SAYING "I DON'T" TO CHILD MARRIAGE: CREATING A FEDERAL MINIMUM MARITAL AGE REQUIREMENT THROUGH THE TREATY POWER

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I. INTRODUCTION

"I was sixteen years old and pregnant, so in my mind that should have been evidence of a rape."[1] The father of the child was twenty-eight years old, but instead of being prosecuted for statutory rape, the State of Nevada

1. Charlotte Alter, *Child Marriage Survivor: I Was Introduced to Him in the Morning and Handed Over That Night*, TIME MAGAZINE (June 6, 2017), http://time.com/4807611/us-child-marriage-survivor-story/.

issued the couple a marriage license and sent them on their way.[2] Typically, child marriage is viewed as an issue only prevalent in developing countries. Though the majority of child marriage does occur in such places, child marriage also transpires far too often in some of the world's most developed nations.[3] Between 2000 and 2015, the United States saw more than 207,000 married minors.[4] While the number of people in the U.S. marrying before the age of eighteen fell by sixty-one percent between 2000 and 2010, there are still gaps in the law that currently allow thousands of minors, some as young as the age of twelve, to be forced into marriage each year.[5]

While the general age of marriage in the U.S. is eighteen, most states allow for exceptions to the rule under parental consent, judicial consent, pregnancy, or a combination thereof.[6] In total, twenty-six U.S. states have no minimum age requirement, meaning there are twenty-six states where no age is too young to marry.[7] Concerned citizens have called on their states to establish a minimum marital age, but so far, only New Jersey and Delaware have passed laws banning marriage for individuals under the age of eighteen.[8] In many states, legislators face opposition from conservative and religious groups.[9] Recently, Kentucky legislators introduced a bill that would prohibit anyone aged sixteen or under from marrying and prevent any seventeen-year old from marrying without the approval of a judge.[10] The judge must be convinced that the minor is mature, self-sufficient, and not being coerced into marriage.[11] Despite seemingly strong support for a reasonable law, the vote was delayed due to heavy opposition from the Family Foundation of Kentucky, a conservative lobbyist group.[12]

2. *Id.*

3. *Children in a Digital World*, UNICEF (Dec. 2017), https://www.unicef.org/publications/files/SOWC_2017_ENG_WEB.pdf

4. Anjali Tsui, et al., *Child Marriage by the Numbers*, FRONTLINE (July 6, 2017), http://apps.frontline.org/child-marriage-by-the-numbers/ (Minor being any individual under 18).

5. *Id.*

6. *Id.*

7. *See* Sheri Stritof, *State-by-State Legal Age Marriage Laws*, SPRUCE (Oct. 31, 2018), https://www.thespruce.com/legal-age-marriage-laws-by-state-2300971.

8. Andrea Cavallier, *New Jersey Becomes Second State to Fully Ban Child Marriage*, PIX11 (Jun. 22, 2018, 3:51 PM), https://pix11.com/2018/06/22/new-jersey-becomes-second-state-to-fully-ban-child-marriage/.

9. Judith Vonberg, *Kentucky: Child Marriage Ban Delayed After Opposition from Conservative Group*, INDEPENDENT (Mar. 5, 2018, 11:58 PM), https://www.independent.co.uk/news/world/americas/kentucky-child-marriage-ban-delayed-vote-conservative-group-opposition-lawmakers-us-a8240121.html.

10. *Id.*

11. *Id.*

12. *Id.*

Eventually the bill was passed, but not without dissent.[13] While some states are successful in their quest to end child marriage, others are not.[14] Tennessee, for example, tried to pass a law in 2019 that would require both parties to be at least eighteen years old to marry, but the effort was quickly shut down by conservative groups.[15]

Congress, however, has the power to end the problem with a federal minimum marital age requirement. Admittedly, the most common sources of Federal authority do not apply to this subject matter. The Supreme Court has not ruled that the Fourteenth Amendment applies to this area, and it would be far outside the scope of the Commerce Clause.[16] Therefore, the most expedient and constitutional method to establish a minimum marital age falls under the Treaty Power by utilizing Article 23 of the Covenant on Civil and Political Rights ("Covenant") as the basis for legislation. Article 23 of the Covenant states that "[n]o marriage shall be entered into without the free and full consent of the intending spouses."[17] Full consent means a person must have the capacity to consent and be free from compulsion.[18] It is well-founded that people under the age of eighteen lack the legal capacity to consent to a serious contract such as marriage, but many children are still forced into marriage for the purposes of religion or custom. These children have not "full[y] consent[ed]," as required by the provision.[19] Therefore, the U.S. may implement Article 23 and establish a national minimum marital age of eighteen to combat the dangers posed to children from underage marriage and to reconcile their lack of capacity to fully understand the implications of consent and the consequences of marriage. Establishing a minimum age requirement for marriage allows the U.S. to implement the

13. Deborah Yetter, *Bill to Limit "Child Brides" in Kentucky Advances, but 3 Senators Don't Hold Their Peace*, LOUISVILLE COURIER JOURNAL (Mar. 7, 2018, 7:04 PM), https://www.courier-journal.com/story/news/2018/03/07/kentucky-child-marriage-bill-passes-senate/404486002/; KY SB48, 2018 S., Reg. Sess. (Ky. 2018), BILL TRACK 50, https://www.billtrack50.com/BillDetail/909562.

14. Zack Ford, *Tennessee Conservatives Kill Child Marriage Bill to Keep Fighting Same-Sex Marriage*, THINK PROGRESS (Mar. 8, 2018), https://thinkprogress.org/tennessee-child-marriage-anti-gay-4c56c32cb3ab/.

15. *Id.*

16. The Commerce Clause allows Congress "to regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3.

17. International Covenant on Civil and Political Rights art. 23, Dec. 16, 1966, 999 U.N.T.S. 171.

18. Casey Swegman, *The Intersectionality of Forced Marriage with Other Forms of Abuse in the United States*, NAT'L ONLINE RESOURCE CTR. ON VIOLENCE AGAINST WOMEN (Feb. 2016), https://www.tahirih.org/wp-content/uploads/2016/02/AR_ForcedMarriage.pdf.

19. *Determining the Legal Age to Consent to Research*, WASH. U. IN ST. LOUIS (Jul. 26, 2012), https://hrpo.wustl.edu/wp-content/uploads/2015/01/5-Determining-Legal-Age-to-Consent.pdf.

current requirements of Article 23 with the constitutional authority conferred on the Federal Government through the Treaty Power. As evidenced in the following sections, child marriage has horrific consequences and can be dealt with constitutionally through the Treaty Power. Contrary to the position held by the opposition, child marriage should not be viewed as a fundamental right or a protected exercise of religious belief, meaning it should not limit the arm of the Treaty Power or any rights held by individuals.

