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Before Loving: The Lost Origins of the Right to Marry

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BEFORE LOVING:
THE LOST ORIGINS OF THE RIGHT TO MARRY

Michael Boucai*

Abstract

For almost two centuries of this nation’s history, the basic contours of the fundamental right to marry were fairly clear as a matter of natural, not constitutional, law. The right encompassed marriage’s essential characteristics: conjugality and contract, portability and permanence. This Article defines those four dimensions of the natural right to marry and describes their reflections and contradictions in positive law prior to Loving v. Virginia (1967). In that landmark case, the Supreme Court enforced a constitutional “freedom to marry” just when marriage’s definitive attributes were on the brink of legal collapse. Not only did wedlock proceed in Loving’s wake to lose its exclusive claims to licit sex and legitimate procreation, personal autonomy in those very domains gained independent constitutional protection. Drained of its conjugal essence, today’s constitutional right to marry is thus an anachronism, the vestige of a bygone consensus about what, if anything, “marriage” fundamentally is.

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There are . . . in legal consciousness at any moment, concepts that legal thinkers find in . . . a preceding age, and perhaps themselves mouth ritualistically, without any confidence that they have a meaning.¹

INTRODUCTION

The fundamental right to marry is a paradox in contemporary American jurisprudence: repeatedly and reverently affirmed by the Supreme Court, but viewed with puzzlement, skepticism, even outright disbelief by legal scholars. On the judicial side of the ledger, we encounter a line of precedents stretching from Meyer v. Nebraska (1923), with its fleeting invocation of a “right . . . to . . . marry, establish a home and bring up children,” to Obergefell v. Hodges (2015), which extended the marriage right to same-sex couples.² The case that definitively identified marriage as a constitutional right was decided about midway between those two rulings. In Loving v. Virginia (1967), the Court held that prohibitions of interracial marriage violate the Fourteenth Amendment, violating both the Equal Protection Clause and an independent “freedom to marry” anchored in the Due Process Clause.³ Since that landmark decision, the Court has consistently cast marriage as the most august, central, and specific among a family of freedoms—privacy, intimate association, sexual autonomy, the rights to procreate and not to procreate—traveling together under the banner of “substantive due process.”⁴ That doctrine is notoriously

¹ DUNCAN KENNEDY, THE RISE AND FALL OF CLASSICAL LEGAL THOUGHT 70 (1975).
³ Loving v. Virginia, 388 U.S. 1, 12 (1967).
BROUGHT BEFORE LOVING has gone to show that it cannot possibly be all wrong. Justices who quarrel vehemently over the bounds of due-process “liberty” evince shared faith that marriage, though “nowhere mentioned” in the Constitution, is a fundamental right thereunder.\(^5\)

To legal scholars, Loving’s “freedom to marry” comes as a challenge, a riddle. Our quandary originates in the fact that every decision vindicating the right involves access to civil matrimony, a state-run institution. Is that really what “the freedom to marry” guarantees? If so, access to marital status would be one of few unenumerated, positive entitlements gleaned from a constitution reductively but not unaccountably styled a “charter of negative liberties.”\(^6\) Hypotheticals about marriage abolition are


\(^6\) Judge Richard Posner coined the phrase “charter of negative liberties” and had a hand in popularizing it. See Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982); Richard A. Posner, The Constitution as Mirror: Tribe’s Constitutional Choices, 84 MICH. L. REV. 551, 558 (1986). Commitment to a “negative” understanding of constitutional rights was evident in the Obergefell dissents, which stressed the distinction between entitlement to “privileges . . . that exist solely because of . . . government” and rights to engage in conduct long “associated with marriage,” like “making vows, . . . raising children, and otherwise enjoying the society of one’s spouse.” Obergefell, 135 S. Ct. at 2636 (2015) (Thomas, J., dissenting) (emphasis in original); Obergefell, 135 S. Ct. at 2620 (Roberts, C.J., dissenting) (“refus[ing] to . . . convert the shield provided by constitutional liberties into a sword to demand positive entitlements from the State”). For criticism of the Obergefell dissenters’ adherence to a strict “negative/positive binary,” see Susan Frelch Appleton, Obergefell’s Liberties: All in the Family, 77 OHIO ST. L.J. 919, 922, 929 (2016) (arguing that the binary “obscures complexities” that partly derive from the “distinctive features” of marriage and endorsing scholarship that has more broadly “exposed the distinction as specious”) (citing Susan Bandes, The Negative Constitution: A Critique, 88 MICH. L. REV. 2271, 2292–93 (1990) and Frances E. Olsen, The Family and the Market: A Study of Ideology and Legal Reform, 96
adduced to test this possibility—to locate the institution’s definitive and indispensable characteristics. Usually it is a fruitless search. Most scholars find no attribute of marriage that cannot be altered or jettisoned, though they assure us that Loving and its progeny could have yielded the same desirable results on grounds other than the right to marry.7 Others, defending the notion of a positive right to marry, offer subtle and philosophically rich explanations tethered at varying lengths to judicial precedent.8 Compelling or not, their theories grapple creatively with the problem at the heart of this constitutional matter: the meaning of marriage itself.

This Article approaches the puzzle of our modern right to marry from the standpoint of legal history. Rather than trying to rationalize what the Supreme Court has said and done since “the freedom to marry” gained constitutional bite in Loving, it asks what American lawyers said and did (and did not say or do) about the right


8 One scholar argues that the marriage right guarantees a just framework for administering the unusually flexible duties characteristic of long-term intimate relationships, and furthermore that contemporary divorce law’s basic design is exactly the enforcement regime the Constitution requires. Gregg Strauss, Why the State Cannot “Abolish Marriage”: A Partial Defense of Legal Marriage, 90 IND. L.J. 1261, 1310 (2015) (arguing the first theory); Gregg Strauss, The Positive Right to Marry, 102 VA. L. REV. 1691, 1739 (2016) (arguing the second theory). Another scholar draws on Hegel to define marriage as a “uniquely ethical bond” whose “transcendent unity of feeling” depends on “individuals’ particular commitment to each other,” “the state’s commitment to [them], and [their] commitment to the state.” Maura I. Strassberg, Distinctions of Form or Substance: Monogamy, Polygamy and Same-Sex Marriage, 75 N.C. L. REV. 1501, 1528, 1576 (1997); see also Peter Nicolas, Fundamental Rights in a Post-Obergefell World, 27 YALE J.L. & FEMINISM 331, 360 (2016) (arguing that “States have the power never to extend the right to its citizens in the first instance, but once they [do so], they cannot subsequently withdraw it” without violating the Equal Protection Clause).
to marry in the nearly two centuries before *Loving*. We will call this period the classical age of American marriage jurisprudence. The word “classical” here refers not to the era’s temporal and intellectual imbrications with the age of “Classical Legal Thought,” but, more colloquially, to the longevity, ubiquity, traditionalism, and relative coherence of the marital ideology that prevailed from the Revolutionary War to the Sexual Revolution. Whatever other traits that ideology may share with Classical Legal Thought, by far the most important, so far as this Article is concerned, is “the very idea that marriage is anything—anything at all.”

The classical ideology of marriage was rooted in natural law, deeply and unabashedly. Often dubbed a “contract of natural law,” marriage as classically conceived was an organic human relation “founded on the distinction of sex,”

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9 Duncan Kennedy associates Classical Legal Thought (“CLT”) most strongly with a period that begins around 1850 and ends around either 1914 or 1935. Noting “a tendency to identify” CLT “with ‘formalism,’ ‘deduction,’ or ‘conceptual jurisprudence,’” he says its “most important” features were: (1) the idea that law emanates “either from private or from public will, with the distinction between the two being of primary importance”; and (2) “the public/private distinction as the central way of organizing legal rules.” See *Kennedy*, *supra* note 1, at 28; Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850–2000, in The New Law and Economic Development: A Critical Appraisal* 21 (David M. Trubek & Alvaro Santos eds., 2006) [hereinafter Kennedy, *Three Globalizations*]. These CLT hallmarks related in complex ways to contemporaneous jurisprudence on the family. See Janet Halley, *What Is Family Law?: A Genealogy Part I*, 23 *Yale J.L. & Human* 1, 1, 71–74, 81 (using Kennedy’s periodization to describe “how . . . Domestic Relations emerged as a distinct legal topic” defined against “the law of contract and . . . of the market”). What the present Article calls the “classical” ideology of marriage preceded and survived CLT’s heyday, but that ideology shared several habits of the CLT mindset: emphatic concern for the rights-bearing individual; commitment to formal equality; normative ideas of “will [and] fault”; and an aspiration to “synthesiz[e] . . . the positivist science of law [and] natural rights constitutionalism.” Kennedy, *Three Globalizations*, *supra* at 20–22; *Kennedy*, *supra* note 1, at 3.


supposedly “[t]he first difference which nature . . . established among persons.”

Marriage on this understanding derived from sources—God, instinct, moral necessity—higher than the positive law of any given people or place. As such, marriage ranked high among “the natural rights of man.”

The natural right to marry was a multifarious creature, neither wholly negative nor wholly positive. It encompassed the relation’s essential features: conjugality and contract, portability and permanence. Where the conjugal right to marry assured matrimony’s unique and definitive prerogatives—namely, licit sex and legitimate procreation—the contractual right to marry guaranteed autonomy at the institution’s threshold. Individuals inherently possessed a right against involuntary marriage (in other words, a right not to marry); a right to marry by mutual agreement, without permission or formalities (what Americans came to call “common-law marriage”); and, more contentiously, a right to marry the person of one’s choice. Finally, wedded couples had a right to stay married.

Legal culture of the classical period saw a broad, generally stable consensus around the natural—and Christian, and often markedly Protestant—ideology of marriage. But the precepts of this higher law were expressed as moral and political ideals, not constitutional imperatives. No doubt many provisions of positive family regulation were deemed “agreeable to the order of nature” and were judicially construed in that light. On occasion, the natural right to marry also served as a gap-filler or furnished a default rule. (It played this role, for instance, in the doctrine that marriage is “a contract so completely of natural and moral law” that it could be solemnized with literally global effect even in a place “where there are no established laws,” as might happen between a man and woman “cast away on an

Adams, 78 S.W. 588, 589 (Mo. 1904) (same); Collins v. Hoag & Rollins, 238 N.W. 351, 354 (Neb. 1931) (same).

13 JOHN BOUVIER, INSTITUTES OF AMERICAN LAW 61 (1851).


15 See infra Part I, Section II.A., and Section II.B.

16 See infra Section II.B.

17 See infra Section II.C.

18 Id.

unknown island.”  

Yet it was not until the turn of the twentieth century, in the heady atmosphere of Lochner-style judicial review, that the natural right to marry began its slow, sporadic ascent into our constitutional pantheon.

Loving’s enforcement in 1967 of a “fundamental freedom” to marry took place in a legal context still permeated with the ideology of natural marriage. Even at that late date, the likeness between marriage’s natural- and positive-law forms remained close enough, in abstract principle and juridical fact, that Loving’s “right to marry” could pass as the constitutional incarnation of an ancient idea. But that resemblance, already under considerable strain by the mid-1960s, went on to deteriorate with breathtaking speed. True, nearly forty long years passed before Lawrence v. Texas (2003) ratified a universal “liberty . . . in matters pertaining to sex”; in hindsight, however, the game probably was up in 1972, when Eisenstadt v. Baird declared that any right of married people to engage in contracepted intercourse “must be the same for the unmarried.”

Eisenstadt’s precise holding was sufficiently narrow, and the Court’s reasoning sufficiently fractured, to obscure the decision’s radical implications. But canny observers, mainly unhappy conservatives, saw where the wind was blowing. In 1976, Mary Ann Glendon remarked that the constitutional “ideologizing of the freedom to marry” appeared to hit its stride “just when . . . legal distinctions between the married and unmarried are being blurred or erased.” Three years earlier, John Noonan had expressed bewilderment at “[h]ow quickly . . . the vital personal right recognized in Loving”—that is, “the right to be immune to the legal disabilities of the unmarried and to acquire . . . the unique legal privileges of heterosexual monogamy”—was becoming “constitutionally obsolete.”

Though partial in any sense of the word, Noonan’s definition stands among the most incisive post-Loving

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20 STORY, COMMENTARIES (1st ed. 1834), supra note 11, at § 122; Note, Tug-Boat Marriages and the Lex Domicilli, 12 HARV. L. REV. 273, 274 (1898) [hereinafter Tug-Boat Marriages].

21 See infra note 494.


25 Mary Ann Glendon, Marriage and the State: The Withering Away of Marriage, 62 VA. L. REV. 663, 664–65 (1976); see also Homer H. Clark, Jr., The New Marriage, 12 WILLAMETTE L.J. 441, 445, 450 (1975) (describing judicial decisions “significantly reducing the legal importance of marriage or . . . drastically altering its definition” and worrying that same-sex marriage would upend “the most fundamental of all characteristics of marriage.”).

descriptions of the marriage right’s pre-Loving content. To appreciate its truth is not to endorse it. To acknowledge its demise is not to mourn it.

* * *

This Article proceeds as follows. Part I explains in broad strokes how participants in classical American legal culture understood the ideal of natural marriage. Part II turns squarely to the natural right to marry. It describes each of the right’s subsidiary guarantees—conjugality, contract, portability, and permanence—and it documents how those entitlements were and were not inscribed in positive law. Part III traces the right’s slow, spotty, and sometimes tentative introduction into constitutional discourse in the first half of the twentieth century. Part IV discusses the right’s apparent triumph in Loving and the subsequent collapse of its original meanings. A concluding section summarizes the Article’s main descriptive claims and flags some of their doctrinal and political implications. Above all, it affirms that Loving’s “right to marry,” forged out of a bygone consensus about the fundamental meaning of “marriage,” now hides a jurisprudential void that, a priori, we have no cause to fill.

27 Cf. Poe v. Ullman, 367 U.S. 497, 553 (1961) (Harlan, J., dissenting) (asserting that “not to discriminate” between fornication and sex within marriage “would entirely misconceive” why marriage has a preferred constitutional status).

28 For some scholars, recognition that the marriage right’s foundations have crumbled beneath it prompts (or at least predicates) valiant efforts to reconstruct it on new grounds. See Nicolas, supra note 8, at 361 (arguing that, although “the negative . . . right to marry disappeared when the Court decided Lawrence, . . . the Due Process Clause protects the right of existing couples to retain their marriages, while the Equal Protection Clause guarantees existing unmarried couples the right to enter such marriages on an equal basis with those who . . . previously . . . exercise[d] the right”) (emphasis added); Strauss, supra note 8, at 1699 (recognizing that “the rights to procreate and form a family [formerly] entailed a right to marriage” that became “obsolete” when those rights came to “receive independent constitutional protection,” but positing a constitutional right to marry along the lines described in note 8 above). Other scholars appear content to retire the right to marry entirely now that “modern developments in constitutional law,” most importantly Lawrence v. Texas, have “completely eroded” its “natural law justification.” Pull, supra note 7, at 75; see also Tucker B. Culbertson, The End of Marriage, in LOVING V. VIRGINIA IN A POST-RACIAL WORLD: RETHINKING RACE, SEX, AND MARRIAGE 253, 254–57 (Kevin Noble Maillard & Rose Cuison Villazor eds., 2012) (proposing that “fundamental rights to sex, family, and the other ends of marriage” more generously uphold Loving’s ideals of “liberty and equality”) (emphasis added); Tebbe & Widiss, supra note 7, at 1399 (“[U]nder modern constitutional principles, a right to enter marriage is no longer necessary to protect . . . liberty interests associated with . . . sexual intimacy [and] child rearing.”).
I. NATURAL MARRIAGE

Natural law, like marriage, is a concept with ancient roots and myriad, tangled branches. Among the variants most influential on and in American legal culture prior to the twentieth century, nearly all claimed a divine origin. “There is a law of nature, or in more proper words, a law of God, the author of nature,” wrote John Quincy Adams in 1842, and “[b]y this law . . . the human being comes into life, the child of two parents, male and female, both of one species, but of different constitutions, adapted to each other for union.”29 Nature’s rules on marriage transcended the doctrines of particular faiths.30 In the context of American religious pluralism, what Thomas Jefferson called “the law of nature and of nature’s God”31 tended to be radically ecumenical—of “absolute, immutable, and . . . universal validity,”32 not unlike the physical laws of the universe.33

Natural law’s theological meaning was the first of eight usages, notionally distinct but rarely differentiated in practice, catalogued in Benjamin Fletcher Wright’s enduring 1931 survey of the concept’s career in American legal and political thought.34 His remaining definitions encompassed a diverse range of ideas: “rational or reasonable . . . principles discovered out of the nature of things”; law consistent with human nature; the law most “appropriate or useful” to human

29 JOHN QUINCY ADAMS, THE SOCIAL COMPACT, EXEMPLIFIED IN THE CONSTITUTION OF THE COMMONWEALTH OF MASSACHUSETTS 11 (1842); see also JOHN AUSTIN, THE PROVINCE OF JUSTICE DETERMINED (1832) (noting that “the law of God” is “frequently styled the law of nature, or natural law”); James Wilson, Lectures on Law [1790], in 1 WORKS OF JAMES WILSON 498 (James DeWitt Andrews ed., 1896) (“[T]his law, natural or revealed, made for men or for nations, flows from the same divine source: it is the law of God. . . . ”); THEODORE D. WOOLSEY, POLITICAL SCIENCE, OR, THE STATE THEORETICALLY AND PRACTICALLY CONSIDERED 124–25 (1878) (describing natural law as “coeval with the divine mind”) [hereinafter WOOLSEY, POLITICAL SCIENCE].

30 “In many civilized countries,” where marriage “has . . . the sanctions of religion superadded, . . . [i]t becomes a religious, as well as a natural and civil contract.” STORY, COMMENTARIES (1st ed. 1834), supra note 11, at § 108 (quoting Dalrymple v. Dalrymple (1811) 161 Eng. Rep. 665, 669) (emphasis added).

31 THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

32 EDWIN W. PATTERTON, JURISPRUDENCE 333 (1982).

33 See Howard Schieber, The “Science” of Legal Science: The Model of the Natural Sciences in Nineteenth-Century American Legal Education, 17 LAW & HIST. REV. 421, 427 (1999); see also 1 WILLIAM BLACKSTONE, COMMENTARIES *39–42 (comparing God’s “rules . . . for the perpetual . . . motion” of “matter” to “certain immutable laws of human nature”); GEORGE SHARWOOD, LECTURES INTRODUCTORY TO THE STUDY OF LAW 112–13 (1870) (subsuming within the “Law of Nature . . . those laws which govern the physical universe” and “the characteristic qualities of mind or spirit as displayed in rational creatures”).

34 BENJAMIN F. WRIGHT, AMERICAN INTERPRETATIONS OF NATURAL LAW 1, 338 (1931) (observing natural law’s “indefinite” and “confused . . . mixture of . . . meanings” and noting “numerous instances” in which “natural law has been given [multiple] meanings by the same author, sometimes in the same statement.”).
“happiness” and flourishing; law that is “just or equitable”; “ideal” as opposed to “actual” law; “ordinal” rather than “conventional” law; and finally, anticipating what would soon become standard judicial speech on the scope of substantive due process, “laws and customs . . . so firmly established that they are clearly fundamental.”

Observe how forthrightly that last usage, equating “firmly established” with “fundamental” norms, conflates is and ought. As the nineteenth century progressed, American lawyers became increasingly hesitant to excavate moral truths from an imagined prehistory (“the state of nature”) or to apprehend them through one or another aspect of “the essential nature of man,” be it innate instinct or “right reason.” Under the influence of “historical jurisprudence,” however, they could still engage the natural-law tradition by seeking the “natural” in what was, in a deep sense, “conventional.” From Hugo Grotius, the Dutch statesman and scholar credited with founding international law on natural-law principles, they learned to infer the jus naturale from the jus gentium—rules universally acknowledged by all, “or at least the more civilized,” human societies; and following Edward Coke, the preeminent jurist of Elizabethan and Jacobean England, they discerned the predicates of natural justice in the primordial common law, source and safeguard of the “immortal rights of Englishmen.” The image of that age-old corpus “mirroring what had existed in a prior state of nature” loomed large in American

35 Id. at 333–38, 342.
36 Id. at 335; see also Snyder v. Massachusetts, 291 U.S. 97, 105 (1934), the first of many cases interpreting the Due Process Clause of the Fourteenth Amendment to protect “principle[s] of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.”
37 WRIGHT, supra note 34, at 333; see also Philip A. Hamburger, Natural Rights, Natural Law, and American Constitutions, 102 YALE L.J. 907, 926 (1993).
38 FRANCIS LIEBER, MANUAL OF POLITICAL ETHICS 65 (1838).
39 See WRIGHT, supra note 34, at 7–8; see also R.H. HELMOLZ, NATURAL LAW IN COURT 2 (2015).
40 WRIGHT, supra note 34, at 338.
41 2 HUGO GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES 23–24 (Francis W. Kelsey trans., 1925); see also WRIGHT, supra note 34, at 7 (reporting that Grotius was “widely read and utilized in [early] America”).
42 Roscoe Pound, The Revival of Natural Law, 17 NOTRE DAME L. REV. 287, 342, 344, 349 (1942) (describing the “transition” of natural rights’ “theoretical basis from natural law to history” and noting American lawyers’ identification of common-law rights, “as expounded by Coke,” with both “the natural rights of man” and “rights guaranteed under constitutions’); see also Schweber, supra note 33, at 427 (agreeing with Pound that Blackstone’s “substitution of the authority of custom for natural law” helped to “develop[] the idea of historical jurisprudence”).
legal consciousness, with some thinkers stressing how thoroughly “[t]he Christian religion is part of our common law, . . . the very texture of which it is interwoven.”

However much natural law in general may have “lost its hold on . . . most lawyers” as the nineteenth century wore on, classical marriage jurisprudence continuously and unapologetically reflected the full variety of natural-law discourses that Wright came to identify in 1931. “Marriage was before human law,” wrote the Wisconsin Supreme Court in 1875, “and exists by higher and holier authority—the Divine Order, which we call the law of nature.” Legal writers described marriage as an institution “of divine origin,” “begun in the garden of Eden,” “established by God himself,” who implanted the nuptial ideal as “a principle in our nature.” Marriage was an imperative supported by reason, evident upon “the most mature and thoughtful reflection,” yet knowable equally by

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44 Simon Greenleaf, A Discourse Pronounced at the Inauguration of the Author as Royall Professor of Law in Harvard University 24 (1834); see also Goodrich v. Goodrich, 44 Ala. 670, 673 (1870) (“it has been said, by the highest authority, that Christianity is a part of the common law”); Roscoe Pound, The Ideal Element in American Judicial Decision, 45 HARV. L. REV. 136, 139 (1931) [hereinafter Pound, Ideal Element] (discussing “historical warrant in the old English law books for saying that Christianity was part of the common law”).


46 Campbell v. Campbell, 37 Wis. 206, 214 (1875); see also Leonard Shelford, The Practical Treatise on the Law of Marriage and Divorce 2 (1841) (defining marriage “according to the primitive law of God and Nature”).

47 Joel Prentiss Bishop, Commentaries on the Law of Marriage and Divorce and Evidence in Matrimonial Suits § 31 (1st ed. 1852) [hereinafter Bishop, Commentaries (1st ed. 1852)]; see also Bradwell v. Illinois, 83 U.S. 130, 141 (1873) (“The constitution of the family organization . . . is founded in the divine ordinance, as well as in the nature of things.”).

48 Edward Deering Mansfield, The Legal Rights, Liabilities and Duties of Women 235 (1845).

49 State v. Gibson, 36 Ind. 389, 402–03 (1871); see also James Schouler, A Treatise on the Law of the Domestic Relations 24 (1st ed. 1870) [hereinafter Schouler, Domestic Relations (1st ed. 1870)] (marriage was “instituted by God himself, and has its foundation in the law of nature”).

50 Dickson v. Dickson’s Heirs, 9 Tenn. 110, 112 (1826); see also Theodore D. Woolsey, Essay on Divorce and Divorce Legislation 234 (1869) [hereinafter Woolsey, Divorce Legislation] (describing marriage “as a divine institution established both in our nature and by positive precept”).

51 W.C. Rodgers, Treatise on the Law of Marriage § 2 (1899); see also Schouler, Domestic Relations (1st ed. 1870), supra note 49, at 8 (“Whether we consult the facts of history or the inspirations of human reason, the family may justly be pronounced the earliest of all social institutions . . . .”); Bishop, Commentaries (1st ed. 1852), supra
“instinct.”52 It existed, or would exist, “in the state of nature,” as John Locke had claimed,53 and it was “as much contemplated in the common as in the divine law.”54 Marriage was *jus gentium*—“in the highest sense, a matter pertaining to the law of nations,” “applicable in all places, to the entire race of man wherever man is found on the earth.”55 As with natural-law talk more broadly, these sundry ways of describing marriage tended to be voiced in combination, as if their differences could only complement one another.56

Classical American jurists emphasized marriage’s antiquity, especially relative to the advent of positive law,57 and they insisted with equal vigor that no civilization

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52 1 JAMES SCHOULER & ARTHUR W. BLAKEMORE, A TREATISE ON THE LAW OF MARRIAGE, DIVORCE, SEPARATION AND DOMESTIC RELATIONS § 10 (6th ed. 1921) [hereinafter 1 SCHOULER & BLAKEMORE, DOMESTIC RELATIONS (6th ed. 1921)] (“the fundamental rights and duties involved in this relation are recognized by something akin to instinct, so as to require by no means an intellectual insight; intellect, in fact, impairing often . . . the charm of the relation”); see also JOEL FOOTE BINGHAM, CHRISTIAN MARRIAGE 16 (1871) (marriage “depends on the Divine appointment of sexes [and] on the Divinely implanted instincts of each”).

53 JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 46 (Thomas P. Peardon ed. 1952) (1689); see also STORY, COMMENTARIES (1st ed. 1834), supra note 11, at §108 (“It may exist between two individuals of different sexes, although no third person existed in the world, as happened in the case of the common ancestors of mankind.”).

54 Nichols v. Nichols, 48 S.W. 947, 954 (Mo. 1898).

55 1 BISHOP, COMMENTARIES (4th ed. 1864), supra note 12, at §§ 6, 167, 351 (“Its source is the law of nature, whence it has flowed into . . . the general law of nations.”).

56 See, e.g., Wightman v. Wightman, 1 N.Y. Ch. Ann. 861, 861 (Ch. 1820) (explaining that “the marriage of a lunatic” should be nullified “in the absence of any statutory prohibition” no less than “a marriage between parent and child,” as both are “criminal and void by the law of nature, . . . those fit and just rules of conduct which the Creator has prescribed to man, . . . and which are to be ascertained from the deductions of right reason, though they may be more . . . explicitly declared by divine revelation”); RODGERS, supra note 51, at 1 (declaring that marriage was “ordained by the Creator,” has been “practiced and sanctioned by all civilized people from the earliest times,” is “prompted by [a] natural instinct,” and is affirmed by “mature and thoughtful reflection”); Wilson, supra note 14, at 316 (“Whether we consult the soundest deductions of reason, or resort to the best information conveyed to us by history, or listed to the undoubted intelligence communicated in the holy writ, we shall find, that to the institution of marriage the true origin of society must be traced.”).

57 See, e.g., In re Estate of McLaughlin v. McLaughlin, 30 P. 651, 653 (Wash. 1892) (“[M]arriage is . . . anterior to all human law.”); SCHOULER, DOMESTIC RELATIONS (1st ed. 1870), supra note 49, at 7–8 (naming the marital family “the earliest of all social institutions” and declaring that “the law of the domestic relations is . . . older than that of civil society”).
could appear or survive without it.\textsuperscript{58} Marriage marked humankind’s “first step from barbarism.”\textsuperscript{59} One chestnut called marriage “the parent, not the child of society.”\textsuperscript{60} Judges and scholars strained to convey matrimony’s necessity to the “peace, happiness, and well-being” of persons and polities.\textsuperscript{61} In 1869, Theodore Dwight Woolsey, President of Yale College, declared: “If any relations in human life can be called natural and necessary, . . . [i]f any are of importance in themselves and for the conservation of all others, . . . if any show the prevision of the divine mind,” it is marriage.\textsuperscript{62} “But for this institution,” admonished a legal scholar of the same era, “all that is valuable, all that is virtuous, all that is desirable in human existence, would . . . fade[] away in . . . perilous darkness.”\textsuperscript{63} The warning was no less fervent at century’s end. Forsake marriage, wrote William Champ Rodgers in 1899, and “religion, government, morals, progress, enlightened learning, and domestic happiness must all fall into most certain and inevitable decay.”\textsuperscript{64}

Underlying professions of marriage’s centrality to the birth and survival of civilized society was a particular understanding of what that relation—“in an abstract and general shape,” as a moral category “really existing” prior to any civil recognition—naturally entails.\textsuperscript{65} This understanding was so ubiquitously shared and so far beyond question that it most often went without saying.\textsuperscript{66} But legal writers found their words when circumstances required. In 1870, the Alabama Supreme Court looked to Thomas Rutherford’s celebrated \textit{Institutes of Natural Law} (1754) for a definition that “all writers . . . seem to agree in”: “Marriage is a contract between a man and woman, in which, by their mutual consent, each acquires a right in the person of the other, for the purpose of their mutual happiness and for the production and education of children.”\textsuperscript{67} For a pithier description, the Supreme Court

\textsuperscript{58} See State v. Gibson, 36 Ind. 389, 402–03 (1871) (explaining that “society could not exist without the institution of marriage”); \textit{STORY, COMMENTARIES} (1st ed. 1834), \textit{supra} note 11, at § 108 (calling marriage “the very basis of the whole fabric of civilized society”).

\textsuperscript{59} Maynard v. Hill, 125 U.S. 190, 211 (1888) (quoting Adams v. Palmer, 51 Me. 480, 485 (Me. 1863)).

\textsuperscript{60} \textit{KEEZER, supra} note 11, at 5 (“Marriage . . . is the parent of civil society. . . .”); \textit{SCHOULER, DOMESTIC RELATIONS} (1st ed. 1870), \textit{supra} note 49, at 24; \textit{STORY, COMMENTARIES} (1st ed. 1834), \textit{supra} note 11, at § 108.

\textsuperscript{61} Frasher v. State, 3 Tex. Ct. App. 263, 275 (Ct. App. 1877) (calling marriage “essential” to these ends); see also 1 \textit{THEOPHILUS PARSONS, JR., THE LAW OF CONTRACTS} 556 (1st ed. 1853) (“The relation of marriage is founded upon the will of God, and the nature of man; and it is the foundation of all moral improvement, and all true happiness.”).

\textsuperscript{62} \textit{WOOLSEY, DIVORCE LEGISLATION, supra} note 50, at 84.

\textsuperscript{63} 1 \textit{BISHOP, COMMENTARIES} (4th ed. 1864), \textit{supra} note 12, at § 12.

\textsuperscript{64} \textit{RODGERS, supra} note 51, at § 2.

\textsuperscript{65} \textit{WOOLSEY, DIVORCE LEGISLATION, supra} note 50, at 132.

\textsuperscript{66} Cf. \textit{THOMAS G. WEST, THE POLITICAL THEORY OF THE AMERICAN FOUNDING} 35 (2017) (“One right that all founders accepted, but which was rarely mentioned because no one questioned it, is the natural right to marry.”).

\textsuperscript{67} Goodrich v. Goodrich, 44 Ala. 670, 674 (1870) (citing, in accord with this definition, treatises by Joel Prentiss Bishop, James Kent, and John Bouvier); see also \textit{SHELFOLD, supra}}
of Missouri relied in 1835 on Matthew Bacon’s *New Abridgment of the Law* (1768), calling marriage “a compact between a man and a woman for the procreation and education of children.” Joel Prentiss Bishop and James Schouler, authors of the nineteenth century’s preeminent treatises on domestic relations, characterized marriage in part by what it was not; crediting Lord Stowell’s famous opinion in the Scottish case of *Lindo v. Belisario* (1795), Bishop explained:

>a marriage . . . is not every carnal commerce; nor would it be so even in the law of nature. . . . But when two persons agree to have that commerce for the procreation and bringing up of children, and for . . . lasting cohabitation,—that, in a state of nature, would be a marriage, and, in the absence of all civil and religious institutions, might safely be presumed to be . . . a marriage in the sight of god."

The foregoing definitions attest to the two core features of natural marriage as classically conceived: contract and conjugality. Regarding the contractual aspect, it suffices for now to state very generally that it refers to the mutual consent by which a marriage comes into being. “Conjugality” describes the relation’s substance, its basic content. Revivified of late by debates over legal recognition of same-sex unions and other nontraditional domestic relationships, the term “conjugality” is

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68 State ex rel. Gentry v. Fry, 4 Mo. 120, 151 (1835).
used here to mean the status or condition of matrimony as a supposedly organic phenomenon, one closely related to cohabitation and parenthood but defined first and foremost by morally permissible sexual relations and the possibility of legitimate procreation.\textsuperscript{73} 

According to natural law, conjugal marriage was a “natural institution proceeding necessarily from the organization and the condition of the sexes”;\textsuperscript{74} it was “the state of existence ordained by the Creator[,] who . . . fashioned man and woman expressly” for one another.\textsuperscript{75} “The universal sentiment of mankind,” wrote Bishop, “accepts the fundamental doctrine of the law of marriage, that the sexes should not associate promiscuously as prompted by mere animal instinct, but [should] ‘pair off[,] . . . [like] the birds of the air.’”\textsuperscript{76} Natural marriage “necessarily” entailed sexual union;\textsuperscript{77} this was its “essence.”\textsuperscript{78} And there could be no sexual union
without marriage, “the only . . . relation by which Providence has permitted the
continuance of human life.”

