering two landmark Supreme Court decisions, which held that states may not vest parents with veto power over their daughter's abortion decision due to the "grave and indelible" consequences of foisting motherhood upon a pregnant teen by fiat.[153] From here, we turn to the literature on the complexities of teen motherhood, including challenges to the dominant narrative that it inevitably dooms young women to a life of limited opportunities and poverty. We then consider the groundbreaking Turnaway Study, which—although not teen-specific—details the enduring consequences of being denied a wanted abortion. I argue that any move to raise

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[146] Manian, *supra* note 14, at 179 (emphasis added).
[147] *Id.* at 161
[148] *Id.* at 130.
[149] *Id*. at 161.
[150] *Id*. at 130, 133.
[151] *Id.* at 161.
[152] Ebbert, *supra* note 1.
[153] Bellotti v. Baird, 433 U.S. 622, 642 (1979).

the age of consent to eighteen for abortion for the claimed purpose of achieving legal congruence with the minimum marital age would engender a perverse result: dismantling the intended purpose of putting young women in the driver's seat of their lives.

1. *Parents' Views on Abortion*

In the 1976 case *Planned Parenthood of Central Missouri v. Danforth*[154] and again in the 1979 case *Bellotti v. Baird*,[155] the Supreme Court struck down parental consent laws from Missouri and Massachusetts, respectively, although it stopped short of holding that the abortion rights of teens are coterminous with those of adults. In assessing whether these laws impermissibly interfered with the abortion rights of teens, the Court faced vastly divergent understandings of the parent-child relationship.

On one side, abortion rights supporters argued for a modern understanding of teens as rights-bearing individuals with an identity separate and apart from their families. As Planned Parenthood of Central Missouri argued in the amicus brief it filed in *Danforth,*

> The fact that the minor became pregnant and sought an abortion contrary to the parents' wishes indicates that whatever control the parent once had over the minor has diminished, if not evaporated entirely . . . If a minor's pregnancy has fractured the family structure, imposition of a parental prohibition of abortion cannot reasonably be expected to restore the family's viability as a unit.[156]

This language highlights what Dolgin conceptualizes as the contemporary understanding of "family members as autonomous individuals, connected to each other as such rather than as inseparable parts of a holistic social unit."[157] The brief also stressed that while refusing consent would "prevent an abortion," parents would not have any "ongoing legal obligations, duties or rights in regard to the resulting child following its birth. They would be free to turn their backs and to ignore the child's welfare. The minor mother, however, would continue to have full legal obligations of support."[158] In short, although effectively allowed to compel the birth of their future grandchild, grandparents would not have any formal obligations to their daughter or to her baby based upon any notion of family unity.

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[154] See 428 U.S. at 83–84.

[155] *See* 443 U.S. at 651.

[156] Brief for Planned Parenthood Federation of America, Inc. et al. as Amici Curiae at 31 (quoting Poe v. Gerstein, 517 F.2d 787, 793–94 (1975)), Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52 (1976) (No. 74–1151), 1975 WL 171452, at *19.

[157] Dolgin, *supra* note 112, at 357 (quoting Eisenstadt v. Baird, 405 U.S. 438, 453 (1972)).

[158] Brief for Planned Parenthood Federation of America, Inc., at 53, Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52 (1976) (No. 74-1151), 1975 WL 171451, at *98.

In sharp contrast, abortion opponents urged the Court to embrace a traditional model of the family that "reenforces strong parental authority, and assumes children's choices to be nonexistent, or to be rightly displaced by the choices of their parents."[159] To this end, the United States Catholic Conference ("USCC") argued in the amicus brief it filed in *Bellotti* that parental involvement mandates are necessary to protect "the right of a parent to counsel an unmarried minor," a "familial right" in line with parents' "primary role" in the family.[160] In a similar vein, in their amicus brief, the Catholic League for Religious and Civil Rights urged the Court to repudiate the view that "there exists a right to 'privacy' which may comprehend access to abortion by minors . . . which can be invoked by the courts to negate the fundamental interests of parents."[161]

Clearly favoring the individual rights model, the *Danforth* Court began from the premise that "Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights."[162] Grounded in this view of minors as constitutional persons, the Court struck down the Missouri law that vested parents with absolute veto power over their daughter's abortion decision as a clear derogation of the abortion right as established in *Roe*.[163] In doing so, the Court unequivocally sounded the death knell to the position articulated by the USCC that "the organic view of the family . . . requires that parental authority be favored over the wishes of a minor."[164] However, it hinted that a less intrusive parental involvement law might withstand constitutional scrutiny.[165]

Three years later, in *Bellotti*, the Court faced a challenge to the Massachusetts parental consent statute, which—in contrast to the Missouri law—gave teens the right to seek judicial authorization for the abortion in the event parental consent were denied. However, the *Bellotti* Court made clear that this additional feature did not resolve the parental veto problem:

> Many parents hold strong views on the subject of abortion, and young pregnant minors, especially those living at home, are particularly vulnerable to their parents' efforts to obstruct both an abor-

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[159] Dolgin, *supra* note 112, at 374.

[160] Brief for United States Catholic Conference, et al. as Amicus Curiae Supporting Appellants, Bellotti v. Baird, 443 U.S. 622 (1979) (No. 78–329), 1978 WL 207329, at *2, *3, *5.

[161] Brief for Catholic League for Religious and Civil Rights et al. as Amici Curiae Supporting Appellants, Bellotti v. Baird, 443 U.S. 622 (1979) (No. 78–329), 1979 WL 199887, at *33.

[162] Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 74 (1975).

[163] *Id.* at 74.

[164] Brief for United States Catholic Conference, et al. as Amici Curiae Supporting Appellee, Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52 (1975) (No. 74–1151), 1975 WL 171454, at *30.

[165] Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 74 (1975).

> tion and their access to court. It would be unrealistic, therefore, to assume that the mere existence of a legal right to seek relief in superior court provides an effective avenue of relief for some of those who need it the most.[166]

In short, as the Court made clear, the Massachusetts statute vested parents with indirect veto power over their daughter's decision, which was most likely to be exercised by those who withheld their consent in the first instance by preventing their daughter from accessing a judicial hearing or subsequent abortion services.

2. *Burdens of Unwanted Motherhood on Minors*

The *Bellotti* Court paid close attention to the adverse consequences of allowing parents to veto their daughter's abortion decision, stressing that

> the potentially severe detriment facing a pregnant woman . . . is not mitigated by her minority. Indeed, considering her probable education, employment skills, financial resources, and emotional maturity, unwanted motherhood may be exceptionally burdensome for a minor.[167]

The Court also recognized that "the fact of having a child brings with it adult legal responsibility, for parenthood, like attainment of the age of majority, is one of the traditional criteria for the termination of the legal disabilities of minority."[168] Underscoring the difficulties of foisting unwanted motherhood on a teen, it concluded that there "are few situations in which denying a minor the right to make an important decision will have consequences so grave and indelible."[169]

In recognizing the life-altering consequences of a parental veto of their daughter's abortion decision, the Court distinguished between the impacts of a parental consent mandate for abortion and for marriage. It explained, "A minor not permitted to marry before the age of majority is required simply to postpone her decision. She and her intended spouse may preserve the opportunity for later marriage should they continue to desire it," whereas the timeframe for terminating a pregnancy "effectively expires in a matter of weeks."[170] We will return to this distinction between postponement and foreclosure of a right in the below discussion of the campaign to raise the minimum marital age to eighteen, as it plays a key role in resolving the seeming

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[166] Bellotti v. Baird, 433 U.S. 622, 647 (1979).
[167] *Id.* at 642.
[168] *Id.*
[169] *Id*. For a detailed discussion of the adverse consequences of being denied a wanted abortion, see the below discussion of the Turnaway Study.
[170] Bellotti v. Baird, 433 U.S. 622, 642 (1979).

incoherence of a legal regime that effectively deems minors to be too young for marriage but not for abortion.

3. *Crafting an Intermediate Legal Status for Abortion-Seeking Teens: The Judicial Bypass Compromise*

Although the *Bellotti* Court was attuned to the reality that vesting parents with veto power over their daughter's abortion effectively served to put *them* in the driver's seat of her life, it nonetheless stopped short of granting teens full decisional autonomy over the abortion decision. Insisting that the constitutional rights of minors "cannot be equated with those of adults"[171] due to their "peculiar vulnerability . . . their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing,"[172] it ultimately devised a judicial bypass compromise. This compromise allows a state to impose a parental involvement requirement;[173] however, if it chooses to do so, it must also provide an "alternative procedure," virtually always a court hearing, "whereby authorization for the abortion can be obtained" without the knowledge or involvement of a teen's parents.[174] At this hearing, she is entitled to show that she is mature enough to make the abortion decision "independently of her parents' wishes" or, if "not able to make this decision independently, the desired abortion would be in her best interests."[175]

With its judicial bypass alternative, the *Bellotti* Court effectively carved out an intermediate constitutional status for teens that stands poised between the legal worlds of children and adults. In rejecting the view that parental authority trumps the decisional rights of a minor child when it comes to abortion, the Court released minors from what Dolgin refers to as the "limitations and protections that follow from their inclusion within the holistic social hierarchy of the traditional family."[176] However, by denying minors full decisional autonomy over the abortion decision by requiring them to instead obtain judicial authorization for the procedure, the decision reinforces the conventional "limitations childhood imposes on personhood."[177]

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[171] *Id.* at 634.