II. CHILD MARRIAGE AND ITS DETRIMENTAL EFFECTS

Although child marriage is an issue that affects both girls and boys, girls are overwhelmingly the target of underage marriage and comprise eighty-seven percent of underage marriage.[20] Further, the majority of underage marriage is between a child and an adult, and not two children marrying one another.[21] As the evidence shows, child marriage is traumatic to a child's physical, mental, and emotional well-being.[22]

By forcing children into adulthood by marriage, child spouses are often deprived of their fundamental rights to health, education, and safety.[23] Child spouses are neither physically nor emotionally ready to give birth and as a consequence, child brides face higher risks of death during childbirth and are particularly vulnerable to pregnancy-related injuries.[24] Child spouses are also more likely to suffer from mental health disorders such as depression, anxiety, and bipolar disorder.[25] A recent study suggests the rates of mental health disorders among child spouses are so high that child marriage should be considered a catalyst for major psychological trauma.[26] In addition, child

20. Tsui, *supra* note 4.

21. *Id.*

22. INT'L PLANNED PARENTHOOD FOUND., ENDING CHILD MARRIAGE A GUIDE FOR GLOBAL POLICY ACTION 14 (2006), https://www.unfpa.org/sites/default/files/pub-pdf/endchildmarriage.pdf.

23. A. V. Chari et al., *The Causal Effect of Maternal Age at Marriage on Child Wellbeing: Evidence from India*, 127 J. OF DEV. ECON. 42, 43 (2016) (finding that delayed marriage results in significantly better child health and educational outcomes).

24. Some pregnancy related injuries include Obstetric fistula, which is a hole between the vagina and rectum or bladder that is caused by prolonged obstructed labor, leaving a woman incontinent of urine or feces or both. Getting pregnant enduring childbirth under the age of 18 makes this condition more likely because the girl's body is not developed enough to handle the birth. NANCY WILLIAMSON, UNITED NATIONS POPULATION FUND, MOTHERHOOD IN CHILDHOOD 19 (Richard Kollodge et al. eds., 2013).

25. YANN LE STRAT ET AL., CHILD MARRIAGE IN THE UNITED STATES AND ITS ASSOCIATION WITH MENTAL HEALTH IN WOMEN, 128 OFFICIAL J. OF THE AMERICAN ACAD. OF PEDIATRICS 524, 525 (2011).

26. *Id.* at 530.

spouses often face limited access to education and economic opportunities, leaving them significantly more likely to live in poverty.[27]

Families subject their children to underage marriage for a variety of reasons, with the most common being cultural customs or to save family honor when a girl is impregnated out of wedlock or is found having premarital sex.[28] Conservative advocates encourage pregnant teens to marry because it is what they view as best for the baby.[29] Although statistics show that children are better off when raised in a home with married parents, marriages between individuals under the age of eighteen are more likely to end in divorce, which negates the alleged benefit.[30] Further, evidence repeatedly shows that divorce negatively affects both the parents and the children in the home.[31] Teenage marriage and divorce are closely related. The stresses associated with marrying young, especially when dealing with the additional factor of pregnancy, often causes marriages to fail.[32] Thus, it is false hope to believe that child marriage as a result of premarital sex or a teen pregnancy will help create a better environment for the teen and child. In reality, the marriage is unlikely to succeed and the potential divorce will cause more turmoil in the family and prolong psychological trauma to both spouses and their child.

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27. INT'L PLANNED PARENTHOOD FOUND., *supra* note 22, at 14.

28. V.v.B., *Why America Still Permits Child Marriage*, ECONOMIST (Jan. 3, 2018), https://www.economist.com/the-economist-explains/2018/01/03/why-america-still-permits-child-marriage; Swegman, *supra* note 18.

29. Nicholas Syrett, *Child Marriage is Still Legal in the US*, CONVERSATION (Dec. 11, 2017), https://theconversation.com/child-marriage-is-still-legal-in-the-us-88846; Mary Parke, ARE MARRIED PARENTS REALLY BETTER FOR CHILDREN? WHAT RESEARCH SAYS ABOUT THE EFFECTS OF FAMILY STRUCTURE ON CHILD WELL-BEING 8, (Ctr. for Law and Soc. Policy, 2003), https://www.clasp.org/sites/default/files/public/resources-and-publications/states/0086.pdf ("Compared to children who are raised by their married parents, children in other family types are more likely to achieve lower levels of education, to become teen parents, and to experience health, behavior, and mental health problems. And children in single- and cohabiting-parent families are more likely to be poor. This being said, most children not living with married, biological parents grow up without serious problems.").

30. Vivian E. Hamilton, *The Age of Marital Capacity: Reconsidering Civil Recognition of Adolescent Marriage,* 92 BOSTON UNIV. L. REV. 1817, 1818 (2012) (discussing the social, mental, and health costs of early marriage).

31. Paul R. Amato & Christopher J. Anthony, *Estimating the Effects of Parental Divorce and Death with Fixed Effects Models*, 76 J. MARRIAGE & FAM. 370, 382 (2014).

32. See Kay Hymowitz et al., Knot Yet: The Benefits and Costs of Delayed Marriage in America, THE NATIONAL MARRIAGE PROJECT (2013), http://nationalmarriageproject.org/wordpress/wp-content/uploads/2013/04/KnotYet-FinalForWeb-041413.pdf.

Sometimes children are abused under the guise of marriage.[33] For example, in 2006, the Colorado Court of Appeals validated a marriage between a thirty-four-year-old man, Willis, and a fourteen-year-old girl, Jamie, under the common law.[34] Jamie was three years old when she first met Willis, who was then thirty-three years old.[35] Willis was a convicted drug dealer who was twice divorced and Jamie grew up in a broken home with a drug-addicted mother who neglected her, leaving her a vulnerable target in search for love.[36] In 2002, Jamie and Willis began living together when she was fourteen years old and he was thirty-four years old.[37] Soon after they cohabitated, Jamie became pregnant, and in 2003, the couple applied for a marriage license.[38] The legal age to marry in Colorado was eighteen, but at sixteen, a child could get married with parental consent, or judicial consent if parental consent was unavailable.[39] Although Jamie was not sixteen years old, and therefore not legally allowed to marry, her application slipped through the cracks, and the marriage was ultimately approved.[40] In 2004, the Department of Human Services ("DHS") realized there had been a mistake when they discovered that a fifteen-year-old girl was pregnant and married to a man almost twenty years older.[41] DHS sought to declare the marriage invalid, take custody of Jamie, and charge Willis with child molestation.[42] Willis' defense to the charge was that he could not have molested Jamie because she was legally his wife under the common law,[43] a legal concept recognized by eight states, including Colorado, and the District of Columbia.[44] Under the common law, marriage between two people creates a valid marital relationship, even without a legal marriage ceremony performed in accordance with statutory

33. Ettie Bailey-King, *Stop Stealing Her Childhood: Girls Not Brides Members Demand Action from World Leaders to End Child Marriage*, GIRLS NOT BRIDES (Oct. 15, 2019), https://www.girlsnotbrides.org/stop-stealing-her-childhood-girls-not-brides-members-demand-action-from-world-leaders-to-end-child-marriage/; Chari, *supra* note 23, at 43.