Procreation was thus “the first purpose of matrimony, by the laws of nature and
society.” On this point practically all authors agreed. They cast marital procreation
as “a consummation of the Divine command to ‘multiply and replenish the earth,’”
and marriage itself as “a divine institution . . . ordained for obtaining a legitimate
increase of the human family.” That word “legitimate” signals other personal and
social advantages of marriage, most importantly “the proper nurture . . . of
offspring” and the familial descent of property—an other natural “institution,”
which, “together with . . . maternity,” secured “the only firm foundation of all
civilization.” But the reproduction of individuals and families was not the only

“obligation” of marital status “fixed by society in accordance with the principles of natural
law”; Tyler, supra note 71, at 822 (“Without sexual intercourse, the ends of marriage, the
procreation of children, and the pleasures and enjoyment of matrimony, cannot be
attained.”).

79 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 76 (John M. Gould ed., 14th ed.
1896) [hereinafter 2 KENT, COMMENTARIES (14th ed. 1896)]; see also Raymond v.
Raymond, 79 A. 430, 431 (N.J. Ch. 1909) (“The human race was created male and female
with the manifest purpose of perpetuating the race. Marriage without sexual intercourse
utterly defeats its purpose, as sexual intercourse except in the marital relation is contrary to
divine law.”).

80 Baker v. Baker, 13 Cal. 87, 103 (1859); see also LOCKE, supra note 53, at 44
(“Conjugal society . . . consist[s] chiefly in such a communion and right in one another’s
bodies as is necessary to its chief end, procreation.”).

81 RODGERS, supra note 51, at § 2; see also BOUVIER, supra note 13, at 102 (“The end
of marriage is the procreation of children and the propagation of the species.”).

82 JOHN H. LIVINGSTON, A DISSERTATION ON THE MARRIAGE OF A MAN WITH HIS
SISTER IN LAW 2 (1816); see also Ramon v. Ramon, 34 N.Y.S.2d 100, 108 (Dom. Rel. Ct.
1942) (“The procreation of offspring under the natural law being the object of marriage, its
permanency is the foundation of the social order.”).

83 1 SCHOULER & BLAKEMORE, DOMESTIC RELATIONS (6th ed. 1921), supra note 52, at
§ 10.

84 LIEBER, supra note 38, at 135. For a famous but somewhat unconventional statement
of marriage’s close connection to parenthood, see LOCKE, supra note 53, at 44–45:

[T]he end of conjunction between male and female being not barely procreation
but the continuation of the species, this conjunction . . . ought to last . . . so long
as is necessary to the nourishment and support of the young ones . . . by those that
get them till they are able to . . . provide for themselves.

For echoes of Lieber’s designation of civilization’s two most necessary institutions, see
WILLIAM SLADE, THE ABOLITION OF SLAVERY AND THE SLAVE TRADE WITHIN THE
DISTRICT OF COLUMBIA 17 (1837) (arguing that slavery’s demise in Vermont “has not dissolved the
natural relations,” for “[n]one who deserve to be named think of . . . abolishing the marriage
institute, or of annulling the laws which protect the acquisition, enjoyment, and inheritance
of property”); J.L. Stocks, Preface to PASchal Larkin, Property in the Eighteenth
reason for confining sex to marriage. Equally important was a decent “satisfaction of [humankind’s] most powerful passion.”\(^{85}\) “[T]he avoiding of fornication” was a vital moral norm in its own right.\(^{86}\) Thus the second of marriage’s “principal ends” was “a lawful indulgence of the passions to prevent licentiousness.”\(^{87}\)

Contract and conjugality weren’t natural marriage’s only attributes, but they stood among a handful that commanded practically unanimous agreement.\(^{88}\) Aside from rights of portability and permanence discussed below,\(^{89}\) only the rule of endogamy—the incest taboo—saw comparable consensus.\(^{90}\) On other questions, large and small, opinions differed. Many American jurists assumed wifely “subjugation” to be an aspect of “the conjugal union in . . . a state of nature,”\(^{91}\) but other authorities, following Locke and his comparably influential contemporary Samuel von Pufendorf,\(^{92}\) denied that “absolute sovereignty . . . naturally belonged to the husband” or was “necessary to . . . conjugal society.”\(^{93}\) A few jurists even

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\(^{86}\) 1 BISHOP, NEW COMMENTARIES (8th ed. 1891), supra note 76 at § 760; see also Dane, supra note 72, at 307 (emphasizing that, “given the[] sexual natures” of “[h]eterosexual men and women,” the natural-law “conception of marriage does not see it as merely the engine for reproduction.”).

\(^{87}\) Grover v. Zook, 87 P. 638, 641 (Wash. 1906).

\(^{88}\) How striking it is to find the ironic, iconoclastic Karl Llewellyn espousing “the old truth” that “[m]arriage . . . is built on the fact that there are two sexes, and attraction between them, and that sexual union has results. On the fact that . . . children are not kittens, and need long years before they come to handling their own lives.” K.N. Llewellyn, *Behind the Law of Divorce: I*, 32 COLUM. L. REV. 1281, 1284 (1932).

\(^{89}\) See infra Sections II.C and II.D.

\(^{90}\) Although incest was generally abhorred, there was widespread uncertainty about the degree of familial relation “at which the laws of nature have ceased to discountenance the union.” 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 71 (1st ed. 1827) [hereinafter 2 KENT, COMMENTARIES] (1st ed. 1827)]; see also 2 CHARLES-LOUIS DE SECONDAT, BARON DE MONTESQUIEU, *Spirit of the Laws* 166 (Nugent trans., A. Donaldson & J. Reid 3d ed. 1762) (1750) (“With regard to the prohibition of marriage between relations, it is a thing extremely delicate to fix exactly the point at which the laws of nature stop and where the civil laws begin.”).

\(^{91}\) 1 SCHOULER & BLAKEMORE, DOMESTIC RELATIONS (6th ed. 1921), supra note 52, at § 10 (suggesting that coverture was a “divine” rather than “human” element of the marriage contract); see also BOUVIER, supra note 13, at 62 (“By the natural law, the superior control in a state of marriage belongs to the man rather than the woman.”).

\(^{92}\) See WRIGHT, supra note 34, at 7 (identifying Pufendorf’s *De Jure Naturae et Gentium* among “the most important” contributions to “American theories of natural law”).

\(^{93}\) LOCKE, supra note 53, at 46–47; SAMUEL VON PUFENDORF, OF THE LAW OF NATURE AND NATIONS 448–49 (L. Lichfield trans., 2d ed. 1710) (1672). In an antebellum contest over
protested that women’s subordination in marriage was in certain respects contrary to natural law. As to the ideal of lifelong union, some authors argued that nature imposed an absolute prohibition of divorce, others that adultery and perhaps abandonment gave aggrieved spouses a natural right to dissolution, and still others that marriages contracted in a state of nature could be disbanded at any time for any reason. Some claimed that “miscegenation” bans followed natural law; others said they violated it. Even polygamy, generally deemed “contrary to the spirit of Christianity and of the civilization which Christianity has produced in the Western

which state’s coverture rules dictated ownership of a married woman’s slave, the North Carolina Supreme Court noted that marriage,

\[\text{Moye v. May, 54 N.C. 84, 86 (1853) (emphasis in original); see also Allen v. Miles, 36 Miss. 640, 647–48 (1859) (criticizing the English common law’s “idea that it was against natural right, that [married women] should own property in their own right”).}\]


95 See, e.g., Moore v. Moore, 22 Tex. 237, 239 (1858) (“the law of nature requires that the [marriage] contract should be perpetual”).

96 Woolsey, Divorce Legislation, supra note 50, at 101 (doubting whether natural law permits “any . . . ground for divorce” but adultery); 2 Joel Prentiss Bishop, Commentaries on the Law of Marriage and Divorce, of Separations Without Divorce, and of Evidence of Marriage in All Issues; Embracing Also Pleading, Practice, and Evidence in Divorce Causes, With Forms § 167 (4th ed. 1864) (advocating divorce where “one of the parties . . . is permanently out of the country,” because such a marriage is “not matrimony, as viewed by the law of nature”).

97 Johnson v. Johnson’s Administrator, 30 Mo. 72, 88 (1860) (“It can hardly be said that the power of divorce, in one or both of the parties to the contract, at his or her pleasure, is inconsistent with the law of nature.”); see also Bishop, Commentaries (1st ed. 1852), supra note 47, at § 720 n.3 (rejecting as a “fallacy” the notion that “the dissolubility or indissolubility of the marriage is an essential part of the contract,” and thus a matter “of universal obligation,” rather than a locally determined “incident to the status of husband and wife”) (quoting 1 William Burge, Commentaries on Colonial and Foreign Laws 680–95 (1838)).

98 Scott v. Sandford, 60 U.S. 393, 409 (1857) (stating that “intermarriages between white persons and negroes or mulattoes were regarded as unnatural and immoral” by the legislators who voted to proscribe them); see also infra notes 388–392 and accompanying text (describing a range of views on interracial marriage’s status under natural law).
world,”99 was not to all minds unnatural. In classical America no less than in Pufendorf’s day, “[w]hether or not this Practice be repugnant to the Law of Nature, [was] a Point not fully settled amongst the Learn’d.”100 Some authors unequivocally deemed plural marriage unnatural;101 some considered it simply “a legal, not a natural, disability”;102 some asserted that having multiple husbands, but not multiple wives, is “intrinsically evil” and “can in no way be reconciled with natural law”;103 and some were ambivalent,104 as Aquinas had been in concluding that “plurality of wives is in a way against the law of nature, and in a way not against it.”105 Still more idiosyncratic claims about natural marriage touched on such diverse subjects as

99 Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 49 (1890).

100 PUFENDORF, supra note 93, at 455.

101 WOOLSEY, POLITICAL SCIENCE, supra note 29, at 95–96 (calling polygamy “contrary to nature and an abuse of nature” but acknowledging that, “in all the races of men, except the Indo-European, . . . [it] has been allowed and practiced from time immemorial.”).

102 MANSFIELD, supra note 48, at 240. There was precedent for this view in 1 HUGO GROTIANUS, DE JURE BELLII AC PACIS 196 (Fancis W. Kelsey trans., 1925) (scoffing at “those who . . . labour in the effort to prove that things which are forbidden by the Gospel are not permissible by the law of nature, as concubinage, divorce, and polygamy.”).


104 Avoiding direct reference to natural law, classical writers on polygamy often relied instead on the universal “condemnation of all Christendom.” BISHOP, COMMENTARIES (1st ed. 1852), supra note 47, at § 201; see also Davis v. Beason, 133 U.S. 333, 341 (1890) (“Bigamy and polygamy are crimes by the laws of all civilized and Christian countries. . . .”); SCHOULER, DOMESTIC RELATIONS (1st ed. 1870), supra note 49, at 33 (“Polygamy, or bigamy as it is often termed—since the common law of England could scarcely conceive of such conjunctions carried beyond a double marriage—is discarded by all Christian communities.”); STORY, COMMENTARIES (1st ed. 1834), supra note 11, at § 25 (naming polygamy among the “institutions . . . adapted to heathen nations” but “totally repugnant to . . . those which embrace Christianity.”). Striking something of a middle course, courts regularly referred to “the law of nature, as generally recognized in Christian countries,” to support departures from the rule of lex loci contractus in cases involving polygamous marriages valid where celebrated. See, e.g., Wilson v. Cook, 100 N.E. 222, 222 (Ill. 1912); Penegar v. State, 10 S.W. 305, 306 (Tenn. 1889); Heflinger v. Heflinger, 118 S.E. 316, 320 (Va. 1923).

105 ST. THOMAS AQUINAS, THE “SUMMA THEOLOGICA” OF ST. THOMAS AQUINAS, THIRD PART 331 (Fathers of the English Dominican Province, trans., 1922) (1265–74) (attempting to reconcile Christian morality with the domestic lives of Abraham, Isaac, and Jacob).
spousal support and maintenance,\textsuperscript{106} doctrines governing marital jurisdiction,\textsuperscript{107} and criminal law’s leniency toward men who answer wifely infidelity with homicide.\textsuperscript{108}

Discussion of natural marriage was rarely pursued for its own sake. The “higher law” of nature was at once a foundation and an aspiration for practical governance.\textsuperscript{109} According to John Bouvier’s popular survey of American jurisprudence, “marriage owes its institution to the law of nature, and its perfection to the municipal or civil law.”\textsuperscript{110} While it was no secret that “the essential character of the relation of husband and wife, as determined by the law of nature,” could be “perverted” or “confused . . . by the positive law,”\textsuperscript{111} classical jurists generally believed that “legislation [governing marriage] is ordinarily in accord with the notion of the true relation.”\textsuperscript{112}

Faith that “positive law . . . enforces the mandates of the law of nature, and develops rather than creates a system,” was hardly confined to the field of domestic relations,\textsuperscript{113} but in the United States a distinctly Protestant theology of marriage lent this belief special force and meaning.\textsuperscript{114} As Joseph Story explained in 1834, whereas

\textsuperscript{106} See, e.g., McClanahan v. Hawkins, 367 P.2d 196, 198 (Ariz. 1961) (“[I]t is generally agreed that alimony . . . provide[s] for the maintenance and support of the wife and is founded on the natural and legal duty which marriage imposes. . . .”); Campbell v. Campbell, 37 Wis. 206, 213–15 (1875) (“Judgment of divorce can sever the legal bond of marriage, but it cannot undo the natural relation . . . and consequent obligation [of] . . . support from the husband. . . .”).

\textsuperscript{107} See, e.g., SCHOULER, DOMESTIC RELATIONS (1st ed. 1870), supra note 49, at 9 (“The domicile of the wife follows that of the husband; the domicile of the infant may be changed by the parent. Thus does the law of domicile conform to the law of nature.”); JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 110 (3d ed., 1846) [hereinafter STORY, COMMENTARIES (3d ed. 1846)] (noting that “every civilized country” locates a marriage’s “rights, duties, and obligations” in “the law of the domicil”).

\textsuperscript{108} Howard v. Howard, 51 N.C. 235, 237 (1858) (crediting “nature” as the “origin” of the doctrine that a husband is guilty of manslaughter, not murder, if he discovers another man “in the act of adultery with his wife, and instantly kills him”); see also infra note 151 (discussing nature’s provision for self-help in such circumstances).

\textsuperscript{109} “The traditional view of natural law is that it is a body of immutable rules superior to positive law. It is ideal law since it consists of the highest principles of morality.” A.G. Chloros, \textit{What Is Natural Law?}, 21 MOD. L. REV. 609, 609 (1958).

\textsuperscript{110} BOUVIER, supra note 13, at 101; see also 1 SCHOULER & BLAKEMORE, DOMESTIC RELATIONS (6th ed. 1921), supra note 52, at § 13 (“[T]he rights and obligations of [marriage] are fixed by society, in accordance with principles of natural law.”).

\textsuperscript{111} Mathewson v. Mathewson, 63 A. 285, 286 (Conn. 1906).

\textsuperscript{112} Id.

\textsuperscript{113} SCHOULER, DOMESTIC RELATIONS (1st ed. 1870), supra note 49, at 5.

\textsuperscript{114} To stress the especially Protestant character of classical ideas about the complementarity of natural- and positive-law marriage is not to deny comparable beliefs in other religions, including Roman Catholicism. See, e.g., Brendan F. Brown, \textit{The Natural Law, the Marriage Bond, and Divorce}, 24 FORDHAM L. REV. 83, 93 (1955) (“Natural law sets the minimum requirements of a juridical institution, authorizing Church and State to establish additional reasonable requirements in the light of specific social conditions of the
Catholics “consider marriage as a sacrament . . . governed by the Divine law[,] . . .
Protestants . . . have considered it mainly as a civil institution, . . . subject to the
legislative authority.” This did not mean that Protestantism’s proliferating
denominations renounced belief in matrimony as a “holy estate.” Quite the
opposite. As one treatise put it in 1845, “what the natural law has founded and the
revealed law confirmed, the law of society . . . enforces.” Marriage on this view
“was . . . to be administered by . . . civil authorities who had been called as God’s
vice-regents.” Far from rejecting the natural law of marriage, this allocation of
responsibility was premised partly on its universality, its manifest transcendence of
religious difference. Civil control was also justified by moral necessity. Marriage
“being essential to the peace, . . . harmony, . . . virtues and improvements of civil
society”—to sexual continence and “the purity of families” above all—its
permissions and prohibitions were best entrusted to a power that could enforce them
against all citizens, not just believers, in this world rather than the next.

Not coincidentally, it was “only in the light of a civil institution” that American
law claimed to view marriage. This was no mere pretense, notwithstanding constant
reference to Christian morality in judicial and scholarly disquisitions on the

———. But see Fay Botham, Almighty God Created the Races 70, 72 (2009)
 contrasting, in the context of American disputes over interracial marriage, a typically
Catholic emphasis on the moral force of natural law’s right to marry with the commitment
to civil control that “exemplified the traditional Protestant position”).

115 Story, Commentaries (1st ed. 1834), supra note 11, at § 209.

116 Church of England, The Book of Common Prayer: The Texts of 1549, 1559,
and 1662, 64–65, 434, 436 (Brian Cummings ed., 2011). On the Protestant invention
of marriage as an institution subject to “regulation . . . by the secular political community,” see
Mary Ann Glendon, The Transformation of Family Law: State, Law, and Family

117 An 1845 survey of American women’s legal condition found it “proper . . . to recite
a few of the leading principles of Scripture in regard to the duties of husbands and wives, in
order that we may observe hereafter, how far the law of man has grown out of, and been
made in conformity to that of God.” Mansfield, supra note 48, at 261–62, 312 (explaining
that, “in Christian countries, human laws . . . may indeed exist without, but not in opposition
to,” God’s law).


119 “That the children of this world, distinctly from the followers of Christ, should
marry, is quite natural. And this shows . . . that it is a civil right and a civil institution, properly
belonging to the citizens of the world, and therefore the privilege of every man who chooses
to use it.” John Dunlavy, The Manifesto, or A Declaration of the Doctrine and
Practice of the Church of Christ 317 (1818).

120 Bingham, supra note 52, at 14–15, 18–20, n.10 (“[A] matter . . . of an importance
so immense, . . . pervading to every fibre of human rights and happiness, were a thing
impossible to be ignored by the civil law.”).

121 Bishop, Commentaries (1st ed. 1852), supra note 47, at § 31 (emphasis added).
“To distinguish . . . marriage as the law views it from marriage as a religious rite, the courts
and text-writers almost uniformly speak of and describe it as . . . a ‘civil contract.’” Id.
subject. Religious and natural-law tenets rarely (if ever) provided the sole grounds of decision in matrimonial cases. And if, as a rule, classical jurists frowned upon marital regulation contrary to ecclesiastical teaching, they never questioned its legal efficacy. It was black-letter law that secular government possessed complete control over the marital institution. Indeed, Protestantism’s principle of divine delegation echoed in the classical period’s most important constitutional word on marriage: “the doctrine of status,” which held that “marriage being a status and in its nature semi-public, the legislative power over it is nearly, perhaps absolutely, omni potent.” In some of its most important applications, this doctrine was the mortal enemy of the natural right to marry, to which we now turn.

II. “A THING OF NATURAL RIGHT”

Classical American jurists described marriage as “a thing of natural right,” “one of the natural rights of human nature,” a “right of which each individual is equally possessed,” “a natural and civil right pertaining to all persons,” a “right

122 “Mid-nineteenth-century judges and other public spokesmen had hardly been able to speak of marriage without mentioning Christian morality.” NANCY COTT, PUBLIC VOWS 197 (2000).

123 Though theoretically consonant with disestablishment principles, this forbearance was sometimes facilitated in practice by Christianity’s supposed absorption into English common law. See, e.g., Wightman v. Wightman, 4 Johns. Ch. 343, 347–50 (N.Y. Ch. 1820) (“The principles of canonical jurisprudence, and the rules of the common law, are the same. . . . Prohibitions of the natural law . . . become rules of the common law, . . . sanctioned by immemorial usage, and, as such, are clearly binding.”).

124 1 BISHOP, NEW COMMENTARIES (8th ed. 1891), supra note 76, at § 824. The phrase “doctrine of status” refers to the idea that a state has full “sovereign power to regulate the status of its own domiciled subjects” and therefore has full power to regulate marriage. See Atherton v. Atherton, 181 U.S. 155, 166 (1901); id. at 175 (Peckham, J., dissenting); see also infra notes 350–352, 354, 484.


126 Overseers of the Poor of the Town of Newbury v. Overseers of the Poor of the Town of Brunswick, 2 Vt. 151, 159 (1829); see also United States v. Ritchie, 58 U.S. 525, 530 (1854) (quoting appellants’ argument that “Indians were human beings entitled to the rights of humanity, . . . including the rights of marriage and descent”); Hurlbut, supra note 74, at 147 (counting marriage among “the rights of humanity”).

127 THOMAS HERTTELL, REMARKS COMPRISING IN SUBSTANCE JUDGE HERTTELL’S ARGUMENT IN THE HOUSE OF ASSEMBLY OF THE STATE OF NEW YORK, IN THE SESSION OF 1837 29 (1839).

128 Ford v. State, 53 Ala. 150 (1875).
of personality,” and so on. As Joel Prentiss Bishop explained, “all persons are naturally entitled” to marry because marriage “involves the most valued interests of every class” and “awakens the thoughts and engages the care of nearly every individual.” This truth, he said, was “recognized in all countries, in all ages, among all people, all religions, all philosophies.”

Perhaps because the natural right to marry was thought to be eternally and ubiquitously accepted, classical jurists never bothered to give a full account of it. None so much as observed that, by their own scattered descriptions, this singular, undifferentiated “right to marry” consisted of several distinct attributes: conjugality, contract, portability, and permanence. To agree to become husband and wife (contract) was to enter an exclusively sexual and ideally procreative relationship (conjugality) that was both entitled to recognition everywhere (portability) and immune from dissolution without cause (permanence). The natural right to marry protected this unity. The following sections explain why it did so and how its protections fared in positive law before Loving.

A. The Conjugal Right to Marry

Family ties between slaves occasioned some of the classical period’s most poignant allusions to the conjugal right to marry. Nineteenth-century lawyers took for granted that enslavement was an absolute bar to civil matrimony, but most believed that slaves were nonetheless capable of “natural marriage,” or what President Abraham Lincoln described in 1864 as marriage “in fact.” During
Reconstruction, a number of state legislatures adopted procedures for regularizing slaves’ “quasi marriages” and set evidentiary standards for “recogniz[ing] as a legal relation that which the parties had constituted a natural one.”

Pursuant to these measures, proof that a couple had “cohabitated” or otherwise “associated as husband and wife” transformed thousands of “de facto” spouses into lawfully wedded couples—usually voluntarily, sometimes not—and rescued tens of thousands of “offspring [from] the disgrace of bastardy.”

“The unhappy condition” of servitude, declared the Alabama Supreme Court in 1870, may have kept slaves’ “marriages from being perfect in the . . . legal sense,” but it did not and could not extinguish their “natural right” to marry. Slaves had exercised this right, explained the Texas Supreme Court three years later, through a “sort of contubernium”—an “observance of the matrimonial condition” that often “resulted in procreation of families” and sometimes incorporated “a certain degree of continence.” Emancipation made these facts of slaves’ family lives newly salient, not newly visible. They were discernable even in an atmosphere congested


State v. Harris, 63 N.C. 1, 5 (1868); see also TERA W. HUNTER, BOUND IN WEDLOCK: SLAVE AND FREE BLACK MARRIAGE IN THE NINETEENTH CENTURY 174 (2017) (quoting Rep. Reverdy Johnson’s 1864 description of slaves who had “lived together but were never man and wife except in the eye of Heaven.”). Legislators also saw to the legitimation of children born of such marriages. A Louisiana statute, for example, provided that

natural fathers and mothers shall have power to legitimate their natural children . . . provided, that there existed at the time of the conception of such children no other legal impediments to the intermarriage of their natural father and mother, except those resulting from color or the institution of slavery.

Marionneaux v. Dupuy, 19 So. 466, 467 (La. 1896).

Davenport v. Caldwell, 10 S.C. 317, 337, 344 (1878); KATHERINE FRANKE, WEDLOCKED: THE PERILS OF MARRIAGE EQUALITY 43 (2015). “Although the process of regularizing slave marriages began during the Civil War, tens of thousands of marriage certificates were drawn up in a short period of time soon after.” HUNTER, supra note 135, at 5.

Stikes v. Swanson, 44 Ala. 633, 636 (1870).

Honey v. Clark, 37 Tex. 686, 708 (1873) (acknowledging that “[t]he laws of slavery did not forbid the coupling together of man and woman in this manner.”). “Contubernium” was a doctrine of ancient Roman law that gave retroactive civil effect to the de facto marriages of emancipated slaves. See ADOLF BERGER, ENCYCLOPEDIC DICTIONARY OF ROMAN LAW 415 (1953) (defining contubernium as a “permanent, marriage-like union between slaves”).

Prior to the Civil War, “leading jurists distinguished between ‘natural law’ and ‘civil law,’ . . . [and] recognized that slaves were compelled by human impulses, as old as Adam and Eve, to mate, to procreate, and to form marital bonds.” Significantly, antebellum judges “typically used the word ‘marriage’” to describe these bonds, sometimes using formulations
with racist accounts of slaves’ supposedly inferior capacity for virtue. Not long before the Civil War, in a ruling that mitigated to manslaughter a slave’s fatal attack on the lover of his de facto wife, the North Carolina Supreme Court affirmed that “there is in moral contemplation, and in the nature of man, a wide distinction between the cohabitation of slaves ‘as man and wife’ and indiscriminate sexual intercourse; and this is recognized among slaves, for as a general rule, they respect the exclusive rights of fellow slaves who are married.”

As the preceding descriptions of slave marriages suggest, sex and procreation, the main elements of marital conjugality, were in turn the definitive privileges of the conjugal right to marry. Sexual intercourse—the relation’s *sine qua non*, its “distinguishing feature”—was unquestionably the right’s most essential attribute. An entitlement to procreate both justified the physical union of spouses and followed from it. By contrast, parenthood and cohabitation were not entitlements belonging specifically to natural marriage, however strongly they were associated with it. Parenthood was ideally but not inevitably the province of married couples. Rights to the custody and control of children traveled with parental obligations—duties of care and support that natural law (unlike a good deal of positive law) imposed on procreators regardless of marital status. As for “cohabitation” (a constant reference point in postbellum appraisals of freedmen’s antebellum family lives), the dictates of natural law depended on the particular usage at issue. In the bare, literal sense of living together, “cohabitation” was both an expectation and a right of natural marriage, but not exclusively so; a man and his wife were hardly the only combination of individuals who were permitted or indeed entitled to dwell under a single roof. And in its more metaphorical sense, “cohabitation” was practically redundant with—and, in effect, a euphemism for—conjugality’s first and most important prerogative: sexual intercourse.

Like “quasi marriage” and “marriage de facto” to distinguish them from civil marriages, *Hunter*, *supra* note 135, at 76–77.

140 *Id.* at 188 (highlighting the contradiction between “assertions that slaves were immoral and incapable of handling the prerequisites of Christian marriage” and observations that “slaves formed meaningful conjugal bonds witnessed by and affirmed before God.”).


143 *See infra* notes 186–197 and accompanying text.


145 *See infra* notes 198–212 and accompanying text.
1. Sex and Procreation

Marital conjugality—strictly speaking, a redundancy—was a matter of natural duty as well as natural right. A duty of sexual fidelity was written into the very definition of marriage as a carnal union between two persons “to the exclusion of all others.” The fundamental promise of “constancy, a virtue demanded by all moral systems and purer religions,” gave each spouse “the right that the other shall be continent.” A 1904 decision of the U.S. Supreme Court called this “a right of the highest kind, upon . . . which the whole social order rests,” and from it a number of subsidiary rules could be inferred. As Justice Joseph Story wrote in 1836, “if marriage be an institution derived from the law of nature, then, whatever has a natural tendency to discourage it, or to destroy its value, is by the same law prohibited. Hence we may deduce the criminality of fornication, . . . adultery, seduction, and other lewdness.”

This web of penal regulation indicates a conspicuously positive aspect of the natural right to marry: an obligation on the state to deter sexual infidelity, lest a jealous husband “be left to his natural remedies.” The natural-law complement of sexual fidelity was sexual access. For much of Western history, the expression “conjugal right” referred precisely to “the natural rights of . . . husband and wife to each other’s person.” The concept harked back to St. Paul’s first letter to the Corinthians, which, “echoing Mosaic and natural law

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146 Riddle v. Riddle, 72 P. 1081, 1084 (Utah 1903). Minus the word “two,” this principle was equally important to conceptions of natural law that permitted polygamy (never polyandry). See 1 BISHOP, COMMENTARIES (6th ed. 1881), supra note 76, at § 1 (“Even where polygamy is tolerated, fidelity to and among the family of wives is enjoined, the same as is the more restricted fidelity in monogamy.”).

147 LIEBER, supra note 38, at 63.

148 State ex rel. Gentry v. Fry, 4 Mo. 120, 181 (1835) (citing 1 THOMAS RUTHERFORD, INSTITUTES OF NATURAL LAW 314 (1756)).

149 Tinker v. Colwell, 193 U.S. 473, 484 (1904).


151 Hurlbut, supra note 74, at 129–32 (suggesting that, in the absence of “a due measure of [public] protection” of marital fidelity, the state has no “right to molest [an] individual who resorts to self-redress” when his spouse has been unfaithful). Where legal deterrence of wives’ inconstancy was weak or unavailable, natural law was said to permit a husband “to take the law into his hands” by killing his wife’s seducer. Hendrik Hartog, Lawyering, Husbands’ Rights, and the Unwritten Law, 84 J. AM. HIST. 79, 88 (1997) (quoting a defense attorney who in 1870 called husbands’ right to kill in such circumstances “perfect under Divine law”).

precedents,” admonished a man to “give to his wife her conjugal rights, and likewise the wife to her husband.” The *jus conjugale* was a right to payment of what medieval canonists called “the conjugal debt,” “the obligation of a spouse to engage in sexual intercourse upon the demand of the other.” Just as surely as a man and woman gained by marriage “the right that the other shall be continent,” each committed “to demean him or herself that the ends proposed by the marriage shall be accomplished.” On this foundation rested the common law’s rule that a woman could not be raped by her husband, as well as its fixation of ages of consent—“fourteen in males and twelve in females”—at points when each sex was presumed to have attained “natural and corporal ability to perform the duty of marriage.”

However draconian in its sanction of forcible intercourse between spouses, the allegedly mutual right of sexual access expressed a basic interest at the heart of the conjugal right to marry: the “natural indulgence of natural desire,” narrowly understood as coitus between husband and wife. This restrictive view of natural sexuality indicated the specifically procreative end of marriage and of the sexual “instinct” itself. But marital sex was more than a mere means to reproduction. “The indulgence of natural cravings” was a purpose distinct from the imperative to

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154 1 Corinthians 7:3 (English Standard Version).

155 See Makowski, supra note 152, at 99.


157 State ex rel. Gentry v. Fry, 4 Mo. 120, 181 (1835) (quoting Rutherford, supra note 148, at 314).

158 According to Rutherford, because “the law of nature gives each party a perpetual right to the person of the other,” consummation by force is rape only if the predicate marriage contract was itself “extorted” against a bride’s will. If the marriage was voluntary, he wrote, “[c]onsummation is no more than a taking actual possession of what, by the previous contract, each had a right to.” Rutherford, supra note 148, at 364; see also Mary Becker, *Family Law in the Secular State and Restrictions on Same-Sex Marriage*, 2001 U. Ill. L. Rev. 1, 27 (2001) (linking the assumption that “consent . . . had already been given” to the common law’s “marital rape exemption”); Charles J. Reid, Jr., *Rights and the Legal Equality of Men and Women in Twelfth and Thirteenth-Century Canon Law*, 35 Loy. L.A. L. Rev. 471, 511 (2002) (noting that “[t]he violence of a forcible consummation was nearly completely masked by the invocation of rights language” in early medieval Christian theology and that “[e]ven Thomas Aquinas, who was willing to . . . condemn [as sin] . . . a husband’s forcible intercourse with his newly wed bride,” determined that the sin “did not amount to the crime of rape, because [the husband] had some right to take this action.”).

159 1 Bishop, *Commentaries* (4th ed. 1864), supra note 12, at § 144 (internal quotations omitted).