[172] *Id.* For a discussion regarding why the Court's reliance on these factors is misplaced, see J. Shoshanna Ehrlich & Jamie Ann Sabino, *A Minor's Right to Abortion–The Unconstitutionality of Parental Participation in Bypass Hearings*, 25 NEW ENG. L. REV. 1185, 1189 n.20 (1991).

[173] *Bellotti*, 433 U.S. at 647–48.

[174] *Id.* at 643. The Court did not actually mandate that this alternative procedure be a court hearing, suggesting that authority could instead be delegated to "an administrative agency or officer." *Id.* at 644. However, most, if not all, states with a parental involvement law have taken the judicial bypass route. *See* GUTTMACHER INST., *supra* note 106.

[175] *Id.* at 643–44.

[176] Dolgin, *supra* note 112, at 376.

[177] *Id.* at 392.

I should note that I have been extremely critical of the *Bellotti* Court's decision to subject teens to the parental consent/judicial bypass requirement rather than simply allow

The Court's embrace of these limitations is underscored by the fact that in crafting the bypass option, it implicitly shifted veto power over a teen's abortion decision from her parents to the presiding judge.[178] This is not to say that these alternatives are equivalent: a judge simply does not have the same personal stake in the outcome as a parent is likely to have. A judge is also constrained by the constitutional requirement that she authorize the abortion if she determines that the teen is mature enough to make her own abortion decision or, alternatively, that it is in the teen's best interest. Even so, the Court's clarity regarding a teen's right to avoid parental involvement should not be read as tantamount to a grant of full decisional autonomy.

The possibility of this paternalistic outcome stands as a stark reminder of the Court's cautious approach in disputes involving parents and children. However, rather than embrace a traditional family model that "reenforces strong parental authority, and assumes children's choices to be nonexistent, or to be rightly displaced by the choices of their parents,"[179] it instead vested authority over a minor's decision in the state. In a throwback to the Progressive Era view that "authority over children resided either in their parents . . . or in the state, acting as *parens patriae* to protect individual children,"[180] it refused to fully treat teens as autonomous persons despite having freed them from parental control. Elsewhere, I have argued that this skewed result is indicative of the Court's increasingly pro-natalist tilt and the concomitant fear that "left to her own devices, a young woman may fail to fully consider the 'origins of the human life that lie within the embryo.'"[181]

4. *The Challenges of Teen Motherhood: What the Literature Says*

a. A Matter of Growing Public Concern

The *Bellotti* decision was handed down at a time of mounting public concern over teen pregnancy and early childbearing, and a considerable body of literature emerged detailing rather dismal outcomes for teen moms.[182] Capturing these concerns, the Senate Report accompanying the Adolescent Health Services and Prevention Act reported that

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them to make the abortion decision for themselves. *See generally* J. SHOSHANNA EHRLICH, WHO DECIDES?: THE ABORTION RIGHTS OF TEENS (2006). By way of a further critique, see Carol Sanger, *Decisional Dignity: Teenage Abortion, Bypass Hearings, and the Misuse of Law*, 18 COLUM. J. GENDER & L. 409 (2009).

[178] A judge's authority is circumscribed by the constitutional requirement that authorization must be granted if a minor is found to be mature enough to make her own decision, and if not deemed sufficiently mature, that the abortion is in her best interest. *Bellotti*, 443 U.S. at 643–44.

[179] Dolgin, *supra* note 112, at 374.

[180] Huntington & Scott, *supra* note 9, at 1383.

[181] Ehrlich, *supra* note 145, at 102 (quoting Ohio v. Akron Ctr. for Reprod. Health, 597 U.S. 502, 520 (1990)).

[182] *See* EHRLICH , *supra* note 85, at 87–110. *See generally* LINCOLN ET AL., 11 MILLION TEENAGERS: WHAT CAN BE DONE ABOUT THE EPIDEMIC OF ADOLESCENT PREGNANCY IN THE UNITED STATES? (1976).

> The young mother, particularly those under 15 years of age, may face grave risks to her health in bearing a child. The infant of an adolescent mother faces a marked, increased risk of mental retardation, developmental disabilities and other handicapping conditions. With respect to education, pregnancy is the major contributing reason for young women not completing their high school education. Since educational attainment has a direct connection to employment prospects . . . it is not surprising to learn that the teenage mother has often turned to welfare dependency for financial support for herself and her child.[183]

Much of this panic was infused with racialized fears and stereotypes. As Luker writes, "Teenagers who have babies don't conform with . . . middle-class assumptions and expectations"[184] and are frequently typecast as "inner-city teens who lack stability and guidance, engage in irresponsible behavior, and then expect to be supported by the state."[185] This view dovetails with what García Coll et al. refer to as the "culturally deficient model," which "conceives of the 'culturally deprived' as those who lack the benefits and advantages of white middle-class America and thus end up with developmental deficiencies and deviances."[186] Put slightly differently, Geronomus argues that "a danger of social inequality is that dominant groups will be motivated to promote their own cultural goals, at least in part, by holding aspects of the behavior [including early childbearing] of specific marginal groups in public contempt."[187]

Although the moral panic has waned, due in large measure to a significant decline in teen pregnancy and childbearing rates,[188] contemporary studies continue to raise a host of concerns about the prospects of teen moms.

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[183] Senator Edward Kennedy. S. Comm. on Hum. Res. Rep. to Accompany Adolescent Health, Services, and Pregnancy Prevention and Care Act, S. 2910, 95th Cong. 2d Sess. (1978), 13–14.

This 1978 Act sought to "establish a program for developing networks of community-based services to prevent initial and repeat pregnancies among adolescents, to provide care to pregnant adolescents, and to help adolescents become productive independent contributors to family and community life." https://www.govtrack.us/congress/bills/95/s2910 [HTTPS://PERMA.CC/234A-HA6Y].

[184] KRISTIN LUKER, DUBIOUS CONCEPTIONS: THE POLITICS OF TEENAGE PREGNANCY 176 (1996).

[185] *Id.*; *see also* Cynthia García Coll et al., *An Integrative Model for the Study of Developmental Competencies in Minority Children*, 67 CHILD DEV. 1891, 1894 (1996).

[186] García Coll et al., *supra* note 185, at 1894. It should be noted that this article is not specifically focused on teen mothers.

[187] Arline T. Geronimus, *Damned if You Do: Culture, Identity, Privilege and Teenage Childbearing in the United States*, 57 SOC. SCI. & MED. 881, 890 (2003).

[188] *See* ADRIENNE L. FERNANDES-ALCANTARA, CONG. RSCH. SERV., R45184, TEEN BIRTH TRENDS: IN BRIEF 1 (2020); BRADY E. HAMILTON, STATE TEEN BIRTH RATES BY RACE AND HISPANIC ORIGIN: UNITED STATES, 2017–2018, 69 NAT'L VITAL STAT. REP. 1 (2020).

Chief among these are the risks of educational disruption[189] and the closely related diminution of socioeconomic prospects.[190] One study based on in-depth interviews with teen mothers of color revealed that many felt a "deep sense of isolation and loneliness," and while a few "reported that they would not change their lives if they could, the vast majority of the respondents spoke of how difficult their lives had become and a longing for the childhood they had left behind."[191] Studies also continue to raise concerns about the wellbeing of the children of teen moms.[192]

These challenges of early motherhood are not distributed equally. Poor teens are significantly more likely to become mothers than are more affluent teens,[193] and although racial disparities in birth rates have declined over time since the 1990s, they remain a consistent feature of this landscape.[194] Reinforcing the intersectional axis of race/ethnicity, class, and gender, one report concluded that when "compared with those who choose childbirth, adolescents who choose abortion tend to come from higher socioeconomic backgrounds, have higher educational aspirations . . . have greater feelings of control over life . . . are better able to conceptualize the future . . . [and] may choose to have an abortion so that they can pursue that future."[195] The structural inequalities associated with early childbearing are further underscored by racialized disparities in teen birth outcomes, notably the risks of pre-term births and low birth weight, which are both highly correlated with the risk of infant mortality.[196]

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[189] *See generally* Jennifer B. Kane et al., *The Educational Consequences of Teen Childbearing*, 50 DEMOGRAPHY 2129 (2013) (providing a study on the educational consequences of teen childbearing); Charles E. Basch, *Teen Pregnancy and the Achievement Gap Among Urban Minority Youth*, 81 J. SCH. HEALTH 614 (2011) (providing a literature review of the impact of teen pregnancy on educational attainment among urban minority youth).

[190] Chyongchiou Jeng Lin et al., *Long-term Outcomes for Teen Mothers Who Participated in a Mentoring Program to Prevent Repeat Teen Pregnancy*, 111 J. NAT'L MED. ASS'N 296, 296 (2019).