34. *In re* Marriage of J.M.H., 143 P.3d 1116, 1119 (Colo. App. 2006).

35. *See generally* Kirk Mitchell, *She was 14. He was 34.*, DENVER POST (Sep. 9, 2007, 6:43 PM), https://www.denverpost.com/2007/09/09/she-was-14-he-was-34/.

36. *See generally* Karen Schwartz, *In Colorado, Children of Any Age Can Get Married. A Former Child Bride Thinks that Should Change*, COLORADO SUN (Nov. 19, 2018, 6:00 AM), https://coloradosun.com/2018/11/19/jamie-rouse-child-marriage/.

37. *Id.*

38. *Id.*

39. *J.M.H.*, 143 P.3d at 1117.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

requirements.[45] These requirements usually consist of the couple living together for a period of time and holding themselves out as married to friends, family, and the community.[46] Though both parties must also have the capacity to marry, which would normally be possible at eighteen years old, the age of consent under the common law is fourteen for males and just twelve for females.[47]

Since Jamie was over twelve years old and the couple had lived together and held themselves out as married, the couple met the requirements of common law marriage and the court was required to hold the marriage as valid.[48] Following this case, the Colorado legislature held an emergency meeting and changed the common law age of marriage to eighteen. Regrettably, the results of this case did little to stop the continued exploitation of children cloaked in the guise of marriage, as the problem still persists across America today.[49]

III. MINORS LACK THE ABILITY TO GIVE "FREE AND FULL CONSENT" TO MARRIAGE

Any marriage that lacks consent violates Article 23, and thus, Congress has the ability to use Article 23 to prevent marriages that do not satisfy the requirements of the treaty.[50] There are three primary reasons children cannot consent to marriage: (1) they are a target for coercion leaving them vulnerable to being manipulated into the act, (2) they do not have the capacity to consent, at least based on legal principles; and (3) they are psychologically incapable of understanding the true ramifications of marriage. Black's Law Dictionary describes knowing consent as "a person's agreement to allow something to happen, made with full knowledge of the risks involved and the alternatives."[51] The three reasons argued as to why children cannot consent also demonstrate why parental consent and judicial bypasses are ineffective.

45. *What is Common Law Marriage?,* FINDLAW, https://family.findlaw.com/marriage/common-law-marriage.html (last visited Jan. 8, 2020).

46. *Id.*

47. *J.M.H.*, 143 P.3d at 1119.

48. *Id.* at 1120.

49. Mitchell, *supra* note 35.

50. International Covenant on Civil and Political Rights, *supra* note 17, at 179.

51. *Informed Consent,* BLACK'S LAW DICTIONARY (11th ed. 2019).

A. *Children are a Target for Coercion, Leaving Them Vulnerable to Being Manipulated or Forced into Marriage*

Commentators would agree that problems arise when a minor is forced into marriage given the inability of children to truly give consent. The U.S. Department of State "considers the forced marriage of a minor child to be a form of child abuse, since the child will presumably be subjected to non-consensual sex."[52] Although not every forced marriage involves a child, there is much overlap between forced marriage and child marriage due to the vulnerability of children.[53]

Forced marriages happen for a variety of reasons, but they most often occur as a byproduct of cultural customs, or in situations where a family forces a child to marry when the child becomes pregnant out of wedlock, or when children are found to be having sex out of wedlock.[54] In some occasions, marriage is forced through either physical abuse or death threats, and often times, through coercion and economic threats.[55] Some of these threats include withholding food from the child, isolating the minor by taking them out of school, cutting off social ties, and threatening to kick the child out of the home, leaving the child with nowhere to go.[56]

It is often believed that only children in their early teens are subject to forced marriage. This erroneous belief catapults the false idea that a problem does not exist as long as states do not allow children younger than sixteen or seventeen years old to be married since older children are the less likely to be coerced. However, youth that are older than sixteen years old suffer a higher risk of forced marriage.[57] Moreover, older children are more likely to fall through the cracks of child protection, and if the children do not seek further help, law enforcement is more likely to dismiss any claims of abuse as dramatic behavior.[58] To make matters worse, a child that reports a forced marriage is frequently left without assistance since child protection authorities are often constrained by a limited mandate which allows them to investigate abuse and neglect by parents, but not by spouses.[59]

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52. 7 U.S. DEP'T OF STATE, Foreign Affairs Manual § 1741 (2005), https://fam.state.gov/FAM/07FAM/07FAM1740.html.

53. Swegman, *supra* note 18, at 3.

54. Loretta M. Kopelman, *The Forced Marriage of Minors: A Neglected Form of Child Abuse*, 44 J. L. MED. & ETHICS 173, 174 (2016).

55. *Id.* at 175.

56. *Id.*

57. *Id.*

58. *Id.* at 175-76.

59. *Id.*

Moreover, children forced into marriage often cannot hire an attorney due to their age and financial limitations. They also cannot resort to confiding in shelters or with the police without having their parents notified since authorities are legally obligated to bring them home. This leaves minors extremely vulnerable to forced marriage with no viable option of escape. This is why parental consent, especially on its own, will never be a sufficient indicator of a child's true consent to marriage since parents can easily physically and emotionally abuse a child into the marriage. Requiring merely a parental signature as a safeguard to ensure children are consenting to marriage only continues the cycle of forced marriage.[60] Indeed, not all parents who consent to their child marrying are forcing them to do so, but states that only require a parent signature to allow a child to get married create an environment where exploitative parents or would be spouses can manipulate the situation. Requiring parental consent does not translate to the child's consent but rather invites the abuse of children.

B. *Legal Principles Indicate That Children Do Not Have the Ability to Consent*

In an effort to address the issue of parental coercion and ensure the child gives adequate consent, many states require judicial consent in addition to parental consent. However, those restrictions, too, fail to ensure true consent. Even if the minor agrees to the marriage free from any direct force, they are incapable of consenting to such a serious legal contract. The U.S. places legal limitations on a minor's right to contract.[61] Generally, a minor cannot enter into a contract under the age of eighteen.[62] The policy reasons for these restrictions is to protect minors from entering into contracts that involve responsibilities and obligations which they may not understand.

Every state recognizes an age of consent for an individual to engage in sexual relations, with the youngest age at sixteen and the oldest age at eighteen.[63] States effectuate this requirement into law because they recognize that regardless of what children may want, children are unable to make thoughtful and fully consensual decisions to engage in sexual relations at a younger age. As a society, the U.S. takes this idea so seriously

60. *See* Kopleman, *supra* note 54.

61. Richard Stim, *Who Lacks the Capacity to Contract?*, NOLO, https://www.nolo.com/legal-encyclopedia/lack-capacity-to-contract-32647.html (last visited Jan. 22, 2020).

