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**Trends, Values, and Changes in Families and Family Law in the USA: Towards Realism, Idealism or Confusion?**

**By Lynn D. Wardle[[1]](#footnote-1)**

1. *Introduction: Balancing Idealism and Realism in American Family Law*

This paper analyzes recent developments in American family law from the perspective of the tension in law between recognizing the real and seeking the ideal. It considers the proper and effective roles of Family Law in reflecting social reality on the one hand, and in promoting social ideals and aspirations on the other. It discusses some recent developments in American family law regulating parent-child relationships as well as spousal relationships.

There usually is a gap (small or large) between the realities of life and the ideals of the law. The ideal in family law is to protect, support, and foster healthy, happy, and effective families. The reality, however, sometimes falls short of that ideal. Sadly, American family law sometimes impedes family success and frustrates the well-beings of families and family members. The diversity of individual experiences, beliefs and social realities seldom are fully reflected in the law. Some disparity is unavoidable because the law must establish a clear, uniform rule applicable to all members of society including those who hold and wish to observe other (minority) standards. Viewpoints regarding family life and family values vary substantially among the members of any society. Thus, normal individual diversity often impedes or frustrates the pursuit of social and legal uniformity, especially in family law.

Lawmakers generally seek to enact laws that reflect the values and experiences of the majority. Inevitably, the views and values of some other members of society –especially minorities and dissenters – are inadequately reflected in or are omitted from the laws. That is how democracy works – by respecting and implementing the will of the majority. However, mature democracies also value and seek to protect the rights and interests of minorities, as well. One way that the rights and interests of minorities are protected in the United States is because of the federal structure of government. Certain governmental authority and power was granted to the national government (especially concerning defense and economic interests), but with other governmental authority and power reserved to the state governments – including the power and authority to regulate family relations. That means that, within broad constitutional boundaries, each state determines what its own family laws and policies will be, and they may differ from the laws and policies of the other states. That also means that there is no (or very little) uniform American (i.e., national) family law, but rather dozens of family laws and policies as each state sets its own family laws and policies.

Discrepancies also exist in American family law between ideals and realities, between majority and minority values, and between aspirations and actualities. The law generally seeks to facilitate and to promote the aspirational, the exemplary, and majoritarian ideals in human life, activities, and relationships. However, the law also strives to protect all persons, especially vulnerable minorities, from dangerous and harmful activities, individuals, and majorities. Sometimes efforts to accommodate minorities frustrate legitimate aspirations of the majority.

This paper provides some discussion of current marriage laws in the Unites States of America. American marriage laws vary from state to state, sometimes significantly. Different communities strike different balances between the realistic and the idealistic in their marriage laws. To unfamiliar observers, the differences may appear to indicate confusion. To the well-informed, however, the differences in American family laws represent tolerance, inclusion, diversity and freedom.

1. *The Gap Between the Real and the Ideal in American Family Law*

One of the great and persistent jurisprudential questions is whether the law primarily reflects social reality and values, or promotes certain ideals and aspirational standards.[[2]](#footnote-2) It commonly is said that law emerges out of custom, and, hence, law generally can be expected to reflect social norms.[[3]](#footnote-3) However, legal rules and sanctions sometimes can generate and sustain new social norms and values.[[4]](#footnote-4)

For example, research by Professor Richard D. Schwarz found that --

the threat of sanction can deter people from violating the law, perhaps in important part by inducing a moralistic attitude toward compliance. This mechanism seems particularly significant when those subject to sanction threat are not trained by, and associated with, an authoritative institution other than the state. The threat of punishment appears, however, to produce some resistance to compliance. Such resistance can be minimized through alternative techniques of securing compliance, such as the utilization of appeals to conscience and to a sense of civic responsibility, motives which can be more powerful than sanction threat in increasing compliance with the law.[[5]](#footnote-5)

However, there often is disparity between the desirable and the actual. For example, most people desire to be successful – in the sense of having adequate material resources, stable marriages and happy families. Social scientists have identified very clearly the “success sequences” that most often results in financial and family well-being. As W. Bradford Wilcox and Wendy Wang have reported, “Millennials are much more likely to flourish financially if they follow the “success sequence”—getting at least a high school degree, working full-time, and marrying before having any children, in that order.”[[6]](#footnote-6) Yet in recent years the rate of childbearing before marriage and before completing basic education has increased or plateaued at historic high levels.[[7]](#footnote-7) Sadly, Census Bureau researchers report that “’women with a nonmarital first birth are both less likely to ever marry and less likely to remain married if they do marry,’ it said. Childbearing outside of marriage is also linked to higher risks for poverty, lower educational attainment and family instability.”[[8]](#footnote-8)

Some commentators see significant competition and conflict between formal laws and informal rules and customs. For instance, anthropologist Stanley Diamond argued that instead of “law and order” in society, the more common reality is “law versus order.” He wrote that:

We live in a law-ridden society; law has cannibalized the institutions which it presumably reinforces or with which it interacts.... [W]e are encouraged to assume that legal behavior is the measure of moral behavior.... Efforts to legislate conscience by an external political power are the antithesis of custom: customary behavior comprises precisely those aspects of social behavior which are traditional, moral and religious--in short, conventional and nonlegal. Put another way, custom is social morality. the relation between custom and law is basically one of contradiction, not continuity.[[9]](#footnote-9)

*III. Some Diversity in Family Law Reflects Differences Between Communities*

In the United States of American, there is not “one” body of family law, but at least fifty-one (arguably fifty-seven) different family law systems, each with its own diverse, substantive family laws.[[10]](#footnote-10) The Constitution of the United States divided governmental power between the national government and the State governments.[[11]](#footnote-11) The national government was given explicit but limited powers; the remaining governmental powers (including the power to enact family laws) were reserved for the state governments. That allocation of power (preserving the state authority to regulate domestic relations) reflects the general belief that state lawmakers are closer to the people and better able than federal judges and federal legislators to identify and protect the values and preferences of the citizens whose lives and domestic relationships will be regulated by those laws.[[12]](#footnote-12) It also is generally believed that state courts and agencies are better able to grasp, interpret and properly apply domestic relations laws than are federal judges and agencies who have much less experience and expertise in family law.[[13]](#footnote-13) Thus, most family law is state law, not federal law, and family law often varies (sometimes quite dramatically) from state to state.

However, some issues – including some family law issues - fall with the jurisdiction of both the state governments and the national government. Thus, almost every year the Supreme Court of the United States decides a very small number of cases involving family law.[[14]](#footnote-14) Out of nearly 7,000 petitions for review that the Supreme Court receives each term it hears approximately seventy(70) cases.[[15]](#footnote-15) In the most recent term of the Supreme Court (the October 2016 Term, which concluded in late June 2017),[[16]](#footnote-16) the Supreme Court decided only three cases that dealt with some aspect of family law. They are discussed in Part IV below.

1. *Ideology Vs. Reality*

The Supreme Court of the United States decided three cases in its most recent (October 2016) term that involved issues of family law. Two of them concerned federal laws that implicated family relations. In *Howell v. Howell,[[17]](#footnote-17)*  the Court unanimously (7+1) ruled that a state court may not order a military veteran to indemnify his divorced spouse for the loss of some of her portion of his military retirement pay that was awarded to her upon divorce, when the retirement benefit was reduced due to his later election of disability pay which reduced the amount of retirement pay he received. That case concerned the regulation of federal military benefits which is governed exclusively by federal law, so the state court order that contravened the federal law was invalidated by the Supreme Court.

In *Sessions v. Morales-Santana,[[18]](#footnote-18)*  the majority (per opinion of Justice Ginsburg) held that gender-based differential in the federal law governing acquisition of U.S. citizenship of a child born abroad was unconstitutional. The U.S. law allowed for transmittal of citizenship if the mother had lived in the U.S. for one year before the birth of the child, but required ten years pre-birth residence for the father. Again, the issue concerned a federal law (regulating citizenship).

Only one Supreme Court case decided in the 2016 term concerned a state family law. In *Pavan v. Smith*,[[19]](#footnote-19) the Supreme Court *per curiam* (6-3) struck down an Arkansas birth certificate law requiring the name of the mother’s male spouse to appear on the child’s birth certificate—regardless of his biological relationship to the child – but not allowing a female same-sex spouse of the mother to be named on the birth certificate. (One wonders whether the biological facts of human reproduction might justify the gendered birth certificate difference, but the majority of the Court focused narrowly on marital status and gender equality, and invalidated the differential treatment of male and female spouses with no discussion of the dual-gender reality of human reproduction. The Court concluded that mere biological differences regarding human reproduction do not justify a difference in the legal treatment of male and female partners of birth mothers for purpose of identifying parentage on birth certificates. Critics might ask whether the Court gave ideology priority over biology; whether the majority’s preference for a politically correct relationship or ideal trumped respect for the reality of dual-gender human reproduction. But the holding in *Pavan* was as clear as it was intellectually questionable.

That Supreme Court decision in the *Pavan* case illustrates one of the tensions that is the subject of this paper. There is persistent tension between law’s need to acknowledge and reflect social reality and the law’s aspiration to promote certain ideals, values or principles.

In one sense, the Court’s recent *Pavan* ruling seems unremarkable under its ruling just two years ago in *Obergefell v. Hodges.[[20]](#footnote-20)* In *Obergefell* the Court invalidated state laws barring same-sex couples from marrying; *Obergefell* mandated that all states and government agencies must allow and recognize same-sex marriages. Traditionally marriage has created a legal presumption of parentage for the spouse of the birth mother, even if the spouse physically could not be the parent (i.e., was absent at the time of conception).[[21]](#footnote-21) So by mandating the legalization of same-sex marriage, the Court cleared the path (to marriage) by which a same-sex partner could not only establish a full, legal marital relationships with a partner, but which would provide the basis for a parentage claim to children born to his or her same-sex spouse during the marriage.