[191] Janet Jacobs & Stephanie Mollborn, *Early Motherhood and the Disruption in Significant Attachments: Autonomy and Reconnection as a Response to Separation and Loss Among African American and Latina Teen Mothers*, 26 GENDER & SOC'Y 922, 940 (2012).

[192] Lee A. Savio Beers & Ruth E. Hollo*, Approaching the Adolescent-Headed Family: A Review of Teen Parenting*, 216 CURRENT PROBS. IN PEDIATRIC ADOLESCENT HEALTH CARE 216, 217 (2009).

[193] LUKER, *supra* note 184, at 113–16.

[194] According to a report by the Congressional Research Service, in 2018, the birth rates for Black and Latinx teens were more than double that of white teens. *See* FERNANDES-ALCANTARA, *supra* note 188, at 3. *See also* Teresa Wiltz, *Racial and Ethnic Disparities Persist in Teen Birth Rates*, PEW FOUNDATION (Mar. 3, 2015), https://www.pewtrusts.org/en/research–and–analysis/blogs/stateline/2015/3/03/racial–and–ethnic–disparities–persist–in–teen–pregnancy–rates [https://perma.cc/NNT4-5FVK].

[195] AM. ACAD. OF PEDIATRICS COMM. ON ADOLESCENCE, POL'Y STATEMENT ON THE ADOLESCENT'S RIGHT TO CONFIDENTIAL CARE WHEN CONSIDERING ABORTION 2 (2017).

[196] *See* Sheryl L. Coley et al., *Race, Socioeconomic Status, and Age: Exploring Intersections in Preterm Birth Disparities among Teen Mothers*, 2015 INT'L J. POPULATION RSCH. 1, 1 (2015). For further resources on racialized birth disparities, see *Literature*,

b. Challenges to the Dominant Narrative

While there is general agreement that teen motherhood remains "associated with a higher risk of negative outcomes for the young mother . . . and her children,"[197] a number of scholars have challenged the dominant narrative. According to Luker, rather than representing irresponsibility and a lack of stability, early childbearing may represent a reasoned choice for teens who are low-income: not only does a "sixteen-year-old [have] a much larger claim on the attention and resources of her extended family, especially of her mother, than does a twenty-four-year-old."[198] Moreover, as compared to more affluent teens, those from less privileged backgrounds "may see few options open to them"[199] and motherhood may offer a "dream of something better."[200] Likewise, contesting the view that "teen pregnancy brings with it the forgone conclusion of dropping out of school, poverty and failure" based on a series of interviews with low-income Black teens, Schultz found that for some, having a child motivated them to "stay in school and work toward a career in order to support their children."[201] Edin and Kefalas similarly write that having a child can "provide motivation and purpose in a life stalled by uncertainty and failure" and offer "young women with limited options a valid role and a meaningful set of challenges."[202]

c. The Turnaway Study and the Consequences of Being Denied a Wanted Abortion

It is critical to keep in mind that the research above focuses on young women who, however constrained their options, *chose* to carry their pregnancies to term. Even if one ascribes to the more optimistic view of what this life choice means for them, the general view is that "teen mothers have a much harder lot in life than those who wait until they are older to

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BLACK MAMAS MATTER ALL., https://blackmamasmatter.org/resources/literature/ [https://perma.cc/UW5U-AKNM].

[197] Beers & Hollo, *supra* note 192, at 217.

[198] LUKER, *supra* note 184, at 171. It should also be noted that kin social support has been "positively associated with psychological well-being and parenting practices." Ronald D. Taylor, *Kin Social Undermining, Adjustment and Family Relations Among Low-Income African-American Mothers and Adolescents: Moderating Effects of Kin Social Support*, 24 J. CHILD & FAM. STUD. 1271, 1277 (2014). According to Taylor, kin support can play a "vital role . . . in family life in African American homes, particularly among the urban, economically disadvantaged." *Id. See also* CAROL STACK, ALL OUR KIN: STRATEGIES FOR SURVIVAL IN A BLACK COMMUNITY 62-89 (1974) (discussing shared responsibility for childrearing among kin as a survival strategy); García Coll et al., *supra* note 185, at 1906; Geronimus, *supra* note 187, at 885.

[199] LUKER, *supra* note 184, at 173.

[200] *Id.* at 182.

[201] Katherine Schultz, *Constructing Failure, Narrating Success: Rethinking the "Problem" of Teen Pregnancy*, 103 TCHR. COLL. REC., 582, 583 (2001).

[202] KATHERYN EDIN & MARIA KEFALAS, PROMISES I CAN KEEP: WHY POOR WOMEN PUT MOTHERHOOD BEFORE MARRIAGE 172 (2011).

have a child."[203] This reality only magnifies a core premise of the *Bellotti* decision that *forcing* a pregnant teen to become a mother results in grave consequences. Reinforcing the likely harms of compelled motherhood, the Committee on Adolescence of the American Academy of Pediatrics cautions that there is a greater likelihood of dissatisfaction with a pregnancy outcome that is "the result of coercion" compared to those over which a teen has a "sense of 'ownership.'"[204]

Although not specifically focused on teens, ANSIRH's[205] groundbreaking Turnaway Study shines an important light on the substantial burdens of *unwanted* motherhood.[206] In an effort to understand the "mental health, physical health and socioeconomic consequences of receiving an abortion compared to carrying an unwanted pregnancy to term," researchers in this longitudinal prospective research project interviewed nearly 1,000 women who sought abortions from 30 clinics around the country between 2008 and 2010.[207] Some participants obtained the abortion they were seeking, while others were "turned away because they were past the facility's gestational age limit."[208] The quest to understand the consequences of being denied a wanted abortion ultimately led to a decade-long collaboration between more that 40 researchers, including epidemiologists, nurses, psychologists, demographers, sociologists, nurses, and public health scientists,[209] resulting in (as of 2020) the publication of fifty scientific papers in peer-reviewed journals.[210]

The Turnaway Study provides a comprehensive and troubling picture of the adverse impacts of being denied a wanted abortion. A key finding is that there were "large and statistically significant differences in the socioeconomic trajectories of women who were denied wanted abortions compared with women who received abortions—with women denied abortions facing more economic hardships—even after [accounting] for baseline differences."[211] Compared with women who had children after receiving an abortion, those denied a wanted abortion were more likely to report that they did

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[203] LUKER, *supra* note 184, at 110.

[204] AM. ACAD. OF PEDIATRICS COMM. ON ADOLESCENCE, POL'Y STATEMENT ON THE ADOLESCENT'S RIGHT TO CONFIDENTIAL CARE WHEN CONSIDERING ABORTION 6 (2017).

[205] Although ANSIRH is better known by its acronym, the organization's full name is Advancing New Standards in Reproductive Health.

[206] *See generally* DIANA GREENE FOSTER, THE TURNAWAY STUDY: TEN YEARS, A THOUSAND WOMEN, AND THE CONSEQUENCES OF HAVING—OR BEING DENIED—AN ABORTION (2020) (providing an overview of the study).

[207] ANSIRH, INTRODUCTION TO THE TURNAWAY STUDY (2020), https://www.ansirh.org/sites/default/files/publications/files/turnawaystudyannotatedbibliography.pdf [https://perma.cc/HZ3U-S5VA].

[208] ANSIRH, TURNAWAY STUDY, https://www.ansirh.org/sites/default/files/publications/files/turnaway_study_brief_web.pdf [https://perma.cc/27XE-P5BA].

[209] Foster, *supra* note 206, at 6.

[210] For an annotated list of these publications, *see* ANSIRH, *supra* note 207.

[211] Diana Greene Foster et al., *Socioeconomic Outcomes of Women Who Receive and Women Who Are Denied Wanted Abortions in the United States*, 108 AM. J. OF PUB. HEALTH 407, 412 (2018).

not have enough money to cover housing, transportation, and food.[212] Women who were denied a wanted abortion also "reported worse long-term physical health that those who received abortion," including a "persistent worsening" in self-reported health problems, and while the reported difference was small, the authors stressed that self-reported health is "strongly predictive of future health and mortality."[213]

Comparing the "outcomes of children born from pregnancies that were explicitly unwanted in that their mother sought but was denied abortion care . . . with those children born within the next 5 years to women who received an abortion," the Turnaway Study also found "measurable associations of women's access to abortion with their children's well-being."[214] Not only were there "significant economic differences" between the two cohorts, with women who were denied abortion "more likely to report insufficient money to pay for basic needs," researchers also found that "children of women denied an abortion experienced poorer maternal bonding than did subsequent children of women who received an abortion."[215] They also found that "injuries were more likely" among children born to women who were denied an abortion, noting that although this finding "raises possible concerns about abuse or neglect," it may also "reflect difficulty in raising an unexpected child or raising children born in quick succession."[216]

The Turnaway Study further revealed that women who were denied abortions were comparatively "less likely to have aspirational one-year plans" and "more likely to have neutral or negative expectations for their future."[217] While this finding was not specifically focused on young women, it represents a salient concern given that teen mothers often have fewer life options and correspondingly less optimism regarding future prospects compared to women who wait until they are older to give birth.[218] It may well be that the flattening effect of *unwanted* motherhood on aspirational plans for the future is particularly pronounced for teens.