62. *Id.*

63. *United States Age of Consent Map*, AGEOFCONSENT, https://www.ageofconsent.net/states (last visited Jan. 22, 2018).

that people may be charged with statutory rape for having sex with a minor who is not of the age to consent to the act.[64] Though sex is not a traditional contract, it is an agreement that can have serious consequences. There is no logical reason we should believe that if a minor cannot consent to sex, then he or she can consent to marriage, especially when marriage entails so much more than sex.

The U.S. also limits the activities that children are permitted to partake in, primarily under the notion that children are not mature. For example, laws do not allow minors to smoke tobacco until the age of eighteen, drink alcohol until the age of twenty-one, and drive until the age of sixteen.[65] All of these restrictions are based on the idea that below a set age, an individual does not have the emotional and physical maturity to handle the activity. In Florida and California, minors cannot purchase cough syrup given the likelihood of drug abuse, yet these states entrust sixteen-year-old children to handle marriage.[66] Legislators set many restrictions on minors for everyday activities with the recognition that minors are unable to responsibly undertake certain activities not restricted to adults. Yet, states allow minors to marry, expecting them to understand the responsibilities and consequences of marriage. Marriage is perhaps the most important legal contract of an individual's life and thus, requires a level of consent that is greater than what a child can manage.

Statutory rape, a criminal charge that is recognized in all fifty states, is another example of how the law recognizes that minors cannot consent.[67] The legal age of consent varies between states, from sixteen to eighteen years old.[68] Shockingly, in all of the forty-eight states that allow child marriage, marriage is a defense to statutory rape.[69] In other words, it is illegal for an adult to have sex with an individual under the age of consent because a minor is legally unable to consent. However, if the adult marries

64. Eugene Volokh, *Statutory Rape Laws and Ages of Consent in the U.S.*, WASH. POST (May 1, 2015, 8:17 AM), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/05/01/statutory-rape-laws-in-the-u-s/?utm_term=.5430d3a12b3e.

65. FDA, *Selling Tobacco Products in Retail Stores* (2019), https://www.fda.gov/tobacco-products/retail-sales-tobacco-products/selling-tobacco-products-retail-stores (last visited Jan 14, 2020); FED. TRADE COMM'N, CONSUMER INFORMATION, *21 is the Legal Drinking Age* (2013), https://www.consumer.ftc.gov/articles/0386-21-legal-drinking-age (last visited Jan 14, 2020).

66. Erin Schumaker, *New Law Bans Sale of Specific Cough Medicine to Minors*, HUFFINGTON POST (Jan. 4, 2017, 8:09 AM), https://www.huffpost.com/entry/new-law-bans-sale-of-specific-cough-medicine-to-minors_n_586be307e4b0de3a08f9a5a4.

67. SANDRA NORMAN-EADY, ET AL., *STATUTORY RAPE LAWS BY STATE*, CONN. GEN. ASSEMBLY OFFICE OF LEGISLATIVE RESEARCH (Apr. 14, 2003), https://www.cga.ct.gov/2003/olrdata/jud/rpt/2003-R-0376.htm.

68. *Id.*

69. 18 U.S.C. § 2243 (2007).

the minor, the sexual act is no longer recognized as statutory rape and is ultimately allowed under the law. Marriage is, without a doubt, a far more serious act than just sex. There is no logical reason that legislatures would recognize a minor is incapable of consenting to sex but also agree that the minor is capable of consenting to marriage. Further, this loophole invites a legal form of sexual abuse, as described in the Colorado case previously mentioned.[70]

C. *Children are Psychologically Incapable of Understanding the True Ramifications of Marriage*

Minors are incapable of giving proper consent since minors lack the developed brain functions that they would have upon reaching adulthood. Neurophysiological imaging studies repeatedly show that the brain's overlapping control systems for reasoning, problem solving, reward and punishment conceptualization, self-regulation of behavior, and decision-making, all influence how a person formulates consent.[71] These areas of the brain continue to develop into the early and mid-twenties.[72] This science suggests that children are unable to control impulses, regulate emotional responses, and make reasoned and appropriate choices the same way adults do.[73] The areas of the brain that help humans form responsible and reasonable choices are some of the last to develop.[74] These neurological differences are why increased risk-taking behaviors, such as experimentation with risky sexual practices, drugs, alcohol, and gambling, are more common among minors.[75]

When individuals consent to a contract, society requires them to have the cognitive ability to understand what they are consenting to. Medical research often shows that because of the time it takes for the human brain to develop, minors do not have this ability.[76] It was once thought that the human brain finished developing by puberty, but the past decade of scientific research shows that the brain is not fully developed until the mid-

70. *J.M.H.*, 143 P.3d at 1119.

71. Laurence Steinberg, *Does Recent Research on Adolescent Brain Development Inform the Mature Minor Doctrine*, 38 J. MED. & PHIL. 256, 263 (2013).

72. *Id.* at 259.

73. *Id.* at 260-61.

74. *Id.* at 264.

75. *Id.*

76. *Id.* at 263.

twenties.[77] As scientific evidence expands our understanding of how the brain develops and the role that it has in decision-making behavior, the law must change to reflect what we have come to understand. Centuries ago, society considered thirteen to be the age of adulthood and therefore accepted that people of such age could willingly enter into marriage.[78] With a better understanding of child development, society ought to no longer accept that minors can consent to the life changing choice of marriage.

Though even eighteen-year-old people do not have completely developed brains, they are universally allowed to marry. While statistics reflect that marriages are healthier and less likely to end in divorce when the parties wait to marry until their late-twenties and older,[79] society must draw a line. In the early stages of human life, the brain is a rapidly developing organ. Though reasoned choices are best made when the brain is fully developed, and even though eighteen-year-old brains are not fully developed, the brain of an eighteen-year-old is significantly better able to understand the consequences of marriage when compared to that of a sixteen-year-old.[80] The growth the human brain experiences in that two-year difference is substantial, making the legal age of marriage at eighteen more than just an arbitrary number.[81] The U.S. also recognizes eighteen as the age when an individual can vote, enter into a binding contract, and buy or lease property.[82] The U.S does not usually allow sixteen-year-old minors to undertake such tasks because they are not likely to understand the depth of their decision, including the responsibilities associated. Socially and legally, eighteen is the age where individuals are more likely to understand the depths of their decisions.[83]

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77. Sara B. Johnson, et al., *Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy*, 45 J. ADOLESCENT HEALTH 216, 216 (2009).

78. *See* Anjali Tsui, *Married Young: The Fight Over Child Marriage in America*, FRONTLINE, (Sept. 14, 2017) https://www.pbs.org/wgbh/frontline/article/married-young-the-fight-over-child-marriage-in-america/.

79. *See* Theresa E. DiDonato, *These Are the Best (and Worst) Ages to Get Married,* PSYCHOLOGY TODAY, (June 1, 2016), https://www.psychologytoday.com/us/blog/meet-catch-and-keep/201606/these-are-the-best-and-worst-ages-get-married.