161 Even “imperfect coitus” was considered “unnatural.” Id.

162 Rutherford, supra note 148, at 350 (“Now by the contract of marriage each party has an exclusive right in the person of the other for the purposes of producing children.”).
“propagate the human family.””\textsuperscript{163} Apart from “the love of life,” the erotic love of man and woman was the only “passion[] in the human heart . . . superior to government and control of reason,” for it was “planted there by a particular Providence, for the preservation of the species.”\textsuperscript{164} Recalling the Pauline admonition that “it is better to marry than to burn,”\textsuperscript{165} as well as Martin Luther’s teaching that sex is “as necessary to the nature of man as eating and drinking,”\textsuperscript{166} classical jurists evinced a measure of respect, sometimes grudging, for humans’ “baser appetites.”\textsuperscript{167} They acknowledged that “[t]he passions which draw together the sexes are from nature, and beyond the control of legislation,” except insofar as “law, aided by religious and moral teachings, may prescribe for them reasonable limits and restraints.”\textsuperscript{168} “To marry is one of the natural rights of human nature,” pronounced one court in 1829, for it was “instituted in a state of innocence for the protection thereof.”\textsuperscript{169} Just as temptation to carnal transgression served throughout the nineteenth and early twentieth centuries as a reason to permit divorce in cases of abandonment and to abolish prohibitions of remarriage after divorce,\textsuperscript{170} classical legal discourse

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  \item \textsuperscript{163} Schouler, Domestic Relations (1st ed. 1870), supra note 49, at 31. Under both natural and civil law, failure to consummate a marriage was cause for annulment; failure to procreate was not. See Rutherford, supra note 148, at 356; see also John T. Noonan, Tokos and Atokion: An Examination of Natural Law Reasoning Against Usury and Against Contraception, 10 Nat. L. F. 215, 228 (1965) [hereinafter Noonan, Tokos and Atokion] (discussing Christian theology’s recognition of “a purpose other than generation” in marital intercourse).
  \item \textsuperscript{164} Debate on Mr. Fox’s Appeal for the Repeal of the Marriage Act, in Cobbett’s Parliamentary History of England, From the Earliest Period to the Year 1803, Comprising the Period from the Twenty-Sixth of March 1781, to the Seventh of May 1782, at 398 (William Cobbett ed., 1814); see also Henry St. George Tucker, A Few Lectures on Natural Law 11 (1844) (“Besides the principle of self-preservation, there are I conceive some others not less universal. The first of these is the natural inclination between the sexes.”).
  \item \textsuperscript{165} 1 Corinthians 7:9 (King James).
  \item \textsuperscript{166} Martin Luther, To the Christian Nobility of the German Nation, in Three Treatises 68 (Charles M. Jacobs trans., 1970) (1520).
  \item \textsuperscript{167} “Marriage . . . divinely instituted for the natural comfort . . . and happiness of both man and woman . . . It affords necessarily a discipline to both sexes; sexual indulgence is mutually permitted under healthy restraints.” 1 Schouler & Blakemore, Domestic Relations (6th ed. 1921), supra note 52, at § 10.
  \item \textsuperscript{168} 1 Bishop, New Commentaries (8th ed. 1891), supra note 76, at § 51.
  \item \textsuperscript{169} Overseers of the Poor of the Town of Newbury v. Overseers of the Poor of the Town of Brunswick, 2 Vt. 151, 159 (1829).
  \item \textsuperscript{170} 1 Bishop, New Commentaries (8th ed. 1891), supra note 76, at § 51 (arguing for divorce where cohabitation has ceased because “it is the simple fact, growing out of the natures which for the preservation of the species God has given to men and women, that the larger part of those who were originally inclined to marry will not submit to what they see to be a never-ending and childless isolation”); Louis Freeland Post, Ethical Principles of Marriage and Divorce 89 (1906) (arguing for a right to remarry after divorce because
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recognized a natural right to marry partly on the ground that perfect continence was too much to ask of most people—that abstinence was “repugnant to human nature,” as Grotius had asserted centuries earlier in his defense of “the right to seek . . . and contract marriages.”\footnote{Grotius, supra note 41, at 204.} In 1837, Judge Thomas Herttell reminded the New York Assembly that, because “the right to marry is a natural right, and the exercise of it is as imperative as the natural incitements which dictate it are influential and dominant,” the state lacks power either to “enjoin celibacy” or to forbid “its constituents to marry.”\footnote{Herttell, supra note 127, at 29; see also John A. Ryan, Why Private Land Ownership Is a Natural Right, 18 CATH. U. BULL. 228, 228–29 (1912) (arguing for a “natural right to embrace or reject the conjugal condition” given that the “only conceivable alternatives are free love,” which “is inadequate for any person,” and “celibacy,” which “is adequate only for a minority”).} Several years later, Elisha Hurlbut, another New York lawyer (and later judge), named “the innate love of the opposite sex” among several attributes that, “spring[ing] from the very existence of a human being,” furnish the basis of “human rights.”\footnote{Hurlbut, supra note 74, at 13.} “Wherever Nature has ordained desire,” Hurlbut explained, “she has . . . [supplied] the means of gratification. From this we infer the right to its indulgence.”\footnote{Id.} Of course, the existence of a “right to the gratification, indulgence, and exercise of every innate power and faculty” was a question separate from “the manner of its exercise”; when it came to the sexual powers, Hurlbut was unequivocal: marriage’s “sacred exclusiveness” was the one and only outlet.\footnote{Id. at 13, 146; see also William Paley, Principles of Moral and Political Philosophy 170 (Liberty Fund ed., 2002) (1785) (“The passion being natural, proves that it was intended to be gratified; but under what restrictions, or whether without any, must be collected from different considerations.”). Cf. David G. Ritchie, Natural Rights: A Criticism of Some Political and Ethical Conceptions 46–47 (1916) (“Natural rights have been explained as ‘biological rights,’ by which I understand is meant that there are certain natural instincts or tendencies in human nature which must be respected by legislation. This is . . . much less than is meant by ‘rights’ under the law of nature in its old sense. It is . . . an appeal to fact” that fails to tell us “which instincts deserve our respect and which do not . . . ”).}
Procreation was the second dimension of the conjugal right to marry. As a Texas court stated in 1926, “[t]he right of the opposite sexes to mate for the purpose of becoming husband and wife . . . is, always has been, and always will be, an inherent, natural right of the highest importance.”176 Why? Because this right was “indispensable for the propagation of the human family.”177 The idea was not new. Quoting Montesquieu’s Spirit of the Laws (1748), the Missouri Supreme Court in 1910 spoke admiringly of ancient Roman laws that had upheld “the natural right which every one had to marry and beget children,” a right which “could not be taken away.”178

It would have been easy for classical lawyers to argue, as some did with respect to sexual intercourse, that the biological capacity to bear and beget offspring is a near-universal human capacity, that its exercise is therefore a human right, and that natural law circumscribes such exercise to the institution of marriage.179 But nineteenth-century jurists apparently found it unnecessary to defend the procreative aspect of the natural right to marry. The point was obvious enough to go without saying. It had a self-evidence that marital intercourse, when it was not potentially procreative, lacked.180 Given Christianity’s mistrust of carnal pleasure, sex within marriage had to be justified precisely to the extent that spouses didn’t or couldn’t intend to produce offspring.181 Marital procreation needed no such apology. Rather it was so widely assumed to be the chief end of marriage that its inclusion within the right to marry was usually implicit.182 Not until the early twentieth century, when eugenic regulation endangered procreative freedom in newly troubling ways, did Americans begin to talk about it in terms of natural right—a natural right to procreate, yes, but also the natural right to marry.183 Infringements of the latter were

177 Id.
179 For judicial endorsement of the first two propositions, see Simpson v. Found. Co., 95 N.E. 10, 14 (N.Y. 1911) (acknowledging an injured plaintiff’s “natural right to possess unimpaired the power of procreation during the normal period”).
180 See supra notes 171–175 and accompanying text.
181 Hence Bishop’s sad observation that “persons of mature years who lack the capabilities on which the matrimonial connection is based, are, for this reason, disqualified to contract perfect marriage.” 1 BISHOP, COMMENTARIES (4th ed. 1864), supra note 12, at § 144 (emphasis added). In Pufendorf’s more vivid explanation, “when an ancient Couple are link’d together without any Prospect of a Blessing from the Bed, . . . we shall not speak improperly if we call these Honorary Marriages, as we term those Offices Honorary, in which a Title only is conferr’d, without Action or Business.” PUFENDORF, supra note 93, at 465.
182 PUFENDORF, supra note 93, at 465.
183 But see EDMOND BLISS FOOTE, PLAIN HOME TALK ABOUT THE HUMAN SYSTEM 758 (1870) (discussing a 1787 Connecticut case in which a woman was “prosecuted . . . for the fifth time for having illegitimate children” and calling “her defense [at trial] . . . an admirable vindication of her natural right to bear children”); WOOLSEY, DIVORCE LEGISLATION, supra
asserted whether states pursued their eugenic aims indirectly, by restricting individuals’ eligibility to secure a marriage license, or directly, through sterilization schemes like the one successfully challenged in *Skinner v. Oklahoma* (1942). As the Supreme Court famously said in that case, “We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race.” This was no sleight of hand. To imagine “[m]arriage and procreation” as a single, compound right was perfectly consonant with the natural-law tradition from which the “rights of man” emerged.

2. **Parenthood and Cohabitation?**

Parenthood and cohabitation were no less strongly associated with natural marriage than sexual intercourse and procreation, but they weren’t quite as strongly associated with the natural right to marry. Although matrimony was unquestionably natural law’s preferred context for raising as well as bearing children, it actually wasn’t a prerequisite for exercising the rights—nor, crucially, the duties—of parenthood. Cohabitation, on the other hand, was most certainly a natural right of marriage, in that husband and wife were presumptively entitled to dwell with one another. Yet unlike sexual intercourse and procreation, two (or more) individuals’ natural freedom to live together wasn’t contingent on marriage—except in the many instances where “cohabitation” was euphemistic shorthand for sexual intimacy.

In light of parenthood’s close connection to marriage generally and to the procreative prerogative that natural law reserved to marriage, it may be surprising to learn that rights to the “care, custody, and control” of one’s child were not also subsumed under the conjugal right to marry. Although the sex instinct being indifferent if not inimical to stable family relationships, it was thought that Providence had supplemented “the natural inclination between the sexes” with both a moral tendency toward sexual fidelity and the “natural affection” of parents for their children. Were it not so, explained James Schouler in 1870, “the human race must have perished in the cradle.” Through marriage, “the sexual cravings of nature were speedily brought under wholesome regulations” dictated by “[n]atural law or the teachings of a divine providence.” Thanks to marriage a man could be

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185 *Id.* at 541.
186 TUCKER, *supra* note 164, at 11 (1844); see also MANSFIELD, *supra* note 48, at 312 (noting that “the ties of natural affection towards offspring” are “so close . . . that if there were no other laws than those of nature, the majority of mankind would unquestionably perform all the duties which that relation requires.”).
188 *Id.*
certain of the paternity of his wife’s children, and then would feel compelled—by conscience, or in advanced society by positive law—to attend to “the helplessness of [his] tender offspring, and for their sake [to] put[] a check upon his baser appetites, and concentrate[] his affection upon the home he has founded.”

Under natural law, then, marriage, procreation, and parenthood were parts of a unified whole. Or to put the point more precisely, an exclusive heterosexual relationship of indefinite duration (“marriage”) was the context to which natural law relegated the begetting and rearing of offspring. Children, indeed, had “a natural right . . . to be born of a . . . marriage.”

Despite their close connection to marital reproduction, however, rights to the care, custody, and control of one’s child were not subsumed under the conjugal right to marry. Instead the privileges and duties of parenthood derived from, and extended only so far as to effectuate, the “natural duties” that arose—regardless of marital status—from procreation. According to Rutherford, “[t]he right, which parents have over their children, arises originally from generation . . . .” Echoing Enlightenment philosophers like John Locke and Moses Mendelssohn, Tapping

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189 1 SCHOULER & BLAKEMORE, DOMESTIC RELATIONS (6th ed. 1921), supra note 52, at § 10; see also MONTESQUIEU, supra note 90, at 88 (“The natural obligation of the father to provide for his children has established marriage, which makes known the person who ought to fulfill this obligation.”).

190 See, e.g., Story, Natural Law, supra note 150, at 316 (stating that marriage, as “an institution . . . deemed to arise from the law of nature, . . . tends to the procreation of the greatest number of healthy citizens, and to their proper maintenance and education”); John Witherspoon, Lectures in Moral Philosophy, in SELECTED WRITINGS OF JOHN WITHERSPOON 195 (Thomas P. Miller ed., 1990) (“[M]arriage is a relation expressly founded upon the necessity of providing for offspring who “at their birth are weaker and more helpless than any other animals.”).

191 POST, supra note 170, at 55.

192 1 ZEPHANIAH SWIFT, A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT 186, 204, 206 (1795) (noting that such duties are “founded in nature, and result from [parents’] ardent affection towards their offspring” and that even civil law in Connecticut “enjoins on parents toward their illegitimate offspring” a “duty . . . of maintenance.”). In 1844, Henry St. George Tucker affirmed that “[t]he natural right of a parent over a child is the obvious consequence of his duties.” TUCKER, supra note 164, at 106. In the seven pages Tucker devoted specifically to natural rights of parenthood, marriage is mentioned but once, and then only respecting the question of whether a parent’s nonconsent invalidates his child’s marriage under natural law (Tucker said it doesn’t). Id. at 106–13; see also Current Topics, 23 ALBANY L.J. 141, 143 (1881) (noting that, under Austrian law, “the duty of a father to provide for the maintenance of his child ‘till they can support themselves’ . . . is a natural one.”).

193 RUTHERFORD, supra note 148, at 159.

194 LOCKE, supra note 53, at 30 (“all parents, were, by the law of nature, ‘under an obligation to preserve, nourish, and educate the children’ they had begotten”); MOSES MENDELSSOHN, JERUSALEM 50 (Allan Arkush trans., 1983) (“Whoever helps to beget a being capable of felicity is obligated, by the laws of nature, to promote its felicity, as long as it is not yet able to provide for its own advancement.”).
Reeve similarly wrote in his 1816 treatise on The Law of Baron and Femme that “whoever has been the instrument of giving life to a being incapable of supporting itself, is bound by the law of morality to support such being, during such incapacity.” Whereas civil law in most American jurisdictions tended to sharply distinguish between children born in and out of wedlock so far as parental (especially paternal) obligations and the descent of property were concerned, natural law evidently did not. In fact, for most of the classical period, it is far from clear that jurists understood “the Prerogative of Paternal Power” as a fundamental or natural right at all.

Compared to parenthood, cohabitation has a much superior claim to protection under the natural right to marry. What James Schouler called “the universal law” of matrimony “necessarily suppose[d] a home and mutual cohabitation”; married couples were expected “to live together—or as the expression sometimes goes, to adhere.” Nature guaranteed each spouse “a right to the society of the other.”

Although American courts of the classical period viewed joint residence as “the great central fact” of a relationship “in its nature matrimonial,” cohabitation wasn’t an exclusive right of marriage—except, again, insofar as it implied a sexual relationship. Very often it did, in social perception no less than in speech. As the California Supreme Court declared in 1888, “the cohabitation of persons of opposite sexes, whether legal or illicit, suggests sexual intercourse, and is evidence of it.” Considering the commonplace circumstances in which an adult male and an adult female might chastely cohabit—a mother residing with her grown son, for instance, or a gentleman bachelor living with his female housekeeper—this was a sweeping overgeneralization, but no less telling for that.

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195 TAPPING REEVE, LAW OF BARON AND FEMME 283 (1816).
196 Cf. Matchin v. Matchin, 6 Pa. 332, 337 (1847) (“The great end of matrimony is not the comfort or convenience of the parties, . . . but the procreation of a progeny having legal title to maintenance by the father.”). Surely it’s suggestive that, in “the phraseology of the English or American law” as reported in 1864, “natural children are children born out of wedlock, or bastards, and are distinguished from legitimate children.” 2 JOHN BOUVIER, LAW DICTIONARY: ADAPTED TO THE CONSTITUTION AND LAWS OF THE UNITED STATES 200 (1864) (emphasis added).
198 SCHOULER, DOMESTIC RELATIONS (1st ed. 1870), supra note 49, at 53.
199 Id.
200 I BISHOP, COMMENTARIES (4th ed. 1864), supra note 12, at §§ 457, 540 (noting the interest “of the parties, of the children, and of the community, that all intercourse between the sexes in its nature matrimonial should be such in fact”); see also JOSEPH R. LONG, A TREATISE ON THE LAW OF DOMESTIC RELATIONS § 62 (1905) (“It is the duty of husband and wife to live together, cohabitation being an essential element of the notion of marriage.”).
201 E.g., Sharon v. Sharon, 16 P. 345, 358 (Cal. 1888).
According to Frank Keezer’s treatise on *The Law of Marriage and Divorce* (1906), “cohabitation” could refer to any state of affairs in which “a man and woman are conveniently situated as to each other,” whether they be in “an open field, or railroad train . . . .” As this pointedly gendered definition suggests, classical legal discourse on marriage used “cohabitation” to mean sharing not (or not just) a home but a bed. An exception neatly proves the rule. In *Cannon v. United States* (1885), an alleged bigamist challenged his conviction for “unlawful cohabitation” under Utah territorial law. He argued that the trial court should have instructed the jury that sexual intercourse was a necessary element of the crime and should have let him present evidence of “non-access” to his alleged second “wife.” The U.S. Supreme Court rejected both claims, adopting an unusually broad definition of the key statutory term. It reasoned that Utah’s ban on polygamous “cohabitation” was less concerned with “the intimacies of the marriage relation” than with the “outward appearances” of a “bigamous household,” and therefore that Angus Cannon was properly convicted even if he did not “occupy the same bed or sleep in the same room . . . or actually have sexual intercourse with either of” his supposed brides. Two Justices dissented, finding “no instance in which the word ‘cohabitation’ has been used to describe a criminal offense where it did not imply sexual intercourse.” The majority opinion conceded this point. It cited two dictionaries, both of which defined “cohabit” to mean, first, “to dwell with,” and second, “to live together as husband and wife”—that is, in a sexual relationship; and the opinion acknowledged that “[t]he word is never used in its first meaning in a criminal statute . . . .” In short, every Justice on the *Cannon* Court understood that “cohabitation,” to the extent it was an exclusive privilege of civil marriage, was “used in the limited sense of sexual intercourse.”

The linguistic practice documented in *Cannon* was equally true of natural law, which found it not only “agreeable” that “one man should be joined to one woman in a constant society of cohabiting together” but “necessary for the propagation

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203 For example, the two words were used interchangeably to mean “sexual intercourse” in *Jewell’s Lessee v. Jewell*, 42 U.S. 219, 224 (1843) (addressing “whether, if the contract be made per verba de presenti, and remains without cohabitation, or if made per verba de futuro, and be followed by consummation, it amounts to a valid marriage”) (internal quotation marks omitted); see also *Long*, * supra* note 200, at § 105 (describing the infidelities punished by offenses like “alienation of affections” and “criminal conversation” as “wrongs against the right of marital cohabitation”).
205 *Id.* at 70.
206 *Id.* at 72–74.
207 *Id.* at 80 (Miller, J., dissenting).
208 *Id.* at 74 (majority opinion).
209 *Id.* at 75.
of . . . their offspring; and to render clear and certain the right of succession." To take a particularly ubiquitous example: Throughout the eighteenth and nineteenth centuries’ heated discussions of the right to informally contract a marriage, the perennial question of whether “consensus” alone or “consensus et concubitus” constitutes matrimonium was rendered in English as whether a natural marriage was made by consent alone or by consent plus intercourse, with the latter denoted by either “consummation” or (just as often) “cohabitation.” The two expressions were used interchangeably, often in the same text. “Cohabitation” was the significer; sex is what it signified.

3. The Conjugal Right in Positive Law

The conjugal right to marry had both positive and negative aspects. It obligated the state to both act and abstain from acting. In its positive (and probably more familiar) guise, the right required a substantial regulatory infrastructure designed to enforce spouses’ sexual commitments. Mandated by natural justice, this body of strictures was in practice of such a punitive bent that classical jurists occasionally spoke of marriage as a status belonging fundamentally to penal law. The relegation of sex to matrimony, a norm so fundamental that it was said to govern even the polygamous marriages of certain “warm countries” and “eastern” lands,

210 Root, supra note 19, at xxvii; see also Campbell v. Campbell, 37 Wis. 206, 214 (1875) (insisting that a judicial decree “may separate husband and wife and set them legally free; but . . . [i]t cannot obliterate their cohabitation in marriage, [n]or the natural and indelible relation which cohabitation in marriage fixes on them forever.”).

211 Parsons, supra note 61, at 557.

212 See, e.g., Herd v. Herd, 69 So. 885, 886 (Ala. 1915) (referring to verbal contracts of marriage “consummated by cohabitation”); Dumaresly v. Fishly, 10 Ky. 368, 372 (1821) (using “cohabitation” and “consummation” interchangeably); 1 Bishop, New Commentaries (8th ed. 1891), supra note 76, at § 300 (identifying “fornication” and “marriage” as “the only forms of sexual cohabitation” known to law).

213 Dane, supra note 72, at 321–22 (discussing natural law’s requirement that worldly governments institute marriage, “including both interpersonal rights [as between spouses] and [spouses’] rights of liberty against the state”).

214 Story, Natural Law, supra note 150, at 316 (“If marriage be an institution derived from the law of nature, then, whatever has a natural tendency to . . . destroy its value . . . is by the same law prohibited.”).

215 See, e.g., Barber v. Root, 10 Mass. 260, 265 (1813) (“Regulations on the subject of marriage and divorce are rather parts of the criminal, than of the civil, code” and are imposed “with a principal view to the public order . . . and the happiness of the community.”); Timmins v. Lacy, 30 Tex. 115, 136 (1867) (emphasizing that “the legal rights of husband and wife” entail “corresponding disabilities, . . . many of which are of a severely penal character”); Rubin v. Irving Tr. Co., 113 N.E.2d 424, 432 (N.Y. 1953) (noting the “grave criminal and moral ramifications” of determining the validity of a marriage).

216 1 Joel Prentiss Bishop, Commentaries on the Law of Marriage and Divorce, with the Evidence, Practice, Pleading, and Forms; Also of Separations
was secured through criminal sanction of fornication, nonmarital cohabitation, homosexual conduct, and adultery.\textsuperscript{217} Civil law had a major role to play as well. To keep spouses from “defiling and disgracing the marriage bed,” it imposed disabilities on “illegitimate” children and provided money damages for torts like “alienation of affections” and “criminal conversation.”\textsuperscript{218}

Classical marriage regulation enforced the duty of sex within marriage lessconcertedly—and, excluding the marital rape exception, less harshly—than it enforced the prohibition of sex outside of marriage. But they did enforce it. For all their hesitation to find against the existence of an otherwise regular marriage, American courts were accustomed to granting annulments for impotency, want of consummation, undisclosed sterility, and fraudulent representation of intent to have children.\textsuperscript{219} And in the twentieth century, legislatures increasingly authorized divorces for “refusal of marital relations,” a species of “constructive abandonment.”\textsuperscript{220}

In its negative guise, the conjugal right to marry was a strictly bounded freedom of intimate association—an entitlement to the marital lifestyle, understood as a monogamous heterosexual relationship (or, more controversially, an internally exclusive polygamous relationship) that normally but not necessarily embraced procreation, parenthood, and cohabitation.\textsuperscript{221} Having been fashioned by nature to gravitate toward this conjugal pattern, human beings had a right to do so.\textsuperscript{222} Apart

\textsuperscript{217} See Ford v. State, 53 Ala. 150, 150 (1875) (“[A]dultery is offensive to all laws human and divine, and human laws must impose punishments adequate to the enormity of the offence and its insult to public decency.”); Story, Natural Law, supra note 150, at 316 (“deduc[ing]” from natural law “the criminality of fornication, incest, adultery, seduction, and other lewdness”).

\textsuperscript{218} Alexander H. Robbins, Note, Right of Husband to Maintain an Action for the Debauchery of His Wife Due to Her Own Improper Advances, 54 CENT. L.J. 61, 71–72 (1902).

\textsuperscript{219} See H.H. Clark, The Law of Domestic Relations in the United States 110 (2d ed. 1988); see also Tyler, supra note 71, at 822 (urging that, “in the case of the impotence of either of the parties, none of the peculiar ends of matrimony can be accomplished . . . and a union should be discarded as much as the marriage of two persons of the same sex.”).

\textsuperscript{220} See Refusal of Sexual Intercourse as Justifying Divorce or Separation, 148 AM. JUR. PROOF OF FACTS 3d § 329 (2015).

\textsuperscript{221} On the range of opinion concerning polygamy’s compatibility with natural law, see supra notes 101–104 and accompanying text.

\textsuperscript{222} A marvelous study of slave marriages in the British Caribbean cites an 1816 letter in which an Anglican pastor in the Bahamas argues that
from restrictions based on natural disqualifications like inability to consummate a marriage or incapacity to contract one, deprivations of the conjugal right were so inconceivable that explicit affirmations of it were at once extremely rare and supremely confident. In 1787, when Connecticut Federalist Oliver Ellsworth argued against appending a bill of rights to the proposed national constitution, he assured readers that certain freedoms, enumerated or not, were beyond Congress’s “power to prohibit”—“liberty of conscience,” for example, “or of matrimony, or of burial of the dead.”

Four decades later, the Vermont Supreme Court proclaimed that marriage “was ordained by the great Lawgiver of the universe, and [is] not to be prohibited by man.” Just what would it mean for “man” to prohibit marriage? It’s hard to tell exactly what kinds of suppression these writers had in mind. On its face, their language seems broad enough to encompass restrictions fixed upon specific individuals, particular social groups, or the populace as a whole.

A passage from the 1873 edition of Bishop’s famous Commentaries appears to be concerned mainly, perhaps only, with exclusions of specific individuals:

Matrimony is a natural right and, being such, . . . can be forfeited only by some wrongful act. Therefore the government is under obligation to permit every person of mature years to be the husband or wife of another, who will substantially perform the duties required in the matrimonial relation.

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224 Overseers of the Poor of the Town of Newbury v. Overseers of the Poor of the Town of Brunswick, 2 Vt. 151, 159 (1829).

225 For further discussion of whether classical jurists understood the Constitution to bar marriage abolition, see infra Section II.D on the right of marital permanence.

226 1 BISHOP, COMMENTARIES (5th ed. 1873), supra note 216, at § 33. Two years earlier, Reverend Joel Foote Bingham went even further than Bishop, arguing that marriage . . . is not a thing of human institution; nor is it competent for human law to forbid or do it away. No matter what may be the commands of Caesar, God Almighty has appointed it; and men may in innocence and duty enter into its holy union in defiance, even, of any civil mandate.
In practice, did American governments fulfill their “obligation” to make
marriage universally available? Bishop almost certainly would have thought so.
Wholesale denials of the conjugal right to marry were unusual. American law
tolerated such deprivations insofar as slaves had no right in civil law to have sex,
procreate, cohabit, or parent children over their masters’ objection, despite a widely
if not universally acknowledged capacity for natural marriage.\footnote{227} When it came to
free persons, however, positive law generally protected subjects against privately
imposed celibacy—refusing, for example, to enforce contracts and testamentary
provisions “in restraint of marriage.”\footnote{228} Public impositions of lifelong celibacy were
effected primarily through two mechanisms: statutes and common-law doctrines
denyng marriage to individuals deemed incapable of consent (a category of
exclusion discussed below in terms of the contractual rather than the conjugal right
to marry);\footnote{229} and laws and judgments barring the guilty party in a divorce action
(usually a proven adulterer) from remarriage.\footnote{230} This latter class of prohibition was
widely criticized for withholding the medicine of wedlock from society’s sickest
patients, whose “sexual passion . . . will probably be indulged either licitly or

\footnote{227} See Davenport v. Caldwell, 10 S.C. 317, 338 (1878) (“There was no law forbidding
marriage among slaves, but the intention of slavery made the right of property in the master
paramount, and natural marriage could not be allowed to interfere with that power. . .”); see
also Howard v. Howard, 51 N.C. 235, 237 (1858) (discussing extralegal “marriages”
between slaves that were “permitted and encouraged by owners”).

\footnote{228} See Knost v. Knost, 129 S.W. 665, 666 (Mo. 1910) (discussing inheritances
“received . . . on condition of not marrying” and construing legal hostility to such conditions
as a marker of respect for “the natural right which every one had to marry and beget
children”); Parsons, supra note 61, at 555 (“Contracts in Restraint of Marriage . . . are
wholly void . . . .”); Reeve, supra note 195, at 220–21 (“If the contract by A with B, be, that
he never would marry, this would be a void contract.”). But see 2 James Schouler &
Arthur W. Blakemore, A Treatise on the Law of Marriage, Divorce, Separation
and Domestic Relations § 1270 (6th ed. 1921) (noting “only one main qualification to the
rule against total restraint of marriage, and that is an exception touching widows,” in whose
“viduity” deceased husbands retained “a sort of mournful property right”).

\footnote{229} See infra notes 252–255 and accompanying text (describing marital disqualifications
based on incapacity to consent).

\footnote{230} Some bars on remarriage obtained only so long as the innocent ex-spouse was still
living. Others applied for a statutorily or judicially fixed time and/or were limited to
marriages between adulterers and their partners in crime. Strictly speaking, the latter
prohibition would have been a restriction on marital choice, see infra section II(B)(3), not on
the conjugal right to marry. See 3 George Elliot Howard, A History of Matrimonial
illicitly.” Even so, they exemplified Bishop’s principle that revocations of the right to marry must be based on “some wrongful act.”

B. The Contractual Right to Marry

Lawyers of the classical period frequently described the relation of husband and wife as “a contract of natural law.” They said that marriage’s eternal form, what Pufendorf had called “the Principal Contract of true and perfect Matrimony,” was inscribed in “the Law of Nature” — devised, “unlike other contracts, by God himself.” In turn they held that “the right to contract a marriage is a natural right, not a legislatively conferred privilege.”

Thus “the natural right of marriage”—a right to the relation itself, to a presumptively lifelong heterosexual union—was thought to entail “freedom of contract in the exercise of the right.” In positive law, this freedom referred to the civil contract of marriage and was properly styled a “civil right.” As in our own day, the designation “civil” served mainly to distinguish “marriage as the law views it from marriage as a religious rite,” but it also signaled a quality and quantity of regulation at odds with the conventional ideal of contract. The state both wrote the

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231 BISHOP, COMMENTARIES (1st ed. 1852), supra note 47, at § 211; see also Current Topics, supra note 192, at 142 (objecting that “the prohibition against remarriage in decrees for divorce . . . proposes to punish adultery by holding out a premium for more adultery.”).

232 1 BISHOP, COMMENTARIES (5th ed. 1873), supra note 216, at § 33 (“[W]hether [the guilty party] . . . should be permitted to marry, or not, is a question, not of right with him, but of public expediency.”).

233 See, e.g., KEEZER, supra note 11, at 5; STORY, COMMENTARIES (3d ed., 1846), supra note 107, at § 108.

234 PUFENDORF, supra note 93, at 448–49.

235 SCHOULER, DOMESTIC RELATIONS (1st ed. 1870), supra note 49, at 24 (locating the contract’s “foundation in the law of nature”) (quoting PATRICK FRASER, A TREATISE ON THE LAW OF SCOTLAND: AS APPLICABLE TO THE PERSONAL AND DOMESTIC RELATIONS: COMPRISING HUSBAND AND WIFE, PARENT AND CHILD, GUARDIAN AND WARD, MASTER AND SERVANT, AND MASTER AND APPRENTICE: WITH AN APPENDIX OF FORMS (1846)).

236 Rubin v. Irving Trust Co., 305 N.Y. 288, 305 (1953) (emphasis added); see also Butterfield v. Ennis, 186 S.W. 1173, 1176 (Mo. Ct. App. 1916) (“The contract of marriage being one of natural right . . . the contract proven in this case [is presumptively] valid . . . .”); 1 BISHOP, NEW COMMENTARIES (8th ed. 1891), supra note 76, at § 44 (invoking “the law of nature whereby all marriagable persons are entitled to enter [marriage] at will”).


238 BISHOP, COMMENTARIES (1st ed. 1852), supra note 47, at § 31; see also Maynard v. Hill, 125 U.S. 190, 212 (1888) (calling marriage “a civil contract, as distinguished from a religious sacrament”); MANSFIELD, supra note 48, at 235 (explaining that “the term civil” as applied to the “civil contract” of marriage refers “to the artificial laws of society and not to those of nature or revelation”).
contract and considered itself a “third party” to it.\textsuperscript{239} To be sure, marriage “settlements” were fairly common in the nineteenth century; along with wills, trusts, and other devices, these instruments enabled affianced and wedded couples to opt out of certain standardized rules.\textsuperscript{240} But even people with wherewithal to make such arrangements did so only by the grace of the state. For them, too, marriage remained primarily a status—a “legal position or condition”\textsuperscript{241} patterned according to public rather than private design.\textsuperscript{242}

The contract/status dialectic caused a fair amount of jurisprudential handwringing in the early-to-mid nineteenth century,\textsuperscript{243} but one contractual element of marriage was never doubted: its foundation in mutual agreement.\textsuperscript{244} The bedrock requirement that marriage be voluntary—that it be “founded on mutual consent, which is the essence of all contracts”—was no less a tenet of positive than of natural law.\textsuperscript{245} One important effect of this principle was to make marriageability hinge, in large part, on a person’s capacity to contract in general.\textsuperscript{246} Certain civil incapacities,

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\item[239] See 2 Joel Prentiss Bishop, Commentaries on the Law of Marriage, and Divorce, With the Evidence, Practice, Pleading, and Forms; Also of Separations Without Divorce, and of the Evidence of Marriage in All Issues § 230 (6th ed. 1881).
\item[241] 2 Stewart Rapalje & Robert Linn Lawrence, A Dictionary of English and American Law 1218 (1883) (defining “status”).
\item[242] In substance, of course, civil marriage had always been a “status,” as that term is defined above. See Noel v. Ewing, 9 Ind. 37, 49 (1857) (“At common law, marriage as a status had few elements of contract about it . . . .”). That being said, the institution’s nineteenth-century “transformation . . . from contract to status” was no mere rhetorical shift. See Halley, Behind the Law of Marriage, supra note 10 (explaining this conceptual evolution and its steep ideological stakes).
\item[243] See generally Halley, Behind the Law of Marriage, supra note 10. For a subtle disclosure of contract’s decline as the prevailing descriptor of marriage, compare Schouler, Domestic Relations (1st ed. 1870), supra note 49, at 22 (“It is frequently said . . . . that marriage is nothing more than a civil contract.”) and James Schouler, A Treatise on the Law of the Domestic Relations 22 (5th ed. 1895) [hereinafter Schouler, Domestic Relations (5th ed. 1895)] (“It has been frequently said . . . . that marriage is nothing more than a civil contract.”) (emphases added).
\item[244] “Whatever question or controversy may exist . . . concerning the nature of the relation subsisting between husband and wife after marriage—whether the[ir] rights and liabilities . . . are then to be . . . governed by the principles applicable to all civil contracts, or the contract is to be considered as merged in the higher nature of the status created by the agreement of the parties—all the authorities concur in this, that marriage has its origin and foundation in a purely civil contract.” Tyler, supra note 71, at 806.
\item[245] Bishop, Commentaries (1st ed. 1852), supra note 47, at § 31; see also Bouvier, supra note 13, at 102 (“As an institution of the law of nature, [marriage] consists in the free and voluntary consent of both parties. . . .”).
\item[246] See Woolsey, Divorce Legislation, supra note 50, at 86 (“If either of the parties is . . . not sui juris, he or she cannot enter into the state” of matrimony); see also Rapalje &
like slavery, claimed little or no basis in natural law.\textsuperscript{247} Slaves were incapable of legal marriage not because they lacked “moral power to agree to such a contract,”\textsuperscript{248} but because, as the U.S. Supreme Court explained in 1875, “the slave was incapable of entering into any contract, not excepting the contract of marriage.”\textsuperscript{249} Not twenty years earlier, Justice Benjamin Curtis had seized upon this “inflexible . . . law of African slavery”\textsuperscript{250} to argue that Dred Scott’s status as a slave in Missouri had been extinguished by a civil marriage he contracted in Illinois.\textsuperscript{251}

\textsuperscript{247} See supra notes 135–142 and accompanying text (describing slaves’ perceived capacity for natural marriage even in the absence of legal recognition). Well before the period under study here, Christian theologians who accepted the institution of slavery nonetheless believed that slaves were naturally entitled to “lawfully contract marriage.” MARRIAGE CANONS FROM THE DECRETUM OF GRATIAN AND THE DECRETALS, Sext, Clementines and Extravagantes, Case 29 (Question II (C.1)) (Augustine Thompson, O.P., eds. & John T. Noonan, trans. 1967) (quoting Pope Julius I (d. 352)); see also THOMAS AQUINAS, SUMMA THEOLOGICA, Third Part 177 (trans. Fathers of the English Dominican Province, supp. 1947) (as “slavery is of positive law” and “marriage is of natural and Divine law, . . . even . . . a slave” may “marry freely, even without his master’s consent or knowledge”); John T. Noonan, Power to Choose, in 4 Viator 419, 430 (1973) [hereinafter Noonan, Power to Choose] (discussing Gratian’s view that “there is neither slave nor free . . . in the marriage of Christians”).