In another sense, however, *Pavan* was a significant and controversial expansion of the same-sex marriage ruling in *Obergefell*.[[22]](#footnote-22) It would have been easy for the Court to distinguish the adult vertical relationship of parent/partner-child in *Pavan* from the horizontal, adult co-equal relationship of marriage involved in *Obergefell.* However, the majority of the Court in *Pavan* apparently wanted to extend the *Obergefell* principle of the equality of same-sex and opposite-sex relationships beyond the marriage context and into the parentage context. Of course, in reality adult-adult relationships and adult-child relationships are not the same and by simply equating them legally the Court seemed to ignore some very important state and social interests in the best interests of children. Critics might suggest that children’s welfare was subordinated by the *Pavan* majority to the interests and preferences of same-sex adult partners who want to have a same-sex partner of the mother listed as the parent of a child born to a same-sex spouse.

These tensions are not new. In his masterful article *The Seduction of Lydia Bennet: Toward a General Theory of Society, Marriage and the Family,* Professor Scott FitzGibbon discussed the “system of rules and principles” that regulated “family, friendship, and social rank” in England in Jane Austen’s day.[[23]](#footnote-23) He noted that: “Most societies operate in major part through the medium of obligation”.[[24]](#footnote-24) When obligations are violated, “[s]ocieties often afford faculties for setting things straight.”[[25]](#footnote-25) In *Pride and Prejudice,* Austen has Elizabeth say of Lydia’s unfortunate marriage to Mr. Wickham: “[H]ow little of permanent happiness could belong to a couple who were only brought together because their passions were stronger than their virtue.”[[26]](#footnote-26) Perhaps the same might be said of many cohabiting non-marital and same-sex couples in America today.

Marriage matters tremendously for society – especially for children and for those who will depend upon their support in the future. For example, college graduates generally earn much more, and have more successful lives and families than those who do not graduate from college. And the evidence is irrefutable that children raised by married parents have much greater likelihood of both college graduation and of their own successful marriages. The Pew Research Center summarizes some of the research as follows:

Among parents who live with a child under the age of 18, [eighty-nine percent] 89% of college graduates are married, compared with 64% of parents with less than a high school diploma and 70% of those with just a high school diploma.[[27]](#footnote-27)

So the benefits of marriage are not enjoyed equally by all Americans. “When it comes to matrimony, the United States is [*two separate countries*](http://www.economist.com/node/9218127). There's college-graduate America, where getting and staying married is still the norm. Then there's the rest of America, where marriage rates are retreating and divorce is rampant.”[[28]](#footnote-28)

As Robert Pollak has explained: “College graduates—men and women—are using marriage as a ‘commitment device’ to jointly invest a lot in children . . . .”[[29]](#footnote-29) Likewise, Brookings Institute scholar Richard Reeves argues that today, American college graduates “are reinventing marriage as a child-rearing machine for a post-feminist society and a knowledge economy.”[[30]](#footnote-30) Yet, in America and many other affluent Western nations,

[m]arriage has been on the decline for decades, particularly [for those with less education](http://www.pewsocialtrends.org/2010/11/18/the-decline-of-marriage-and-rise-of-new-families/). At the same time, the share of [non-marital births](http://www.pewsocialtrends.org/2010/05/06/the-new-demography-of-american-motherhood/) for the less educated has risen dramatically, and the [likelihood of divorce](http://www.pewsocialtrends.org/2010/10/07/the-reversal-of-the-college-marriage-gap/4/) remains significantly higher among those lacking a college degree than among those who have one. [[31]](#footnote-31)

The benefits of marriage and marital childrearing are found among both the college-educated and the non-college-educated. “Approximately 30% of moms with less than a college degree who live with their kids are living without a spouse or partner, as compared with 7% of comparable dads. In comparison, [just] 13% of college-educated moms who live with their kids are living without a spouse or partner, as are 3% of comparable dads.”[[32]](#footnote-32) Yet,

[s]ince 1950, marriage behavior in the United States has changed dramatically, though most men and women still marry at some point int heir lives, they now do so later and are more likely to divorce. Cohabitation has become commonplace as either a precursor or an alternative to marriage, and a growing fraction of births take place outside marriage.

We’ve seen a retreat from marriage within all racial and ethnic groups and across the socioeconomic spectrum. But the decoupling of marriage and parenthood has been much less prevalent among college graduates.[[33]](#footnote-33)

A simplistic interpretation of the data seems to suggest that those who are smart enough (and/or self-controlled enough) to attend college are also smart enough to marry. But it is likely that the dynamics are more complicated than that.