80. *See generally* Laurence Steinberg, *Should the Science of Adolescent Brain Development Inform Public Policy?* ISSUES IN SCI. AND TECH., 28, n. 3 (2012).

81. *See id.*

82. CAL. BAR ASS'N, WHEN YOU TURN 18: A SURVIVAL GUIDE FOR TEENAGERS 2 (2014).

83. *See* Richard Monastersky, *Who's Minding the Teenage Brain?*, CHRON. HIGHER EDUC., Jan. 12, 2007, 53 Issue 19, at A14; *see generally* Amanda Schaffer, *Head Case: Roper v. Simmons Asks How Adolescent and Adult Brains Differ*, SLATE (Oct. 15, 2004, 5:50 PM), https://slate.com/technology/2004/10/how-do-adolescent-and-adult-brains-differ.html.

In *Roper v. Simons*, the Supreme Court held that a boy who committed robbery and murder at the age of seventeen could not be sentenced to the death because, at the age of seventeen, children experience diminished culpability, where they display a "lack of maturity and an underdeveloped sense of responsibility," which are characteristics more often found in youth than in adults.[84] These qualities often result in children making impetuous and ill-considered decisions."[85] Therefore, the Court reasoned that sentencing an adolescent to death constitutes cruel and unusual punishment.[86] This case demonstrates that the law recognizes the scientific evidence that shows the inability of children to fully understand the choices they make. These recent discoveries in child brain development underline the importance of applying scientific knowledge to child marriage to enforce a minimum age requirement.

The significance of cognitive ability in the issue of consent is also reflected in cases involving those with special needs and mental illness.[87] In the context of contract law, if an individual suffers from mental illness or is mentally disabled and thus, is unable to understand the gravity of a contract that he or she is signing, then the contract may be deemed void or voidable.[88] The policy underlying this situation is directly tied to why this nation should not allow minors to enter into the serious contract of marriage. Minors, similar to those with mental illness or disabilities, are medically incapable of making informed decisions to enter into such a major contract. Critics may argue that the law allows those with mental illness or disabilities to enter into contracts with a guardian and thus, society should allow the same for minors in the context of marriage.[89] However, as previously stated, allowing parental consent to be the safeguard of marriage, especially when it is the only safeguard, is risky, and

84. Roper v. Simmons, 543 U.S. 551, 569 (2005).

85. *Roper*, 543 U.S. at 569.

86. *Roper*, 543 U.S. at 578-79.

87. *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 12, 15 (AM. LAW INST. 1981).

88. *Id.*; *See generally* Laurence Steinberg, *Adulthood: What the Brain Says About Maturity*, N.Y. TIMES, (May 29, 2012, 3:09 PM), https://www.nytimes.com/roomfordebate/2012/05/28/do-we-need-to-redefine-adulthood/adulthood-what-the-brain-says-about-maturity; Valerie Reyna, The Adolescent Brain: Learning, Reasoning, and Decision Making, Lecture at Cornell University, (Mar. 1, 2012), https://media.library.cornell.edu/media/The+Adolescent+BrainA+Learning%2C+Reasoning%2C+and+Decision+Making/1_p4kl4ol9 (at 35:00-45:00); Coalition for Juvenile Justice, *What are the implications of Adolescent Brain Development for Juvenile Justice?* (2006), https://www.juvjustice.org/sites/default/files/resource-files/resource_134.pdf.

89. *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 12, 15 (AM. LAW INST. 1981); *see generally* Laurence Steinberg, *Adulthood: What the Brain Says About Maturity*, N.Y. TIMES, (May 29, 2012, 3:09 PM), https://www.nytimes.com/roomfordebate/2012/05/28/do-we-need-to-redefine-adulthood/adulthood-what-the-brain-says-about-maturity.

opens the door for forced marriage and abuse. It is inexcusable morally, legally, and scientifically, to conclude that minors have the ability to consent to marriage.

IV. TREATY POWER AND THE COVENANT

Treaties are the mechanism by which domestic law interacts with international law. The Supremacy Clause states that "all treaties made… under the authority of the United States, shall be the supreme law the supreme law of the land."[90] This means that treaties preempt inconsistent state law.[91] Domestically, treaties work in two ways. Some treaties are self-executing, meaning they automatically have the effect of domestic law, and others are non-self-executing, which "constitute international law commitments," but "do not by themselves function as binding federal law."[92] Non-self-executing treaties are enforceable only after additional legislation or judicial action.[93]

The Treaty Power sparks fierce debate amongst scholars, as some believe that the Treaty Power should be limited by the scope of the enumerated federal powers and the Tenth Amendment.[94] However, the Supreme Court adopts a different interpretation of the Treaty Power. Treaties are not limited by subject matter or by the Tenth Amendment's reservation of power to the states.[95] As Professor Lori Damrosch of Columbia Law School stated, "Constitutional law is clear that treaty-makers may make supreme law binding on the states to any subject, and notions of states' rights should not be asserted as impediments to the full implementation of treaty obligations."[96] Although some scholars believe that the Treaty Power is limited in scope, the Restatement Third of Foreign Relations Law of the United States declares that there is "no definitive authority for such a rule."[97]

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90. U.S. CONST. art. 6, cl. 2.

91. Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 392 (1998).

92. Ted Cruz, *Limits on the Treaty Power*, 127 HARV. L. REV. F. 93 (2014).

93. *See id.*

94. *Id.* at 103-04.

95. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S., § 302 (AM. LAW INST. 1987).

96. Bradley, *supra*, note 91 at 393 (quoting Lori Fisler Damrosch, *Role of the United States Senate Concerning Self-Executing and Non-Self-Executing Treaties*, 67 CHI.-KENT L. REV. 515, 530 (1991)).

97. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S., § 111 cmt. I.

The primary case which interprets the Treaty Power is *Missouri v. Holland*.[98] In *Missouri v. Holland*, Congress enacted a statute to regulate the hunting of migratory birds to implement a treaty that the President entered into with Great Britain.[99] The statute was challenged under the premise that it infringed upon the States' Tenth Amendment rights.[100] The Supreme Court acknowledged that the Migratory Bird Treaty Act perhaps could not be created under Congress' commerce powers but nonetheless held the act to be valid.[101] The Court ruled that a law which infringes the rights reserved to the States under the Tenth Amendment may nevertheless be considered valid if it is passed to implement a treaty made under the authority of the Federal Government, and is therefore the supreme law of the land.[102] This means if a treaty is valid in its creation, any statute made to implement it is also necessarily valid under Article 1, Section 8 of the U.S. Constitution.[103] Article 1, Section 8 of the U.S. Constitution permits all legislative acts that are necessary and proper to execute the powers granted to the Federal Government, including the Treaty Power.[104]

The U.S. adopted and ratified the Covenant in 1992, and by doing so, the U.S. agreed to comply with and implement the provisions of the Treaty just as it would any other international obligation, subject to Reservations, Understandings, and Declarations ("Reservations").[105] One of the Reservations attached by the U.S. Senate to the Covenant is a "non-self-executing" declaration. Thus, the Covenant does not by itself function as domestic law but can still be used as a mechanism to establish domestic federal law, such as a minimum age for marriage.[106]

Using the Treaty Power and the Covenant to establish a minimum marital age may seem straight-forward by acknowledging the connection between the lack of a minor's inability to consent to marriage and the Covenant's clear requirement for marriage to be consensual, but the Treaty Power is still constantly debated.[107] Critics of *Missouri v. Holland* have repeatedly called for the Supreme Court to overturn the decision, in part because, almost 100 years after the decision, the Supreme Court has ruled

98. Missouri v. Holland, 252 U.S. 416 (1920).

99. Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 Harv. L. Rev. 1867, 1871-73, nn.19-25 (2005).