Although teen motherhood is no longer regarded as a "universally negative" experience, it nonetheless remains "associated with a higher risk of

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The study results initially showed that some of these differences converged over time. *Id.* However, a follow-up study analyzing credit report data found clear evidence that being denied an abortion has large and persistent negative effects on a woman's financial well-being. *See* Sarah Miller et al., *The Economic Consequences of Being Denied an Abortion* 1–2 (Nat'l Bureau of Econ. Rsch., Working Paper No. 26662, 2020).

[212] Diane Greene Foster et al., *Comparison of Health, Development, Maternal Bonding, and Poverty Among Children Born After Denial of Abortion vs After Pregnancies Subsequent to an Abortion*, 172 JAMA PEDIATRICS 1053, 1057 (2018).

[213] Lauren J. Ralph et al., *Self-reported Physical Health of Women Who Did and Did Not Terminate Pregnancy After Seeking Abortion Services: A Cohort Study*, 171 ANNALS INTERNAL MED. 238, 245–46 (2019).

[214] Foster et al., *supra* note 212, at 1053, 1058.

[215] *Id.* at 1058.

[216] *Id.*

[217] Ushma D. Upadhyay et al., *The Effect of Abortion on Having and Achieving Aspirational One-Year Plans*, 15 BMC WOMEN'S HEALTH 102, 107 (2015).

[218] *See* LUKER, *supra* note 184, at 182–83.

negative outcomes for the young mother" and her children.[219] Consequently, there is nothing to be gained from *forcing* a pregnant teen into an unwanted role that will most likely have a long-term deleterious impact on her well-being across multiple domains. In short, as the *Bellotti* Court stressed, motherhood by fiat is uniquely laden with "grave and indelible" consequences.[220]

Moreover, even if one embraces the more optimistic view of young motherhood as a potential source of motivation and purpose, particularly for low-income teens who *choose* this path, the Turnaway Study makes clear that *motherhood by fiat* imposes a particularly heavy burden. This burden is directly at odds with the *Bellotti* Court's recognition of teens as constitutional persons whose decisional rights over their reproductive bodies may not be subordinated to the will of their parents—an outcome that would undoubtedly divest young women of the opportunity to be in the driver's seat of their own lives.

C. (En)gendering Child Marriage: The Campaign to Raise the Minimum Marital Age to Eighteen Without Exception

1. *A Startling Realization*

In contrast to the nearly half-century struggle over the abortion rights of teens, the current contestation over child marriage is of more recent origin. The contemporary movement to raise the marital age to eighteen without exception grew from an analysis of state marriage licenses by the Tahirih Justice Center, which led to the "startling realization that over 200,000 minors . . . were married from 2000-2015 alone."[221] According to the Center's comprehensive 2017 report, *Falling Through the Cracks,* "nearly 90% of [the minors] were girls," including some as young as twelve or thirteen, and "nearly 90% married adults," some of whom were decades older than they were.[222]

The Report's characterization of the documented rate of child marriage in this country as "startling" reflects the reality that "[p]rior to 2015, the public and policymakers had no idea what the nature and scope of America's child marriage problem really was."[223] This lack of awareness was likely attributable to two primary considerations. First, most states have established eighteen as the statutory minimum marital age.[224] Accordingly, a cursory glance at the United States' marital regime would likely give the impression

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[219] Beers & Hollo, *supra* note 192, at 217.
[220] Bellotti v. Baird, 433 U.S. 622, 642 (1979).
[221] Tahirih Just. Ctr., The National Movement to End Child Marriage (2020), https://www.tahirih.org/wp-content/uploads/2020/02/Comparison-States-CM-Reforms-01.12.2020.pdf [https://perma.cc/6WUB-56UW].
[222] Tahirih Just. Ctr., *supra* note 42, at 3–4.
[223] Tahirih Just. Ctr., *supra* note 221.
[224] Tahirih Just. Ctr., *supra* note 42, at 6.

that child marriage is not a legally available option. However, the Report pointed out that statutory exceptions allowing earlier marriage based upon parental or judicial consent, or in circumstances involving pregnancy or the birth of a child,[225] effectively meant that child marriage was in actuality permissible in all states.

Second, child marriage had long been identified as a problem endemic to poor countries, one that the United States has not recognized as a domestic concern.[226] For example, in a 2015 visit to Kenya, President Barack Obama recognized child marriage as a tradition that "may go back centuries" but declared that "[t]here's no place in civilized society for the early or forced marriage of children."[227] Also sounding an externally-focused warning bell, a 2016 State Department report, *Global Strategy to Empower Adolescent Girls,* identified child marriage as a human rights abuse that "produces devastating repercussions for a girl's life, effectively ending her childhood" and that "forces a girl into adulthood and motherhood before she is physically and mentally mature."[228] The Report identified the practice as "rooted in patriarchal beliefs that value girls less and confine them to traditional roles of motherhood and domestic labor."[229]

2. *Ending Child Marriage in the United States as an Urgent Feminist Project*

Inspired by this globally-focused effort to end a practice that the State Department had reproved for perpetuating "gender inequality,"[230] several advocacy organizations along with the Tahirih Justice Center took up the cause of banning child marriage in the United States as an urgent feminist project.[231] They highlighted the stark reality that some teens in this country are indeed forced into marriage by parents, other family members, or the prospective spouse, who may deploy a range of tactics including "taking her

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[225] *See id.* at 8. An Appendix to this report that provides "'scorecards on features of states' minimum marriage age laws" is available at https://www.tahirih.org/pubs/understanding–state–statutes–on–minimum–marriage–age–and–exceptions/.

[226] *See* Johnson-Dahl, *supra* note 18, at 1048.

[227] David Smith, *Barack Obama in Kenya: 'no excuse' for treating women as second–class citizens*, GUARDIAN, (Jul. 26, 2015), https://www.theguardian.com/us–news/2015/jul/26/barack–obama–condemns–tradition–women–second–class–citizens–nairobi [https://perma.cc/E3C9-YNHT]

[228] UNITED STATES GLOBAL STRATEGY TO EMPOWER ADOLESCENT GIRLS 6 (U.S. DEP'T OF STATE 2016), https://2009–2017.state.gov/documents/organization/254904.pdf [https://perma.cc/TQN4-AH43].

[229] *Id.* at 5.

[230] *Id.*

[231] In addition to the Tahirih Justice Center, these organizations include Equality Now and Unchained At Last. Alongside their individual efforts, these organizations have joined forces to convene the National Coalition to End Child Marriage to advocate for the enactment of "federal legislation to help end child marriage in the U.S." NAT'L COAL. TO END CHILD MARRIAGE IN THE U.S., https://endchildmarriageus.org/ [https://perma.cc/8J5R-A73S].

out of school, depriving her of food . . . cutting off her social ties and networks," and subjecting her to physical abuse or torture until she relents.[232] Victim testimonies have played a prominent role in moving this reform agenda forward.[233]

However, not all groups who are committed to a gender equality agenda have signed onto this effort, concerned that a ban on child marriage would weaken other rights claims teens currently possess.[234] Some groups worry that "restricting pregnant teens from getting married could lead to proposals limiting their access to reproductive care and abortions"[235] by importing "protectionist rhetoric suggesting that minor girls do not have the decisionmaking capacity to make choices of this weight."[236] This concern is particularly potent in light of the fact that the Supreme Court has long deemed marriage to be a fundamental right.[237]

3. *Are Child Marriages Tantamount to Forced Marriages?*

Concerns about forced marriage, which the UN Office of the High Commissioner for Human Rights ("OHCHR") defines as one in which "one and/or both parties have not personally expressed their full and free consent

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[232] Debajani Roy, *An Introduction to Forced Marriage in the South Asian Community in the United States*, 9 MANAVI OCCASIONAL PAPER 7, 23 (2011), https://1h9qfk17fgkf28jdhv234txc–wpengine.netdna–ssl.com/wp–content/uploads/2014/08/An–Introduction–to–Forced–Marriage–in–the–South–Asian–Community_Manavi_Debjani–Roy.pdf [https://perma.cc/XS6V-BEGD].

According to the Tahirih Justice Center, coercive tactics can also include, but are not limited to, emotional blackmail, threats of social ostracization, stalking, and the use of death threats. TAHIRIH JUST. CTR., SURVEY ON FORCED MARRIAGE IN IMMIGRANT COMMUNITIES: 2011 NATIONAL SURVEY RESULTS 2 (2011), https://www.tahirih.org/wp–content/uploads/2015/03/REPORT–Tahirih–Survey–on–Forced–Marriage–in–Immigrant–Communities–in–the–United–States.pdf. [https://perma.cc/7RA9-L9UD].