\textsuperscript{248} Girod v. Lewis, 6 Mart. (o.s.) 559, 559–60 (1819) (stating that slaves, by definition “deprived of all civil rights,” had “no legal capacity to assent to any contract,” including that of matrimony, but holding that a marriage contracted with “the consent of the master and moral assent of the slave, from the moment of freedom, although dormant during slavery, produces all the effects which result from such a contract among free persons”).

\textsuperscript{249} Hall v. United States, 92 U.S. 27, 30 (1875); see also REEVE, supra note 195, at 341 (affirming that “the rights and duties of a husband are inconsistent with a state of slavery.”); PARSONS, supra note 61, at 341 (calling the “incidents of marriage . . . so inconsistent with the condition of slavery, that we do not see how any ceremonies . . . could make such marriage legal.”). Astonishingly, certain states prior to the Civil War officially declined to recognize any contract, including one of marriage, entered into by a “free negro.” See Bryan v. Walton, 14 Ga. 185, 201 (1853) (“[T]o become a citizen . . . capable of contracting, [or] of marrying . . . requires . . . more than the mere act of enfranchisement.”); 1 BISHOP, COMMENTARIES (4th ed. 1864), supra note 12, at § 310 (describing a provision of the Indiana Constitution). Other states appear to have limited civil marriage, if not other contracts, to white people. See HUNTER, supra note 135, at 101, 104 (describing antebellum laws in Mississippi and Virginia).

\textsuperscript{250} Hall, 92 U.S. at 30.

\textsuperscript{251} Scott v. Sanford, 60 U.S. 393, 600 (1857) (Curtis, J., dissenting) (“There can be no more effectual . . . act of emancipation . . . than by the consent of the master that the slave should enter into a contract of marriage, . . . attended by all the civil rights and obligations which belong to that condition.”).
Unlike the condition of slavery, several other marital incapacities were thought to denote a supposed lack of intellectual or “moral power” to consent.\(^{252}\) As Chancellor Kent wrote in 1827, “all persons who have not the regular use of the understanding sufficient to deal with discretion in the common affairs of life,” such as “idiots and lunatics . . . , are incapable of agreeing to . . . marriage,” just as they were “incapable of agreeing to any contract.”\(^{253}\) Another important incapacity, justified mainly by physical immaturity but sometimes also by intellectual immaturity, was “want of age.”\(^{254}\) Like “idiocy” and insanity, this was “both a natural and a legal disability.”\(^{255}\)

Marital disqualifications based on incapacity obviously limited exercise of the otherwise “universal” freedom to contract a marriage.\(^{256}\) In natural law, this freedom embraced two, arguably three, more specific entitlements. First, marriage’s origin in free and mutual consent inherently implied a natural right not to marry—a prohibition against compelling any person to marry against her will. Second, an otherwise eligible man and woman had a right to marry one another by simple mutual agreement, without observance of particular formalities and without the permission or participation of any third parties. To the extent this right placed the power to marry in individuals’ own hands, it implied a third dimension of the freedom to contract marriage: a right to marry the person of one’s choice. Rarely described in so many words, this last was increasingly repudiated after the Civil War, primarily for the sake of racial segregation in marriage.

The following sections elaborate the three main aspects of the contractual right to marry, and they show in broad strokes how each aspect was discussed, respected, and disrespected in classical American marriage law. First, as a matter of principle, black-letter doctrine consistently and uncontroversially acknowledged a right not to marry, but courts only found “involuntary” agreement to marry in cases of extreme fraud or duress.\(^{257}\) Second, in protracted and shifting debates over “common-law

\(^{252}\) This distinction was drawn, for example, in \textit{Davenport v. Caldwell}, 10 S.C. 317, 344 (1878) (explaining that a slave’s “incapacity to marry [civilly] was not \textit{in re}, but \textit{per lege}”—not “in itself,” but “by law”).

\(^{253}\) 2 \textsc{Kent, Commentaries} (1st ed. 1827), \textit{supra} note 90, at 65; see also \textsc{1 Bishop, Commentaries} (4th ed. 1864), \textit{supra} note 12, at §§ 126, 143 (describing age, “idiocy,” and insanity as “general” and “universal” impediments).

\(^{254}\) \textsc{Mansfield, supra} note 48, at 239. Disqualification for “want of age” didn’t necessarily encompass everyone yet to reach the usual threshold of adulthood. Following canon law and common law, many jurisdictions allowed female “infants” to wed if they were at least twelve years old and males to do so if they were at least fourteen years old. See \textsc{1 Bishop, Commentaries} (4th ed. 1864), \textit{supra} note 12, at §§ 143–46.

\(^{255}\) \textsc{Mansfield, supra} note 48, at 239; see also \textsc{2 Thomas Edlyne Tomlins, Marriage, in The Law-Dictionary} (3d ed. 1820) (counting “age” and “want of reason” as disabilities “grounded on natural law”); \textsc{Hurlbut, supra} note 74, at 152 (insisting, contrary to provision for marriage “during a lucid interval,” that “the laws of nature forbid” a “lunatic . . . from marrying at all times”).

\(^{256}\) \textsc{1 Bishop, New Commentaries} (8th ed. 1891), \textit{supra} note 76, at § 838.

\(^{257}\) See \textit{infra} Section II.B.1.
marriage,” classical lawyers and lawmakers wrestled earnestly with whether and how civil law should accommodate the natural right to marry by mutual agreement. Finally, although a right to marry the person of one’s choice was but a small logical step from marriage by private agreement, jurists of the period generally affirmed the validity, indeed the propriety, of civil constraints on mate selection.

1. The Right Not to Marry

Through all the law of marriage runs the principle which puts it in the power of parties to assume or not, at their own election, the marriage status, while the status is imposed upon no one who does not accept it voluntarily.

The right not to marry, or the principle that “marriage . . . must be the effect of willingness as well as capacity to contract it[,]” operated against state and private actors alike. While states avowedly “favored” and encouraged marriage, not least by making nonmarital sex and procreation illegal, Joel Prentiss Bishop could nonetheless assert without qualification in 1864 that “the law compels no one to assume the matrimonial status.” When scholars of our own day speak of a “right not to marry,” this is exactly what they mean: a “right to be free from state-imposed marriage, . . . a negative right.”

With regard to coercion by nonstate actors, all but slaves were protected from involuntary marriage. In cases where A’s marriage to B was challenged for want of genuine consent, courts worked from a universally accepted premise that “a marriage procured by force or fraud is . . . void ab initio, and may be treated as null by every court.” This did not mean that arranged marriages were invalid, that parental consent couldn’t be required by statute, or that parents and guardians had

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258 See infra Section II.B.2.
259 See infra Section II.B.3.
260 1 BISHOP, COMMENTARIES (4th ed. 1864), supra note 12, at § 121.
261 James Wilson, Of the Natural Rights of Individuals, in 2 WORKS OF JAMES WILSON 323 (James DeWitt Andrews ed., 1896).
262 KEEZER, supra note 11, at 5 (1906) (“the law favors and encourages marriage”).
263 1 BISHOP, COMMENTARIES (4th ed. 1864), supra note 12, at § 218.
266 2 KENT, COMMENTARIES (1st ed. 1827), supra note 90, at 67 (explaining that “the ingredient of fraud or duress . . . in this . . . as in any other contract” vitiates “the free assent of the mind”).
to abstain from pressuring children and wards into a favored match.\textsuperscript{267} Absent serious threats of personal and usually physical harm, courts were prepared to find “free assent of the mind” in all of these circumstances,\textsuperscript{268} just as they readily accepted marriages undertaken to avoid prosecution or punishment for criminal seduction.\textsuperscript{269} In suits for fraud, moreover, courts gave eager suitors wide berth for exaggeration and even outright prevarication so long as no misrepresentations went to the conjugal “essentials of the marriage.”\textsuperscript{270}

Like many classical ideas about marriage, the prohibition of involuntary unions was attributed to natural law and inferred from many of natural law’s standard reference points.\textsuperscript{271} It had analogues in Christian theology and an especially long heritage in canon law.\textsuperscript{272} According to Bishop, the rule that marriage is “never . . .

\textsuperscript{267}See, e.g., WOOLSEY, DIVORCE LEGISLATION, supra note 50, at 86 (“[I]t is flagitious to force a child or ward into consent without his or her own will confirming it.”).

\textsuperscript{268}MANSFIELD, supra note 48, at 238 (“If . . . a marriage is forced by imprisonment, or by threats of the loss of life or limb, such contract is absolutely void.”).

\textsuperscript{269}See Melissa Murray, Marriage as Punishment, 112 COLUM. L. REV. 1, 23 (2012). In the same year that Loving v. Virginia was decided, an eminent family law expert demonstrated that “a great many of our laws dealing with sexual intercourse between unmarried parties . . . have been consciously oriented toward or have in fact served to encourage or force marriage between parties who indulge in such conduct.” Walter Wadlington, Shotgun Marriage by Operation of Law, 1 GA. L. REV. 183, 193 (1967) (finding thirty-five jurisdictions in which subsequent marriage or “a renewed offer” to marry “will serve as a defense” to the crime of seduction and noting “several jurisdictions which permit [the defense] in prosecutions for statutory rape, bastardy, . . . adultery,” and/or fornication).

\textsuperscript{270}LONG, supra note 200, at §§ 43–52; see also Kerry Abrams, Marriage Fraud, 100 CAL. L. REV. 1, 5 (2012) (“Only fraud going to the ‘essentials’ of the marriage—lies about sex or procreation—qualified a marriage for annulment.”).

\textsuperscript{271}BOUVIER, supra note 13, at 101 (“As an institution established by nature, [marriage] consists in the free and voluntary consent of both parties . . .”). MANSFIELD, supra note 48, at 238 (explaining prohibitions of involuntary marriage as means of “securing . . . women in the just exercise of all their natural rights”).

\textsuperscript{272}Medieval Church doctrine had “create[d] a zone of freedom” around marital choice, with “the facultus contrahendi matrimonium, the faculty of contracting marriage,” coming to be considered “a right [that] . . . a person was free to exercise . . . as he or she saw fit,” without “coercion.” Charles J. Reid, Jr., The Canonistic Contribution to the Western Rights Tradition, 33 B.C. L. REV. 37, 77–78 (1991). The eminent sixteenth-century theologian Francisco de Vitoria held that “no pope, prince, or parent can harm or impede th[e] natural right” to voluntary marriage and that “no one can be coerced, tricked, or otherwise misled into . . . marriage.” Witte, supra note 153, at 618 (quoting Francisco de Vitoria, Relectio de Matrimonio, in RELECTIONES THEOLOGICAEC XII (1557)). This principle proved no less important in most Protestant teachings on marriage. See, e.g., DUNLAVY, supra note 119, at 317 (stating the Shaker doctrine that “no one man, or association of men, have any right to forbid or require anyone to marry”). For an excellent account of the contractarian model’s development in Protestant thought on the family, see generally JOHN WITTE, JR., FROM SACRAMENT TO CONTRACT: MARRIAGE, RELIGION, AND LAW IN THE WESTERN TRADITION (1997).
imposed on parties who do not consent to accept the status . . . runs throughout the entire extent of that unwritten law which our forefathers brought hither from the mother country” and which “radiates, too, through all the domains of our reason.”

Dictated by “the first principles of natural equity,” the rule of voluntariness was also juris gentium, a policy “to which the world long ago assented, and which no man yet has appeared, either in this country or in any other, with enough folly to deny.”

The natural right not to marry was so fervently cherished that, to an unusual extent, jurists spoke of it in constitutional and quasi-constitutional terms. Quoting Thomas Cooley, that “most conservative of all commentators on constitutional law,” the Supreme Court of Mississippi proclaimed in 1931: “For the legislature to marry parties against their consent, we conceive to be decidedly against the law of the land.”

Marriage contrary to the will of one or both parties, the court continued, “has always been odious to the free people of this country, and, with the abolition of slavery, the last remnant of it disappeared from among us.” Unlike in “oriental and semibarbarous nations,” it said, such marriages “have never received toleration here and . . . would be none the less odious if attempted . . . by the state itself instead of the smaller despotisms of inner circles.” Bishop had made a similar point half a century earlier: “A government which should compel people into matrimony without their consent, could not be endured.”

To illustrate, he sketched the following scenario:

Now, if a man and woman . . . should be brought together by brute force, and an official person should say a marriage ceremony over them, they not consenting, this profanation . . . would not make them husband and wife. And if the legislature should step in and declare them to be, therefore, married, the act would be a high outrage . . . [and] there would be, at least, doubt, whether it would be binding under the constitutions of our States.

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273 1 BISHOP, COMMENTARIES (5th ed. 1873), supra note 216, at § 95.
274 Natural equity’s first rule held that government should not “adopt any rule which is inherently oppressive to its subjects.” 1 BISHOP, COMMENTARIES (4th ed. 1864), supra note 12, at § 12.
275 1 BISHOP, COMMENTARIES (5th ed. 1873), supra note 216, at § 95.
277 Id. at 579.
278 Id.
279 1 BISHOP, COMMENTARIES (5th ed. 1873), supra note 216, at § 94.
280 Id. at § 90a. Borrowing Bishop’s admonition that “the status of marriage is never superinduced by any government,” the Mississippi Supreme Court imputed a minimum requirement of implied consent to a law that purported converted extant cohabitations “as husband and wife” into legal marriages. Dickerson v. Brown, 49 Miss. 357, 373–76 (1873) (quoting 1 BISHOP, COMMENTARIES (4th ed. 1873), supra note 12, at § 218).
Notably, Bishop gave no indication which constitutional provisions a forced marriage might violate.

2. The Right to Marry by Mutual Consent

_Mutual consent is of the essence of marriage; it constitutes of itself... a perfect marriage according to natural law._281

Reciprocal consent, as we have seen, was a necessary condition of marriage under natural law. In the United States, it has always and everywhere been necessary to a valid civil marriage. But was consent alone sufficient? Or were further formalities required?—particular recitations, parental sanction, community notice, witnesses, “the interposition of person in holy orders, ... or solemniz[ation] in a church”?282 Answers to these questions have fluctuated widely over time and across jurisdictions. Their variation attests to the turbulent rise and unfinished fall of that peculiarly American doctrine—peculiar in both name and substance—known as “common-law marriage.”283 broadly defined as “marriage which does not depend for its validity upon any religious or civil ceremony but is created by the consent of the parties as any other contract.”

Common-law marriage was never so uncontroversial an institution as many of its supporters proclaimed it, and questions regarding its adoption and regulation generated prolific case law and commentary throughout the nineteenth and early-

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281 **Bishop, Commentaries** (1st ed. 1852), _supra_ note 47, at § 63.

282 **Reeve, supra** note 195, at 196 (railing against mandatory clerical officiation as a “usurpation of the church of Rome on the rights of the civilian”).

283 English, Scotch, and Irish jurists did not speak of “common-law marriage.” Instead they described nuptials that failed to adhere to legal formalities as “informal,” “irregular,” or, where the union was solemnized outside a church, “clandestine.” Substantively, American common-law marriage differed from its English variants in several respects. For example, American courts treated such marriages as fully valid, endowing them with all the same legal incidents as “regular” marriages; and some states refused to recognize informal marriages not consummated by sexual intercourse. _See Grossberg, supra_ note 19, at 69 (describing how post-Revolutionary American law “rechristened ‘irregular marriage’ as ‘common-law marriage’” and “made matrimony much easier for a couple to enter”); **Rebecca Probert, Marriage Law and Practice in the Long Eighteenth Century** 21–69 (2009) (calling common-law marriage a “distinctive[ly] American concept” and detailing the important ways in which English law differentiated between regular and irregular marriages, including its limitation of permissible sexual intercourse to the former); _see also supra_ notes 211–212 and accompanying text and _infra_ note 288 and accompanying text (discussing American debates on the necessity of sexual consummation to a valid common-law marriage).

twentieth centuries. Those sources interest us here primarily for their bearing on an important feature of the natural right to marry—namely, the right to wed by mutual consent, without any formalities except mutual assent to be husband and wife.

Conflicting and often fervent beliefs about sexual morality and social order motivated a good deal of both legislative and judicial decision-making on common-law marriage. Nonetheless, judges and treatise writers spilled less ink on such policy concerns than on two relatively technical matters: Did the common law of a given jurisdiction historically respect a right of informal marriage? And if so, did anything of that common-law right survive legislation codifying procedures for proper solemnization? Both inquiries could prove quite intricate, involving a host of subtle distinctions: between a marriage forged by words of present assent (a “contract per verba de praesenti”) and one that arises upon sexual consummation of an “engagement of matrimony” (a “promise per verba de future cum copula”);

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285 In a 1915 case presenting just one of many subsidiary questions relating to common-law marriage (viz., whether a marriage per verba de praesenti could be found where there was no subsequent “cohabitation as man and wife”), the Alabama Supreme Court complained that “[i]t would consume too much time and space to attempt to review the textbooks and adjudicated cases on this subject. There is not only lack of unanimity, but great conflict . . . [that] amounts almost to a state of anarchy.” Herd v. Herd, 69 So. 885, 887 (Ala. 1915).

286 For explicit engagements with the policy implications of common-law marriage, see Reeve, supra note 195, at 198 (arguing that “it would be very inconvenient” if “the common law . . . consider[ed] a marriage, celebrated irregularly, as void”); Rodebaugh v. Sanks, 2 Watts 9, 11 (Pa. 1833) (foreseeing that “a rigid execution of [solemnization statutes] would bastardize a vast majority of the children which have been born within the state for half a century”); Sorensen v. Sorensen, 100 N.W. 930, 932 (Neb. 1904) (arguing that the “ancient doctrine” of common-law marriage “tends to weaken the public estimate of the sanctity of the marriage relation [and] puts in doubt the certainty of the rights of inheritance”); Huard v. McTeigh, 113 Or. 279, 295 (1925) (citing as reason to strictly apply solemnization statutes the court’s “opinion” that common-law marriage “is contrary to public policy and public morals” because it “places a premium upon illicit cohabitation and offers encouragement to the harlot and the adventuress”); Rubin v. Irving Tr. Co., 113 N.E.2d 424, 432 (N.Y. 1953) (noting the issue’s “grave criminal and moral ramifications, e.g., the possible bastardization of issue and [the] existence of a meretricious relationship”).

287 An equivalent question was raised, mutatis mutandis, in states and territories with a colonial heritage of civil rather than common law. In a case involving a marriage supposedly celebrated in Alabama, the U.S. Supreme Court looked “to the laws in force in the Spanish colonies previous to their cession” in determining the validity of a union contracted before a civil magistrate rather than a priest. Hallett v. Collins, 51 U.S. 174, 181 (1850); see also Bishop, Commentaries (1st ed. 1852), supra note 47, at § 163 (naming ten states in which “the intervention of a minister in holy orders . . . has been held unnecessary at common law” and reporting that “the same has been held in Louisiana” even though that state “derived its common law from Spain”).

288 Denison v. Denison, 35 Md. 361, 377, 374 (1872); see also Askew v. Dupree, 30 Ga. 173, 189 (1860) (“[I]f the contract is per verba de presenti— that is, I take you to be my
between an invalid and an illegal marriage;⁴⁸⁹ between laws preserving and laws abrogating common-law rights;⁴⁹⁰ between the great swaths of law that English colonists imported to America and the portions they left behind;⁴⁹¹ “between the common law of England and the canon law of Europe”;⁴⁹² between “English canon law as it stood previous to the Council of Trent” in the mid-sixteenth century and English canon law after the Council;⁴⁹³ and on and on.⁴⁹⁴

wife, and I take you to be my husband—though it be not consummated by cohabitation, or if it be made per verba de futuro, and be consummated, it amounts to a valid marriage, in the absence of all municipal regulations to the contrary . . . .

⁴⁸⁹ See, e.g., Sharon v. Sharon, 16 P. 345, 352 (Cal. 1888) (citing a unanimous holding of the House of Lords that, “by the law of England” as it existed prior to Lord Hardwicke’s Act of 1753, “a contract of marriage per verba de praesenti was indissoluble between the parties themselves” and enabled one to sue the other for solemnization in ecclesiastical court, “but such contract never constituted a full and complete marriage”) (quoting Regina v. Millis (1844) 8 Eng. Rep. 844; 10 Cl. & F. 534); Dumaresly v. Fishly, 10 Ky. 368, 370–71 (1821) (distinguishing between the informal marriages that English common law had “deemed valid to most purposes” and a properly solemnized “marriage de jure, . . . valid to every purpose”); Denison, 35 Md. at 376 (invoking “common law authorities” to the effect that a “contract per verba de praesenti, or per verba de futuro cum copula, . . . was incomplete, and did not confer the civil rights incident to the married state until” its solemnization was “duly performed”).

⁴⁹⁰ See infra notes 320–332 and accompanying text.

⁴⁹¹ See, e.g., Dumaresly, 10 Ky. 368 at 377 (Mills, J., dissenting) (accepting arguendo that the English common law permitted informal marriage, but maintaining that the American colonies and then states “adopted the common law of England . . . only so far as suited our local situation, and was compatible with the genius and spirit of our government”); 1 BISHOP, NEW COMMENTARIES (8th ed. 1891), supra note 76, at § 418 (“assuming,” contrary to the authors’ own view, “that the English common law did when our country was settled, render impossible a marriage without a priest,” but doubting that “this impediment to matrimony [was] adapted to our altered situation and circumstances”); REEVE, supra note 195, at 199 n.1 (arguing that Lord Hardwicke’s Act of 1752, “although . . . passed while we were colonists of Great Britain,” was “entirely hostile to the spirit of our institutions” and “could [n]ever be extended here by construction”).

⁴⁹² Denison, 35 Md. at 375.

⁴⁹³ SCHOULER, DOMESTIC RELATIONS (1st ed. 1870), supra note 49, at 40; see also Hallett v. Collins, 51 U.S. 174, 181 (1850) (“That marriage might be validly contracted by mutual promises alone . . . was an established principle of civil and canon law antecedent to the Council of Trent,” which declared in 1563 that a marriage not celebrated before clergy or multiple witnesses was henceforth “ecclesiastically void”).

⁴⁹⁴ Jurists also deliberated on the differences [1] between the Council of Trent’s initial statement that marriages by verba de praesenti are “vera matrimonia” and its contrary decree that such contracts are “null and void,” Hallett, 51 U.S. at 181–82; [2] between recognizing informal marriage and accepting cohabitation and repute as evidence of a properly solemnized marriage contract, KÖGEL, supra note 284, at 110; [3] between a marriage “clandestine” in the specialized sense that it wasn’t witnessed by clergy (or that it lacked some “other requisite[] of ecclesiastical law”) and a truly “secret” marriage—i.e., one without witnesses, Sharon v. Sharon, 16 P.345, 377 (Cal. 1888) (McFarland, J., dissenting);
Throughout 150 years of wrangling over so many fine points of law and legal history, one background proposition seems to have passed without contradiction. Time and again, classical writers on “common-law,” “informal,” and otherwise “irregular” matrimony avowed that two persons’ good-faith agreement to be husband and wife constitutes a marriage valid “in the sight of heaven.”\textsuperscript{295} “[B]y the law of nature the contract is binding.”\textsuperscript{296} For proponents of informal marriage, invocations of the “natural right of union between a man and a woman” traded on a widely perceived kinship between natural and common law.\textsuperscript{297} But even the institution’s opponents regularly admitted (and certainly never denied) that, under “the law of nature, marriage may be constituted by the mutual present consent of competent persons, without the addition of any formality.”\textsuperscript{298} Often this principle was stated by reference to “the state of nature, where no solemnities of marriage are prescribed.”\textsuperscript{299} American jurists frequently adopted Lord Stowell’s account in Lindo \textit{v. Belisario} (1795)\textsuperscript{300} of the bilateral consent to cohabitation and procreation that, “in a state of nature, would be a marriage,”\textsuperscript{301} and they were still more enamored of his description in Dalrymple \textit{v. Dalrymple} (1811) of the “contract of natural law” that existed between “the common ancestors of mankind.”\textsuperscript{302} In 1908, a Missouri court named those ancestors explicitly, stating that “the marriage of Adam and Eve was not only without a witness, . . . but, so far as the record shows, they married themselves; he repeating the contract and she acquiescing by silence.”\textsuperscript{303}
In canon law, it wasn’t the fertile bond of Adam and Eve but the chaste marriage of Mary and Joseph that had proved decisive as to whether consent alone or “consent cum copula” was the basis of true matrimony (“verum matrimonium”). Since the twelfth century, the Church generally followed Peter Lombard in rejecting the view “that without carnal union, matrimony cannot be contracted.” To put the point in positive terms, canon law “adopted,” for largely theological reasons, the adage of the Roman civil law that “consensus, non concubitus, facit matrimonium”—that “it is the contract, . . . not the cohabitation, which makes [a] marriage.”

In the American jurisdictions that recognized informal marriage, courts imputed this doctrine of the medieval Church to the common law of England—and, in turn, to the

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304 Regina v. Millis (1844) 8 Eng. Rep. 844; 10 Cl. & F. 534 (Op. of the Lord Chancellor) (“a mutual promise or contract of present matrimony . . . was considered to be of the essence of matrimony, and was therefore, and by reason of its indissoluble nature, styled in the ecclesiastical law verum matrimonium, and sometimes ipsum matrimonium”); STEPHANIE COONTZ, MARRIAGE, A HISTORY 106 (2005); see also Grigsby v. Reib, 153 S.W. 1124, 1129 (Tex. 1913) (invoking Adam and Eve’s fulfillment of the divine command to “multiply and replenish the earth” as reason to reject an alleged common-law not perfected by “cohabitation”).

305 ELIZABETH FRANCES ROGERS, PETER LOMBARD AND THE SACRAMENTAL SYSTEM 246 app. (1917); see also JAMES A. BRUNDAGE, LAW, SEX, AND CHRISTIAN SOCIETY IN MEDIEVAL EUROPE 264–65 (1987) (describing the “triumph” of Peter Lombard’s theory that “consummation was legally irrelevant” where “a couple . . . had exchanged present consent to marry”).

306 PATRICK IRVINE, CONSIDERATIONS ON THE INEXPEDIENCY OF THE LAW OF MARRIAGE IN SCOTLAND 13 (1828); see also 12 CORPUS JURIS: BEING A COMPLETE AND SYSTEMATIC STATEMENT OF THE WHOLE BODY OF THE LAW 514 (William Mack & William Benjamin Hale eds., 1817) (explaining, with citation to Blackstone, that this “maxim . . . is adopted by the common lawyers who, indeed, have borrowed (especially in ancient times) almost all their notions of the legitimacy of marriage from the canon and civil laws”).

307 Bullock v. Bullock, 32 N.Y.S. 1009, 1010 (N.Y. Gen. Term 1895) (calling this “a maxim as old as the common law”); see also McKenna v. McKenna, 54 N.E. 641, 643 (Ill. 1899) (reciting this “universally accepted maxim”). The maxim stood in tension with the availability of annulment in certain cases of nonconsummation, including those where one party had failed before marrying to disclose his or her inability to consummate. Following Rutherford, some jurists resolved this tension by holding that “want of consummation . . . rather invalidates by non-performance a marriage, that was otherwise complete, than makes it a nullity from the beginning by any defect in the marriage itself.” RUTHERFORTH, supra note 148, at 356–57. Fraud, mistake, and analogous claims offered supplementary justifications for annulment in such cases; see BISHOP, COMMENTARIES (1st ed. 1852), supra note 47, at § 227 (citing the aforementioned lines from Rutherford); Jerosolimski v. Jerosolimski, 188 N.Y.S.2d 272, 273 (N.Y. App. Div. 1959) (stating that an “assertion of [ ] sexual potency . . . is [presumptively] implicit in every offer of marriage” and therefore holding that an annulment on the ground of impotency should have been granted in the trial court).
common law of their own states. Conformity to “principles of natural law” only bolstered this lineage. An 1821 decision of the Kentucky Court of Appeals, for instance, proceeded directly from nature’s barebones model for contracting marriage to the conclusion that “a marriage thus made without further ceremony, was, according to the simplicity of the ancient common law, deemed valid to all persons.”

Accounts of American common-law marriage often begin with Fenton v. Reed (1809), a short per curium decision attributed to Chancellor James Kent. Fenton declared the law in New York to be, first, that “a contract of marriage made per verba de presenti amounts to an actual marriage, and is as valid as if made in facie ecclesiae,” and second, that such a contract “may be proved . . . from cohabitation, reputation, acknowledgment of the parties, reception in the family, and other [relevant] circumstances . . . .” The inaugural edition of Kent’s Commentaries (1827) elaborated these points. In what proved to be an immensely influential passage, Kent appealed to natural law and several of its positive-law repositories to burnish his particular gloss on the common law of marriage:

No peculiar ceremonies are requisite by the common law as to the valid celebration of [a] marriage. The consent of the parties is all that is required; and as marriage is said to be a contract jure gentium, that consent is all that is required by natural or public law. The Roman lawyers strongly inculcated the doctrine that . . . [n]uptias non concubitus, sed consensus facit. This is the language equally of the common and canon law, and of common reason.

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308 See, e.g., In re Hulett’s Estate, 69 N.W. 31, 33 (Minn. 1896) (describing “the authorities” as “practically unanimous to this effect”); Davis v. Stouffer, 112 S.W. 282, 285 (Mo. Ct. App. 1908) (applying this “maxim of the common law”); Jackson v. Winne, 7 Wend. 47, 50 (N.Y. Sup. Ct. 1831) (stating that “the maxim of the civil law . . . has ever been regarded in courts of common law as a good definition of marriage”). A minority of courts held otherwise. See, e.g., Hawkins v. Hawkins, 142 Ala. 573, 574 (1905) (finding “no marriage” where “the formal consent to be man and wife was not consummated into that relation”).

309 See, e.g., Dumaresly v. Fishly, 10 Ky. 368, 370, 372 (1821) (upholding “a marriage de facto” that “was not consummated by cohabitation” and explaining that “the maxim of the common law . . . that ‘consensus, non concubitus, facit matrimonium’” may have been “borrowed, it is true, from the civil law, but [was] founded on the . . . nature of the thing.”); see also FRASER, supra note 235, at 91 (opining that “the maxim . . . is not so much of positive law as of natural reason”).