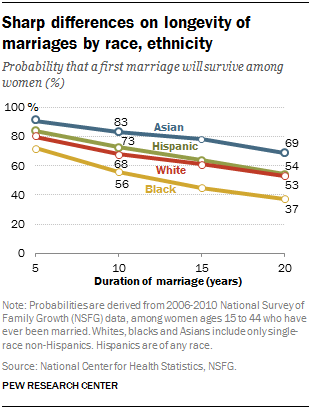
This is very important because marriage matters for kids -- and for those will depend upon them (and their taxes/support) in the future. Distinguished professor Sara McLanahan has concluded: “Children of single-parent families suffer measurable harm.”[[34]](#footnote-34) She summarized some of the evidence:

Children who grow up with only one of their biological parents (nearly always the mother) are disadvantaged across a broad array of outcomes. … [T]hey are twice as likely to drop out of high school, 2.5 times as likely to become teen mothers, and 1.4 times as likely to be idle -- out of school and out of work -- as children who grow up with both parents. Children in one-parent families also have lower grade point averages, lower college aspirations, and poorer attendance records. As adults, they have higher rates of divorce. These patterns persist even after adjusting for differences in race, parents' education, number of siblings, and residential location.[[35]](#footnote-35)

Another Pew Research report notes that:

Researchers at the [National Center for Health Statistics](http://www.cdc.gov/nchs/data/nhsr/nhsr049.pdf) estimate that 78% of college-educated women who married for the first time between 2006 and 2010 could expect their marriages to last at least 20 years. But among women who have a high school education or less, the share is only 40%.”[[36]](#footnote-36)

There also are significant differences in the longevity of American marriages between different racial and ethnic groups, as the following graph shows.[[37]](#footnote-37)

[](http://www.pewresearch.org/fact-tank/2015/12/04/education-and-marriage/ft_15-12-03-cohabitation-marriage/)

What about these racial-ethnic differences might explain the huge differences in marriage longevity between the races? I suggest that the cultural differences regarding respect for, commitment to, and practice of marriage are the core reasons for such marriage longevity differences among these American ethnic groups. People from cultures that value marriage more tend to have longer, healthier, and happier marriages – and richer, more fulfilling lives than do people from cultures that value marriage less.

Yet, in America and many other affluent Western nations,

[m]arriage has been on the decline for decades, particularly [for those with less education](http://www.pewsocialtrends.org/2010/11/18/the-decline-of-marriage-and-rise-of-new-families/). At the same time, the share of [non-marital births](http://www.pewsocialtrends.org/2010/05/06/the-new-demography-of-american-motherhood/) for the less educated has risen dramatically, and the [likelihood of divorce](http://www.pewsocialtrends.org/2010/10/07/the-reversal-of-the-college-marriage-gap/4/) remains significantly higher among those lacking a college degree than among those who have one. [[38]](#footnote-38)

So we have a serious problem to address. The decline and disintegration of marriage foreshadow serious troubles that will come upon all individuals and families in all of the societies where it occurs.

1. *How to Revive a Marriage Culture*

We live in an imperfect world filled with imperfect people in imperfect communities, with imperfect marriages. However, even imperfect people have ideals and aspirations. With patience for the imperfections we all have and see, we must elevate our aspirations. The law must establish and confirm society’s core normative goals and values. For the welfare of families – including adults as well as their children and greadchildren – the law must reaffirm, reestablish and convey clearly in laws and public policies the tremendous importance and great value of marriage.

The law must protect and facilitate fulfillment of the marriage aspiration – the desire of a man and a woman to unite in fidelity in a loving, intentional, life-long union to care for and support each other and their children. Yet how to do that seems to be a mystery.

The Universal Declaration of Human Rights famously declares that: “The family is the natural and fundamental group unit of society . . . .”[[39]](#footnote-39) Clearly, it is recognized universally that families are enormously important for the well-being of individuals and of societies. The evidence is indisputable that families founded on marriage are the most secure, most happy, and the most successful. Marriage matters greatly for families; and for that reason marriage matters greatly for all nations, peoples and societies. Yet that simple truth seems to get lost from time to time.

It seems to have been forgotten in contemporary American society. As commentator Anne Kim has noted: “Today . . . marriage in America seems to be dying.”[[40]](#footnote-40)

In 2010, according to the Pew Research Center, only about half of all Americans over age eighteen were married, compared to nearly three out of four in 1960. Americans today are marrying later, if at all, and the share of Americans who [have] never married has climbed to record highs. As one result, the share of children growing up with single moms is also skyrocketing; in 2013, 41 percent of all births were to unmarried women.[[41]](#footnote-41)

The percentage of Americans aged 18-45+ who were married declined between 1960 and 2010 for each age cohort, dropping nine percent (for those ages 45+) to dropping 38% (for those ages 25-34).[[42]](#footnote-42) But for the most advantaged Americans, there has been relatively less decline in marriage.