[233] *See generally Forced and Child Marriage: Survivor Stories,* UNCHAINED AT LAST (last visited Oct. 12, 2021), https://www.unchainedatlast.org/forced–and–child–marriage–survivor–stories/; TAHIRIH JUST. CTR., CHILD MARRIAGE IN THE U.S.: SURVIVOR STORY COMPILATION (2020), https://www.tahirih.org/pubs/child–marriage–in–the–u–s–survivor–story–compilation/ [https://perma.cc/H4SD-ZX4N].

[234] Johnson-Dahl, *supra* note 18, at 1065.

[235] Scott Dance, *Effort to limit teen marriage in Maryland failed amid concerns from abortion rights*, *women's groups*, BALT. SUN (Apr. 12, 2018, 6:20 PM), https://www.baltimoresun.com/politics/bs-md-marriage-age-20180412-story.html [https://perma.cc/D5V4-D25W].

[236] Johnson-Dahl, *supra* note 18, at 1080.

[237] *See* Anjali Tsui, *In Fight Over Child Marriage Laws, States Resist Calls for a Total Ban*, FRONTLINE (Jul. 6, 2017), https://www.pbs.org/wgbh/frontline/article/in-fight-over-child-marriage-laws-states-resist-calls-for-a-total-ban/ [HTTPS://PERMA.CC/2EN4-4UBF]; Dartunurro Clark, *End Child Marriage in the U.S.? You Might be Surprised at Who's Opposed*, NBC NEWS (Sept. 8, 2019), https://www.nbcnews.com/politics/politics–news/end–child–marriage–u–s–you–might–be–surprised–who–n1050471 [HTTPS://PERMA.CC/3MCH-4D5W].

to the union,"[238] have played a central role in the drive to ban child marriage. Some commentators and organizations regard *all* underage marriages as "intrinsically nonconsensual,"[239] effectively erasing *any* distinction between forced marriage and child marriage based upon the presumed decisional incapacity of teens. For instance, the OHCHR continues to state that "child marriage is considered to be a form of forced marriage, given that one and/or both parties have not expressed full, free and informed consent."[240]

The question of arranged marriages also enters the picture here. These marriages are formally distinguishable from forced marriages, in that the former is one in which "the families of both parties (or religious leaders or others) take the lead, *but ultimately, the choice remains with the individual*."[241] However, while recognizing this distinction in principle, some marriage reform advocates argue that the "fine line between consent and coercion" more often than not renders this distinction meaningless.[242] For instance, Unchained at Last warns of the "dangerous message such a dichotomy might send to women, girls and others who are pressured, bribed or tricked into marriage but do not face explicit threats or endure actual violence. Such individuals need to know what is happening to them is not 'benign,' and they deserve and can get help."[243]

Although the boundaries between forced and arranged marriages may not always be clear, the ready conflation of the two[244] risks eliding a valued tradition in many communities.[245] As Tahir writes, when viewed through a Eurocentric lens that idealizes "individual freedom and conjugal choice," the "arranged marriage culture is seen as 'deficient' and 'deformed.' It becomes the 'other.'"[246] She argues that arranged marriages are set in binary opposition to love marriages as an inherently "not so free" and a clearly inferior system.[247]

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[238] *Child, Early and Forced Marriage, Including in Humanitarian Settings*, U.N. HUM. RTS. OFF. OF THE HIGH COMM'R, https://www.ohchr.org/en/issues/women/wrgs/pages/childmarriage.aspx (last visited Oct. 12, 2021) [https://perma.cc/8Z8B-QPAZ].

[239] Julia Alanen, *Shattering the Silence Surrounding Forced and Early Marriage in the United States*, 32 CHILD.'S LEGAL RTS. J. 1, 8 (2012)

[240] U.N. HUM. RTS. OFF. OF THE HIGH COMM'R, *supra* note 238.

[241] TAHIRIH JUST. CTR., *supra* note 232, at 2 (emphasis added).

[242] *Arranged/Forced Marriage*, UNCHAINED AT LAST, https://www.unchainedatlast.org/about-arranged-forced-marriage/ [https://perma.cc/L7X6-S8JM].

[243] *Id. See also* Alanen, *supra* note 239, at 6.

[244] UNCHAINED AT LAST, *supra* note 242.

[245] Accordingly, in offering guidance to consular officers who may be "approached for assistance by U.S. citizens planning to be married abroad," the State Department recognizes that "arranged marriages have been a long-standing tradition in many cultures and countries," and stresses that it "respects this tradition, and makes a very clear distinction between a forced marriage and an arranged marriage. In arranged marriages, the families of both spouses take a leading role in arranging the marriage but the choice whether to accept the arrangement remains with the individuals." FOREIGN AFFAIRS MANUAL § 7–1459(b) (U.S. DEP'T. OF STATE 2005).

[246] Naema N. Tahir, *Understanding Arranged Marriage: An Unbiased Analysis of a Traditional Marital Institution*, INT'L J. L., POL'Y, AND FAM. 1, 3–4 (2021).

[247] *Id*. at 4–5.

This perceived binary can lead to an overidentification of forced marriage with immigrants, despite the fact that the practice of arranged marriage is "not limited to foreign nationals or immigrant communities."[248] As Alanen writes, the "so-called 'shotgun wedding,' wherein parents force a pregnant daughter and the presumed father of the fetus to marry, is the most notorious contemporary harmful marriage practice" that "persists in American families of nearly every imaginable race, faith, and heritage."[249]

4. *The Gendered Harms of Child Marriage*

To support their goal of banning *all* child marriages in the United States, reformers rely on a body of literature detailing the gendered harms of the practice and on harrowing stories from young women who were forced into marriage by violence or other forms of coercion from their parents and/or future spouse.[250] Although it is possible that not all activists in the marital reform movement operate from the assumption that meaningful consent by minors is an impossibility—an assumption that, as discussed above, serves to erase any distinction between child and forced marriages—this possibility does not play an apparent role in shaping the marriage reform movement's legislative agenda. Distilled to its essence, the goal is simply to set the minimum marital age at eighteen as "the clearest solution to the problem of child marriage in the United States."[251]

Many of the documented harms of early marriage parallel those associated with teen motherhood, which is not particularly surprising given that the two often co-exist.[252] Hamilton writes that early marriers "are less likely to complete high school and attain the social and human capital needed for financial security, they experience higher levels of family dissolution, and they tend to exhibit ineffective parenting styles."[253] Early marriage also has been correlated with declines in both mental and physical well-being, with studies indicating that young women who married as minors—but not young men—faced worsened physical health outcomes.[254] Assessing the link between early marriage and financial insecurity, it is important to recognize

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[248] Alanen, *supra* note 239, at 7.

[249] *Id.*

[250] *See, e.g., Forced and Child Marriage: Survivor Stories*, UNCHAINED AT LAST, https://www.unchainedatlast.org/forced-and-child-marriage-survivor-stories/ [https://perma.cc/44W2-4RU6] (last visited Oct. 21, 2021).

[251] TAHIRIH JUST. CTR., *supra* note 42, at 6.

[252] Vivian E. Hamilton, *The Age of Marital Capacity*: *Reconsidering Civil Recognition of Adolescent Marriage*, 92 B.U. L. REV. 1817, 1849 (2012).

[253] *Id.*at 1849–50; *see also* Johnson-Dahl, *supra* note 18, at 1066–70.

[254] Hamilton, *supra* note 252, at 1847–48. For more detail on negative mental health outcomes, see Yann Le Stratt et al., *Child Marriage in the United States and Its Association with Mental Health in Women*, 2011 PEDIATRICS 524, 524 (2011). *But see* Jeremey E. Uecker, *Marriage and Mental Health Among Young Adults*, 53 J. HEALTH AND SOC. BEHAV. 67, 67 (2012).

that—as with teen motherhood—early marriage may be the result, not the cause, of poverty:

> Poverty . . . remain[s] a factor in early marriage today. In many places where education is poorly funded, where sex education is nonexistent, and where opportunities for young people, especially girls, seem limited to one's immediate environs, there are fewer reasons to believe that postponing marriage makes much sense.[255]

In contrast, paralleling what Luker argues about teen motherhood,[256] "if more affluent girls wait to marry . . . it is generally because they believe that other opportunities await them with which marriage would interfere . . . In places where those opportunities seem more like fantasies, there is less reason to wait."[257] As is often the case with childbearing, "[p]ostponing marriage requires a reason to do so; poor girls often do not have one."[258]

Gendered inequalities in the marital relationship itself—which are likely exacerbated by the age difference between the partners—have also concerned marital reform advocates, particularly increased rates of intimate partner violence ("IPV") that may stem from the "limited power" a teen with "little schooling and few resources" is likely to have in relationship to her adult husband.[259] Illustrating a power differential between marital partners as a form of "gender inequality," Esthappan et al. characterize forced marriage as a "symbolic and instrumental means for men to assert and maintain power over women."[260] To this end, "different forms of violence, coercion, and abuse may be used to control and subjugate women."[261] Although much of the data on the connection between early marriage and the risk of IPV comes from the global context, a recent study of child marriages in the United States found that they were "characterized by high levels of violence," including "physical, sexual, or emotional violence" as well as "fiduciary abuse" in which one spouse takes control over a couple's finances.[262]

As a tool for confronting sexual abuse, statutory rape laws have certainly been the subject of some feminist critique, perhaps foremost for the concern that they elide young women's sexual desires and capacities.[263]

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[255] SYRETT, *supra* note 20, at 253.
[256] *See* LUKER, *supra* note 184, at 173.
[257] SYRETT, *supra* note 20, at 253.
[258] *Id.*
[259] Aditi Wahi et al., *The Lived Experience of Child Marriage in the United States*, 34 SOC. WORK PUB. HEALTH 201, 202 (2019).
[260] Sino Esthappan et al., *Understanding Forced Marriage in the United States: Developing Measures, Examining its Nature, and Assessing Gender Disparities*, 36 J. INTERPERSONAL VIOLENCE 5730, 5736 (2018). It should be noted that the authors are not specifically focused on child marriages.
[261] *Id.*
[262] Wahi et al., *supra* note 259, at 204, 208.
[263] *See* Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387, 402–406 (1984); Marsha R. Greenfield, *Protecting Lolita: Statutory Rape Laws in Feminist Perspective*, 1 WOMEN'S L.J. 1, 8–9 (1976).