310 Dumaresly, 10 Ky. 368 at 370.

311 Fenton v. Reed, 4 Johns. 52, 54 (N.Y. Sup. Ct. 1809).

312 2 KENT, COMMENTARIES (1st ed. 1827), supra note 90, at 75. Kent’s long chain of mutual corroborations resounded a generation later in another influential volume of Commentaries. See BISHOP, COMMENTARIES (1st ed. 1852), supra note 47, at § 67 (reporting that the maxim “consensus non concubitus” was the rule of Roman “civil law, and has become equally so of the ecclesiastical, of the common, and indeed of all law . . . .”).
As Kent’s critics protested “from the first,” the learned judge’s liberal take on “the freedom of the common law” of marriage formation was incomplete and largely erroneous.\textsuperscript{313} Even so, within a few decades of its appearance, “the Kent doctrine” on matrimony had become gospel to many American lawyers, including multiple Justices of the U.S. Supreme Court.\textsuperscript{314} In the unanimous case of \textit{Hallett v. Collins} (1850), Justice Robert Cooper Grier acknowledged that, in England, the supposed birthplace of common-law marriage, “it has been disputed as of late” that a “marriage might be validly contracted by mutual promises alone”; still he pretended that this principle was “never doubted here.”\textsuperscript{315} The latter statement was simply

\footnotesize{\textsuperscript{313} \textit{See} 2 \textit{Kent, Commentaries} (1st ed. 1827), \textit{supra} note 90, at 74 (describing New York’s permissive stance). “[F]rom the first, there has been a small but respectable body of judges and writers who have constantly and consistently questioned the Kent doctrine, and opposed its acceptance. Not only do they deem it pernicious to society, but they also attack [its] historical premises . . . .” \textit{Cook, supra} note 298, at 521–23 (alleging that \textit{Fenton} was not “borne out by the English cases [it] cited[,] . . . was based on no American authority, and was . . . inconsistent with the statutory system that had come down from colonial times.”). Even Bishop, a strong proponent of common-law marriage, could not say with certainty that “the law of England as it stood” prior to Lord Hardwicke’s Act incorporated the principle that “mutual consent, . . . constitutes of itself, and without the addition of any ceremonies, a perfect marriage according to natural law . . . .” \textit{Bishop, Commentaries} (1st ed. 1852), \textit{supra} note 47, at § 63 (emphasis added). Bishop’s hesitation was warranted. As Rebecca Probert has meticulously demonstrated, there were multiple and important ways in which English common law refused, well before Lord Hardwicke’s Act, to honor a marriage \textit{per verba de praesenti}. \textit{See generally Probert, supra} note 283. Interestingly, Probert’s main findings accord with the much older conclusions of quite a few American jurists; \textit{see, e.g., Parsons, supra} note 61, at 561 (recommending “Jacob’s Addenda to Roper on Husband and Wife” for its “elaborate” showing “that a contract of marriage \textit{in verba de praesenti}, without ceremony of any kind, did not constitute a valid marriage at common law”); \textit{Cheney v. Arnold}, 15 N.Y. 345, 351 (1857) (denying that informal marriage became “the law of [New York] by force of our adoption of the common law of England, for it was not a part of that common law”); \textit{Denison v. Denison}, 35 Md. 361, 377 (1872) (construing “all the common law authorities” to mean that a “contract \textit{per verba de praesenti}, or \textit{per verba de futuro cum copula} . . . was incomplete, and did not confer” any of marriage’s civil incidents “until . . . sanctioned by religious ceremony, duly performed”); \textit{Peacock v. Peacock}, 26 S.E.2d 608, 614 (Ga. 1943) (summoning “respectable authority” to the effect that the American doctrine of common-law marriage was based on “misconceptions” of English legal history); \textit{In re Soeder’s Estate}, 220 N.E.2d 547, 561 (Ohio Ct. App. 1966) (noting that, in 1684, “the Colonial Assembly of New York . . . passed an act requiring marriage to be solemnized formally,” a fact “overlooked by Chancellor Kent” in his account of New York’s law on the matter).

\footnotesize{\textsuperscript{314} \textit{See} \textit{Cook, supra} note 298, at 526 (surveying common-law marriage’s acceptance across much of the United States and concluding that “the Kent doctrine may be said to be the prevailing common law” in this country).

\footnotesize{\textsuperscript{315} \textit{Hallett v. Collins}, 51 U.S. 174, 181 (1850).}
untrue, and is nothing short of baffling when one considers that the Court was “evenly divided” only seven years earlier on a closely related—some said identical—question.\(^\text{317}\)

The natural, common right to marry reached its doctrinal high-water mark in Meister v. Moore (1877), where the question presented was whether a union allegedly contracted in Michigan in 1845 was valid if, contrary to a statute then and there in force, “neither a minister nor a magistrate was present.”\(^\text{318}\) Writing for another unanimous bench, Justice William Strong upheld the marriage. Like Justice Grier in Hallett, he professed to harbor “no doubt, in view of the adjudications made in this country, from its earliest settlement to the present day,” that “informal marriage by contract per verba de praesenti . . . constitutes a marriage at common law.”\(^\text{319}\) Following a popular (but not universal) practice among state courts, Justice Strong treated the Michigan statute as “merely directory”—that is, advisory—pursuant to the venerable canon of statutory interpretation according to which legislation “passed in derogation of the common law . . . should be construed strictly.”\(^\text{320}\) Although “a statute may take away a common-law right[,]” Meister explained, “there is always a presumption that the legislature has no such intention, unless it be plainly expressed” in clear “words of nullity.”\(^\text{321}\)

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\(^{316}\) See, e.g., Milford v. Worcester, 7 Mass. 48, 53 (1810) (“When our ancestors left England, and ever since, it is well known that a lawful marriage there must be celebrated before a clergyman in orders . . . .”).

\(^{317}\) Although the specific question presented in Jewell v. Jewell was “what constituted marriage, at the time of [the parties’] cohabitation, by the laws of Georgia and South Carolina,” certain language in the decision could be read to contemplate a more abstract and universal common law. The Court “express[ed] no opinion” as to whether a “contract . . . per verba de praesenti . . . or . . . per verba de futuro . . . followed by consummation . . . amounts to a valid marriage . . . and is as equally binding as if made in facie ecclesiae.” 42 U.S. 219, 224, 230–34 (1843) (emphasis added). Some readers of the Jewell decision understood the case to involve only Georgia and South Carolina law, but others opted for the broader interpretation. For examples of the former, see Jones v. Jones, 48 Md. 391, 401 (1878) and In re Roberts’ Estate, 133 P.2d 492, 501 (Wyo. 1943). For examples of the latter, see Herd v. Herd, 69 So. 885, 886 (Ala. 1915); Roberts v. Roberts, 1 Ohio Dec. Reprint 368, 368–69 (Com. Pl. 1850); and PARSONS, supra note 61, at 561.

\(^{318}\) Meister v. Moore, 96 U.S. 76, 77 (1877).

\(^{319}\) Id. at 78. Forty years after Meister, the Court invoked this passage in a ruling that strained to discern a valid marriage in a relationship commenced in Virginia, continued in Maryland, and ended by the husband’s death in New Jersey, which was the only state among the three to recognize common-law marriage. See Travers v. Reinhardt, 205 U.S. 423, 440 (1907).

\(^{320}\) Ross v. Jones, 89 U.S. 576, 591 (1874); see also Meister, 96 U.S. at 80–81 (avowing the Court’s adoption of the general “rule deduced . . . from the decided cases . . . ‘. . . in most, if not all, the United States’”) (quoting 2 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE 514–15 (7th ed. 1858)). On courts’ selectivity in applying the canon, see Pound, Ideal Element, supra note 44, at 142–43.

\(^{321}\) Meister, 96 U.S. at 79.
withdrawing the “common-law right to form the marriage relation by words of present assent,” Michigan’s statute merely “provid[ed] a legitimate mode”—not the only one—“of solemnizing it.”

The doctrine of Meister treated informal marriage as a liberty that, if not a constitutional right, was still no ordinary object of the state’s general police power. Thanks to the canon that statutes in abrogation of common law are merely advisory unless a contrary “intention . . . be plainly expressed,” the right to privately contract marriage long enjoyed a formidable measure of judicial protection. The language in which judges articulated that protection enhanced the doctrine’s quasi-constitutional feel. In Meister, the Court said that legislation may “regulate the mode of entering into the contract, but they do not confer the right.” It held Michigan’s solemnization “merely directory . . . because marriage is a thing of common right”—a notable but somewhat ambiguous expression. “Common right” was often used at the time as shorthand for nothing more than a right recognized at common law, but it also carried centuries-old connotations of “higher law”: “something fundamental, something permanent”.

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322 Id.
323 Id.; see also GROSSBERG, supra note 19, at 74 (recounting how judges’ deployment of the canon, coupled with “legislative inaction,” long enabled courts in multiple jurisdictions to “render[] nuptial statutes impotent”); cf. Follansbee v. Wilbur, 44 P. 262, 264 (Wash. 1896) (reading Meister as “a construction of . . . a Michigan statute” and therefore having scant relevance in other states and territories).
324 Meister, 96 U.S. at 78.
325 Id. at 81 (emphasis added).
326 See, e.g., Spring Valley Water Works v. Schottler, 62 Cal. 69, 107 (1882), aff’d sub nom. Spring Valley Water-Works v. Schottler, 110 U.S. 347 (1884) (“[T]he common right refers to the right of citizens generally at common law.”); see also Common Right, BLACK’S LAW DICTIONARY (2d ed. 1910) (defining “common right” as “the term applied to rights, privileges, and immunities appertaining to and enjoyed by all citizens equally and in common, and which have their foundation in the common law”.
withheld by the will of the sovereign; something, indeed, “of natural law.” In these loftier senses, common rights had conceptual and ethical affinities with constitutional rights. Their infringement might not, like constitutional rights, be overturned by judicial review, but insofar as “common” rights were no less than

328 See, e.g., Arkansas R.R. Comm’n v. Indep. Bus Lines, 285 S.W. 388, 391 (Ark. 1926) (McCulloch, C.J., dissenting) (contrasting “common use” of a state’s highways with privileged “special use” and stating that only the latter could be “granted or withheld by the lawmakers at will”); Shaw v. Crawford, 10 Johns. 236, 238 (N.Y. Sup. Ct. 1813) (describing “the general sense of mankind” that “the free use of waters which can be made subservient to commerce” is a common right that “ought to be liberally supported”). As these examples suggest, “things” said to be “of common right” were often public utilities. While it’s tempting to consider marriage in that light—the relation itself, after all, was frequently characterized in divorce litigation as a res—the expression “common right” was almost always used in this context to refer to getting married, not to the marital status itself. See Coddington v. Coddington, 20 N.J. Eq. 263, 264 (Ch. 1869) (explaining that divorce actions and “[p]roceedings with regard to the validity . . . of marriage . . . are . . . proceedings in rem” because “[t]hey actually operate upon the matter; they affirm, constitute, or dissolve the marriage relation”).


331 For an indication of both the distance and the proximity between the two ideas, consider the argument that plaintiffs in the Slaughter-House Cases, 83 U.S. 36 (1873), “butchers claiming a right to pursue a lawful employment,” were essentially “invit[ing] the Court to hold that the Fourteenth Amendment provided absolute constitutional protection for all such ‘common rights.’” Kevin Christopher Newsom, Setting Incorporationism Straight: A Reinterpretation of the Slaughter-House Cases, 109 YALE L.J. 643, 673 (2000); see also Oliver Wendell Holmes, John Marshall, in COLLECTED LEGAL PAPERS 266, 266 (1920) (crediting as “one of the foundations for American constitutional law” James Otis’s 1761 invocation of Coke’s argument in Dr. Bonham’s Case that a legislative act “against common right and reason” is void); Corwin, supra note 327, at 380 (suggesting that “American constitutional law during the last half century has tended increasingly . . . to return to the vaguer tests of ‘common right and reason’”); Pound, Ideal Element, supra note 44, at 138 (arguing that judicial interpretations of the Fourteenth Amendment continue a tradition of “ethical natural law with . . . common-law content” that “seemed to have a warrant” in prominent English jurists’ uses of “common right and reason” and “the nature of justice”).

332 Bennett v. Boggs, 3 F. Cas. 221, 228 (C.C.D.N.J. 1830) (“[W]e cannot pronounce [a] law void because, in the exercise of an unbounded constitutional power, the government . . . [has] restrained it within limits narrower than those allowed by common law, or common right.”). Inklings of such forbearance can be found even in Marbury v. Madison, where Chief Justice Marshall, lauding our “written constitution” as the nation’s “greatest improvement on political institutions,” explained that the federal government’s “powers . . . are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written.” 5 U.S. 137, 176–78 (1803) (emphases added). Five years before
common-law rights, judges keen to preserve them were not without options. As they did with laws abrogating the right to marry informally, courts could forestall through vigilant statutory interpretation what they could not forbid by constitutional decree.332

To the extent that “common right” did mean something more—more fundamental, more permanent—than “common-law right,” this surplus constituted an especially compelling reason, or at least an exceptionally high-sounding justification, to make compliance with solemnization statutes optional. Decisions holding these laws directory, not mandatory, stressed that a natural as well as a common-law right was at stake.333 As James Schouler explained the thrust of many a nineteenth-century judicial decision, it was “out of consideration for what may be termed the public, or natural and theoretical law of marriage” that “many American courts have, to a very liberal extent and beyond all stress of necessity, upheld the informal marriage against even legislative provisions for a formal celebration.”334 In 1861, the Ohio Supreme Court refused to treat such a “statute as restrictive and prohibitory, as invalidating what, by natural law, the general law of society,

Marbury, however, members of the Court had disagreed about the propriety of nullifying legislation on extra-constitutional grounds. Compare Calder v. Bull, 3 U.S. 386, 388 (1798), with Calder, 3 U.S. at 399 (Iredell, J., dissenting).

332 On courts’ quasi-constitutional use of the canon that statutes in derogation of common law should be strictly construed, see Roscoe Pound, Common Law and Legislation, 21 HARV. L. REV. 383, 386–88 (1908) [hereinafter Pound, Common Law and Legislation] (associating the canon as well as judicial review with the American common-law judge’s prejudice against legislation and finding the canon generally indefensible where there is a written constitution); Pound, Ideal Element, supra note 44, at 142–43 (describing a pronounced strain in American legal thought that posits “the historically given common law as natural law” and expresses itself both in the canon of strict construction “as applied to legislation” and in judicial interpretations of “bills of rights” “as applied to constitutions”). More recent scholarship has has suggested that Coke’s famous claim in Dr. Bonham’s Case—that “common law will controul . . . [and] void” legislation “against common right and reason”—can either be read “modestly as an example of the canon . . . of . . . strict construction” or “more broadly” as a harbinger of the canon of constitutional avoidance. William N. Eskridge, Jr., All About Words: Early Understandings of the “Judicial Power” in Statutory Interpretation, 1776–1806, 101 COLUM. L. REV. 990, 1005–06, 1018, 1025, 1027, 1036 (2001).

333 “Marriage existed before statutes; it is of natural right. . . . Hence, . . . it has become established authority that a marriage good at the common law is good notwithstanding the existence of any statute on the subject, unless the statute contains express words of nullity.” 1 BISHOP, NEW COMMENTARIES (8th ed. 1891), supra note 76, at §§ 423–24 (emphasis in original) (citing nineteen cases in support of this proposition); see also In re McLaughlin’s Estate, 4 Wash. 570, 587 (1892) (summarizing but rejecting the rule of Askew v. Dupree, 30 Ga. 173 (1860), which held “that marriage is a natural right, which always existed prior to the organization of any form of government, and all laws in restraint of it should be strictly construed in consequence thereof”).

334 JAMES SCHOULER, A TREATISE ON THE LAW OF THE DOMESTIC RELATIONS § 29 (4th ed. 1889) (citing, inter alia, Meister v. Moore, 96 U.S. 76 (1877)).
independent of statutory prohibition, would be regarded a valid marriage." Thirty
years later, applying the same rule of construction, another Ohio decision began
with a reminder that “statutes neither confer nor abridge the right to enter into
marriage. The right to marry is a natural one, recognized . . . by the laws of all Christian
countries.”

Appeals to “the general law of society” and “the laws of all Christian countries”
indicate another device by which proponents of informal marriage reinforced the
moral claims of natural law, linked them to the age-old tradition of the common law,
and resisted legislation requiring formalities. Recall Chancellor Kent’s declaration
that “marriage is . . . a contract jure gentium,” the simple “consent of the parties . . .
[being] all that is required by natural or public law.” As the phrasing of Kent’s
pronouncement suggests, “public law,” in the sense of public international law or
“the law of nations,” had strong associations with natural law. Like the notion of
common right, it offered all the more reason to condemn legislative encroachment
on “contract[s] of marriage per verba de presenti,” which were said to be “valid by
a common law prevailing throughout Christendom.” According to Bishop, one
consequence of marriage’s location in the jus gentium was a rebuttable presumption
that informal marriages are valid under the law of any foreign jurisdiction.

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335 Carmichael v. State, 12 Ohio St. 553, 558–59 (1861). Instead the court applied the
“rule of construction, which appears to be established by the authorities, that a marriage good
at the common law is good notwithstanding the existence of any statute on the subject, unless
the statute contains express words of nullity.” Id. at 555.


337 2 KENT, COMMENTARIES (1st ed. 1827), supra note 90, at 75; see also SHOULER,
DOMESTIC RELATIONS (1st ed. 1870), supra note 49, at 40 (“Informal celebration constitutes
marriage as known to natural and public law.”).

L. REV. 819, 823 (1989) (noting the eighteenth-century “consensus . . . that the law of nations
rested in large measure on natural law”); Pound, Common Law and Legislation, supra note 332, at 394 (“[C]ommon law dicta [to the effect] that legislation cannot change a rule of
international law . . . proceed upon the theory that international law is the law of nature
applied to international relations and hence is of superior authority to positive law.”).

339 Davis v. Stouffer, 112 S.W. 282, 286 (Mo. Ct. App. 1908) (quoting with approval
Voltaire’s belief that “marriage may exist, with all its natural and civil effects,” without
religous solemnization, because “[m]arriage is a contract in the law of nations, of which the
church has made a sacrament”).

340 Bishop’s logic on this point is elaborate. Having established “the well-settled general
principle of the common law, or perhaps more properly of international law,” that a
marriage’s validity is governed by the lex loci contractus, Bishop explains the evidentiary
presumption in favor of informal marriage as follows: “Marriage . . . is a thing of natural
law, and under that law it is entered into by mutual consent alone. . . . From the law of nature
it has ascended through the municipal institutions of all civilized countries into the general
international code. Now,” because “all courts recognize the laws both of nature and of
countries,” even a jurisdiction with mandatory formalities for solemnization must, unless its
own laws expressly hold otherwise, not only honor an informal marriage validly contracted
abroad; it must presume such validity—for “[i]t would not be safe to say that parties had
Favoring this approach over several alternative rules of decision, a Missouri court reasoned in 1916 that, since “[t]he contract of marriage [is] one of natural right and recognized by the law of nations,” a couple’s “mutual agreement” only three years earlier in Nebraska—“he promising her to be a good husband and she promising him to be a good and faithful wife”—was “valid [in Missouri] in the absence of any showing . . . that it was invalid where made.” A handful of judges pushed the presumption of validity still further. Faced with the text of a foreign country’s (or sister state’s) solemnization statutes, they applied an internationalized (or federalized) version of the canon of strict construction, reading statutory “restrictions and conditions” as hortatory unless they specifically “declare[d] marriages void which are not contracted according to their provisions.”

Common-law marriage’s vulnerability to legislative derogation is one reason why, especially in the long run, the doctrine’s opponents and skeptics lost little to concede that natural law encompasses a right to marry by private agreement—or, consented to a thing, as marriage, unless the consent were expressed as required by the law of the place . . . .” BISHOP, COMMENTARIES (1st ed. 1852), supra note 47, at §§ 125, 144. For cases applying the presumption, see, e.g., People v. Loomis, 64 N.W. 18, 18–19 (Mich. 1895) and Hutchins v. Kimmell, 31 Mich. 126, 132 (1875).

341 See Hynes v. McDermott, 82 N.Y. 41, 41 (1880) (“In the absence of proof it will not be presumed that the law of marriage of another country is different from that of this State.”); Fowler v. Fowler, 79 A.2d 24, 26 (N.H. 1951) (“If no evidence of the law of a foreign or sister state is present then the trial court, a presumption in favor of the common law will govern if that law is there in force.”).

342 Butterfield v. Ennis, 186 S.W. 1173, 1174, 1176 (Mo. Ct. App. 1916). As it happens, Nebraska did recognize common-law marriage, albeit grudgingly, when the couple exchanged vows in 1913, so the presumption of extraterritorial validity was accurate in that case. See Sorensen v. Sorensen, 100 N.W. 930, 932 (Neb. 1904). By contrast, in 1896, the Illinois Supreme Court upheld an interracial marriage contract per verba de praesenti in Louisiana in 1869 because “marriage is a contract jure gentium” and there was no evidence in the record that Louisiana prohibited the marriage at that date—which, in fact, it had. See Laurence v. Laurence, 45 N.E. 1071, 1072 (Ill. 1896); VIRGINIA DOMINGUEZ, WHITE BY DEFINITION: SOCIAL CLASSIFICATION IN CREOLE LOUISIANA 26, 28 (1986) (stating that Louisiana repealed its “miscegenation” ban in 1870, one year after the marriage validated in Laurence, and did not reenact such a ban until 1894).

343 Overseers of the Poor of the Town of Newbury v. Overseers of the Poor of the Town of Brunswick, 2 Vt. 151, 160 (1829) (validating a Canadian marriage contract per verba de praesenti where the statute lacked express words of nullity); see also Hutchins, 31 Mich. at 132 (endorsing “the doctrine of Steadman v. Powell, 1 Add. 58 (1820), where the proof of an Irish marriage” tended to confirm that it had been celebrated “by a popish priest” and was therefore illegal under local law).

344 Roberts v. Roberts, 1 Ohio Dec. Reprint 368, 368–69 (Com. Pl. 1850) (ruling that “simple agreement between the parties . . . without solemnization . . . may, in the sight of heaven, be a valid marriage,” but was invalid in Ohio); see also Inhabitants of Town of Milford v. Inhabitants of Town of Worcester, 7 Mass. 48, 55 (1810) (acknowledging that “a mutual engagement to intermarry, by parties competent to make such contract, would in a moral view, be a good marriage”). The principle of legislative supremacy in this matter had
indeed, that mandatory nuptial statutes “invade [a] most sacred right of the individual.”\textsuperscript{345} If anything, critics seemed to suggest, appeals to natural law proved too much. In regulating the solemn business of contracting marriage, “advanced” societies were entitled and probably wise to forsake the do-it-yourself permissiveness of stateless nature.\textsuperscript{346} Who could deny that recognition of informal marriage was fast becoming anomalous in the “Christian” and “civilized” world?\textsuperscript{347} The trend was but one of “many ways” in which the “natural rights or privileges of mankind” were “restrained . . . to promote the welfare of the community and the government of the many.”\textsuperscript{348}

Ultimately, when legislative push came to shove, the natural right to marry by private contract and its supposed incarnation in common law proved no match for statutes mandating formalities. In fact, contests over the fate of this ostensible common-law right were among American jurists’ earliest opportunities to articulate the classical period’s most audible and important constitutional idea about marriage—to wit, that “marriage being a status and in its nature semi-public, the legislative power over it is nearly, perhaps absolutely, omnipotent.”\textsuperscript{349} The Supreme Court’s decision in \textit{Maynard v. Hill} was the definitive statement of this “doctrine of pedigree. See, e.g., \textsc{Pufendorf, supra} note 93, at 476–77 (affirming the duty of “all Subjects to obey . . . Ordinances” that require certain “ceremonies, annex’d to Matrimony, . . . altho’ the Law of Nature be a Stranger to these Formalities . . . ”).

\textsuperscript{345} \textsc{Howard, supra} note 230, at 184 (arguing that this “right . . . must yield to the higher claims of society”).

\textsuperscript{346} \textsc{James Schouler, A Treatise on the Law of the Domestic Relations} § 31 (3d ed. 1884) (contrasting “informal marriage” with “formal requirements which human government imposes at an advanced stage of society” and noting equanimously that laws “now in force in England and most of the United States render certain solemnities . . . indispensable [sic]”); see also \textit{Inhabitants of Town of Milford}, 7 Mass. at 55 (associating informal celebration with “fraud,” “surprise,” and “the vilest seduction”); \textit{In re Roberts’ Estate}, 133 P.2d 492, 498 (Wyo. 1943) (suggesting that reliance on “the bare element of natural law” in “a contractual marriage” has “little regard for the sanctity of marriage”).

\textsuperscript{347} See, e.g., \textit{Herd v. Herd}, 69 So. 885, 886–87 (Ala. 1915) (“we know of no civilized nation or country which has not some civil regulations on the subject”); \textit{Cheney v. Arnold}, 15 N.Y. 345, 350–51 (1857) (endorsing Lord Mansfield’s 1753 declaration in Parliament that “enter[ing] into a marriage contract without . . . any religious ceremony whatever . . . will be a good marriage both by the law of God and the law of nature; yet the law of this society, and I believe of every other Christian [sic] society, has declared it not to be a good marriage”); \textsc{Bishop, Commentaries} (1st ed. 1852), \textit{supra} note 47, at § 42 (“[M]utual agreement is the only thing requisite, in a state of nature, to constitute marriage. But the laws of many, perhaps most civilized countries, have added other conditions, though they may, philosophically, be all resolved into . . . one, since the law does not recognize that as a contract which is entered into contrary to the provisions of law.”); \textsc{Parsons, supra} note 61, at 1853 (“In all Christian countries of which we have any knowledge, and as we suppose in all civilized countries, certain ceremonies are prescribed for the celebration of marriage, either by express law, or by a usage which has the force of law . . . .”).

\textsuperscript{348} \textit{Offield v. Davis}, 40 S.E. 910, 914 (Va. 1902).

\textsuperscript{349} \textsc{1 Bishop, New Commentaries} (8th ed. 1891), \textit{supra} note 76, at § 824.
Rejecting a claim that the Contracts Clause protects some or all of marriage’s obligations from legislative impairment, the Maynard Court opined that, apart from the relation’s initial basis in mutual consent, marriage is “simply . . . a status or institution.”

Marriage, . . . as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature. That body prescribes the age at which parties may contract to marry, the procedure or form essential to constitute marriage, the duties and obligations it creates, its effects upon the property rights of both, present and prospective, and the acts which may constitute grounds for its dissolution.

This principle of plenary legislative control wasn’t entirely without limits. Classical marriage jurisprudence contemplated two situations in which natural law—in and of itself, or through the medium of international law—might compel the validity of an informal marriage. The first of these was actually a corollary of the doctrine of status. In places where there was no legislative or other sovereign power overseeing marriage formation, as “on the high seas, or out of the jurisdiction of any civilized state, . . . the laws of nature and of nations” furnished the default rules. Thus it was “generally recognized . . . that parties marooned on an island, where ‘no law’ applies, could marry according to their own forms.”

350 See supra note 123 and accompanying text, as well as infra notes 354 and 484 and accompanying text.

351 Maynard v. Hill, 125 U.S. 190, 213 (quoting Noel v. Ewing, 9 Ind. 37, 50 (1857)) (emphasis in original, perhaps to convey use of a Latin or French term that had not yet been wholly absorbed into American legal English). For a relevant lexicographic discussion of the word “status,” see Halley, Behind the Law of Marriage, supra note 10, at 36–41.

352 Maynard, 125 U.S. 190, at 205 (emphasis added).

353 See Probert, supra note 283, at 21–22, n.3.

354 Bishop, Commentaries (1st ed. 1852), supra note 47, at § 144; see also Fisher v. Fisher, 165 N.E. 460, 461–62 (N.Y. 1929) (A marriage on the “high seas” is valid unless clearly condemned “by the common voice of Christendom” or by some law which “follow[s] the ship . . . .”). On courts’ determinations of which sovereign’s law, if any, follows a particular vessel onto the high seas, see Clive Parry, A Conflicts Myth: The American “Consular” Marriage, 67 Harv. L. Rev. 1187, 1207–09 (1954) and James B. Smith, Tying the Knot at Sea, 112 Mil. L. Rev. 155 (1986).

355 Comment, Marriage on the High Seas, 38 Yale L.J. 1129, 1132–33, n.25 (1929) (making a similar argument for marriage “on the open sea,” which is either res communis, “subject only to international law,” or “a place without law,” where the “natural right” to marry is immediately operative); see also Story, Commentaries (1st ed. 1834), supra note 11, at § 122 (citing Philippe Antoine Merlin and other French jurists who asserted that marriage “is a contract so completely of natural and moral law, that when celebrated by savages . . . where there are no established laws, it will be recognised as good in other countries.”).
The second natural-law limitation on state control over nuptial solemnization was more provocative, mainly because it departed from a rule of “comity,” a “jus gentium,” whereby “the validity of a marriage . . . is referred to the lex loci contractus” (i.e., the law of the place where it was contracted). Here the danger wasn’t a regulatory vacuum, as with “parties cast away on an unknown island,” but exclusionary legislation imposing formalities, typically religious, that a couple traveling abroad couldn’t or wouldn’t fulfill due to “peculiarities of religious opinion” or “conscientious scruples.” Under such circumstances, otherwise marriageable individuals were entitled to wed “in their own forms.”

3. A Right to Marry the Person of One’s Choice?

The previous section offered something akin to a “constitutional” reading of Meister v. Moore and of the many cases before and after Meister in which judges resisted legislative encroachments on the supposed “common-law right” to marry. That reading stressed two related phenomena: courts’ determination to treat statutes imposing formalities as directory rather than mandatory; and their justification of that practice in rhetoric—“common right,” “natural right,” “jus gentium”—redolent of higher law. Evidently, classical legal culture did see direct access to marriage as “more than a mere statutory privilege.” Nonetheless, drawing a direct line from Meister’s “common right” to contract a marriage to Loving’s constitutional right to marry is harder than some scholars have suggested. To state the obvious, the canon of construction that charged courts

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357 Tug-Boat Marriages, supra note 20, at 274.
358 Story, Commentaries (1st ed. 1834), supra note 11, at § 118; see also Joseph Jackson, The Formation and Annulment of Marriage 171 (2nd ed. 1969) (affirming that the lex loci “rule . . . is inapplicable where there is no local form, as in some unoccupied territory, or where the local form is not of a kind with which, for legal or moral reasons, a person can conform”).
359 Norman v. Norman, 54 P. 143, 145 (Cal. 1898); see also 1 Bishop, Commentaries (6th ed. 1881) supra note 76, at § 392 (citing, inter alia, Kent v. Burgess, 11 Sim. 361). The principle was often illustrated by reference to foreign authorities; see, e.g., Tug-Boat Marriages, supra note 20, at 273–74 (citing Lord Campbell’s opinion in Beamish v. Beamish (1859) 11 Eng. Rep. 735).
360 Norman, 54 P. at 145.
361 See Strassberg, supra note 8, at 1560–61.
to hold out for “express words of nullity” conceded on its face “legislative power to abolish the common-law rule altogether.” Moreover, this power was totally unaffected by the marriage right’s eventual constitutionalization in Loving and in antecedent cases like Meyer v. Nebraska and Skinner v. Oklahoma. Recognition of common-law marriage declined precipitously over the course of the twentieth century, and even after Loving its abrogation provoked barely a peep of constitutional concern. So whether one looks to the Meister doctrine itself or to subsequent legal developments, the “common right” to common-law marriage was constitutional in neither stature nor substance.

And yet . . . in light of Loving’s identification of a right to marry the person of one’s choice, there is something to be said for the suggestion that “a new American charter,” improved by the Reconstruction Amendments, eventually “constitutionalize[d] the ‘common’ and ‘common-law’ right to marry.” How one

Amendment was recognized earlier and with more confidence than . . . other family rights”) (emphasis added); Christopher A. Scharman, Note, Not Without My Father: The Legal Status of the Posthumously Conceived Child, 55 Vand. L. Rev. 1001, 1027–28 (2002) (“As early as 1877, the Supreme Court began expressly to affirm, as a matter of constitutional law, the importance of the family in society . . . .”) (emphasis added) (citing Meister v. Moore, 96 U.S. 78–81 (1877)).

363 Meister, 96 U.S. at 76, 79.
364 BISHOP, COMMENTARIES (1st ed. 1852), supra note 47, at § 47; Meister, 96 U.S. at 79.

365 Loving v. Virginia, 388 U.S. 1, 12 (1967); Meyer v. Nebraska, 262 U.S. 390, 399 (1923); Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942); see also infra Part IV (discussing Loving’s twentieth-century predecessors).


367 A series of searches on Westlaw yielded exactly one counter-example: Anguiano v. Larry’s Elec. Contracting L.L.C., 241 P.3d 175, 178 (Kan. Ct. App. 2010), which involved an allegation that Kansas’s Workers’ Compensation agency made it constitutionally difficult “to prove a common-law marriage.” The court dismissed the claim, finding no authority to support “a constitutional right to a common-law marriage.” But see Foster, supra note 366, at 60 (speculating that a “constitutional issue” might be presented if “a state that has abolished common law marriages refuses to recognize the validity of a common law marriage that was valid where entered into”).

368 Loving v. Virginia, 388 U.S. 1, 12 (1967).
369 Peggy Cooper Davis, Neglected Stories and the Lawfulness of Roe v. Wade, 28 Harv. C.R.-C.L. L. Rev. 299, 313 (1993). Apparently understanding Meister’s “‘common’ and ‘common-law’ right” to mean a right to marry at all, Davis suggests that this constitutional transformation, prepared by passage of the Civil Rights Act of 1866, was formally achieved through ratification of the Fourteenth Amendment in 1868. Id. But
may marry has potentially profound implications for whom one may marry. In jurisdictions that permitted common-law marriage, including those that did so only for the sake of comity, one of the doctrine’s most significant consequences was its facilitation of unions contrary to parental preference, community expectation, or the parties’ better judgment. 370

Well before informal solemnization emerged as one of the great obsessions of American family law, medieval canon lawyers embraced freedom in spousal choice as a corollary of the right to contract marriage per verba de praesenti (or per verba de futuro cum copula). 371 To be sure, “a giant democracy in which everyone might marry anyone is not the way the medieval world was customarily perceived by its inhabitants”; but in theory and somewhat beyond, canon law protected an ample “power to choose.” 372 Likewise “the Kent doctrine,” according to its namesake, placed “as few checks in the formation of the marriage contract, as in any part of the civilized world.” 373 As the Utah Supreme Court vividly explained in 1895, the doctrine of common-law marriage effectively held that “a couple may meet on the highway at any time in the day or night, and there contract a valid marriage.” 374 If this was, as Kent alleged, “the freedom of the common law,” then the common law was very free indeed. 375

Like other champions of marriage by bare present assent, Kent stopped short of connecting the dots from informal marriage to elopement—an understandable show of restraint given how strenuously proponents of formalities denounced “improvident and improper” unions. 376 Despite the paucity of causes for which an unrelated, competent, different-sex couple could be prevented from marrying,

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Meister’s “common right” related to how, not whether, one might marry, and that right was never constitutionalized except insofar as it arguably implied the freedom of spousal choice vindicated ninety years later in Loving.