[T]he share of young college-graduate white women who were married in 2010 was a little over 70 percent—*almost exactly the same as it was in 1950*. College-educated white women are, moreover, half as likely as other women to be divorced, . . . and they are also refusing single motherhood. *Fewer than 9 percent of women with a bachelor’s degree or more had an unwed birth in 2011—a level barely higher than what it was for all women in 1950*.[[43]](#footnote-43)

The decline in marriage in America continues and is accelerating. According to U.S. Census data, in the year 2000 fifty-five percent (55%) of American young adults ages 25-34 were married. Just nine years later that percentage had dropped to 44.9 percent married.[[44]](#footnote-44) Between 1965 and 2010, the rate of marriage for persons ages 25-34 fell for those will only high school or less education from about 85% to about 45%, and for those with a Bachelor’s degree or more from nearly 80% to just over 50%.[[45]](#footnote-45) University of Virginia Professor Bradford Wilcox, director of the National Marriage Project, reports that between 1975 and 2013 the poverty rates for female householders with no spouse present were about six times higher than for married-couple families.[[46]](#footnote-46) “[T]he share of American adults who have never been married is at an historic high.”[[47]](#footnote-47)

The decline in marriage and support for marriage in America matters for all Americans. But the heaviest burdens and highest costs will afflict our children.

[K]ids raised in married-parent households are much less likely to grow up in poverty, more likely to do better in school, and more likely to move up the economic ladder even if they start out poor. “There’s no argument about what’s best for kids,” says the economic and social policy expert Ron Haskins, of the Brookings Institution. “It’s to be reared in a stable household by married parents.”[[48]](#footnote-48)

Yet if recent trends away from marriage in America and other Western nations continue, children, families and our societies will continue to decline and suffer. On the other hand, if marriage is restored and a culture favoring marriage is rejuvenated, children, families and society are likely to flourish and prosper in our once-favored nations.

*VI. Conclusion: We Must Rebuild A Culture of Marriage in All of Our Nations*

The defining question of our time is whether we will revitalize the culture of marriage in our societies. What we do (or do not do) now to revive the culture of marriage will profoundly impact (help or harm) our posterity for generations to come.

Marriage is the key. Marriage makes all the difference! It matters not only (though most powerfully) for children and their caregivers, but ultimately it matters for all members of all societies whose future welfare depends upon those children and their caregivers.

Baroness Ruth Deech (formerly a family law professor and Principal at St. Anne’s College, Oxford) summarized the importance of marriage well when she said that marriage “[n]ot only is … the safest environment for children, it provides a link to history, to previous generations and generations yet to come.”[[49]](#footnote-49) Baroness Deech was correct about that. She also spoke a profound truth when she declared: “It is marriage that makes all the difference.”[[50]](#footnote-50)

We must work to rebuild and revitalize the culture of marriage in our communities, nations and societies. That will not be easy. But it is a task fitting for family law professors to undertake. If we can make any progress toward reviving marriage that ultimately will benefit not only our own posterity, but it will benefit all of our cultures, all of our societies, and all humanity.