100. *Holland*, 252 U.S. at 431.

101. *Id.* at 434.

102. *Id.*

103. *Id.* at 435.

104. U.S. CONST. art. I, § 8, cl. 18.

105. *See generally* International Covenant on Civil and Political Rights, *supra* note 17.

106. International Covenant on Civil and Political Rights, *supra* note 17, at 173-74.

107. Bradley, *supra* note 91, at 392.

only on a handful of cases involving the Treaty Power.[108] In a recent article, Professors Sloane and Glennon asserted that *Bond v. U.S,* a recent Supreme Court case on the Treaty Power, limits *Missouri v. Holland,* but these claims are unfounded.[109]

In *Bond v. U.S,* Defendant Bond learned that another woman was pregnant with her husband's child.[110] In an effort to retaliate, Bond acquired toxic chemicals and spread those chemicals around the woman's home.[111] Bond was charged with possession and use of a chemical weapon in violation of the Chemical Weapons Implementation Act ("CWA").[112] The CWA prohibits the possession or use of any chemical that can cause death and temporary or permanent harm to another if not intended for a peaceful purpose.[113] The CWA was enacted to implement the Chemical Weapons Convention, a treaty created to prohibit the development and use of chemical weapons.[114] Similar to the Covenant, the Chemical Weapons Convention is also a non-self-executing treaty.[115] Thus, Congress passed the CWA in order to implement the Chemical Weapons Convention.[116] The Supreme Court overturned Bond's charge under the CWA, reasoning that clear proof of congressional intent that the CWA applies to the States is necessary before a statute can be interpreted in such a way.[117] The policy behind the Chemical Weapons Convention Treaty is to combat war and terrorism, not minor assaults among individual citizens within states.[118] Thus, without clear congressional intent that the CWA applies to the States, coupled with the policy reasons that the CWA was founded upon, the Court held that the CWA did not apply to Bond.[119]

The Supreme Court did not specifically rule on the CWA's constitutionality as it pertained to Bond, but instead narrowly ruled that the CWA did not apply to the case.[120] However, it is worth noting that the concurring Justices in the *Bond* opinion asked that *Missouri v. Holland* be

108. Bradley, *supra* note 91, at 442.

109. Robert Sloane & Michael Glennon, *The Sad, Quiet Death of Missouri v. Holland: How Bond Hobbled the Treaty Power*, 41 YALE J. INT'L L. 51, 52 (2016).

110. Bond v. U.S, 572 U.S. 844 (2014).

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.* at 848.

115. *Id.* at 850.

116. *Bond*, 572 U.S. at 851.

117. *Id.* at 866.

118. *Id.* at 863.

119. *Id.*

120. *Id.* at 855.

expressly overruled and the majority chose not to.[121] Whether the majority in *Bond* implicitly affirmed *Missouri v. Holland* is open to interpretation. Nevertheless, *Missouri v. Holland* remains a valid precedent.

Another criticism of the Treaty Power under *Missouri v. Holland* is that it grants the executive branch too much power to create law. This interpretation is mistaken for three reasons. First, a non-self-executing treaty requires a law to be created and passed in order to take effect domestically.[122] In order for the bicameral legislative branch to pass a law, a majority of the House of Representatives and the Senate must pass the bill in question.[123] Thus, when dealing with a non-self-executing treaty such as the Covenant, two branches of government must be involved, significantly limiting the power that the executive branch has in implementing treaties. Involving the Senate also ensures a level of state involvement.

In *Medellin v. Texas*, the Supreme Court affirmed limits on the use of non-self-executing treaties, emphasizing that non-self-executing treaties require the approval of Congress in order to apply to the States.[124] In *Medellin v. Texas*, Medellin was convicted of rape and murder and claimed that as a foreigner, the Vienna Convention required the State to inform him of his right to have the consular personnel notified.[125] He further asserted that a memorandum by the President citing an international court case regarding a criminal's right to contact their consulate meant that state courts must uphold the international case.[126] The Court rejected the argument and held that state courts are not required by the U.S. Constitution to provide review and reconsideration of a conviction, and are not required to show regard to state procedural default rules as required by a memorandum by the President.[127] The Presidential Memorandum at issue was an attempt by the executive branch to enforce a non-self-executing treaty, but without congressional action, it had no binding authority on state courts. The holding assures that a non-self-executing treaty will not be thrust upon states unless Congress takes action to implement the required legislation.

Aside from the fact that the U.S. Constitution gives the executive branch the authority to enter into treaties and the legislative branch to make all laws that are necessary and proper to execute the power given to the Federal Government, any laws that may be passed are still subject to

121. *Bond*, 572 U.S. at 894.
122. Medellin v. Texas, 552 U.S. 491, 525-26 (2008).
123. *Id.*; *see* U.S. CONST. art. II, § 2, cl. 2.
124. *Medellin*, 552 U.S. at 526.
125. *Id.* at 501.
126. *Id.* at 498.
127. *Id.* at 511.

judicial review. The Supreme Court ruled on the construction of a treaty as a proper subject for judicial review, even when the treaty may relate to foreign affairs.[128] Therefore, the judicial branch acts as another check on the Treaty Power so that it is not abused to take away enumerated rights of the people.

The Treaty Power is an enumerated power given to the Federal Government while the powers left to the States under the Tenth Amendment are "the powers not delegated to the United States by the Constitution."[129] Therefore, it is undisputed that the Tenth Amendment overrides the enumerated treaty power given to the U.S. government. The Tenth Amendment encompasses whatever powers were not granted to the Federal Government; it does not act to restrict the powers given to the Federal Government. In the realm of treaties, the powers of the Federal Government are restricted by the checks and balances of all three branches. Further, if the Federal Government was limited to making all treaties fall within an enumerated power of Congress, then Congress would not have the power to make treaties dealing with cross-border child abductions or extradition because there is no enumerated power to make such treaties.