370 See, e.g., Nancy Cott, Public Vows 128 (2000) (describing late-nineteenth-century opponents of informal marriage who associated the practice with “irresponsible, unsuited, or defiant couples”); Morris Ploscowe, Sex and the Law 23 (1st ed. 1951) (lamenting the “matrimonial entanglements” that arise when “two people . . . can marry themselves” without public notice, state license, or other third-party participation); George Elliott Howard, Social Control of the Domestic Relations, in AM. SOCIOLOGICAL SOC’Y, FIFTH ANNUAL MEETING: PAPERS AND PROCEEDINGS 212, 222 (1911) (“[C]ommon law marriage . . . virtually invites impulsive, impure, and secret unions . . . .”); Schouler, Domestic Relations (5th ed. 1895), supra note 243, at 41 (counting “[t]he consent of parents and guardians,” though unnecessary “to perfect a marriage at common law,” among “those formalities which marriage celebration [statutes] now commonly prescribe in the interest of society, as they do banns or the procurement of a license for better publicity.”).

371 See generally Noonan, Power to Choose, supra note 247.

372 Id. at 419, 430–31, 433 (“[R]ecognizing an area of freedom where parents should not trespass, the canons acknowledged rights of the individual . . . .”).

373 2 Kent, Commentaries (1st ed. 1827), supra note 90, at 74.

374 United States v. Simpson, 7 P. 257, 258 (Utah 1885).

375 2 Kent, Commentaries (1st ed. 1827), supra note 90, at 74.

376 In re McLaughlin’s Estate, 30 P. 651, 658 (Wash. 1892).
classical jurists were reluctant to follow John Witherspoon’s lead in situating “the right to marriage” within the individual’s “perfect right[] in a state of natural liberty . . . to associate, if he so incline, with any person or persons, whom he can persuade (not force).”377 If anything, jurists were more apt to affirm states’ authority to stipulate disqualifications beyond the fundamental taboos of nature.378

Prohibitions of interracial marriage occasioned the most audible classical discourse on the existence and extent of a right to choose one’s spouse. Legal challenges to these laws saw some success during Reconstruction,379 then consistently failed, with one exception, between 1878 and 1967.380 Remarkably, in none of those failed challenges was it claimed that racial endogamy laws violate a distinct right to marry. Whether based on the Equal Protection Clause, the Privileges and Immunities Clause, or the Civil Rights Act of 1866, legal protests against interracial marriage bans focused on invidious racial classification.381 When litigants did raise arguments about a substantive right to contract marriage, they emphasized “contract,” not “marriage.”382 They claimed exclusion from one of many domains of

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377 Witherspoon, supra note 190, at 69. But see J.C. Bluntschli, Freedom, and Rights of Freedom, in 2 CYCLOPÆDIA OF POLITICAL SCIENCE 281, 281–84 (John Lalor ed., 1883) (counting “matrimony” among “the individual rights of freedom” and explaining that “it is a question of life for the individual, whether he is to be allowed to follow his own inclination and choice, or . . . is to be prevented from concluding an intended marriage”).

378 See, e.g., SCHOLER, DOMESTIC RELATIONS (5th ed. 1895), supra note 243, at 30–31 (mentioning “race, color, social rank, [and] religion” as possible “disqualifications of civil condition” and noting “statutes formerly forbidding marriage between a Roman Catholic and a Protestant”); see also PUFENDORF, supra note 93, at 445 (“Though Persons are Naturally free to Marry whom they please, yet a Government, if it seem for the Interest of the State, may in some Cases . . . limit this Privilege: for instance it may be order’d, that no Subject shall Marry a Foreigner, none of the Nobility a Plebeian.”).

379 Arguing that the Privileges and Immunities Clause was originally understood to protect a right to interracial marriage, an impressively researched study identifies eleven cases between 1869 and 1877 in which courts from eight different states held or suggested in dicta that miscegenation laws violated the Fourteenth Amendment and/or the Civil Rights Act of 1866. David R. Upham, Interracial Marriage and the Original Understanding of the Privileges or Immunities Clause, 42 HASTINGS CONST. L.Q. 213, 267–73 (2015).

380 “Acts . . . prohibiting marriage between members of the white race and persons of African descent . . . have been universally upheld as constitutional and valid.” Scott v. Epperson, 284 P. 19, 21 (Okla. 1930) (per curiam); see also infra notes 416–419, 553–558 and accompanying text (discussing Perez v. Lippold, 198 P.2d 17 (Cal. 1948)).

381 Courts answered this objection with the doctrine of “equal application,” which was satisfied so long as one party to an illicit interracial union was punished just as harshly as the other. The doctrine was definitively rejected in McLaughlin v. Florida, 379 U.S. 184, 191 (1964) and Loving v. Virginia, 388 U.S. 1, 8 (1967).

382 Outside the courtroom, legal writers and civil-rights advocates occasionally did speak of a right of intermarriage under the Fourteenth Amendment that was not subsumed under a broader liberty of contract. See, e.g., A. O. Wright, Citizenship—State and National, 4 WIS. J. EDUC. 53, 55 (1874).
contractual freedom, not a special, matrimonial sphere of discretion.\textsuperscript{383} As a sympathetic court put in 1872, “[m]arriage is a civil contract, and . . . [t]he same right to make a contract as is enjoyed by white citizens, means the right to make any contract which a white citizen may make.”\textsuperscript{384} Time and again, this logic was defeated by a very different gloss on the term “civil contract,” which underscored the word “civil” and stressed marriage’s public, not private, character—the same “doctrine of status” that entitled legislators to cabin or altogether abolish common-law marriage.\textsuperscript{385} So when the Supreme Court pointedly blessed “[l]aws forbidding the intermarriage of the two races” in \textit{Plessy v. Ferguson} (1896), it explained that such prohibitions were “universally recognized as within the police power of the state.”\textsuperscript{386} Only “in a technical sense” did they “interfere with the freedom of contract.”\textsuperscript{387}

Classical jurists differed as to interracial marriage’s permissibility under natural law. One camp called it positively unnatural, akin to incest, and therefore an exception to the presumptive, natural right to select one’s spouse.\textsuperscript{388} Another denied that such right existed at all.\textsuperscript{389} A third camp, finally, held that “marriage is a natural right into which the question of color does not enter except as an individual preference expressed by the parties . . . .”\textsuperscript{390} However unpopular with the public, this last appears to have been the dominant jurisprudential position.\textsuperscript{391} Miscegenation

\textsuperscript{383} In one case, counsel for a man imprisoned for marrying a white woman argued that his client “was deprived of the right to make contracts, which a white man could make; that is, to contract marriage with a white woman.” The attorney acknowledged that marriage is also “a civil status, but he insisted that . . . it was within the class of contracts contemplated in the first section of the Civil Rights Bill.” Lonas v. State, 50 Tenn. 287, 288–89 (1871).

\textsuperscript{384} Burns v. State, 48 Ala. 195, 197 (1872).

\textsuperscript{385} See, e.g., \textit{In re Hobbs}, 12 F. Cas. 262, 263–64 (C.C.N.D. Ga. 1871); State v. Tutty, 41 F. 753, 757–58 (S.D. Ga. 1890); State v. Brown, 108 So.2d 233, 234 (La. 1959); State v. Gibson, 36 Ind. 389, 402 (1871); \textit{Lonas}, 50 Tenn. at 307–08; Frasher v. State, 3 Tex. App. 263, 275 (1877). On the doctrine of status, see \textit{supra} notes 124, 349–351 and accompanying text, as well as \textit{infra} note 484 and accompanying text.

\textsuperscript{386} 163 U.S. 537, 545 (1896).

\textsuperscript{387} \textit{Id}.

\textsuperscript{388} See, e.g., State v. Bell, 66 Tenn. 9, 11 (1872) (asserting that neither parent-child incest nor a “harem” housing “numerous wives . . . are more revolting . . . or more unnatural” than the marriage of a white man and a black woman); West Chester v. Miles, 55 Pa. 209, 213 (1867) (“The natural law which forbids [the races’] intermarriage . . . is as clearly divine as that which imparted to them different natures.”).

\textsuperscript{389} See, e.g., State v. Jackson, 80 Mo. 175, 179 (1883) (“[N]or is it one of the natural rights of man to marry whom he may choose.”); \textit{Lonas}, 50 Tenn. at 310 (“[D]iscrimination as to race and people, in this most important institution, has been observed, even from the days of the patriarchs, and even as to different people of the same race.”).

\textsuperscript{390} See, e.g., Gordon A. Stewart, \textit{Our Marriage and Divorce Laws}, 23 \textit{POPULAR SCI. MONTHLY} 224, 234 (1883) (observing that this principle was “recognized by the laws of all nations except our own”); D.A.S., \textit{The Southern Problem}, N.Y. GLOBE, Mar. 3, 1883, at 1 (“When a law prohibits a black man from marrying a white woman, because of his color, it strikes at the root of natural liberty.”).

\textsuperscript{391} Stewart, \textit{supra} note 390, at 234.
The natural right to stay married was a matter of respect for marital contracts. It promised two things: portability and permanence. If a marriage contract was valid where executed, it could not be gainsaid anywhere; nor could it be terminated, if at all, without fault or consent.

1. Portability

Marriage . . . [is] of natural and of international law. . . . It could not be international, unless there was a uniform rule among all nations whereby to determine whether it exists or not; it could not be treated as resting in private or natural right, unless the relation lawfully established was respected everywhere . . . .

Presumably, in a true state of nature, marriages would have no need of extraterritorial recognition. Conflicts of law would never arise because there would be but one global standard, supplied by a universal moral code. Only in a world of many sovereigns, each with its own nuptial procedures and qualifications, can there be questions of portability. For instance, if country A sets the age of marital consent at sixteen and country B sets it at twenty, will eighteen-year old newlyweds from A become legal strangers when honeymooning in B? Or if country C permits informal solemnization and D does not, would a couple united in C by clandestine agreement become fornicators if they live as husband and wife in D? To both questions, “the jus gentium, the common law of nations, the law of nature as generally recognized by all civilized peoples” answered no: “the validity of a marriage depends upon . . .

392 “[N]o authority, before or after the [Civil W]ar, made the manifestly false assertion that interracial marriages were generally recognized as unlawful in the world in general, in the Christian world, or even the Anglo-American world,” and “no one asserted that in the absence of some local statute, such marriages were invalid by force of natural law or common law.” Upham, supra note 379, at 219–20; see also Inhabitants of Medway v. Inhabitants of Needham, 16 Mass. 157, 159–61 (1819) (denying that “marriage[s] of negroes and mulattoes with white persons . . . tend to outrage the principles and feelings of all civilized nations”); Follansbee v. Wilbur, 44 P. 262, 263–64 (Wash. 1896) (implicitly conceding that miscegenation statutes did not apply retroactively to interracial common-law marriages); State v. Baltimore, 15 W. Va. 362, 385–86 (1879) (positing that “intermarriage[s] of a white person with a negro” are neither “mala in se” nor “contrary to religion or abstract morality”).

393 BISHOP, COMMENTARIES (1st ed. 1852), supra note 47, at § 719.
whether it was valid where . . . contracted; if valid there, it is valid everywhere.”

By this “rule of universal recognition,” one of the great “rules of comity,” marriage claimed its place as “an international institution.”

To a great extent, classical American judges upheld the portability principle. Though “the doctrine, in its broad extent,” had been doubted by some English and continental jurists of the late-eighteenth and early-nineteenth centuries, Kent’s Commentaries (1827), Story’s Conflicts of Laws (1834), and Parson’s Law of Contracts (1853) all held (to quote Kent) that, “as marriage is part of the jus gentium, . . . the lex loci contractus prevails over the lex domicilii” in ascertaining validity.

By the middle of the nineteenth century, Bishop considered the rule “well established in . . . America.” By the turn of the twentieth century, treatises announced its general acceptance with certitude.

Like other natural entitlements of marriage reflected in positive law, the right of portability admitted limitations imposed “by the law of nature” itself. Such restraints involved “contracts of marriage . . . which outrage our most fundamental

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394 Commonwealth v. Lane, 113 Mass. 458, 462–63 (1873) (enunciating “the law of nature as generally recognized by all civilized peoples”).
395 LONG, supra note 200, at § 40.
397 LONG, supra note 200, at § 40; see also MANSFIELD, supra note 48, at 244 (stating “the meaning” of the expression that “the law of marriage is part of the law of nations”). More often than not, the portability principle is what classical judges had in mind when they called marriage jus/juris gentium. See, e.g., State v. Graves, 307 S.W.2d 545, 548–549 548 (Ark. 1957); Griswold v. Griswold, 129 P. 560, 561 (Colo. App. 1913); State ex rel. Gentry v. Fry, 4 Mo. 120, 129 (1835); True v. Ranney, 21 N.H. 52, 55 (1850); Overseers of the Poor of the Town of Newbury v. Overseers of the Poor of the Town of Brunswick, 2 Vt. 151, 157 (1829); 2 KENT, Commentaries (1st ed. 1827), supra note 79, at 93.
398 BISHOP, Commentaries (1st ed. 1852), supra note 47, at § 125; see also Stevenson v. Gray, 56 Ky. 193, 207 (1856) (noting “a diversity of opinion among writers and judges” but calling lex loci contractus “the settled general rule of law in England, and in most, or all, of the United States.”).
399 2 KENT, Commentaries (1st ed. 1827), supra note 90, at 78; PARSONS, supra note 61, at 565; STORY, Commentaries (1st ed. 1834), supra note 11, at §§ 87, 90, 101.
400 BISHOP, Commentaries (1st ed. 1852), supra note 47, at § 125. Inhabitants of Medway v. Inhabitants of Needham, 16 Mass. 157, 160 (1819), was especially influential in promoting this doctrine in the United States. Courts in sister states cited the case well into the twentieth century. See, e.g., Smith v. Goldsmith, 134 So. 651, 653, 655 (Ala. 1931); Graves, 307 S.W.2d at 548–49; In re Miller’s Estate, 214 N.W. 428, 429 (Mich. 1927); In re May’s Estate, 305 N.Y. 486, 490, 114 N.E.2d 4, 6 (1953).
401 See KEEZER, supra note 11, at § 21; LONG, supra note 200, at § 40.
402 BISHOP, Commentaries (1st ed. 1852), supra note 47, at §§ 130, 149 (calling it a “common-law exception[]” to the portability doctrine that “Christian nations” withhold recognition from “polygamous and incestuous marriages entered into in foreign countries, . . . though they were there allowed by law.”); see also LONG, supra note 200, at § 40 (excluding “marriages deemed contrary to the law of nature as generally recognized in Christian countries”).
concepts” and are everywhere deemed “odious.” As Kent explained, departures from the “comity giving effect to the lex loci” were not to be taken lightly, but were reserved “for gross cases . . . repugnant to the morals and policies of all civilized nations.” A half-century later, James Schouler described these disqualified unions as “immoral marriages, or such as may be considered prohibited by the law of God.” Thus “[n]o Christian nation would tolerate polygamy within its borders on the plea that the marriage took place in some Asiatic country. Nor would incest be permitted. Nor . . . would the marriages of such as are mentally and physically incapable.”

Classical jurists viewed statutory departures from the jus gentium of marital portability much as they viewed statutory departures from the common-law right to marry by mutual agreement. Few went out of their way to affirm, in Bishop’s words, that “it would . . . be perfectly competent for the legislative power . . . to refuse to recognize any foreign marriages whether between its own citizens or foreigners,” but even fewer (if any) questioned lawmakers’ final authority to withhold recognition from marriages legally solemnized abroad but inconsistent with local policy in “form, ceremony, [or] qualification.” Some courts, including the U.S. Supreme Court, declined to recognize exercises of that authority unless the legislature spoke in “express words of nullity,” just as they did with statutes mandating nuptial formalities—the only difference being that here the governing presumption was against “a legislative intent to contravene the jus gentium,” not the common law. Other courts enunciated the broader and more frankly subjective doctrine that the rule of lex loci contractus should yield before a “positive,” “known,” “manifest and distinctive policy of the state as understood by the

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404 2 KENT, COMMENTARIES (1st ed. 1827), supra note 90, at 78.
405 JAMES SCHOULER, A TREATISE ON THE LAW OF THE DOMESTIC RELATIONS § 48 (2d ed. 1875).
406 Id.
407 See supra notes 271–284 and accompanying text.
408 BISHOP, COMMENTARIES (1st ed. 1852), supra note 47, at § 148 (emphasis added). Bishop explained that, “because it would be not only inconvenient and oppressive[,] but a violation of the good faith and comity which nations owe each other,” “no government of a civilized country would . . . [apply such a drastic policy] in respect to persons who were domiciled in the foreign country at the time their marriages were solemnized . . . .” Id.
409 Pennegar v. State, 10 S.W. 305, 306 (Tenn. 1889) (“The legislature has, beyond all possible question, the power to enact what marriages shall be void in its own state, notwithstanding their validity in the state where celebrated.”).
410 Loughran v. Loughran, 292 U.S. 216, 223 (1934) (holding that “marriages not polygamous or incestuous, or otherwise declared void by statute, will, if valid by the law of the state where entered into, be recognized as valid in every other jurisdiction”) (emphasis added); Griswold v. Griswold, 129 P. 560, 562, 563–65 (Colo. App. 1913).
411 Van Voorhis v. Brintnall, 86 N.Y. 18, 18 (1881) (demanding a “clear and unmistakable expression” of legislative intent).
courts . . . concerning the morals and good order of society.”412 Finally, whether by judicial decree or legislative command, many states came to reject marriages that were contracted abroad with “the express purpose of violating the law of the[parties’] domicile.”413 While “most writers on public law” favored or at least tolerated recognition of such “evasive” marriages,414 others, more jealous of state sovereignty, protested that doing so would stretch comity “to an extreme limit.”415

Over the course of the nineteenth and early-twentieth centuries, deviations from the norm of marital portability were championed with increasing vehemence. One reason may be that concern about “migratory marriage”—marriages contracted extraterritorially, in purposeful evasion of the parties’ home-state law—was stoked by concurrent, more intricate, and ever angrier contests over “migratory divorce,” a species of forum shopping that pitted jurisdictions with more restrictive divorce laws against those with less restrictive rules.416 Another reason was surely American culture’s heightened cathexis onto prohibitions of interracial marriage in the wake of Emancipation. A large share of the most zealous rhetoric around the portability doctrine can be found in criminal and civil challenges to mixed-race marriages solemnized abroad in conformity with the lex loci.417 A minority of judges grudgingly stayed faithful to the jus gentium in cases of that sort. Dissenting in Goldman v. Dithrich (1938), for example, Florida Supreme Court Armstead Brown quoted an 1877 ruling from North Carolina to support his view that, “[h]owever revolting to us” (i.e., Southern whites) a mixed-race “marriage may appear,” such disgust could not be called “the common sentiment of the civilized and Christian

412 Pennegar, 10 S.W. at 306–08.
413 In re Stull’s Estate, 39 A. 16, 17 (Pa. 1898) (refusing to recognize a marriage celebrated in Maryland in evasion of a Pennsylvania law prohibiting the marriage of an adulterous couple “during the life of the injured [ex-wife or husband”); see also Lanham v. Lanham, 117 N.W. 787, 789 (Wis. 1908) (refusing to recognize a marriage celebrated in Michigan in evasion of a Wisconsin law prohibiting remarriage within one year of a divorce decree).

414 SCHOULER, DOMESTIC RELATIONS (1st ed. 1870), supra note 49, at 48; see also Horton v. Horton, 198 P. 1105, 1106–07 (Ariz. 1921) (concluding that “the overwhelming weight of the better reasoned cases on the subject” supported recognizing the marriages of Arizona “citizens and residents” who “have gone abroad for the purpose of evading our laws”); PARSONS, supra note 61, at 565 (calling the at-home validity of an “evasive marriage” the “established . . . law of . . . this country”).

415 Pennegar, 10 S.W. at 307.
417 See, e.g., Pearson v. Pearson, 51 Cal. 120, 124–25 (1875) (grudgingly accepting the “intermarriage” of a master and his slave in the Utah Territory); Goldman v. Dithrich, 179 So. 715, 718 (Fla. 1938) (explaining that the lex loci contractus would not control in Florida, for “[i]n the south miscegenation is socially odious”); Kinney v. Commonwealth, 30 Gratt. 858, 865 (Va. 1878) (articulating the rule of “the southern states” to reject interracial marriages celebrated out of state “for the purpose of evading the law . . . of the domicile”).
world.” Some states foreclosed the portability doctrine’s application to interracial unions by adopting legislation that specifically banned migratory marriage, while others added words of express nullity, like “absolutely void,” to existing miscegenation statutes—even though quite a few courts read those statutes to state a “strong public policy” regardless of their precise language.

Notably, the issue of portability played a minor role in *Perez v. Lippold* (1948), the first and only ruling between Reconstruction and *Loving* to hold an interracial marriage ban unconstitutional. Andrea Perez and Sylvester Davis brought the case after the Los Angeles County clerk had denied them a license. To impugn that refusal’s rationality, one of their briefs described how they could “reach the Republic of Mexico within three or four hours, contract a marriage” there, then promptly—and legally—“resume their domicile” in L.A. The argument hit its mark. According to the state’s highest court, California’s anomalous treatment of mixed-race marriages celebrated elsewhere was one of several indications of an “arbitrary” and “irrational” policy.

Nearly twenty years after *Perez*, in a case involving plaintiffs who actually did go out of state to marry, the portability issue received no attention whatsoever. Mildred Jeter and Richard Loving had “married in the District of Columbia pursuant to its laws” and were charged upon returning home with violations of Virginia’s “Racial Purity Law,” including the specific offense of “Leaving State to evade law.” Both were sentenced to one year in jail, but the trial judge “suspended the sentence for a period of 25 years on the condition that” they not set foot again in Virginia. Almost a decade later, the U.S. Supreme Court reversed their convictions. Like the couple’s attorneys and amici, the Court’s decision said nothing

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418 Finding it “impossible” to class interracial marriages alongside the “incestuous or polygamous marriage[s] admitted to be [objectionable] jure gentium,” Justice Brown felt “compelled” by “the law of nations” and by “comity to our sister States” to defer to the *lex loci contractus.* Goldman, 179 So. at 715, 718 (Brown, J. dissenting) (quoting State v. Ross, 77 N.C. 242, 246 (1877)).

419 An 1878 Virginia decision managed to apply all three approaches simultaneously, holding that where “a white person and a negro . . . go to another state . . . for the purpose of evading the law . . . [of] their domicile, [the foreign] marriage is no bar to a criminal prosecution [at home].” Such was Virginia law as expressly “declared by statute” (albeit a statute “passed after the marriage of the parties in th[e] case”). And even “without such statute, the marriage was a nullity. It was . . . prohibited and declared ‘absolutely void.’ It was contrary to . . . a public policy affirmed for more than a century; and one upon which social order, public morality, and the best interests of both races depend.” Kinney, 30 Gratt. at 865–66.

420 *Perez v. Lippold*, 198 P.2d 17, 29 (Cal. 1948).

421 Reply Brief for Petitioner at 8, *Perez*, 198 P.2d 17 (No. 20305).

422 *Perez*, 198 P.2d at 18–19; see also *id.* at 33 (Carter, J., concurring).

423 The statute imposed a prison sentence of one to five years. *Loving v. Virginia*, 388 U.S. 1, 4 (1967).

424 *Id.* at 3.
about portability, comity, *jus gentium*, or the *lex loci contractus*. Instead they all spoke of equal protection—and, more tentatively, of a “fundamental . . . freedom to marry.”  

2. *Permanence*

Recall that slaves were widely deemed capable of forming “natural” marriages. What they lacked was legal, not moral, capacity. Without *de jure* recognition, their *de facto* unions were vulnerable to all kinds of interference—including, most infamously, exercises of *droit de seigneur* and permanent separations wrought by sale. Each of these paradigmatic interferences—encroachment onto marital exclusivity and forced dissolution—was an evil that natural law condemned. The first we discussed in our survey of the conjugal right to marry, noting that natural law prohibited adultery and imposed on states a positive duty to forbid and punish it. The present section looks at the threat of forced dissolution—a hazard that, for free citizens with *bona fide* civil marriages, emanated not from human interlopers but from civil government itself. What limits, if any, did natural law place on sovereign power to undo extant marriages? And how were such limits observed in practice?

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425 Id. at 12–13; *see also infra* notes 599–621 and accompanying text (describing right-to-marry arguments in *Loving*).

426 *See supra* notes 132–141 and accompanying text.

427 “A slave, being subject to his master’s will, had not the legal capacity to contract marriage, yet the so-called marriages of slaves had a certain moral force. . . .” *LONG*, *supra* note 200, at § 19.

428 Privation of legally assured permanence goes far in explaining why, in 1865, so many “enslaved women of Kentucky . . . flooded Northern military and civilian officials with requests . . . to exchange marital vows with their husbands . . . and be issued a formal marriage certificate” even though “the Enlistment Act had automatically married . . . couples” who had “cohabited . . . or associated as husband and wife.” *FRANKE*, *supra* note 136, at 43, 49–50; *see also* *HUNTER*, *supra* note 135, at 7 (arguing that legal marriage “bolstered the ability of ex-slaves to keep their families together . . . and to stay out of the unscrupulous grasp of erstwhile masters.”); *AMY DRU STANLEY, FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE, AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION* 39 (1998) (counting “the right to marry and the ‘sanctity of our family relations’ as badges of freedom”) (quoting *Letter from L. Maria Child, INDEPENDENT* (Apr. 5, 1866)); *Burnham*, *supra* note 265, at 202 (“[T]he threat of separation . . . hung like a dark cloud over every slave couple and family.”).

429 *Davis*, *supra* note 369, at 383–84 (quoting Senator John Sherman’s successful argument in favor of amending the Civil Rights Act of 1866 “to ‘secure to the freedmen of the southern States certain rights, . . . including the right . . . to be protected in their homes and family as a . . . natural right of free men’”).
Classical marriage jurisprudence harbored a range of views as to whether and in what circumstances natural law permitted or even compelled divorce. Subscribing to the letter of the biblical command that “what . . . God hath joined together, let no man put asunder,” some jurists insisted that the natural ideal of lifelong union amounted to an absolute prohibition of divorce. Arguing from fault, others called it “the dictate of natural justice” that aggrieved spouses be permitted to separate for adultery, and perhaps also for desertion and other causes that “frustrate . . . the ends for which [marriages] were created.” Arguing from consent, still other legal thinkers supposed that, in a state of nature, husband and wife could agree to dissolve their contract at any time and for any reason, or even that one spouse could do so unilaterally.

Amid this diversity of opinion, at least one proposition about divorce claimed general support. Classical lawyers roundly agreed that there would be something intolerable—or particularly intolerable, if one opposed divorce across the board—for the state to dissolve a marriage without cause. Whatever permutations of fault and consent particular jurists favored, none believed that a just government, respectful of natural law, would impose divorce in the absence of either.

There was a moment early in the nineteenth century when a limited guarantee of marital permanence seemed like a contender for constitutional status. The Contracts Clause offered the necessary textual hook. For if marriage was really a contract, were not its obligations immune from “impairment”? The Supreme Court first addressed this question in the famous case of Trustees of Dartmouth College v. Woodward (1819), a challenge to New Hampshire’s attempt to rewrite Dartmouth’s

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430 See 1 BISHOP, COMMENTARIES (5th ed. 1873), supra note 216, at § 33 (predicting that states’ divorce legislation would be more uniform “[if] the voice of Christendom were . . . [as united on this subject, as it is on [polygamy]]”).

431 Mark 10:9 (King James).

432 Moore v. Moore, 22 Tex. 237, 239 (1858) (“[T]he law of nature requires that the [marriage] contract should be perpetual.”).

433 1 BISHOP, COMMENTARIES (5th ed. 1873), supra note 216, at § 34 (specifically mentioning “desertion”). This view was sometimes expressed in the proposition that, “when divorce makes its appearance” by operation of civil law, “the real union has [already] ceased,” such that divorce “is not the violent destruction of marriage, but the legal end of a union, which no longer exists in fact.” LUIGI MIRAGLIA, COMPARATIVE LEGAL PHILOSOPHY § 469 (John Lisle trans., Macmillan 1921). But see WOOLSEY, DIVORCE LEGISLATION, supra note 50, at 101 (doubting that natural law permits divorce for any ground but adultery).

434 See, e.g., Johnson v. Johnson’s Adm’r, 30 Mo. 72, 88 (1860) (“It can hardly be said that the power of divorce, in one or both of the parties to the contract, at his or her pleasure, is inconsistent with the law of nature.”); see also PALEY, supra note 175, at 186 (arguing that natural law permits “dissolution of the marriage-contract” of a childless couple “by the act, and at the will, of the husband”); PUFENDORF, supra note 93, at 458 (concluding that it is “repugnant to the Law of Nature, for either of the married Couple, to depart from the other unconsenting, . . . without being able to alledge [sic] any Breach of the matrimonial Pact on the other’s side”) (emphasis added).
charter so as to reconstitute it as a public institution.\textsuperscript{435} In the course of holding this maneuver unconstitutional under the Contracts Clause, Chief Justice Marshall answered a slippery-slope problem that counsel for New Hampshire had “urged with great earnestness”: If the Contracts Clause was construed to encompass Dartmouth’s governmentally-commissioned charter, what would keep it from reaching compacts of marriage? Could not the state “unquestionably impair the obligation of the nuptial contract” by granting a divorce “without the consent of both parties”?\textsuperscript{436} Marshall disclaimed such a “broad, unlimited” interpretation. First, he said, divorce laws are remedial. Far from “impairing a marriage contract,” they “liberate one of the parties” when that contract “has been broken by the other.”\textsuperscript{437} Second, marriage is a “civil institution” and hence materially different from the private transactions of property the Clause was meant to protect.\textsuperscript{438} “The framers . . . could never have intended . . . a provision so unnecessary, so mischievous,” explained Marshall, that it would “render immutable those civil institutions,” like marriage, “which must change with circumstances . . . , which deeply concern the public, and which . . . the public judgment must control.”\textsuperscript{439}

Chief Justice Marshall’s opinion in the \textit{Dartmouth College} case didn’t totally foreclose the possibility that the Contracts Clause might place some constraint, however remote, on civil control over civil marriage: “When any state legislature shall pass an act annulling all marriage contracts, or allowing either party to annul it, without the consent of the other, it will be time enough to inquire, whether such an act be constitutional.”\textsuperscript{440} The hypothetical is evocative, almost whimsical, and perplexing if taken literally. Assuming the essentially conjugal definition of marriage that prevailed at the time,\textsuperscript{441} just what effect did Marshall think this imagined “act” would have? Would single people (now everyone) “level up,” acceding to the once-exclusive privileges of marriage, with nothing but self-restraint and self-help to prevent “wanton and lascivious cohabitation, . . . a prostration of morals, and a dissolution of manners”?\textsuperscript{442} Or would formerly married people “level down,” and like everyone else face a cruel choice between celibacy and fornication? The ludicrousness of either alternative amplifies the hint of cheek in Marshall’s tone and suggests that he may have been having a little fun with his readers—and in particular with his colleague Joseph Story.

Concurring in \textit{Dartmouth College}, Justice Story raised points similar to Marshall’s, but his rhetoric was less extravagant. Like the Chief Justice, Story began by arguing that divorce is no impairment of contract; rather, he said, it’s a remedy

\textsuperscript{435} 17 U.S. 518, 600 (1819).
\textsuperscript{436} \textit{Id.} at 600.
\textsuperscript{437} \textit{Id.} at 629.
\textsuperscript{438} \textit{Id.} at 628.
\textsuperscript{439} \textit{Id.}
\textsuperscript{440} \textit{Id.} at 629.
\textsuperscript{441} \textit{See supra} Section II.A.
\textsuperscript{442} \textit{Inhabitants of Town of Milford v. Inhabitants of Town of Worcester}, 7 Mass. 48, 52–53 (1810).
for breach of contract.\textsuperscript{443} New Hampshire’s proposed analogy between a divorce decree and the new charter it tried to “force upon” Dartmouth only made sense, he insisted, if the imagined marriage were dissol

\textsuperscript{443} Trustees of Dartmouth College, 17 U.S. at 696 (Story, J., concurring) (“A general law regulating divorces, . . . like a law regulating remedies in other cases of breaches of contracts, is not necessarily a law impairing the obligation of such a contract.”).

\textsuperscript{444} Id. at 696, 707. This rendition of Story’s argument is indebted to James W. Fox Jr.’s lucid account in The Law of Many Faces: Antebellum Contract Law Background of Reconstruction-Era Freedom of Contract, 49 AM. J. LEGAL HIST. 61, 102–03 (2007).

\textsuperscript{445} Trustees of Dartmouth College, 17 U.S. at 696 (Story, J., concurring).

\textsuperscript{446} Id. at 696–97. Story’s assertion that “a man has just as good a right to his wife, as to the property acquired under a marriage contract” smacks of the same chauvinist entitlement expressed in his later statement that marriage, as it “arise[s] from the law of nature, . . . secures the peace of society . . . by assigning to one man the exclusive right to one woman.” Story, Natural Law, supra note 150, at 316. To be clear, though, the former quotation (from Dartmouth College) equates a man’s claim “to his wife”—the natural right of every husband—with any claims a man might have under what Story also calls “a marriage settlement” (basically, a pre- or postnuptial agreement). As Story saw it, both the marriage itself and the settlement were “contracts for valuable consideration” that seemed to merit protection under the Contracts Clause. He wasn’t asserting any natural right of husbands to their wives’ property. Indeed, the terms of actual marriage settlements varied widely, and the instruments were often used to give wives greater financial independence than they’d have possessed under marriage’s default rules. Nor should Story be understood to imply that the Contracts Clause restrains a state from retroactively applying changes to those default rules. Although couples may well have wed “under the faith of existing laws,” they had no right to expect the \textit{lex loci contractus} in effect on their wedding day to govern anything but the marriage’s validity. \textit{See supra} notes 240–246 and accompanying text (on marriage settlements); \textit{Story, Commentaries} (1st ed. 1834), \textit{supra} note 11, at § 187 (“[W]here there is a change of domicil, the law of the actual domicil, and not of the matrimonial domicil, will govern as to all future acquisitions of moveable property; and as to all immovable property, the \textit{rei sitae}.”).