1. Bruce C. Hafen Professor of Law, J. Reuben Clark Law School, Brigham Young University, Provo, UT, USA 84602. Email: [wardlel@law.byu.edu](mailto:wardlel@law.byu.edu) . An earlier version of this paper was presented at the 16th World Congress of the International Society of Family Law - on “Family Law and Family Realities” at the Vrije Universiteit of Amsterdam, The Netherlands - 25-29 July 2017. The author expresses great appreciation to the officers and members of the International Society of Family Law (ISFL). This organization and its members have greatly enriched my career as a law professor. I remember well the first ISFL conference that I attended. I was young and idealistic, but I was becoming disillusioned with teaching law because there seemed to be a lot of pressure in the legal academy to conform to dull prevailing viewpoints. Then I attended a world conference of the ISFL and I was thrilled by the broad international perspectives and the rich intellectual diversity I heard in the presentations and discussions at that conference. The ISFL convinced me to remain a law professor. Life is about choices, and I am very glad that the ISFL helped me to choose an academic career nearly 40 years ago. [↑](#footnote-ref-1)
2. *See generally* Richard D. Schwartz, *Law, Society, and Moral Order: Introduction to the Symposium,* 1980 B.Y.U. L. Rev. 721; Lynn D. Wardle, *The Gap Between Law and Moral Order: An Examination of the Legitimacy of the Supreme Court Abortion Decisions,* 1980 BYU L.Rev. 811; Fernando E. Agrait, *In Search of a Role for the Legal System,* 1980 BYU L.Rev. 797; Michael Diamond, *Law, the Problems of Poverty, and the “myth of Rights,”* 1980 BYU L. Rev. 785. *See further The Relationship of the Formal Legal System to the Less Formal and the Relationship of Both to the Private Sector of Society*, in Law and the Behavioral Sciences 171-188 (2d. ed., Larwence M. Friedman & Stuart Macaulay eds., 1977). [↑](#footnote-ref-2)
3. *See., e.g.,* Roland Benabou & Jean Tirole, *Law and Norms,* National Bureau of Economic Research, November 2011, at <http://www.princeton.edu/~rbenabou/papers/NBER%20WP%2017579.pdf> (seen 11 August 2017); Cristina Bicchieri & Ryan Muldoon, *Social Norms,* Stanford Encyclopedia of Philosophy, 1 March 2011, at <https://plato.stanford.edu/entries/social-norms/> (seen 11 Aug. 2017); *see further* Adamson E. Hoebel, The Law of Primitive Man *passim* (1954); . [↑](#footnote-ref-3)
4. Eric Posner, Law and Social Norms, *passim*  (2000) [↑](#footnote-ref-4)
5. Richard D. Schwartz & Sonya Orleans, *On Legal Sanctions,* 34 U. Chi. L. Rev. 274, 300 (1967).  [↑](#footnote-ref-5)
6. W. Bradford Wilcox & Wendy Wang, *The Millennial Success sequence: Marriage, kids, and the ‘success sequence’ among young adults,* AEI, 14 June 2017, at <http://www.aei.org/publication/millennials-and-the-success-sequence-how-do-education-work-and-marriage-affect-poverty-and-financial-success-among-millennials/> (seen 11 Aug. 2017). *See also* W. Bradford Wilcox & Wendy Wang, The Millennial Success Sequence: Marriage, Kids, and the ‘Success Sequence’ among Young Adults*,* at <http://www.aei.org/wp-content/uploads/2017/06/IFS-MillennialSuccessSequence-Final.pdf> (seen 11 Aug. 2017)*,* [↑](#footnote-ref-6)
7. Cheryl Wetzstein, *Census: More first-time mothers give birth out of wedlock,* Wash. Times, 8 July 2014, at (“The number of first-born U.S. babies born into a home with a married mother and father has fallen below 60 percent for the first time, the Census Bureau said Tuesday, while more than one in five first-born children are now born to cohabiting parents.”). [↑](#footnote-ref-7)
8. *Id.*  [↑](#footnote-ref-8)
9. Stanley Diamond, *The Rule of Law versus the Order of Custom* in In Search of the Primitive (1981). [↑](#footnote-ref-9)
10. The United States of America includes fifty-seven different quasi-sovereign legal jurisdictions: the United States (federal government), fifty states, the District of Columbia, and five dependent territories (American Samoa, Guam, Northern Mariana Islands, Puerto Rico, and the Virgin Islands). Each jurisdiction can and does create family law to some extent -- all but the United States have jurisdiction to regulate family relations per se, and the United States has jurisdiction over many areas of human behavior that impact upon and influence family life and family laws. [↑](#footnote-ref-10)
11. The Federalist Papers, No. 14 (Madison) in The Federalist Papers (Clinton Rossiter ed. 1961).

    [T]he general government is not to be charged with the whole power of making and administering laws. Its jurisdiction is limited to certain enumerated objects, which concern all the members of the republic . . . . The subordinate [state] governments, which can extend their care to all those other objects which can be separately provided for, will retain their due authority and activity.