Another argument against the Treaty Power is that a treaty must involve a subject of international concern. While how a country treats its people is certainly of international concern, the argument could be used to discredit certain human rights treaties because unlike international trade treaties, some human rights treaties generally do not involve subjects crossing border lines. On that note, child marriage is possible if subjects move away from a state banning child marriage to a state that allows it. It is important to consider that if the U.S. eradicates child marriage, then citizens may run to other countries to marry children. This is not to suggest that eradicating child marriage laws in the U.S. or creating a minimum age law for marriage is pointless. Rather, it is to point out that in order to fully eliminate the issue, the world must come together and disallow it. We start to fix the problem by starting at home. Without international agreements in place, many nations will continue to engage in human rights violations. Indeed, it is naïve to say that treaties eradicate human rights abuses, but surely, the implementation of treaties for the issue of child marriage will help monitor nations and enforce mechanisms to stop and prevent such abuses.

128. Cruz, *supra* note 92, at 111-12.

129. U.S. CONST. amend. X.

V. WHY CHILD MARRIAGE IS NOT PROTECTED UNDER THE RIGHT TO MARRY AND WHY CURRENT SAFEGUARDS ARE INEFFECTIVE

Proponents of child marriage may argue that the issue of consent can be solved if states allow a judge to ensure that a minor has sufficient capacity to understand what they are agreeing to. In reality, judicial discretion opens the door for personal bias and can never be implemented in a fail-proof manner. If states require judicial approval for a minor to marry, a variance of the "best interests of the minor" standard will be utilized in the context of child marriage.[130] The standard is a loose one that allows for an enormous amount of judicial discretion. While I would not suggest that all or even most judges would abuse discretion, some undoubtedly will.

Another issue with judicial approval is that even if the judge does his or her best to ensure the minor is not being forced into the marriage, the minor may feel obligated or threatened by their family or spouse to consent. For example, in California, parental and judicial consent is required for a minor to marry.[131] Nevertheless, Sara Tasneem was forced into marriage and impregnated at fifteen.[132] Tasneem is now an advocate against child marriage and tells her story of how she was forced into the marriage by her father and abused sexually and physically by her husband.[133] Her husband was almost twice her age, and she first met him on the day they were married.[134] A California judge approved this marriage.[135]

Other judges may impose their religious or moral values upon a minor when approving a marriage. For example, if the minor is a pregnant female and the judge has a strong belief that parents need to be married since marriage is best for children, then the judge may conclude that the marriage is in the best interests of the minor, even though it may not be. This judicial safeguard offers no safety at all for the child.

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130. Rachel L. Schuman, *State Regulations are Failing Our Children: An Analysis of Child Marriage Laws in the United States*, 60 WM. & MARY L. REV. 2337 (2019); *Marriage Age Laws*, NATIONAL CONFERENCE OF STATE LEGISLATURES, https://comm.ncsl.org/productfiles/94723912/NCSL-Marriage-Age-Requirements.pdf (last visited Dec. 19, 2018).

131. Cal. Fam. Code § 302 (West 2019).

132. Sara Tasneem, *Child Marriage Laws in CA Act as Loopholes That Allow for Statutory Rape*, DAILY CALIFORNIAN (May 30, 2017), http://www.dailycal.org/2017/05/30/child-marriage-laws-ca-act-loopholes-allow-statutory-rape/.

133. *Id.*

134. *Id.*

135. David Whiting, *California Lacks Minimum Marriage Age, Puts Children in Danger*, THE ORANGE COUNTY REGISTER (June 15, 2017), https://www.ocregister.com/2017/06/15/california-lacks-minimum-marriage-age-puts-children-in-danger/.

Another criticism of banning marriage under the age of eighteen is that it infringes upon religious freedom. Marrying young or marrying due to an unplanned pregnancy is often seen as a part of conservative values, but conservative values should not be confused with religious morals. There is no known religion that requires the marriage of children.[136] Some religions may require an individual to be a virgin before marriage, which many equate to marrying young, but there is no requirement under any religion that an individual must be under eighteen years old in order for the union to be valid.[137] There may be customs within religious groups that create an environment where minors are encouraged to marry, but these customs are not truly a part of the religious teachings. No religious group has argued that banning child marriage is a restriction on religious freedom. Further, even if it were a requirement for an individual of a certain religious sect to marry as a child, the requirement should not be used as an excuse to allow minors to be victimized. Religion does not negate the fact a minor cannot consent to marriage. Any law passed preventing minors from getting married in their youth would be a law of general application and held constitutional under *Employment Division v. Smith.*[138] Further, Mormonism originally encouraged polygamy as part of the practice of the religion yet all fifty states have restricted the right to marry as a union between only two people. In 1879, the U.S. Supreme Court upheld the federal law banning bigamy and concluded that restricting marriage to a union between only two people did not infringe upon religious freedom.[139]

The biggest criticism of banning marriage under the age of eighteen is the fact that marriage is a fundamental right.[140] In *Loving v. Virginia*, Chief Justice Warren wrote, "the freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."[141] However, restricting marriage to persons eighteen years old and older is not a removal of a fundamental right, but rather a qualification requirement that allows individuals to engage in that right. Marriage as a fundamental right does not mean that the government cannot

136. *8 Child Marriage Myths That Need to Go*, GIRLS NOT BRIDES (Dec. 18, 2017), https://www.girlsnotbrides.org/8-child-marriage-myths-bust-international-womens-day-2017/.

137. *Id.*

138. Employment Div., Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872, 879 (1990); *see also* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 521 (1993).

139. Reynolds v. U.S, 98 U.S. 145, 165 (1878).

140. *14 Supreme Court Cases: Marriage is a Fundamental Right*, AM. FOUND. FOR EQUAL RTS., http://afer.org/blog/14-supreme-court-cases-marriage-is-a-fundamental-right/ (last visited Dec. 19, 2018).

141. Loving v. Virginia, 388 U.S. 1, 12 (1967).

impose restrictions, but instead means that the restriction of the right is subject to review under a certain level of scrutiny.[142] In this case, marriage is subject to strict scrutiny.[143] For a law to pass strict scrutiny, it must further a "compelling governmental interest" and be narrowly tailored to achieve that interest.[144]

Currently, states restrict marriage in a variety of ways. Most states require couples to submit legal paperwork to enter into a marriage and all states require legal paperwork to end a marriage.[145] All forty-eight states that allow child marriage impose qualifications on the marriage, such as parental and judicial consent.[146] In addition, every state has laws against incest and polygamy.[147] Further, New Jersey and Delaware have already banned marriage under the age of eighteen without exceptions, and thus far, the law has not been challenged as infringing upon the fundamental right to marry.[148] Of course, all of these examples involve the state regulating marriage since marriage is an issue typically left to the states to resolve, but nonetheless, they also demonstrate the many ways that the U.S. already restricts marriage.