\textsuperscript{447} See Robert L. Hale, The Supreme Court and the Contract Clause, 57 HARV. L. REV. 512, 517–18 (1944) (citing both opinions to show that “it was recognized at an early time that, despite the contract clause, laws could . . . provid[e] for the dissolution of an obligation because of a breach by the other party to the contract.”).
transform husbands and wives into legal strangers. According to Story, again, the
Contracts Clause might be infringed if a marriage were “dissolved without . . . breach
on either side [and] against the wishes of the parties,” and he considered it “a
violation of the principles of justice” to “divest” a man of his “wife . . . without his
default, and against his will.”\footnote{Trustees of Dartmouth College, 17 U.S. at
696–97 (Story, J., concurring).} Taken at face value, these statements suggest that
Story would have permitted divorce where there was breach but no consent and also
where there was consent but no breach, but not where there was neither breach nor
consent—by which he almost certainly meant bilateral consent.\footnote{See Story, Natural Law, supra note 150, at 316 (arguing that “a power on either side to
dissolve the marriage at will[] would rob . . . maternity of many of its principal blessings
and advantages” and was “prohibited” by “natural law”); see also David P. Currie,
divorce without fault would be unconstitutional.”). None of this is to suggest that Story
favored divorce by bilateral consent. He didn’t. But his disapproval apparently sought no
recourse to the Constitution. See Story, Commentaries (1st ed. 1834), supra note 11, at § 202
(speaking dismissively of “frivolous” causes for divorce, the Roman civil law’s “almost
unbounded license” of divorce, and of dissolution “even at the pleasure of the parties”).}
Meanwhile, in Marshall’s rendering, fault drops out entirely and a constitutional question is
foreseen only where consent is absent—be it the consent of either spouse under “an
act annulling all marriage contracts” or the consent of both spouses under “an
act . . . allowing either party to annul” the marriage at pleasure.\footnote{Trustees of Dartmouth
College, 17 U.S. at 629.} Altogether, then, it sounds as if Marshall, like Story, wouldn’t have interposed the Contracts Clause
against a divorce between two faultless but mutually consenting parties.

Story never recanted the constitutional misgivings about marriage’s
vulnerability to dissolution that he aired in \textit{Dartmouth College}, but neither did he
flaunt them.\footnote{Fifteen years later, disavowing any “design to enter into . . . discussion, as to the
general . . . legislative power to authorize directly or indirectly a dissolution of the
matrimonial state, and to release the parties from all future obligation,” Story acknowledged
somewhat coyly that “it is deemed by all modern nations to be within the competency of
legislation to provide for . . . dissolution and release, in some form and for some causes.”
Story, Commentaries (1st ed. 1834), supra note 11, at § 201 (emphases added).} One imagines he sensed where American law was headed. As early
as 1838, the Supreme Court of Kentucky determined that marriage “is not embraced
by the constitutional interdiction of legislative acts impairing the obligation of
contracts.”\footnote{Maguire v. Maguire, 37 Ky. 181, 184 (1838).} Not only “could [marriage] not, like mere contracts, be dissolved by
the mutual consent of the contracting parties, but it might be abrogated by the
sovereign will whenever the public good, or justice to both parties, or either of the
parties, would thereby be subserved.”

By 1852, Bishop was stating this principle as black-letter American law. 454

Yet it would take the Supreme Court nearly seventy years after Dartmouth College to hold unequivocally that the Contracts Clause places no limit on states’ power to divorce lawfully wedded couples. In Maynard v. Hill (1888), a majority led by Justice Stephen Field flatly stated “that marriage is not a contract within the meaning of the provision.” 455 The permissive implications of this exclusion were evident from the facts of Maynard itself. As a federal appeals court recalled in 1938, “in Maynard v. Hill, it was even held that a special act of the Legislature . . . granting a divorce . . . for no named cause and where none existed . . . did not infringe any provision of the Constitution of the United States.” 456 The Legislature’s “will” alone “was . . . sufficient reason for its action.” 457 Ironically, it was precisely marriage’s superlative importance that permitted lawmakers to so casually denigrate its bond: “Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature.” 458

Maynard’s interpretation of the Contracts Clause effected a categorical exclusion equally applicable to marriage contracts breached by adultery, renounced by the consent of one or both parties, or annulled sua sponte “by the will of the sovereign.” 459 There are clues in the opinion that the Court wasn’t entirely

453 Id.; see also Townsend v. Griffin, 4 Del. 440, 442 (Del. Super. Ct. 1846) (“[T]he marriage contract . . . can be violated and annulled by law, which no other contract can . . . .”); Green v. State, 58 Ala. 190, 193 (1877) (“[I]t can be violated and annulled by law, which no other contract can be; it cannot be determined by the will of the parties, as any other contract may be . . . .”).

454 Bishop, Commentaries (1st ed. 1852), supra note 47, at § 34 (quoting Maguire, 37 Ky. at 181, 183, as an example of the kind of “language . . . employed in the American tribunals”). But see Parsons, supra note 61, at 527–28 (explaining that the Clause’s “relation to . . . marriage and divorce” remained unsettled, with one view of the matter being that “this clause may operate on the contract of marriage; leaving only the question as to what is [its] effect and operation”).

455 Maynard v. Hill, 125 U.S. 190, 211 (1888).

456 Leon v. Torruella, 99 F.2d 851, 855 (1st Cir. 1938) (emphasis added).

457 Id.

458 Maynard, 125 U.S. at 206; see also Halley, supra note 9, at 52 (arguing that “marriage-as-status cases” before and after Maynard “intensified . . . commitment to the idea that marriage and its stability were fundamental to the social order, while simultaneously intensifying the exposure of actual marriages to divorce . . . . ”).

459 Maynard, 125 U.S. at 211 (quoting Adams v. Palmer, 51 Me. 481, 483 (1863)). Mark Strasser finds “language” in Maynard “suggest[ing] that the marital contract might indeed fall within the protections of [the Contracts C]lause under certain conditions and that those conditions might well include . . . a legislature[’s] attempt to retroactively nullify a marriage contrary to the wishes of each of the individual parties.” Mark Phillip Strasser, The Challenge of Same-Sex Marriage 80–81 (1999). But Maynard says nothing about divorce contrary to the will of both parties and its holding that marriage “is not embraced"
comfortable with treating these different scenarios as perfect equivalents. Perhaps it did so because, already, certain Justices could see past the Contracts Clause to by the Contracts Clause carries no qualification. Professor Strasser appears to read an implicit limitation in the Court’s statement of the legislature’s prerogative to “prescribe[] the age at which parties may contract to marry, . . . the duties and obligations [marriage] creates, its effects upon the property rights of both, . . . and the acts which may constitute grounds for its dissolution.” Id. at 79–80 (quoting Maynard, 125 U.S. at 205). Is it warranted to infer from the italicized text that Maynard leaves open a door for Contract-Clause prohibition of divorce without marital fault? As Strasser appears to recognize, such a prohibition would necessarily encompass dissolutions by mutual consent, which even Justice Story hadn’t called into constitutional doubt. See supra notes 240–246 and accompanying text. Moreover, when read in context, the passage in question simply presents a non-exhaustive list of ways in which marriage differs from a regular contract; it does not state the outer bounds of divorce legislation.

Professor Strasser also notes Justice Field’s speculation that, “[i]f the act declaring the divorce should attempt to interfere with the rights of property vested in either party, a different question would be presented.” Id. at 80, 86 (quoting Maynard, 125 U.S. at 206). Whatever Field exactly meant here by “vested” property rights, it suffices for present purposes to observe that the Contracts Clause wasn’t the only constitutional provision that might be implicated by those rights’ infringement. For discussions relevant to this question, see McDuffie v. Commonwealth, 49 Va. App. 170, 176 (2006) (“Any interest a spouse may have in marital property is an inchoate right that becomes vested only upon entry of a decree of equitable distribution in a divorce proceeding.”); 25 AM. JUR. 2D Dower and Curtesy § 8 (2014) (citing decisions that distinguish between a legislature’s “extensive authority” to modify or abolish “inchoate dower . . . and curtesy” rights from its constitutional inability to modify “vested or consummate dower or curtesy,” the latter interest being protected by provisions other than the Contracts Clause); BISHOP, COMMENTARIES (1st ed. 1852), supra note 47, at § 773, 776–82 (discussing the effect of constitutional prohibitions of “retrospective laws” and observing that Contract-Clause protection of vested marital property rights would mean that “nothing could ever be made a ground of divorce which was not so at the time it was entered into,—contrary to the universal doctrine concerning marriage, about which there is no dispute”); HENDRIK HARTOG, MAN AND WIFE IN AMERICA: A HISTORY 17 (2000) (noting that the Contracts Clause and the Takings Clause both proved to be “relatively unimportant constraints” on marriage regulation, even though both could have been construed to protect “valuable property rights vested as a result of marriage”).

460 Regarding consensual divorce, Maynard resignedly acknowledged that upholding David Maynard’s divorce from his wife Lydia probably meant sanctioning a dissolution that, in substance if not in form, was obtained unilaterally against a spouse who had committed no fault. The Court expressed “reprobation” of David’s “loose morals and shameless conduct,” which included obtaining a divorce without notice to Lydia for an abandonment more properly attributed to him; and it predicted that, “if the facts stated had been brought to the attention of congress, that body might and probably would have annulled the [legislative] act” that had granted the divorce. Maynard, 125 U.S. at 208–10. As to divorces imposed without either fault or consent, the evidence of the opinion is less explicit, but, if witting, only more suggestive of the Court’s unease with its own holding. Discussing state-level rulings to the same effect as Maynard, the Court invoked a fifty-year-old Kentucky case and quoted from it verbatim—almost. See id. at 212 (discussing Maguire v. Maguire, 37 Ky. 181
other constitutional bulwarks against the most extreme insults to marital permanence. Or maybe the wholly involuntary dissolutions that Marshall and Story conjured in Dartmouth College were so fantastical that Maynard’s bright-line rule seemed to pose no genuine threat. Both rationalizations, evidently, could inhabit the same judicial brain.

While no state ever passed legislation “annulling all marriage contracts,” there did arise after Maynard a fair number of cases involving petitions to apply retroactively, without the consent of either spouse, statutes prohibiting certain matches: common-law marriages, interracial marriages, marriages between a man and his niece, etc. In all such cases, courts refused to void the challenged marriages; in all but one, they reached that result on the ground that retroactivity, though constitutionally permissible, wouldn’t be found without “plain and unmistakable” statutory language to that effect. Most courts took roughly the same approach to divorce petitions based on a fault ground unavailable when the alleged breach took

(1838)). Aside from transposing the original passage from the present to the past tense, the Court’s only alteration was to omit the text that here appears in italics: “[M]arriage . . . is regulated and controlled by the sovereign power of the State, and can not, like mere contracts, be dissolved by the mutual consent only of the contracting parties, but may be abrogated by the sovereign will either with or without the consent of both parties, whenever the public good, or justice to both or either of the parties, will be thereby subserved.” Maguire v. Maguire, 37 Ky. 181, 184 (1838) (emphasis added).

461 See infra notes 491–493 and accompanying text (discussing a hint of due-process protection of marriage in Citizens’ Sav. & Loan Ass’n v. City of Topeka, 87 U.S. 655 (1874)).

462 About thirty years after Maynard, Alabama Supreme Court Justice J.J. Mayfield authored a totally advisory concurring opinion in which he both contested Maynard’s interpretation of the Contracts Clause and proffered “due process of law” as an alternative constitutional ground on which to prohibit divorce without fault. Like Chief Justice Marshall in the Dartmouth College case, Mayfield illustrated his concerns by way of a hypothetical statute “divorc[ing] all married persons” in one fell swoop. Could a government do this? No, he answered, “but . . . I do not think the courts will ever be called upon to decide the question, because there is no possibility that the Legislature will ever pass such a bill. . . .” Barrington v. Barrington, 7670 So. 81, 90 (1917) (Mayfield, J., concurring). Fifteen years earlier, speaking of yet another hypothetical involving forced marital dissolution, the Supreme Court of Virginia had called the imagined scenario “extreme, . . . remote and improbable,” but conceded that it might be unconstitutional even in the absence of a “precise [textual] limitation.” Farmville v. Walker, 43 S.E. 558, 561 (Va. 1903).


464 Scott v. Epperson, 284 P. 19, 21 (Okla. 1930) (per curiam) (speaking of an interracial marriage ban); see also Succession of Yoist, 61 So. 384, 385 (La. 1913) (finding “nothing in the provisions” of a miscegenation statute to indicate that it should have “retroactive effect”); Collins v. Hoag & Rollins, 241 N.W. 766, 767 (Neb. 1932) (“[W]here . . . a state ha[s] recognized common–law marriages as valid[,] no new statute should be held to invalidate such marriages, unless upon clear language in the statute nullifying [them].”); Weisberg v. Weisberg, 98 N.Y.S. 260, 262 (1906) (holding, without mention of Maynard or any other relevant precedent, that a statute prohibiting marriage between a man and his niece could not be applied retroactively without violating the Contracts Clause).
place,\textsuperscript{465} to say nothing of grounds available under the original \textit{lex loci contractus}.\textsuperscript{466} Eventually, of course, the “no-fault revolution” of the latter half of the twentieth-century made divorce by bilateral consent available everywhere and divorce by unilateral consent available almost everywhere.\textsuperscript{467} These schemes’ constitutionality was unsuccessfully challenged on multiple occasions and today seems irrevocably settled.\textsuperscript{468} If anything, the constitutional needle points in the opposite direction. Relying largely on the Supreme Court’s decision in \textit{Boddie v. Connecticut}\textsuperscript{(1971)},\textsuperscript{469} a number of legal scholars have argued that access to unilateral divorce is, may be, or ought to be a constitutional right.\textsuperscript{470}

Meanwhile, in a separate line of decisions beginning with \textit{Cheever v. Wilson}\textsuperscript{(1870)},\textsuperscript{471} the Supreme Court’s constitutional jurisprudence proved only more

\textsuperscript{465} See, e.g., McGinley v. McGinley, 295 S.W.2d 913, 915 (Tex. Civ. App. 1956) (acknowledging but diverging from “certain jurisdictions where . . . constitutional provisions against retrospective and retroactive laws . . . have been held to restrain retrospective operation of” new or amended divorce laws).

\textsuperscript{466} HARTOG, supra note 459, at 17 (asserting that the Contracts and Takings Clauses failed to place “limits on the powers of states to change the terms of marriage or divorce, on the theory that when couples married, each spouse relied on [the specific] marital regime” that then existed).


\textsuperscript{469} Boddie v. Connecticut, 401 U.S. 371, 383 (1971) (invaliding a law that required anyone seeking a divorce, including indigents, to pay fees and costs).


\textsuperscript{471} Cheever v. Wilson, 76 U.S. 108 (1870).
hostile to the natural right of marital permanence. Affirming the “well settled” principle that a wife could, in certain circumstances, establish a domicile in a different state than her husband’s, Cheever held that a divorce judgment obtained in that new domicile was secure nationwide under the Full Faith and Credit Clause. The phenomenon enacted in Cheever was hardly new, but it was only in the mid-to-late nineteenth century that it earned the moniker “migratory divorce.”

Most of those cases involved people who obtained a divorce in one state without the participation or even the knowledge of a spouse located in another state. Superficially, the doctrine governing such domestic disputes was unremarkable: A judgment warrants full faith and credit so long as it issues from a court with proper jurisdiction. But therein lay the rub. The rules of matrimonial jurisdiction were and remain distinctive. “Under our system of law,” wrote Justice Felix Frankfurter in 1945, “judicial power to grant a divorce... is founded on domicil. The framers of the constitution were familiar with this prerequisite, and since 1789... [no] court in the English-speaking world has questioned it.”

Domicile-based jurisdiction posed no problem in the ordinary case. Divorcing spouses overwhelmingly tended to live in the same state (if not the same dwelling); even when they did not, the marriage was still presumptively subject to the common-law rule that a wife’s domicile follows her husband’s. Admit exceptions to that rule (as Cheever did), and migratory divorce suddenly becomes possible; liberalize

472 Id. at 123–24.
473 For some early American cases, see Richardson v. Richardson, 2 Mass. 153, 153 (1806) and Jackson v. Jackson, 1 Johns. 424 (N.Y. Sup. Ct. 1806).
476 See, e.g., Vanderbilt, 354 U.S. at 416–17; Rice, 336 U.S. at 674–75.
477 Williams, 325 U.S. at 229–30.
478 See generally Comment, Capacity of a Married Woman to Acquire Separate Domicil, 38 YALE L.J. 381, 381 (1929) (“The domicil of the wife, both in England and in the United States, is, in general, determined by that of the husband, even if the wife has never lived at her husband’s domicil.”) (internal citations omitted).
residency requirements and substantive grounds for divorce, as happened spectacularly but unevenly over the course of the nineteenth and twentieth centuries, and migratory divorce becomes rampant. At root, however, it was neither the general command of full faith and credit nor the Cheever rule on separate domiciles that made marriage more vulnerable to dissolution than other contracts. It was the domicile rule itself. The principle that matrimonial jurisdiction derives from spouses’ “residence” in a state, as defined by that state, was and remains a significant relaxation of the usual due-process standards of personal jurisdiction, whose main concern has been fairness to those being “hailed into court”—fairness to defendants, not complainants.479

The Supreme Court specifically blessed a lower standard for matrimonial jurisdiction in *Pennoyer v. Neff* (1877), which laid the constitutional foundation of personal-jurisdiction doctrine for years to come.480 *Pennoyer* held that a court has jurisdiction only over defendants who voluntarily appear before it or are served process within the forum state. This was what the Due Process Clause required—“except in cases affecting the personal status of the plaintiff.”481 *Pennoyer* illustrated the point by reference to marriage, the status *par excellence*: “The State, for example, has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, the causes for which it may be dissolved,” and “the conditions on which proceedings affecting [it] may be commenced and carried on within its territory.”482 And what justified this “absolute right”? Why were parties to a marriage contract due less process than ordinary

479 See Rice, 336 U.S. at 680 (Jackson, J., dissenting) (admonishing the majority for exempting divorce cases from “the usual requirements of procedural due process”); see also Courtney G. Joslin, *Modernizing Divorce Jurisdiction: Same-Sex Couples and Minimum Contacts*, 91 B.U. L. REV. 1669, 1676–77 (2011) (finding the domicile rule “increasingly difficult to square . . . with contemporary principles of personal jurisdiction” and calling for its “abandonment”); Rhonda Wasserman, *Divorce and Domicile: Time to Sever the Knot*, 39 WM. & MARY L. REV. 1, 5 (1997) (characterizing the domicile rule as “the precise opposite” of the jurisdictional principles “that apply in all other cases” and urging its abolition).


481 *Pennoyer*, 95 U.S. at 733 (“[W]e do not mean to assert, by any thing we have said, that a State may not authorize proceedings to determine the status of one of its citizens towards a non-resident, . . . though [commenced] without service of process or personal notice to the non-resident.”).

482 Id. at 734–35. Marriage was sometimes said to fall into the only other category of litigation that *Pennoyer* specifically exempted from its rule of personal service in the state claiming jurisdiction—namely, cases where “the action is in the nature of a proceeding in rem.” Id. at 715. For much of the nineteenth century and for part of the twentieth, courts and commentators commonly spoke of marriage as a “res,” referring not to the specific property interests associated with it but to the marital status itself: the state, the legal condition, of being married. See Williams v. North Carolina, 317 U.S. 287, 297 (1942) (disavowing “the historical view that a proceeding for a divorce was a proceeding in rem”).
litigants? For the same reason that marriage deserved no protection under the Contracts Clause: because it was so important; because it “gives rights and imposes duties and restrictions upon the parties, affecting their social and moral condition, . . . of which every civilized state, and certainly every state of this Union,” must be “the sole judge, so far as its own citizens or subjects are concerned.”\footnote{Atherton v. Atherton, 181 U.S. 155, 166–67 (1901).} Far from qualifying spouses to heightened constitutional protection against government interference, matrimony’s unique significance entailed, as one angry Justice put it in 1945, that “family relationships may be destroyed by a procedure that . . . would not [pass muster] if the suit were to collect a grocery bill.”\footnote{Williams, 317 U.S. at 316 (Jackson, J., dissenting).}

III. THE CONSTITUTIONAL RISE OF THE NATURAL RIGHT TO MARRY

The previous Part sorted classical understandings of the natural right to marry into several specific entitlements: a right to “conjugalit,” or a mode of relationship defined by exclusive privileges as to sex and procreation and strongly associated with cohabitation and parenthood; a right to contract marriage voluntarily, without formalities, and with the willing partner of one’s choice; and finally a right to remain wedlocked, such that a marriage valid at its inception would be valid worldwide and could not be dissolved without fault or consent.

In the nineteenth century, constitutional argumentation about these natural rights was unusual and, from today’s vantage point, conspicuously devoid of appeals to specifically marital entitlements. Challenges to interracial marriage bans invoked not a fundamental right to marry the person of one’s choice but rather broad rights of equality and contract under the Fourteenth Amendment. Challenges to out-of-state divorce decrees relied not on any natural right to marital permanence but to procedural due process and the generic protection of the Contracts Clause. Claims of this sort rarely reached the Supreme Court and found little sympathy when they did. In the \textit{Dartmouth College} case, John Marshall and Joseph Story both toyed with the thought of affording extant marriage contracts some degree of protection against impairment, but their successors on the bench unequivocally rejected that possibility in \textit{Maynard v. Hill}, where it was the permissive “doctrine of status,” not a wronged wife’s failed argument from contract, that stressed the distinctiveness of marriage.\footnote{See supra notes 103, 301–306, 332, and 420, and accompanying text.}

For American lawyers of the nineteenth century, the notion of a fundamental right to marry belonged almost entirely to natural law.\footnote{For a paradigmatic formulation of positive marriage law’s latitude to diverge from natural law, see BISHOP, COMMENTARIES (1st ed. 1852), supra note 47, at § 150 (“[B]y the laws of all civilized countries, as marriage is a natural right, all subjects may marry at pleasure, except when specifically inhibited or restrained by statute.”) (emphasis added). Indeed, two respected scholars of family law argue that, “[b]efore \textit{Loving}, the Supreme Court . . . had never suggested that individuals had some kind of right to marry, nor that states faced constitutional limits.” JOANNA L. GROSSMAN & LAWRENCE M. FRIEDMAN, INSIDE THE}
Reynolds v. United States (1878). Plaintiff George Reynolds, a Mormon, challenged his conviction for bigamy as a violation of the First Amendment’s Free Exercise Clause. That was his sole ground of constitutional complaint. Reynolds’s attorneys, plucky enough to deny that bigamy defies natural law, said nothing of a natural right to marry—even though this was, as we have seen, a familiar concept at the time, and even though Reynolds’s second marriage easily could have been cast as an exercise of that liberty. A constitutional right-to-marry claim was simply “off the wall” in 1878; even a weak free-exercise claim, rejected by a unanimous Court, seemed to have a better chance of sticking. This state of affairs changed drastically in the century to follow.

A. Before Skinner

The present Part describes how the right to marry came to be conceived as an independent substantive right under the Due Process Clause of the Fourteenth Amendment. This progression would have been hard to foresee from the perspective of the nineteenth century, but the Supreme Court started clearing a path for it a full fourteen years before Maynard. The case was Citizens Savings & Loan v. Topeka (1874), which invalidated a state taxation scheme because it served “private interest” rather than “public use.” That holding was founded on constitutional “limitations . . . which grow out of the essential nature of all free governments”—“implied reservations of individual rights, without which,” said the Court, in language reminiscent of the Due Process Clause, “the lives, . . . liberty, and . . . property of . . . citizens” would be enslaved to the “absolute disposition and unlimited control of . . . a despotism.” To illustrate the existence of such implicit constitutional limitations,

487 98 U.S. 145 (1878).
488 Id. at 161–62.
489 “The offence prohibited by sect. 5352 is not a malum in se; it is not prohibited by the decalogue; and, if it be said that its prohibition is to be found in the teachings of the New Testament, we know that a majority of the people of this Territory deny that the Christian law contains any such prohibition.” Id. at 152–53 (summarizing Reynolds’s argument).
490 See Jack M. Balkin, Bush v. Gore and the Boundary Between Law and Politics, 110 Yale L.J. 1407, 1444 (2001) (using the terms “off the wall” and “on the wall” to differentiate between arguments that “any well-trained lawyer could [and could not] accept”).
491 Citizens’ Sav. & Loan Ass’n v. Topeka, 87 U.S. 655 (1875).
492 Id. at 662.
Justice Samuel Miller proclaimed that “[n]o court . . . would hesitate to declare void a statute which enacted that A and B who were husband and wife to each other should be so no longer, but that A should thereafter be the husband of C, and B the wife of D.” 493

Citizens Savings & Loan is remembered as a harbinger of the Lochner era 494—more, of course, for its holding as to property, taxation, and public use than for its passing allusion to divorce by fiat and remarriage by force. 495 But Justice Miller’s hypothetical carved a niche for marriage in the nursery of modern substantive due process. 496 It was a small niche. Compared to the economic rights identified with Lochner, the notion of a distinct right to marry under the Due Process Clause emerged slightly later and developed far more tentatively, coming into its own well after Lochner was “repudiated.” 497 Yet if the idea progressed slowly from dictum to doctrine, it passed through several of the most iconic decisions of the first half of the

493 Id. Roscoe Pound called this passage a “striking example of the purely personal and arbitrary character of all natural law theories.” Pound, Common Law and Legislation, supra note 332, at 392 (contrasting the Supreme Court’s statement with Lord Holt’s assertion in London v. Wood [1702] 88 Eng. Rep. 1592, 1603, “that Parliament ‘may make the wife of A to be the wife of B’”).


495 For scholarship situating Citizens Savings & Loan in the development of modern substantive due process and associating it with Lochner, see generally Bernstein, supra note 493; Chemerinsky, supra note 493, at 65–66; Molly S. McUsic, The Ghost of Lochner: Modern Takings Doctrine and Its Impact on Economic Legislation, 76 B.U. L. Rev. 605, 622 (1996); Pound, Ideal Element, supra note 44.

496 Because Justice Miller’s example combines a violation of the right to marital permanence with a violation of the right against involuntary marriage, we can’t know (or at least can’t tell from the face of the decision) whether he or anyone who joined the opinion considered the first offense alone unconstitutional.

497 Washington v. Glucksberg, 521 U.S. 702, 761 (1997) (observing that “the more durable precursors of modern substantive due process” were being decided “[e]ven before the deviant economic due process cases had been repudiated”) (citing Meyer v. Nebraska, 262 U.S. 390 (1923)); Moore v. East Cleveland, 431 U.S. 494, 499, 501 n.8 (1977) (noting that the Constitution’s protection of “freedom of personal choice in matters of marriage” traces its lineage to Lochner-era cases that “have survived and enjoyed frequent reaffirmance, while other substantive due process cases of the same era have been repudiated.”).
Before Loving

Meyer held that the Due Process Clause prohibited states from mandating English-only instruction in schools. Citing Lochner and a dozen other cases, Justice James McReynolds, like Justice Miller before him, invoked the Constitution’s language of “life, liberty, or property” and proceeded to declare that “the liberty thus guaranteed . . . denotes not merely freedom from bodily restraint but also the right . . . to contract, . . . to marry, establish a home and bring up children, . . . and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.” Again like Justice Miller, McReynolds reinforced the doctrine of substantive due process with a fanciful hypothetical involving marriage—specifically, Plato’s vision for the ideal republic, where “the wives of our guardians are to be common, and their children are to be common, and no parent is to know his own child, nor any child his parent.” This would not do in America. Here, McReynolds stated confidently, a government could not “impose such restrictions upon the people of a state without doing violence to both letter and spirit of the Constitution.”

Meyer’s nomination of constitutional rights to “marry, establish a home and bring up children” may have been fleeting, but by 1923 a number of state courts had already paid this set of ideas more concerted attention. The chief impetus to this development, other than the Lochner-era atmosphere of emboldened judicial review, was eugenic regulation. In the first decades of the twentieth century, marital disqualifications once stated as precepts of natural law—exogamy as to kin, endogamy as to race, no marriage by anyone incapable of consent—were reinterpreted and sometimes revised to comport with a twisted law of natural selection. State-imposed and state-facilitated sterilizations severely damaged

498 Meyer, 262 U.S. at 390.
500 198 P.2d 17 (Cal. 1948).
501 Meyer, 262 U.S. at 403.
502 Id. at 399.
503 Id. at 401.
504 Whereas other substantive due process cases of the Lochner era avoided “the term ‘natural law’” even as they “continue[d] to use the concept under a different name,” Meyer explicitly invoked parents’ “natural duty” and “corresponding . . . right” to educate their children. Wright, supra note 34, at 276–77; Meyer, 262 U.S. at 400–02.
506 See William E. McCurdy, Insanity as a Ground for Annulment or Divorce in English and American Law, 29 VA. L. REV. 771, 794–98 (1943) (discussing “eugenic reasons,” as
many individuals’ prospects of finding a spouse, and institutionalization could foreclose that possibility for however long it lasted.507 Many jurisdictions simply branded certain individuals, or certain permutations of individuals, ineligible to wed.508

Widely cited as the nation’s first self-consciously “eugenic” law, Connecticut’s 1895 “act concerning crimes and punishments” imposed a minimum three years imprisonment for marriage, cohabitation, or sexual intercourse with an “epileptic, imbecile, or feeble-minded” person where the female partner was “under forty-five years of age.”509 The state supreme court considered the statute’s constitutionality in Gould v. Gould (1906), which sustained a divorce awarded to a woman who had been “fraudulently induced” to marry a man with concealed epilepsy.510 As concurring Justice William Hamersley emphasized, this conclusion didn’t depend on “the validity of the [1895] act,” as there could have been fraudulent inducement with or without the criminal statute.511 Nonetheless, in considering whether the enactment ipso facto rendered the marriage void, the court majority expressly denied any violation of Connecticut’s constitutional guarantee of “equality . . . in the rights to ‘life, liberty, and the pursuit of happiness’”—a guarantee, it said, that included “the right to contract marriage.”512 The statute was both reasonable in its purpose (preventing “disease of a . . . serious and revolting character”) and reasonable in its means (“preclud[ing] such opportunities for sexual intercourse as marriage distinct from concerns about “capacity or mistake,” for states’ revision of statutes prohibiting certain “insane” persons from marrying); Edward W. Spencer, Some Phases of Marriage Law and Legislation from a Sanitary and Eugenic Standpoint, 25 YALE L.J. 58, 63–64 (1915) (describing how “conscious eugenic” planning supplemented “vague notions of general morality and social convenience” to rationalize limitations on the right to marry and noting that “statutes against miscegenation . . . have also been defended on the ground that they save both races from deterioration, physical and moral”). This ideological shift was already underway by the mid-nineteenth century, when Bishop explained that “modern opinions” on incestuous marriage stressed “deterioration of the race” rather than “the quiet and accord of families, . . . female chastity, and . . . the formation of favorable alliances.” BISHOP, COMMENTARIES (1st ed. 1852), supra note 47, at § 214.

507 Some eugenicists preferred these methods over specifically marital regulation. One author proclaimed that “no cheap device of a law against marriage will take the place of compulsory segregation of gross defectives. They should be eliminated from the eugenic problem by segregation during the reproductive period, or by sterilization as a last resort.” Spencer, supra note 506, at 73; see also MARTHA A. FIELD & VALERIE A. SANCHEZ, EQUAL TREATMENT FOR PEOPLE WITH MENTAL RETARDATION 10–11 (1999) (counting “sexual segregation” as a primary goal of institutionalization).


510 Id. at 604, 609.

511 Id. at 613 (Hamersley, J., concurring in result)

512 Id. at 604 (citations omitted) (majority opinion).
furnishes"). Justice Hamersley dissented from this portion of the decision, fearing that it conceded too broad a “legislative power . . . to excind . . . persons from . . . the proper domain of individual right, namely, the natural right of marriage [and] the freedom of contract in the exercise of the right.”

Although Hamersley agreed that all liberty is “protected by the Constitution from arbitrary invasion,” he also suggested, citing *Lochner*, that these particular “personal freedom[s]” were “guarantied” and could not be “destroyed by legislation merely because such destruction [is] deemed . . . generally useful . . .”

The “constitutional right of marriage” met with greater but still qualified success in *Peterson v. Widule* (1914), a challenge to Wisconsin’s “Eugenic Marriage Law.” Enacted in 1913, the measure required male applicants for a marriage license to submit a clean bill of venereal health and fixed at three dollars the maximum fee a doctor could charge for the necessary examinations. Pursuant to this provision, Alfred Peterson “presented himself to four physicians,” payment in hand, but was turned away each time. Three dollars, the doctors all explained, was “insufficient” to cover the “delicate and expensive . . . Wassermann test” that was “specially valuable if not practically indispensable” in detecting a certain type of syphilis. Unable to obtain a license, Peterson filed a complaint alleging, *inter alia*, “an unreasonable restriction upon the inalienable right of marriage.”