    *Id.* [↑](#footnote-ref-11)
12. *Id.* *See also* Lynn D. Wardle, *The Proposed Federal Marriage Amendment and the Risks to Federalism in Family Law*, 2 Univ. St. Thomas L.J. 137-198 (2004); Lynn D. Wardle, *DOMA: Protecting Federalism in Family Law,* The Federal Lawyer, vol. 45, no. 2, Feb, 1998, at 30-35. [↑](#footnote-ref-12)
13. *See sources cited supra,* note 12.  [↑](#footnote-ref-13)
14. Among the most notable recent Supreme Court family law decisions are: *Adoptive Couple v. Baby Girl,* 133 S.Ct. 1552 (2013) (declining to protect the paternal rights of a Native American biological father who never had custody); *Kerry v. Din,* 135 S.Ct. 2015) (rejecting wife’s claim that denial of visa to her Afghan husband violated due process); *Obergefell v. Hodges*, 135 S.Ct. 1039 (2015) (mandating same-sex marriage); *Whole Woman’s Health v. Hellerstedt* 579 U.S. \_\_\_ (2016) (invalidating Texas abortion regulations), and *Pavan v. Smith*, 582 U.S. \_\_\_ (2017) (requiring listing same-sex spouse of mother on birth certificate the same as opposite-sex spouses – discussed herein). [↑](#footnote-ref-14)
15. Elizabeth Slattery, *Overview of the Supreme Court’s October 2016 Term,* Heritage Foundation, 20 Sept. 2016, at <http://www.heritage.org/courts/report/overview-the-supreme-courts-october-2016-term> (seen 28 June 2017). [↑](#footnote-ref-15)
16. Supreme Court Calendar, October Term 2016, at <https://www.supremecourt.gov/oral_arguments/2016TermCourtCalendar.pdf> (seen 7 July 2017). [↑](#footnote-ref-16)
17. 581 U.S. \_\_\_, \_\_\_ S.Ct. \_\_\_ (15 May 2017). [↑](#footnote-ref-17)
18. 582 U.S. \_\_\_, \_\_\_ S.Ct. \_\_\_ (12 June 2017). [↑](#footnote-ref-18)
19. 582 U.S. \_\_\_, \_\_\_ S.Ct. \_\_\_ (26 June 2017). [↑](#footnote-ref-19)
20. 135 S.Ct. 1039 (2015). [↑](#footnote-ref-20)
21. “The law has created the presumption that a child born to a married woman is legitimate, and has made it one of the strongest of presumptions. At one point . . . the presumption was conclusive if the husband was not impotent and was within the fours seas, that is, was in England.” Homer H. Clark, Jr., The Law of Domestic Relations in the United States, § 4.4 at 191 (2d ed. 1987). *See also*  *Legitimacy (family law),* in Wikipedia, at <https://en.wikipedia.org/wiki/Legitimacy_(family_law)> (seen 12 July 2017):