In the context of restrictions on child marriage, a similarly positioned restriction is voting. Voting is a well-established fundamental right also subject to strict scrutiny.[149] Voting in the U.S has always been restricted by age. Prior to 1971, an individual had to be twenty-one years old to vote until the Twenty-Sixth Amendment lowered the age requirement to eighteen.[150] The policy behind requiring a person to be the age of eighteen to vote is fueled by the idea that society does not trust an individual

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142. *Fundamental Right*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/fundamental_right (last visited Dec. 19, 2018).

143. *Strict Scrutiny*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/strict_scrutiny (last visited Dec. 19, 2018).

144. *Id.*

145. States that do not allow common law marriage require a license. *See generally Common Law Marriage*, NAT'L CONF. OF ST. LEGISLATURES, https://www.ncsl.org/research/human-services/common-law-marriage.aspx.

146. *Marriage Laws*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/table_marriage.

147. Susan D. Ross, *Should Polygamy Be Permitted in the United States?*, AM. BAR ASS'N (Apr. 1, 2011), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/human_rights_vol38_2011/human_rights_spring2011/should_polygamy_be_permitted_in_the_united_states.

148. Curan Mehra, *NJ and DE: Pioneering States that are the First to Ban Child Marriage*, UNICEF (Jul. 6, 2018), https://www.unicefusa.org/stories/nj-and-de-pioneering-states-are-first-ban-child-marriage/34529.

149. *Marriage laws*, *supra* note 146.

150. Jocelyn Benson & Michael T. Morley, *The Twenty-Sixth Amendment*, THE NAT'L CONST. CTR, https://constitutioncenter.org/interactive-constitution/interpretation/amendment-xxvi/interps/161 (last visited Dec. 19, 2018); U.S. CONST. amend. XXVI.

younger than eighteen years old to have the ability to make such an important decision. We do not believe that a person under the age of eighteen has the cognitive ability to make such life-altering choice. The same policy should apply to marriage. Children continue to develop cognitive abilities well into adulthood, and given that minors are vulnerable to coercion, a child should not be afforded the responsibility and the legal ability to consent to a marriage.

Of course, some individuals under the age of eighteen are mature and developed enough to vote or marry, but that is not how the law works with voting. It is easy to see that if we put into place a test or mechanism to determine if an individual under the age of eighteen is mature enough to vote, the test or mechanism would surely fail. Some children who are not mature enough to vote would likely fall through the cracks and be allowed to do so. Further, creating such a test without inserting bias would be impossible. We avoid these problems by establishing a blanket age at which a person can vote. Requiring an individual to be eighteen years old to marry would produce the same results.

Currently the judicial and parental safeguards for child marriage fail to actually safeguard children. Judicial safeguards are tests that can be easily influenced with bias. Parental consent fails all together since parents do not always have the child's best interests in mind. Although there could be a child who is developed enough to consent and understand what marriage entails, he or she would be in the minority. There is no functional way to ensure that all children are actually consenting to marriage because of the flaws with judicial and parental consent. Thus, creating a blanket age requirement of eighteen to marry is the most narrowly-tailored way to ensure that the person is actually consenting to the marriage. Requiring individuals to be eighteen years old to marry does not take away an individual's right as a whole, but merely restricts it due to the lack of meaningful consent that he or she can give.

There may be a connection between abortion and marriage because they are both fundamental rights, and may require parental or judicial consent if the child is under the age of eighteen.[151] However, the restriction of child marriage and the allowance of a child to abort a birth achieve the same goal, which is the health interests of the minor. People who marry under the age of eighteen are more likely to have a plethora of physical and mental health issues.[152] Further, similar to minors who have children, minors who marry are more likely to live in poverty and receive less

151. *Parental Involvement in Minors' Abortions*, GUTTMACHER INST. (Dec. 1, 2018), https://www.guttmacher.org/state-policy/explore/parental-involvement-minors-abortions.

152. LE STRAT, *supra* note 25.

education.[153] This is not to suggest that a minor who gets pregnant must have an abortion, since the decision to abort a child belongs to that individual alone. The reason we sometimes leave such a decision to the child is rooted in the difference between marriage and sex. Specifically, a person cannot accidentally get married, but even by undertaking precautions, an individual can accidentally get pregnant. Abortion is a corrective measure, whereas marriage is an affirmative act. With abortion, society allows a girl who may not have wanted to get pregnant, or even worse, was the victim of rape, to end the pregnancy. Further, abortion and pregnancy are biological, while marriage is a legal aspect and a social construct. Marriage is completely beholden to humanity's rules, whereas pregnancy is a force of nature. An abortion can provide positive health benefits while an underage marriage only provides health detriments.[154]

Further, the Federal Government can already constitutionally restrict fundamental rights, such as voting, as wells as other rights, such as abortion.[155] Voting is restricted to U.S citizens who are aged eighteen and older and the right can be taken away if an individual commits a felony.[156] In addition, states may implement restrictions on abortions as long as they do not place an undue burden on the woman.[157] These restrictions are allowed because even though the country believes that voting and abortion are rights that should be available to all, the public recognizes that there is good reason to limit these activities in certain circumstances. Restricting marriage until the age of eighteen is a similarly situated restriction that serves in the best interests of protecting children, and if a right as fundamental as voting can be legitimately limited to those over the age of eighteen, then such a restriction can easily be implemented for a less stringent right, such as marriage.

VI. CONCLUSION

Although some state legislatures are making the effort to raise the minimum marital age requirement, it appears to be a slow and difficult process to independently implement laws in all fifty states. Lobbyists fighting against bills and states being resistant to change only adds to this

153. *See* INT'L PLANNED PARENTHOOD FOUND., *supra* note 22, at 14-15.

154. LE STRAT, *supra* note 25, at 525.

155. *See* Planned Parenthood v. Casey, 505 U.S. 833, 833-34 (1992); *Equal Protection and The Right to Vote*, U. OF MO. - KAN. CITY, http://law2.umkc.edu/faculty/projects/ftrials/conlaw/righttovote.html.

156. Richardson v. Ramirez, 418 U.S. 24, 25 (1974).

157. *Casey*, 505 U.S. at 833-34.

struggle.[158] As we wait for states to pass these laws and protect their children, pedophiles are eluding a charge of statutory rape under the guise of marriage. As a country, the U.S. claims to stand for the epitome of human rights and for the protection of people of all ages, genders and races, but it has failed to live up to its responsibilities in this area of law.

The evidence is clear as to why minors are unable the consent to marriage, and the Covenant clearly requires consent to enter into a marriage. Therefore, the legislative branch must use its powers to do what is necessary and proper to uphold the Covenant and create a law that requires an individual to be at least eighteen years of age to marry.

158. *See generally* Judith Vonberg, *Kentucky: Child Marriage Ban Delayed After Opposition from Conservative Group*, INDEPENDENT (Mar. 5, 2018), https://www.independent.co.uk/news/world/americas/kentucky-child-marriage-ban-delayed-vote-conservative-group-opposition-lawmakers-us-a8240121.html.