Goodwin writes that these laws also reinforce racialized associations of sexual purity with white women and girls and of the Black male body as "hypersexualized, prowling, deviant, eager to pounce on vulnerable white women, and in need of legal control."[264] While uplifting the validity and significance of these concerns, it is nonetheless important to recognize that the age disjunction between statutory rape and child marriage laws can enable predatory men to avoid prosecution for sex with underage teens by marrying them.

As Jackson writes, while "no American state has recognized a marital exception to rape for 20 years, the spousal defense to statutory rape survives."[265] In virtually all states, this defense enables "the perpetrator of statutory rape" to argue that "the intercourse was legal because although the minor was under the age of consent," the parties were married at the time.[266] In a minority of states, the marital defense may be available if the parties merely intend to be married,[267] and even if not explicitly encoded in law, "prosecutors can choose not to bring charges if a man marries his underage and pregnant girlfriend . . . thus retroactively protect[ing] a man . . . who would otherwise be accused of statutory rape."[268] As the founder of Unchained at Last rather dramatically puts it, this loophole to statutory rape is "[g]reat news for child rapists," as it sends the message that "[y]ou don't need to be a congressman or beloved film director to get away with your crimes. You just need a marriage license—and that is not too difficult to obtain."[269]

Exacerbating the already-heightened risk of IPV, an abused spouse's minority can make it especially difficult for her to exit a marriage, which can leave her vulnerable to intensifying cycles of violence.[270] Closing off one critical escape route, many domestic violence shelters—which "are often the first step for survivors fleeing abuse"[271]—do not accept minors.[272] This exclusionary policy carries significant costs for teens seeking to leave an abu-

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[264] Michele Goodwin, *Law's Limit: Regulating Statutory Rape Law*, 213 Wis. L. Rev. 481, 493–94 (2013).

[265] Erin K. Jackson, *Addressing the Inconsistency Between Statutory Rape Laws and Underage Marriage: Abolishing Early Marriage and Removing the Spousal Exception to Statutory Rape*, 85 UMKC L. Rev. 343, 344 (2017).

[266] Amber Plumlee*, Don't Put a Ring on It: Abolishing the Marital Defense to Statutory Rape*, 41 Women's Rts. L. Rep. 95, 104 (2019).

[267] *Id.*

[268] Syrett, *supra* note 20, at 263.

[269] Fraidy Reiss*, Child marriage traps girls in an inescapable legal hell. But it is still legal in 46 US states*, Unchained At Last (Apr. 11, 2021, 10:02 AM), https://www.unchainedatlast.org/4–11–2021–child–marriage–traps–girls–in–an–inescapable–legal–hell–but–it–is–still–legal–in–46–us–states/ [https://perma.cc/Z9WA-32H6].

[270] See *Dynamics of Abuse*, Nat'l Coal. Against Domestic Violence, (last visited Oct. 12, 2021), https://ncadv.org/dynamics-of-abuse [https://perma.cc/2YYB-U68P].

[271] *16 Things You May Not Know about Housing for Survivors*, Nat'l Network to End Domestic Violence (Nov. 24, 2017), https://nnedv.org/latest_update/16–things–may–not–know–housing–survivors/ [https://perma.cc/2YY5-WRBJ].

[272] *See* Tahirih Just. Ctr., *supra* note 42, at 5–6.

sive relationship. A study funded by the National Institute of Justice indicated that "if emergency domestic violence shelters did not exist, the consequences for victims would be dire, including: homelessness, losing custody of children, continued abuse, or death."[273] Further trapping her, an underage abused spouse may be legally unable to seek a protective order or file for divorce.[274] Even when minors *are* able to file for divorce, "divorce attorneys often are reluctant to take them on as clients, since contracts with minors, including retainer agreements, usually are voidable."[275]

These age-based limits on the ability of teens to flee abusive marriages reinforce the reality that, although marriage may emancipate a minor from her parents' authority,[276] it does not automatically emancipate her into full legal adulthood and its panoply of attendant rights.[277] Most concerning of these limitations is the inability to independently apply for protective orders or file for divorce,[278] a challenge emphasized by some officials who testified in support of the Massachusetts bill to ban child marriage.[279] In addition, depending upon the jurisdiction, married minors may not be able to sign a lease or open a bank account, additional barriers to their ability to extricate themselves from "abusive or coercive relationships."[280]

This built-in legal disparity between spouses harkens back to the law of coverture, and while it certainly stops well-short of the historic erasure of a married woman's identity, the status gap may reinforce a power disparity between spouses, resulting in a young woman's forced dependence on her adult husband. This structural inequality brings to mind Elizabeth Oakes's "*insist[ence] that the marriage contract be put upon the same base with other contracts . . .* there should be equality—the parties should be of age—and no girl should be considered competent to enter such contract, unless she has reached her majority in law."[281] While parity in age alone does not ensure full marital equality, it is hard to imagine that an age differential that locates spouses on opposite sides of the adult/child legal binary bodes well for an egalitarian partnership, particularly where entry into marriage was less than fully consensual.

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[273] *Id.*

[274] Johnson-Dahl, *supra* note 18, at 1091; Kendra Huard Fershee, *A Parent is a Parent, No Matter How Small*, 18 Wm. & Mary J. Women & L. 425 (2012).

[275] Reiss, *supra* note 269.

[276] Manian, *supra* note 14, at 155–56.

[277] Teri Dobbins Baxter, *Child Marriage as Constitutional Violation*, 19 Nev. L.J. 39, 62 (2018); *see also* Tahirih Just. Ctr. *supra* note 42, at 4–5.

[278] *Id.*

[279] Written Testimony of Marian T. Ryan, District Attorney, Middlesex County, to the Joint Committee on Children, Families and Persons with Disabilities, re S. 24 An Act to End Child Marriage in Massachusetts, March 25th, 2019.

[280] *Id.* It should be noted that the rules on emancipation vary by state, and not all of these limitations will coexist in any given jurisdiction. *See* Tahirih Just. Ctr., *supra* note 42 at 4–5; Baxter, *supra* note 277.

[281] Oakes Smith, *supra* note 43, at 57.

5. *The Demographics of Child Marriage*

Although considerably less studied than teen motherhood, the practice of child marriage is likewise not distributed equally across the population.[282] Syrett indicates that early marriage is associated with "poverty and lack of incentives for delaying marriage . . . No matter where they are, children and adolescents who grow up in homes planning for future schooling and careers do not tend to marry early."[283]

However, poverty is certainly not the sole explanatory factor. Syrett suggests that it can be helpful to think of child marriage practices as "a Venn diagram with four circles that overlap in the middle. The four circles represent rurality, southernness, religious conservatism, and impoverishment. Girls who are any one of those four things are more likely to wed at young ages; but when all four circles overlap, the odds increase substantially."[284] Elaborating on the contributing role of "religious conservatism," Syrett writes, "Sex itself is more tied to the institution of marriage among those who are religiously conservative. In areas of the country where religious conservatives predominate, especially in districts that endorse abstinence-only education or that encourage virginity pledges, marriage is the only site sanctioned for sex."[285]

This religiously-affiliated effort to channel sexual activity into marriage can be understood as an attempt to surveil and manage the sexuality of young women.[286] Supporting this gendered understanding of the channeling function of early marriage, O'Quinn argues that the pregnancy exception to the minimum age floor constructs girls' sexuality as problematic and "reinforc[es] normative morality logics that sexual activity is expected to happen within the confines of heterosexual marriage."[287] Moreover, by securing "responsibility for girls' sexualities in the private sphere of the family," the pregnancy exception likewise supports "dominant understandings of marriage as a 'cure' for social ills."[288] This gendered channeling function of early marriage is in keeping with the religiously-affiliated messaging of abstinence-only-until-marriage education and virginity pledging, which both reinforce the "longstanding association of virginity as a signifier of virtue with the female body, thus holding young women to a higher standard of moral accountability" for sexual activity.[289] For example, an abstinence-only