    In English [common law](https://en.wikipedia.org/wiki/Common_law), Justice [Edward Coke](https://en.wikipedia.org/wiki/Edward_Coke) in 1626 promulgated the "Four Seas Rule" (*extra quatuor maria*) asserting that, absent impossibility of the father being fertile, there was a [presumption of paternity](https://en.wikipedia.org/wiki/Presumption_of_paternity) that a married woman's child was her husband's child. That presumption could be questioned, though courts generally sided with the presumption, thus expanding the range of the presumption to a “Seven Seas Rule".  [↑](#footnote-ref-21)
22. Justice Gorsuch declared: “[I]t seems far from clear what here warrants the strong medicine of summary reversal. Indeed, it is not even clear what the Court expects to happen on remand that hasn’t happened already. The Court does not offer any remedial suggestion, and none leaps to mind.” *Id.* at \_\_, slip op. at 2 (Gorsuch, J., dissenting). [↑](#footnote-ref-22)
23. Scott FitzGibbon, *The Seduction of Lydia Bennet: Toward a General Theory of Society, Marriage and the Family,* 4 Ave Maria L. Rev. 581, 583 (2006), citing Jane Austen, Pride and Prejudice (1818, reprinted \_\_\_) (herein “Pride and Prejudice”) [↑](#footnote-ref-23)
24. *Id.* at 586. [↑](#footnote-ref-24)
25. *Id.* at 588. [↑](#footnote-ref-25)
26. Pride and Prejudice, *supra* note \_\_, at \_\_\_. [↑](#footnote-ref-26)
27. Gretchen Livingston, *The links between education, marriage and parenting* 27 Nov. 2013, in Pew Research Center, FactTank, at <http://www.pewresearch.org/fact-tank/2013/11/27/the-links-between-education-marriage-and-parenting/> (seen 11 July 2017). [↑](#footnote-ref-27)
28. Jordan Weissman, *Marriage Stages a Comeback (but Mostly Just for College Grads),* The Atlantic, 7 Feb. 2014, at <https://www.theatlantic.com/business/archive/2014/02/marriage-stages-a-comeback-but-mostly-just-for-college-grads/283682/> (seen 13 July 2017) (emphasis added). [↑](#footnote-ref-28)
29. Anne Kim, *Why Is Marriage Thriving Among (and Only Among) the Affluent?* Wash. Monthly, March/April/May 2016, at <http://washingtonmonthly.com/magazine/maraprmay-2016/why-is-marriage-thriving-among-and-only-among-the-affluent/> (seen 13 July 2017). *See also* Shelly Lundberg & Robert A. Pollak, *The Evolving Role of Marriage: 1950-2010,* 25 The Future of Children 29 (2015). [↑](#footnote-ref-29)
30. *Id.*  [↑](#footnote-ref-30)
31. Gretchen Livingston, *The links between education, marriage and parenting* 27 Nov. 2013, in Pew Research Center, FactTank, at <http://www.pewresearch.org/fact-tank/2013/11/27/the-links-between-education-marriage-and-parenting/> (seen 11 July 2017). [↑](#footnote-ref-31)
32. Livingston, *supra* note 25, at \_\_\_. [↑](#footnote-ref-32)
33. Shelly Lundberg & Robert A. Pollak, *The Evolving Role of Marriage: 1950-2010,* 25 The Future of Children 29, 29 (2015). [↑](#footnote-ref-33)
34. Sara McLanahan, *The Consequences of Single Motherhood,* The American Prospect, Summer 1994, available at <http://prospect.org/article/consequences-single-motherhood> (seen 28 June 2017). [↑](#footnote-ref-34)
35. *Id.*  [↑](#footnote-ref-35)
36. Wendy Wang, *The link between a college education and a lasting marriage,* Pew Research Center, FactTack, 4 Dec. 2015, at <http://www.pewresearch.org/fact-tank/2015/12/04/education-and-marriage/> (seen 11 July 2017). “While the research does not address reasons these marriages last longer, we do know college-educated adults marry later in life and are more financially secure than less-educated adults.” *Id.*  [↑](#footnote-ref-36)
37. Pew Research Center, The Link Between A College Education And A Lasting Marriage, *Sharp differences on legevity of marriages by race, ethnicity,* 3 Dec. 2015, at <http://www.pewresearch.org/fact-tank/2015/12/04/education-and-marriage/ft_15-12-03-race-marriage/> (seen 11 Aug. 2017). [↑](#footnote-ref-37)
38. Gretchen Livingston, *The links between education, marriage and parenting* 27 Nov. 2013, in Pew Research Center, FactTank, at <http://www.pewresearch.org/fact-tank/2013/11/27/the-links-between-education-marriage-and-parenting/> (seen 11 July 2017). [↑](#footnote-ref-38)
39. Universal Declaration of Human Rights, G.A. Res. 217A, at 76, art. 28, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) [hereinafter Universal Declaration of Human Rights, art. 16; *see also* International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 (XXI), Annex, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316/Annex (Dec. 16, 1966) (“The widest possible protection and assistance should be accorded the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children.”). [↑](#footnote-ref-39)
40. Anne Kim, *Why Is Marriage Thriving Among (and Only Among) the Affluent?* Wash. Monthly, March/April/May 2016, at <http://washingtonmonthly.com/magazine/maraprmay-2016/why-is-marriage-thriving-among-and-only-among-the-affluent/> (seen 13 July 2017). [↑](#footnote-ref-40)
41. *Id.*  [↑](#footnote-ref-41)
42. *Id.* at Fig. 1, Share of Americans Currently Married, 1960 and 2010. [↑](#footnote-ref-42)
43. Kim, *supra*  note 26, at \_\_(emphasis added). [↑](#footnote-ref-43)
44. Mark Mather & Diana Lavery, *In U.S. Propertion Married at Lowest Recorded Levels,* Population Reference Bureau, at <http://www.prb.org/Publications/Articles/2010/usmarriagedecline.aspx> (seen 14 July 2017). [↑](#footnote-ref-44)
45. *Id.* *see* [*www.prb.org/Publications/Articles/2010/usmarriagedecline.aspx*](http://www.prb.org/Publications/Articles/2010/usmarriagedecline.aspx) *.* [↑](#footnote-ref-45)
46. W. Bardford Wilcox, *Married Parents: One Way to Reduce Child Poverty,* Institute for Family Studies, 21 June 2017, at <https://ifstudies.org/blog/married-parents-one-way-to-reduce-child-poverty> (seen 28 June 2017). [↑](#footnote-ref-46)
47. Wendy Wang & Kim Parker, *Record Share of Americans Have Never Married,* Pew Research Center, 24 Sept. 2014, at <http://www.pewsocialtrends.org/2014/09/24/record-share-of-americans-have-never-married/> (seen 11 Aug. 2017). [↑](#footnote-ref-47)
48. Kim, *supra*  note 26, at \_\_(emphasis added). [↑](#footnote-ref-48)
49. Ruth Deech, *Getting Married* (copy in author’s possession); *see also* Cohabitation and the Law, Transcript, Gresham College, 17 November 2009 (seen 1 May 2017). *Id.* at 7 (“Research tells us that cohabitants have different perceptions of the union: the man normally does not assume commitment until he has made a clear decision about their future together, whereas the woman will see it in the fact of her moving in with him.”). [↑](#footnote-ref-49)
50. Baroness Deech, Marriage-Debate, House of Lords debates, 10 February 2011, available at file:///C:/wardle/Publications/Articles&Chs/1103%20Baham%20Conseq%20Fam%20Disintegra/RES%20Deech%20Speech%2010%20Feb%202011%20%20House%20of%20Lords%20debates%20%28TheyWorkForYou.com%29.htm (seen 14 March 2011). *See further* Jessica Elgot, *We must prioritise saving marriage, says Deech,* February 10, 2011, available at <http://www.thejc.com/news/uk-news/44964/we-must-prioritise-saving-marriage-says-deech> (seen 4 May 2015). [↑](#footnote-ref-50)