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[282] *See* SYRETT, *supra* note 20, at 262.
[283] *Id.*
[284] *Id.* at 265.
[285] *Id.* at 264–65.
[286] Alissa Koski & Jody Heymann, *Child Marriage in the United States: How Common Is the Practice, and Which Children Are at Greatest Risk?*, 50 PERSP. ON SEXUAL AND REPROD. HEALTH 59, 64 (2018).
[287] Jamie O'Quinn, *"Child Marriage and Sexual Violence in the United States,"* 25 SOCIO. STUD. CHILD. & YOUTH 191, 192 (2020).
[288] *Id.* at 195.
[289] EHRLICH, *supra* note 85, at 134.

curriculum called *Sex Respect* instructs teen girls that "it is their responsibility to carefully manage their appearances so as to not incite male lust."[290] Accordingly, they are to avoid " 'plunging necklines and short skirts,' which, they learn, are likely to distract even the most decent young men who are trying hard to 'respect girls' by keeping a lid on their lust."[291]

6. *Challenging the Dominant Narrative of Harm*

Although a coherent counternarrative has yet to emerge—as one has for teen motherhood—there have been some challenges to universalizing the harms of early marriage. For example, when it comes to mental health, one study found that although "teenage marriers have more psychological distress than those who married at ages 22 to 26, this difference is the result of selection and not causation."[292] Likewise, Syrett writes that while "middle-class kids, intent on college and careers" have incentives to postpone marriage, poor girls often do not, particularly those from rural areas "blighted by a poverty that makes leaving those communities through education and the professions seem unlikely, if not impossible."[293] Rather than being the cause of a young woman's missed opportunities to attend college or pursue a career, early marriage is at least in part the result of not having access to these opportunities in the first place. Again quoting Syrett, "indeed, marriage and child-rearing may be the things that seem most appealing and rewarding to poor girls without other opportunities."[294]

7. *Legal Reforms*

Responding to the marriage reformers' call for change, as of 2021, six states have banned child marriage by adopting laws that establish eighteen as the minimum marital age without exception, and similar bills are currently pending in a number of states.[295] Many states have reformed or are considering various other reforms to their marriage laws, including encoding a minimum age floor or raising the existing one; narrowing the permissible age gap between partners; requiring judges to engage in a more thorough inquiry into the circumstances of the marriage, including evidence of coercion, and

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[290] *Id.* at 140.

[291] *Id.*

[292] Uecker, *supra* note 254, at 79. However, he did find that while "[w]aiting until later to marry may do little good in terms of avoiding mental health problems," it did correlate with "improving overall well-being."

[293] SYRETT *supra* note 20*,* at 262–263.

[294] *Id.* at 253.

[295] *About Child Marriage in the U.S.*, UNCHAINED AT LAST (Oct. 22, 2021), https://www.unchainedatlast.org/laws–to–end–child–marriage/ [https://perma.cc/Z8LS-X7UC].

whether the marriage is in the best interest of the minor; and making a judicial determination of emancipation a prerequisite to marriage.[296]

8. *Delay, Not Deprivation*

In the 1981 case *Moe v. Dinkins*—generally regarded as the seminal case on the issue—a federal district court considered a challenge by two young couples to a New York statute requiring males between the ages of sixteen and eighteen and females between the ages of fourteen and eighteen to obtain parental consent to marry.[297] In essence, the couples wanted to solidify their commitment through entry into a sanctioned family unit and to remove the stigma of illegitimacy from their soon-to-be born children.[298] However, they were precluded from doing so because the available parent of the underage girls in each couple refused to consent to their marriages.[299]

The couples argued that the law "requiring parental consent for the marriage of minors between the ages of fourteen and eighteen, deprives them of the liberty which is guaranteed to them by the Due Process Clause of the Fourteenth Amendment."[300] As in *Bellotti*, the court began its analysis with the recognition that minors are "not beyond the protection of the Constitution."[301] Noting that "it is evident that the New York law before this court *directly abridges the right of minors to marry*," the court likewise implicitly recognized that the constitutional rights of minors extend to marriage.[302] However, it declined to hold that the marriage right is fundamental for teens in light of the "unique position of minors and marriage under the law."[303]

Grounded in the edict that the "constitutional rights of children cannot be equated with those of adults,"[304] the court evaluated whether the state's articulated interests in ensuring that "at least one mature person will participate in the decision of a minor to marry" and in "preventing unstable marriages" justified the parental consent requirement.[305] Relying on *Bellotti's* trifecta of rationales for allowing the state's greater authority over children than over adults, namely their "peculiar vulnerability . . . their inability to

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[296] For detail, *see* TAHIRIH JUST. CTR., UNDERSTANDING STATE STATUTES ON MINIMUM MARRIAGE AGE AND EXCEPTIONS (2020), https://1ttls613brjl37btxk4eg60v–wpengine.netdna–ssl.com/wp–content/uploads/2016/11/FINAL–August–2020–State–Statutory–Compilation.pdf [https://perma.cc/VFJ8-W26L].

[297] Moe v. Dinkins, 533 F. Supp. 623, 625 (1981). In addition to the parental consent requirement, girls between the ages of 14 and 16 were also required to obtain judicial consent. *Id.*

[298] *Id.* at 626.

[299] *Id.* at 625–26.

[300] *Id.* at 627–28.

[301] *Id.* at 628.

[302] *Dinkins*, 533 F. Supp. at 629 (emphasis added).

[303] *Id.*

[304] *Id.* at 628.

[305] *Id.* at 629.

make critical decisions in an informed and mature manner; and the importance of the parental role in child-rearing," it found the consent requirement permissible as an valid expression of the state's *parens patriae* authority.[306]

In reaching this result, the court relied on the bright-line distinction the *Bellotti* Court had drawn between the abortion and marriage decisions, quoting *Bellotti* for the proposition that

> a pregnant minor's options are much different than those facing a minor in other situations, such as deciding whether to marry. A minor not permitted to marry before the age of maturing is required simply to postpone her decision. She and her intended spouse may preserve the opportunity for a later marriage should they continue to desire it.[307]

In short, as the *Moe* court stressed, "Giving birth to an unwanted child involves an irretrievable change in position for a minor . . . whereas the temporary denial of the right to marry does not. Plaintiffs are not irretrievably foreclosed from marrying. The gravamen of the complaint . . . is not total deprivation but only delay."[308]

IV. ACHIEVING LEGAL HARMONY THROUGH THE INTENDED PURPOSE APPROACH TO THE SHIFTING OF AGE BOUNDARIES

We now return to the question posed at the start of this Article: is it possible to codify a legal regime in which teens are regarded as "too young to get married—but not to end a pregnancy"[309] without seemingly taking a "jumbled approach to doling out decision-making power to adolescents"?[310] As noted, a critical concern underlying this question is that the movement to fix the minimum marital age to eighteen without exception will bolster the protectionist view that "minor girls do not have the decisionmaking capacity

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[306] *Id.* at 628 (quoting *Bellotti*, 443 U.S. at 634). For a discussion of why the Court's reliance on these factors was misplaced, *see* J. Shoshanna Ehrlich, *Minors as Medical Decision Makers: The Pretextual Reasoning of the Court in the Abortion Cases*, 7 MICH. J. GENDER & L. 65, 89–99 (2000).

[307] *Id.* at 630 (quoting *Bellotti*, 443 U.S. at 642).

[308] *Id.*

It is worth noting that, although not the focus of the *Moe* court, the difference between postponement and denial of a right distinguishes the challenged parental consent requirement from the restrictive laws that the Supreme Court had previously invalidated in Loving v. Virginia, 388 U.S. 1 (1967) (banning interracial marriage) and Zablocki v. Redhail, 434 U.S. 374 (1978) (banning individuals owing child support arrearage or whose children were likely to become public charges from marrying) for intruding on the fundamental right to marry. The challenged laws in these cases effectively operated as an absolute barrier to marriage, resulting in an irretrievable loss of the protected right to marry, as distinct from the postponement effectuated by a denial of parental consent.

[309] Ebbert, *supra* note 1.

[310] Mutcherson, *supra* note 5.

to make choices of this weight" in the abortion context.[311] This Article offers a different approach to resolving the law's seeming incoherence by focusing on the harmonizing purpose behind the use of different age markers to demarcate the legal boundary between adulthood and childhood.

This Part elaborates on how the "intended purpose" approach renders coherent what might otherwise constitute a "jumbled approach"[312] to consent rights when it comes to abortion and entry into marriage. It centers how the use of different age markers endows teens with the capacity to shape their own futures by enabling them to avoid the creation of enduring family relationships by fiat. Further refuting the charge of incongruity, this Part elaborates on the critical distinction between the irretrievable loss of a right and its deferral.

As we have seen, requiring a teen to involve her parents in her abortion decision based on the view that she is too immature to make it herself opens the door to motherhood by fiat. Nonetheless, proponents of such a mandate insist that parental involvement in the abortion decision is essential to protect "immature minors" from the "often serious" consequences of abortion, given their inability "to make fully informed choices that take into account both immediate and long-range consequences."[313] However, a troubling irony is at play here. In discursively constructing teens as too immature to make important decisions about their own lives and thus in urgent need of parental guidance when it comes to abortion, parents are effectively vested with the authority to plunge their daughter headlong into the adult world of parental responsibilities. In short, the refusal to treat a teen as a legal adult with the right to make her own decision about the termination of an unplanned pregnancy has the perverse consequence of effectively metamorphosing her into an adult, at least in relationship to her own child.

This problematic metamorphosis is further compounded by the unique set of limitations that jeopardize the ability of teen parents to raise their children in safe and stable environments. Manian makes clear that this is no abstract concern, as teen mothers are at "especially high risk of oversight by the child welfare system."[314] Not only are they "generally more likely to come into contact with the child welfare system than adult parents,"[315] they are also evaluated under the pall of "[m]ultiple vectors of discrimination, including gender race, and class, [which] intersect with age based concerns" to make teens "doubly vulnerable to disruption of their parental rights," especially girls who are in the foster system, poor, and/or racial minorities.[316] Consequently, notwithstanding the "formal grant of full paren-

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[311] Johnson-Dahl, *supra* note 18, at 1080.
[312] Mutcherson, *supra* note 5.
[313] AMERICANS UNITED FOR LIFE, PARENTAL NOTIFICATION FOR ABORTION ACT: MODEL LEGISLATION AND POLICY GUIDE (2018).
[314] Manian, *supra* note 14, at 161.
[315] *Id.* at 164.
[316] *Id.* at 161–62.

tal rights to minor parents," Manian makes clear that "the law often undermines rather than supports those rights."[317]

Heightening their vulnerability, as Fershee details, teen parents are subject to a host of age-based legal impediments that directly undermine their "abilities to parent,"[318] much like those that undermine a teen's ability to participate in a marriage as a fully co-equal partner. For example, Fershee points to the common law rule barring teens from entering into binding contracts.[319] While a teen who lives with her parents may chafe under this limitation, it has more serious consequences for a teen parent who cannot "rent housing, buy or lease a car, or borrow money."[320] As a result, it is likely that she will not be able to provide for her children's basic needs, a reality that "requires adolescent parents to be dependent on their parents, the government, or disinterested third parties in order to survive."[321] Although teen parents "are expected to provide the same opportunities and benefits to their children as any parent, they are expected to do so with a limited tool kit and a forced dependence that can thwart their efforts."[322] This legal inability to "build a stable home for their children" can have devastating consequences in the event that "an accusation of unfitness is leveled against them" by the state—a heightened risk for teen moms—because "there is little recognition of the very legal impediments that might have contributed to their struggles as parents."[323]

In a nutshell, teen parents must forge a life for themselves and their children in a murky grey legal zone in which they are held to the same standards as adult parents but with fewer resources at their disposal. They must also do so under the exacting scrutiny of a child welfare system that imposes "additional hurdles to preserving their parental rights based on their minority" in tandem with other "vectors of discrimination."[324] When one layers this reality onto the challenges of teen parenting in general, which are greatly magnified for those denied a wanted abortion, it is clear that motherhood by fiat divests a young woman of any meaningful opportunity to shape—in the words of the Supreme Court in *Planned Parenthood v. Casey*—"her own conception of her spiritual imperatives and her place in

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[317] *Id.* at 162. For a discussion of how a "skeptical view of an adolescent' decision to become a teen parent" drives the law of voluntary relinquishments in the adoption context, *see id.* at 178–85.

[318] Kendra Huard Fershee, *A Parent is a Parent, No Matter How Small*, 18 WM. & MARY J. WOMEN & L. 425, 453–54 (2012). *See also id.* at 449–51 (discussing limitations on constitutional rights); *id.* at 451–54 (discussing requirements of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, such as that teen parents must "stay in school and live with their parents" in order to receive public assistance, which can have a detrimental impact on a teen's parenting ability).

[319] *Id.* at 454.

[320] *Id.*

[321] *Id.*

[322] *Id.*

[323] *Id.*

[324] Manian, *supra* note 14, at 164.

society."[325] The teen mother is thus doubly punished for transgressing "female adolescent . . . purity norms,"[326] first through the divestiture of decisional rights to choose abortion, and second through the diminution of her ability to care for and maintain her relationship with her child in a safe and stable environment.

When it comes to marriage, it is helpful to disaggregate the situation of a teen being forced into a marriage against her wishes from one in which a teen wishes to enter into a marriage, but cannot because the law deems her incapable of making this decision on her own.[327] As with compelled motherhood, being forced to assume the status of a wife based upon the power that the law ostensibly vests in parents to override their daughter's wishes again effectively metamorphosizes her into an adult—a status that she could not have self-authorized due to her presumed decisional incapacity.

But, as we have seen, teen brides also enter a murky grey legal zone. Although vested with more expansive rights than teen mothers due to the emancipatory effect of marriage, they nonetheless teeter on the brink of legal adulthood with potentially devastating consequences. At its most dangerous, this lack of full legal capacity can trap teens in abusive marriages due to their inability to independently obtain a protective order or a divorce. This risk is compounded by the fact that shelters are often unavailable due to age restrictions. Moreover, depending on her jurisdiction, she may be precluded from opening a bank account, leasing an apartment, or other "adult" activities. She thus partially retains the legal status of a child and must be dependent on her spouse, due to both her legal incapacities and the power differential from the age gap itself.

Layering this reality onto the negative impacts of early marriage, it is clear that vesting parents with the ability to force their daughter into marriage—as with parenthood—divests her of the opportunity to shape her own fate. While a requirement for a judicial inquiry could arguably mitigate this risk, court approval is generally not required for teens between the ages of sixteen and eighteen who make up the bulk of early marriage entrants.[328] Moreover, even if a requirement, "requiring judicial approvals" may provide "little or no real protection. Judges often lack statutory guidance, training, and sensitivity to family violence and coercive control . . . Children may be too afraid or intimidated to disclose to a judge threats they are facing."[329] Moreover, many states do not expressly require a judge to consider the best interests of the prospective teen bride.[330]

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[325] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 852 (1992).

[326] Manian, *supra* note 14, at 133.

[327] As noted earlier, some marriage reform activists do not see this as a valid distinction, and thus collapse the distinction between forced and child marriages. *See* discussion *supra* Part III.C.3.

[328] Johnson-Dahl, *supra* note 18, at 1054–56.

[329] TAHIRIH JUST. CTR., *supra* note 42, at 6.

[330] *Id.* at 2.

What then of the teen who wishes to marry but whose parents deny her permission to do so? Does having to wait until the age of majority also divest her of the ability to shape the course of her own life as in the case of a teen who is forced into motherhood or marriage? The above-referenced distinction between the foreclosure and the postponement of right comes into focus here. If she wishes to marry, a teen simply needs to wait until her eighteenth birthday. In short, her status is not irrevocably altered, and a ban on child marriage does not actually divest a teen of her decisional rights. She is still free to make the decision to marry her intended; what is required is deferred effectuation of this decision. Going a step further, there is nothing to prevent a couple from announcing and celebrating their intended nuptials and going ahead with wedding planning. In fact, according to the magazine *Brides*, waiting can give a couple the opportunity to "enjoy this time . . . You've decided to spend your lives together, so what's the rush to plan a party? . . . Just practice calling your partner your fiancé, and enjoy all the congratulations you get . . . Then, when you're ready to buckle down and address the task list, go for it."[331] While waiting may feel like an unwelcome burden, it certainly cannot be equated with the harms of being forced to assume an unwanted status, be it that of parent or spouse.

V. CONCLUSION

As argued here, setting different age requirements for abortion and marriage does not signify that the law has adopted a "jumbled approach to doling out decision-making power to adolescents."[332] In fact, the very opposite is true. It frees young women from being forced into an unwanted status through parental fiat—a status that awkwardly frees them from the strictures of youth without fully vesting them with the rights and authority of legal adults. Minors enter parenthood and marriage with a limited toolkit, rendering them vulnerable to the supervisory authority of the state vis-à-vis their children or vulnerable to the coercion of their spouse. By contrast, using different age markers advances the shared intended purpose of keeping young women "in the driver's seat of their lives,"[333] and does so without relying upon the protectionist language that is so common in the marital reform movement. It thus avoids the risk that this rhetoric will be imported into the abortion arena to claim that teens lack the decisional capacity to make reproductive decisions without parental guidance. This framing shift

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[331] Jaimie Mackey, *What Is the Average Length of an Engagement?*, BRIDES (Feb. 21, 2021), https://www.brides.com/story/how–long–should–you–be–engaged–before–marriage [https://perma.cc/D5V4-D25W].

[332] Mutcherson, *supra* note 5.

[333] Ebbert, *supra* note 1.

instead registers in the contemporary key of "empower[ing] strong girls to speak for themselves."[334]

[334] *Id.*