The trial court agreed, finding a violation of “inherent rights” implicit in the state constitution’s explicit purpose to secure “life, liberty, and the pursuit of happiness.” On appeal, the Wisconsin Supreme Court awarded Peterson a narrower victory. It conceded that a law mandating the Wassermann test would lay “a practical embargo on marriage,” but, rather than assuming so “absolutely unreasonable” a legislative purpose, it interpreted the law to permit less costly procedures. Two dissenting judges refused to construe the statute so forgivingly.
and voted to hold it unconstitutional.523 “To marry is a natural right,” they argued, 
“guaranteed by the purpose and spirit of the constitution,” and the Eugenic Marriage 
Act “impose[d] such an oppressive burden” on that right “as to . . . destroy it.” 524

One more pre-Meyer case bears mention. **Barrington v. Barrington** (1917) involved 
an Alabama statute enacted in 1915 to authorize divorce “in favor of [any] 
wife” who lived five years “without support . . . and separate and apart from the 
husband”—a ground that, with patience and independent means, a woman could 
satisfy unilaterally, without any fault on her husband’s part.525 In 1916, pursuant 
to this provision, Mary Barrington secured a divorce. Her erstwhile husband then 
appealed, claiming violations of both due process and equal protection.526 The 
Alabama Supreme Court ruled in his favor, but it reached that result on statutory 
rather than constitutional grounds. It held that the 1915 law wasn’t retrospective and 
therefore that Mary shouldn’t have obtained a divorce based on a separation begun 
in 1911.527 Although this interpretation was sufficient to dispose of the case, two 
judges wrote concurrences airing their constitutional misgivings. Justice J.J. 
Mayfield endorsed the husband’s due process theory, stating, like Justice Story in 
**Dartmouth College**, that he was “not yet willing to hold that either the Legislature 
or a court can annul a marriage contract without any breach thereof . . . by one of 
the parties.”528 Justice William Thomas endorsed Barrington’s equal protection 
argument. In language that vacillated between low and high constitutional 
expectations, he called the statute’s sex-based “classification unreasonable, 
capricious, and arbitrary,” and he identified the interest at stake as “the natural right 
of marriage,” “a fundamental right . . . protected under the equality clause of the 
constitution.”529

“discreditable” conduct more prevalent among “the class of unmarried men.” **Peterson**, 147 N.W. at 968, 969–70.

523 Id. at 975–76 (Marshall, J., dissenting).
524 Id. A note in the *Harvard Law Review* that appeared between the two Peterson 
opinions enthusiastically endorsed legislation like Wisconsin’s on the condition that it 
“provide for [medical] examinations at the state’s expanse,” so as not “to deprive a healthy 
man of the right to marry merely because he is poorer than his fellows.” Note, 
*Constitutionality of Eugenic Marriage Laws*, 27 Harv. L. Rev. 573, 574 (1914) (arguing 
that unaffordable requirements for marriage could “deprive [a poor person] wholly of the 
legal means of exercising an all-important function of mankind”).
525 Barrington v. Barrington, 76 So. 81, 81 ( Ala. 1917).
526 Id. at 81–82.
527 Id.
528 Id. at 92; see also supra note 462 (discussing Justice Mayfield’s belief that, 
“abundant authority” to the contrary notwithstanding, the statute ought to be held to violate 
the Contracts Clause).
529 Barrington, 76 So. at 93. Four years later, when the Barrington case resurfaced and 
the constitutional question was no longer avoidable, a majority of the Alabama Supreme 
Court found no violation of equal protection and said nothing about a fundamental or natural 
right to marry. The statute’s discrimination between husbands and wives, it said, was “the 
exercise of a permissible discretion, operating upon the moral, social, economical, and
In *Gould, Peterson, and Barrington*, we see a natural right to marry beginning to take constitutional form. In none of the three suits did a court majority invalidate a law on that ground, but at least one judge in each case would have done so, and only one judge in any of the cases (*Peterson*) openly doubted the marriage right’s constitutional stature. Every member of the *Gould* court signed on to one or another opinion explicitly acknowledging a fundamental right to marry, and at least three (maybe four) of the seven justices in *Peterson* were ready to strike Wisconsin’s Eugenic Marriage Law on that basis if the statute could not be interpreted to “save it from condemnation.” For a liberty whose constitutional status the U.S. Supreme Court had suggested only passingly in 1874, these pre-*Meyer* rulings of 1906, 1914, and 1917 were a pretty decent showing.

The constitutionalization of the natural right to marry slowed considerably after *Meyer*. Doctrinally, this deceleration owed mainly to *Buck v. Bell* (1927), an infamously ugly decision in which Justice Oliver Wendell Holmes held that eugenic ends easily trump any right—none mentioned by name—that a “mental defective” might have against sterilization. After *Buck*, appeals to *Meyer*’s liberties “to marry, establish a home and bring up children” lost much of their promise, especially in contests over eugenic regulation, where, as we’ve seen, the most auspicious developments around those rights had taken place. Indeed, *Buck* dismissed with a sneer the argument that had seen the greatest traction in constitutional litigation against eugenic policies—namely, that states engaged in arbitrary classification and thereby violated equal protection when they took eugenic action only against individuals who were in state custody or otherwise institutionalized.

In *Smith v. Board of Examiners of Feeble-Minded* (1913), for example, the New Jersey Supreme Court held that the “particular vice” of that state’s sterilization law dealt its painful “remedy” to one of two “arbitrarily create[d] classes”: “epileptics . . . in charitable institutions” and “epileptics . . . not [so] confined.” Given the stature and magnitude of the personal liberty at stake, *Smith* explained, evenhanded regulation of physical differences which distinguish the sexes and divide them into natural classes, and which have always invited or demanded . . . many differences or inequalities in legislative treatment.” *Barrington v. Barrington*, 89 So. 512, 514 (Ala. 1921).

*In Peterson*, a single justice appeared to doubt the premise that marriage is a constitutional right, but even this outlier was willing to “assum[e] for argument’s sake that” the “pursuit of happiness” mentioned in the state constitution “does guarantee . . . certain rights which the Legislature may not take away.” *Peterson v. Widule*, 147 N.W. 966, 973 (Wis. 1914) (Timlin, J., concurring).

Id. at 970.


*Davis v. Walton*, 276 P. 921, 923 (Utah 1929) (calling *Buck v. Bell* “a complete answer” to the claim that the state’s sterilization law was “against the Fourteenth Amendment”).

was particularly important in this context: “When we consider that such [a law] necessarily involves . . . constitutional rights, it is not asking too much that [its end] . . . be accomplished, if at all, by a statute that does not deny to the persons injuriously affected the equal protection of the laws guaranteed by the federal Constitution.”

To the extent that Smith and a handful of similar rulings enforced the equality principle more stringently than usual because of the substantive “constitutional rights” at stake, they prefigured what would become known as the “fundamental-interest” branch of equal protection jurisprudence. As Gerald Gunther described it in 1969, this doctrine was a “resurrection” of the kind of “aggressive judicial review . . . reflected in . . . Lochner,” except that it involved specially important “personal interests” (as opposed to “economic concerns”) and was presented “under the guise of equal protection rather than substantive due process.” Like later scholars, Gunther cited Skinner v. Oklahoma (1942) as the inaugural decision in this line of cases.

B. From Skinner to Loving

The Supreme Court granted certiorari in Skinner about a month after the United States entered World War II. By that point, in the brutal light of Nazism, the eugenic vocabulary employed so enthusiastically in Buck v. Bell—“defective,” “degenerate,” “socially inadequate,” “manifestly unfit”—sounded more sinister to a greater swath of the American public. This cultural shift goes far in explaining why the 8-to-1 majority permitting Carrie Buck’s salpingectomy in 1927 gave way, fifteen years later, to a unanimous rejection of Oklahoma’s power to subject Jack Skinner to a vasectomy.

The specific law at issue in Skinner provided for sterilization of “habitual criminal[s]” who had committed “felonies involving moral turpitude.” As defined by Oklahoma, such felonies included armed robbery and chicken stealing (Jack

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535 Id.
538 Id. at 1130, 1131; see also Gerald Gunther, Foreword, In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 28 (1972) (dubbing Skinner “the grandfather of fundamental interest equal protection cases”); Tebbe & Widiss, supra note 7, at 1388 (calling Skinner “arguably the first decision” in “the fundamental interest branch of equal protection law”).
542 Skinner, 316 U.S. at 536.
Skinner’s offenses), but they did not include, for instance, embezzlement, though that too was a theft and a felony.\textsuperscript{543} As Justice William Douglas put it, the law laid “an unequal hand on those who have committed intrinsically the same quality of offense.”\textsuperscript{544} Therefore it violated the Constitution no less “than if it had selected a particular race or nationality for oppressive treatment.”\textsuperscript{545}

As in the \textit{Smith} case discussed in the previous section, \textit{Skinner}’s holding was unambiguously rooted in the Equal Protection Clause, but its reasoning seemed to lean only more heavily on the “fundamental” interests at stake: “marriage and procreation.”\textsuperscript{546} “Strict scrutiny of the classification which a State makes in a sterilization law is essential,” Justice Douglas wrote, because such “legislation . . . involves one of the basic civil rights of man,” a “sensitive and important area of human rights,” “a basic liberty,” “the right to have offspring.”\textsuperscript{547} Only Chief Justice Harlan Stone declined to endorse Douglas’s analysis, preferring to strike the law as a violation of due process—procedural, not substantive.\textsuperscript{548} Also concurring separately, Justice Robert Jackson backed both opinions and hinted at a third rationale, albeit without abandoning the language of invidious classification. “There are limits” he noted, “on the power of a legislatively represented majority . . . to conduct biological experiments at the expense of the dignity and personality and natural powers of a minority—even those who have been guilty of what the majority define as crimes.”\textsuperscript{549} Jackson’s concurrence “reserved judgment” on just what those limits might be, but he flagged the issue to preempt any “implication that such a question may not exist because not discussed.”\textsuperscript{550}

\textit{Skinner} was a milestone for the natural right to procreate—and, derivatively, for the natural right to marry.\textsuperscript{551} True, the decision specifically preserved \textit{Buck v. Bell}, eschewed any mention of \textit{Meyer v. Nebraska}, and lodged its own holding in the constitutional command of equality, not liberty.\textsuperscript{552} Yet its repeated references to these “basic . . . rights of man” added more than rhetorical flourish; they fairly described the interests at stake and significantly, perhaps decisively, shaped the Court’s standard of review—“strict scrutiny,” the Court called it.\textsuperscript{553}

\textsuperscript{543} Id. at 541.
\textsuperscript{544} Id.
\textsuperscript{545} Id.
\textsuperscript{546} Id. For a discussion of \textit{Smith v. Board of Examiners of Feeble-Minded}, 88 A. 963 (N.J. Sup. Ct. 1913), see \textit{supra} notes 533–535 and accompanying text.
\textsuperscript{547} \textit{Skinner}, 316 U.S. at 536, 541.
\textsuperscript{548} Id. at 543.
\textsuperscript{549} Id. at 546–47 (Jackson, J., concurring).
\textsuperscript{550} Id.
\textsuperscript{552} \textit{Skinner}, 316 U.S. at 541–43.
\textsuperscript{553} Interestingly, the phrase “strict scrutiny,” in its modern constitutional sense, wasn’t uttered again by a Supreme Court Justice until two other cases involving marriage and
Six years later, in Perez v. Lippold (1948), an interracial couple drew shrewd analogies between Oklahoma’s defunct sterilization policy and California’s proscription of “marriages of white persons with negroes, Mongolians, members of the Malay race, or mulattoes.”554 Andrea Perez and Sylvester Davis argued that both laws pursued “the same result”—eugenic selection; and, as “two decent citizens,” they asked to be afforded no less “solicitude” than the Skinner Court had shown a “habitual criminal.”555 “The liberty guaranteed by the Fourteenth Amendment,” they claimed, “includes the right of the individual to marry. Marriage is a natural right.”556

By a four-to-three vote, the California Supreme Court held that state’s miscegenation law unconstitutional under the Equal Protection and Due Process Clauses of the Fourteenth Amendment. In a separate concurrence declaring that marriage is “grounded in the fundamental principles of Christianity,” Justice Douglas Edmonds also found a violation of the Free Exercise Clause of the First Amendment.557 This last ground, forcefully urged by plaintiffs’ counsel, was predicated on their shared Roman Catholic faith, whose canonical rules on marriage formation were indifferent to race.558 It was a weak argument, foreclosed by the Reynolds decision on Mormon polygamy,559 but it carried a moral if not legal force that time has understandably obscured. In 1948, Perez and Davis couldn’t have partaken of the sacrament of marriage—neither its ecclesiastical solemnization nor its one-flesh union—without the state’s blessing. As Justice Roger Traynor’s majority opinion perceived, plaintiffs’ claim of religious freedom was more properly a claim of freedom to marry.560

Conceding marriage’s place among the natural rights of humanity, the State of California asserted in Perez a prerogative to “interfere with the exercise of [those] rights” when doing so might avoid “the conception of defective or socially

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554 Perez v. Lippold, 198 P.2d 17, 18 (Cal. 1948).
555 Petitioner’s Reply Brief, supra note 421, at 31.
556 Petition for Writ of Mandamus at 2, 6, Perez, 198 P.2d 17 (No. 20305) (calling the challenged law “an interference with [plaintiffs’] natural right to marry”).
557 Perez, 198 P.2d at 34 (Edmonds, J., concurring).
558 Id. at 18 (majority opinion).
559 See supra notes 487–490 and accompanying text.
560 “If the miscegenation law . . . is directed at a social evil and employs a reasonable means to prevent that evil, it is valid regardless of its incidental effect upon . . . particular religious groups. If, on the other hand, the law is discriminatory and irrational, it unconstitutionally restricts not only religious liberty but the liberty to marry as well.” Perez, 198 P.2d at 18. The closing “as well” here suggests that the court, perhaps for reasons of delicacy and collegiality, shied away from entirely or at least overtly rejecting the free exercise argument even though the preceding sentence necessarily (but implicitly) excluded it.

maladjusted offspring." The State argued that the case should be controlled by *Pace v. Alabama* (1882), where the U.S. Supreme Court had upheld a law making extramarital sex between persons of the same race a misdemeanor while punishing as a felony identical conduct between blacks and whites. Without accepting *Pace* as good law, Justice Traynor dismissed the precedent as irrelevant because “adultery and non-marital intercourse are not, like marriage, a basic right.” That right, he said, encompassed what earlier discussions of natural law had posited rarely or else tacitly: “the right to join in marriage with the person of one’s choice.” At one point, he even called such choice “the essence of the right to marry.”

*Perez*, then, left no doubt about the existence of a constitutional right to marry, nor about the aspect of that right—spousal choice—most acutely constrained by California’s law against interracial marriage. The ruling was similarly straightforward about the right’s textual basis in the “liberty” secured by the Fourteenth Amendment, and about its sufficiency as an independent ground of decision. Moreover, this “fundamental right of free men” triggered heightened scrutiny not only under the doctrine of “substantive due process” and (*à la* Skinner) under the Equal Protection Clause, it also demanded more scrupulous adherence to the constitutional guarantee of fair notice. In view of the difficulty of precisely defining and consistently applying the challenged racial classifications (“white,” “negro,” “Malay,” etc.), the Court concluded that, “even if a state could restrict the right to marry upon the basis of race alone,” California’s statute would still be “too vague and uncertain to constitute valid regulation. A certain precision is essential . . . in regulating a fundamental right.”

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561 Return by Way of Demurrer at 10–11, Perez v. Moroney, 198 P.2d 17 (1948), *sub nom.* Perez v. Lippold, Perez v. Sharp; *see also* Respondent’s Petition for Rehearing at 3, Perez v. Lippold, 198 P.2d 17 (1948), *sub nom.* Perez v. Sharp (agreeing that marriage “is a fundamental right of free men” but denying that this “attribute[] . . . bring[es] it within the scope of . . . constitutional provisions relating to religious freedom.”).
562 *Perez*, 198 P.2d at 26 (citing *Pace v. Alabama*, 106 U.S. 583, 585 (1883)).
564 *Id.* at 19. “Since the right to marry is the right to join in marriage with the person of one’s choice, a statute that prohibits . . . marrying a member of a[nother] race . . . restricts . . . choice . . . and thereby restricts [the] right to marry.” *Id.*
565 *Id.* at 21.
566 *Id.* at 25.
567 *Id.*
568 *Id.* at 19–21, 29.
569 *Id.* at 27.
In the nearly two decades between Perez and Loving, the U.S. Supreme Court refused several opportunities to review decisions upholding interracial marriage bans. But it changed the constitutional law of marriage on other controversial questions. One line of cases, involving migratory divorce, actually predated Perez. After Williams v. North Carolina (1942) curtailed what little room states had under the Due Process Clause to refuse full faith and credit to foreign divorce decrees, Sherrer v. Sherrer (1948) and Johnson v. Muelberger (1953) eliminated that freedom entirely in cases where both spouses had participated in the divorce proceedings. Together these cases allowed married people to decide for themselves “which jurisdiction would control their marital status”; and in Ann Laquer Estin’s astute observation, the decisions “fundamentally altered state power to set the normative boundaries of family life.” Divorce by mutual consent, once the bogeyman of Joseph Story’s concurrence in Dartmouth College, now enjoyed a degree of constitutional protection. Estin suggests that Williams, Sherrer, and Johnson located in “the interstices of the Full Faith and Credit Clause” a new, “individual right” of marital self-determination—and that assessment seems right. But to be clear, this right was contingent—not, or not yet, fundamental. Married couples were still at the mercy of legislative decisions about which divorce grounds to authorize, what procedures to institute, how long a residency to require, and whether, indeed, to permit divorce at all.

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571 Williams v. North Carolina, 317 U.S. 287 (1942) (overruling Haddock v. Haddock, 201 U.S. 562, 570 (1906), which had permitted states to ignore foreign divorces obtained by a party who had “wrongfully” abandoned the shared marital domicile).

572 Sherrer v. Sherrer, 334 U.S. 343 (1948) (prohibiting either party to a divorce from attacking the decree on jurisdictional grounds if both had participated in the proceedings); Johnson v. Muelberger, 340 U.S. 581 (1951) (extending Sherrer’s holding to attacks by third parties).

573 Estin, supra note 416, at 383.

574 Id. (arguing that these later migratory divorce cases “anticipate[d]” future decades’ “more extensive infusion of constitutional principles into family law”).

Compared to the migratory divorce rulings of midcentury, *Griswold v. Connecticut* (1965)\(^{576}\) and its harbinger *Poe v. Ullman* (1961)\(^{577}\) produced a more memorable but ultimately more fragile shift in marriage’s pre-*Loving* constitutional position. Plaintiffs in both cases claimed that it was unconstitutional for Connecticut to forbid married couples to use contraception.\(^{578}\) *Poe* avoided the question on justiciability grounds, with Justices William Douglas and John Marshall Harlan arguing in separate dissents that the challenged statute violated a “right of privacy . . . implicit in a free society” and embedded in the Due Process Clause of the Fourteenth Amendment.\(^{579}\) When the full Court finally reached the merits in *Griswold*, Justice Douglas wrote a majority opinion deriving that privacy right from “penumbras” of more “specific guarantees in the Bill of Rights.”\(^{580}\) Justice Harlan, now concurring, stayed true to the substantive due process theory he had advocated in *Poe* (and that prevailed soon enough in *Roe v. Wade*).\(^{581}\)

On either theory—penumbras or due process—*Griswold* was a momentous ruling. Substantively, it was the first Supreme Court case to extend the evolving right of privacy to matters of sex and reproduction. Methodologically, it reaffirmed (or revived from Lochnerian ignominy) the Court’s “authority to strike down . . . legislation which . . . violates ‘fundamental principles of liberty and justice.’”\(^{583}\) Dissenting in *Griswold*, Justice Hugo Black decried the majority’s divination of constitutional rules from “subjective considerations of ‘natural justice’” and “mysterious and uncertain natural law concepts.”\(^{584}\) The objection pertained to method, but its irony owed to *Griswold*’s substance. Like the conceit of “marital privacy” in which it was enveloped, *Griswold*’s spousal prerogative to engage in purposely nonprocreative sex wasn’t one traditionally recognized by natural law. Classical discussions of natural marriage made as much provision for marital contraception as they did for marital sodomy—which is to say, none.\(^{585}\) To the extent


\(^{578}\) See *Griswold*, 381 U.S. at 485–86; *Poe*, 367 U.S. at 500.

\(^{579}\) *Poe*, 367 U.S. at 533 (Douglas, J., dissenting) (referring to “the right of ‘privacy’”); id. at 551 (Harlan, J., dissenting).

\(^{580}\) *Griswold*, 381 U.S. at 483–85, 487.

\(^{581}\) 410 U.S. 113, 154, 164 (1973); see also *Griswold*, 381 U.S. at 502 (White, J., concurring) (relying on substantive due process).

\(^{582}\) *Griswold*, 381 U.S. at 485 (majority opinion).

\(^{583}\) Id. at 512, 514, 518–19, 522 (1965) (Black, J., dissenting) (quoting Justice Goldberg’s concurrence and decrying the Court’s reliance on “natural law due process philosophy,” “mysterious and uncertain natural law concepts,” and “subjective considerations of ‘natural justice’”).

\(^{584}\) Id. at 522 (Black, J., dissenting). “Natural law due process philosophy,” though clunky, was Black’s favored epithet. Id. at 511 n.3, 515, 516, 517 n.10, 524, 527 n.23.

\(^{585}\) For an extremely rare and predictably unsuccessful claim of such a right, see *State v. Nelson*, 11 A.2d 856, 861 (Conn. 1940) (rejecting defendants’ argument “that people have a natural right ‘to decide whether or not they shall have children’ and a concomitant right to use contraceptives”).
the subject was raised at all, using “devices to prevent the birth of children” was considered “contrary to the natural law.”

Even as Griswold identified a constitutional right where no natural right had been, the decision did chime faintly with natural law’s designation of (hetero)sexual indulgence as a primary purpose of marriage—and one distinct from procreation. Nature, recall, was said to have instituted marriage not only to order human procreation but “to remedy and avert loose-living and concupiscence.” The elderly could marry in accordance with nature; and in some circumstances, so could people unable to beget children for other reasons. Griswold evinced respect for this dimension of natural marriage. With righteous delicacy, the majority Justices gave constitutional sanctuary to sex for its own sake—though no further, they all insisted, than what Justice Douglas called the “sacred precincts of marital bedrooms.”

Decided two years before Loving by a nearly identical Court, Griswold attests to an intense and perhaps defensive loyalty to the traditional model of natural marriage. A conventional, conservative, and conjugal ideal was no mere background assumption in Griswold; it was the decision’s dispositive and limiting principle. According to Justice Douglas, Connecticut’s law was different from regulations dealing with “economic” and other “social conditions” because it interfered “directly” in the “relation of husband and wife,” a relation “intimate to the degree of being sacred.” Reciting Justice Harlan’s dissent in Poe, Justice Arthur Goldberg “found it difficult to imagine what is more private and more intimate than a husband

586 Hafner v. Hafner, 66 N.Y.S.2d 442, 444 (Sup. Ct. 1946). This precept was strongly associated with Christian and especially Catholic doctrine, whose expositors more than adequately compensated for the reticence of ostensibly secular jurists. See, e.g., Germain Gabriel Grisez, Contraception and the Natural Law (1964) (arguing that contraception is immoral because it violates a basic moral principle); Noonan, Tokos and Atokion, supra note 163.

587 Joseph Jackson, The Formation and Annulment of Marriage 20 (2d ed., 1969) (describing Christian teaching on marriage’s “essential function as an institution” in light of the Pauline admonition that “[i]t is better to marry than to burn”); see also supra notes 165–168 and accompanying text.

588 Griswold v. Connecticut, 381 U.S. 479, 485 (1965). This sanctuary was cramped. The majority implied that there was a constitutionally salient difference between statutes prohibiting marital use and marital purchase of contraceptives, see id. at 485–86, and Justice Harlan’s dissent in Poe noted that a state could legislate its moral disapproval of marital contraception through less restrictive means, such as “tax benefits and subsidies for large families,” rules providing for annulment of “a marriage in which only contraceptive relations had taken place,” and laws making “use of contraceptives . . . a ground for divorce.” See Poe v. Ullman, 367 U.S. 497, 533, 548 (1961) (Harlan, J., dissenting).


590 Griswold, 381 U.S. at 481, 482, 486.
and wife’s marital relations.\footnote{591} Obviously, “marital fidelity” had a claim that “sexual promiscuity and misconduct” did not: “Adultery, homosexuality and the like are . . . intimacies which the State forbids . . . , but the intimacy of husband and wife is necessarily an essential . . . feature of . . . marriage, an institution which the State not only must allow, but . . . in every age . . . has fostered and protected.”\footnote{592}

For the most part, Justice Harlan didn’t bother to rehearse in \textit{Griswold} arguments he had set forth at admittedly “unusual length” four years earlier.\footnote{593} One can easily see why. Every member of the \textit{Griswold} majority seemed to endorse his characterization of the constitutional harm that Connecticut’s criminal law inflicted: an invasion of the sole space in which, by that law’s own precepts, “the sexual powers may be used.”\footnote{594} Taken at their word, Harlan’s seemed to understand and agree that the legal structures “confining sexuality to lawful marriage form a pattern so deeply pressed into the substance of our social life that any Constitutional doctrine in this area must build upon that basis.”\footnote{595}

It was not to be.

\section*{IV. \textit{FROM LOVING} to \textit{LAWRENCE}}

\subsection*{A. Loving’s Natural Right to Marry}

During and after Reconstruction, legal challenges to interracial marriage bans invoked a broad, natural right to contract protected by the Fourteenth Amendment and specifically enshrined in the Civil Rights Act of 1866.\footnote{596} In \textit{Loving v. Virginia}, that argument barely surfaced. Richard and Mildred Loving’s brief seeking certiorari from the Supreme Court contained a pithily stated claim, dropped from subsequent filings, that they were “denied the right ‘to make and enforce contracts.’”\footnote{597} Except for a single question at oral argument from Justice Potter Stewart (“You’re arguing

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  \item \footnote{591} \textit{Id.} at 495 (quoting \textit{Poe}, 367 U.S. at 551–52 (Harlan, J., dissenting)).
  \item \footnote{592} “It is one thing when the State exerts its power either to forbid extra-marital sexuality . . . or to say who may marry, but it is quite another when, having acknowledged a marriage and the intimacies inherent in it, it undertakes to regulate by means of the criminal law the details of that intimacy.” \textit{Griswold}, 381 U.S. at 498–99 (quoting \textit{Poe}, 367 U.S. at 553 (Harlan, J., dissenting)).
  \item \footnote{593} \textit{Poe}, 367 U.S. at 523.
  \item \footnote{594} \textit{Id.} at 548 (protesting the contraception statute’s intrusion into couples’ “private use of their marital relations.”); \textit{see supra Griswold}, 381 U.S. at 502–03 (Byron, J., concurring) (including “the right . . . to be free of regulation of the intimacies of the marriage relationship” among “the freedoms of married persons”).
  \item \footnote{595} \textit{Poe}, 367 U.S. at 545.
  \item \footnote{596} \textit{See supra} notes 327–330 and accompanying text.
\end{itemize}
complete freedom to contract, aren’t you, under the Due Process Clause?"'), an undifferentiated, \textit{Lochner}-style freedom of contract did not reappear in the case.\textsuperscript{598}

The \textit{Loving} plaintiffs had more to say—in substance, certainly, and at one point in name—about Virginia’s incursion onto the “natural right” to marry.\textsuperscript{599} Their main authorities for this “basic [and] fundamental” entitlement were the twentieth-century cases surveyed in Part III. Mildred and Richard Loving claimed the conjugal prerogatives of marriage mentioned in \textit{Meyer v. Nebraska} and \textit{Skinner v. Oklahoma}.\textsuperscript{600} They claimed what the California Supreme Court’s \textit{Perez} decision had called “the right to join in marriage with the person of one’s choice.”\textsuperscript{601} And, more tentatively, they claimed the right or rights of marital privacy newly minted in \textit{Griswold v. Connecticut}.\textsuperscript{602}

In a savvy reversal of conventional wisdom, an amicus brief filed by the NAACP Legal Defense Fund called “laws against interracial marriage the weakest, not the strongest, of the segregation laws,” because “they intrude a racist dogma into the private and personal relationship of marriage,” thereby violating the Due Process Clause of the Fourteenth Amendment as well as the Amendment’s Equal Protection Clause.\textsuperscript{603} The Japanese American Citizens League went further, asserting “that even under the now-rejected ‘separate but equal’ doctrine of \textit{Plessy v. Ferguson},” the “vitally personal right . . . to marry” is so “basic,” so “fundamental,” that it “could not be abrogated” by prohibitions of interracial marriage.\textsuperscript{604} Invoking not only dicta from \textit{Meyer} and \textit{Skinner}, but also “the right to marry and to found family” named in

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\textsuperscript{599} Jurisdictional Statement, \textit{supra} note 597, at 15–16 (noting that “marriage is such a basic, fundamental, and natural right . . . that the choice of a mate must be left to one’s own desires and conscience”).
\textsuperscript{601} Jurisdictional Statement, \textit{supra} note 597, at 3, 17 (invoking \textit{Griswold v. Connecticut}, 381 U.S. 479 (1965)); Appellant Brief, \textit{supra} note 600, at 3 (same); Catholic Bishops’ Brief, \textit{supra} note 600 at 17–18, 21 (same); JACL Brief, \textit{supra} note 600, at 9 (same).
\textsuperscript{602} NAACP LDF Brief, \textit{supra} note 600, at 14–15.
\textsuperscript{603} JACL Brief, \textit{supra} note 600, at 9–11.
the Universal Declaration of Human Rights, two Roman Catholic organizations and sixteen southern bishops argued that laws proscribing “marriage between persons of different race . . . deny to such persons the right to beget children, . . . one of the chief lawful rights in marriage,” and therefore “contravene a fundamental liberty guaranteed by the due process clause of the Fourteenth Amendment.”605 In their own briefs, the Lovings cast their right to marry as a “‘liberty’ . . . protected by the due process clause” and, more speculatively, by some or all of Griswold’s constitutional potpourri.606

Overall, however, right-to-marry arguments were ancillary to the Lovings’ main grievance against Virginia’s “Racial Integrity Act.” By far the greater part of their challenge was staked and fought on the terrain of equal protection, as the couple’s counsel haltingly—and, it would seem, apprehensively—assured the Court at oral argument. On the heels of Justice Stewart’s question about “complete freedom of contract . . . under the Due Process Clause,” attorney Bernard Cohen pivoted back to the Fourteenth Amendment’s “protect[ion] against racial discrimination,” which he considered his strongest argument.607 He then confessed: “I do not think that the other arguments are completely invalid. I—I don’t even know if the Court ever has to reach them.”608 Indeed it did not. By 1967, the Equal Protection Clause had developed into a crushingly effective weapon against Jim Crow.609 Anyone following the logic of the Court’s decisions from Brown v. Board

605 “Such persons may have children only if they are willing to pay the penalty of having them legally denominated as bastards.” Catholic Bishops’ Brief, supra note 600, at 20; see also Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810, art. 16 (Dec. 12, 1948).
606 See Jurisdictional Statement, supra note 597, at 15–17 (citing Griswold and claiming violations of the “right of privacy,” the “liberty retained by the people” via the Ninth Amendment, “freedom of association under the First Amendment,” and “penumbras formed by emanations” of “specific guarantees in the Bill of Rights”); Appellant Brief, supra note 601, at 38–39 (citing Griswold and claiming violations of the “right of privacy” and “freedom of association”); see also Loving Oral Argument, supra note 598, at 6 (invoking Griswold and claiming a violation of the Ninth Amendment).
607 Loving Oral Argument, supra note 598, at 7.
608 Id.
609 See, e.g., United States v. Guest, 383 U.S. 745, 756–57 (1966) (holding that even minimal state participation in a conspiracy to perpetrate discrimination “[b]y causing the arrest of Negroes by means of false [criminal] reports” violated the Equal Protection Clause); Griffin v. Maryland, 378 U.S. 130, 135, 137 (1964) (holding under the Equal Protection Clause that arrests by a state deputy acting under his own authority constituted impermissible state action enforcing segregation); Reynolds v. Sims, 377 U.S. 533, 568–69 (1964) (interpreting the Equal Protection Clause to require that state legislative districts be equal in population); Griffin v. County Sch. Bd., 377 U.S. 218, 232 (1964) (concluding that a local government violated equal protection when it closed public schools for the express purpose of avoiding desegregation); Johnson v. Virginia, 373 U.S. 61, 62 (1963) (holding that racial segregation in courtrooms violated equal protection); Watson v. Memphis, 373 U.S. 526, 539 (1963) (holding that racial segregation of public parks violated equal protection); Turner
of Education (1954) to McLaughlin v. Florida (1964) could have predicted that miscegenation laws’ days were numbered. The real question at that point was whether Loving could be decided on any ground other than equality. No matter who articulated them—the NAACP, the Catholic bishops, the Japanese Citizens League, the plaintiffs themselves—claims about Virginia’s infringement of fundamental liberty invariably devolved into arguments about the arbitrariness and irrationality of the racial classification employed to constrain the right’s exercise.

Although the Supreme Court embraced the Lovings’ substantive due process claim, it too subordinated that rationale to the principle of equality. Chief Justice Earl Warren’s majority opinion—joined by all but Justice Stewart, who filed a two-line concurrence rejecting any law that makes “the criminality of an act depend upon the race of the actor”—consisted of two parts. The first, comprising roughly ninety percent of the Court’s analysis, explained why interracial marriage bans are unconstitutional under the Equal Protection Clause. The remaining ten percent, which had been significantly trimmed after several Justices professed to see “no reason” to include it at all, held that Virginia’s law “also deprive the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment.”

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.


See supra notes 597–602 and accompanying text.

Loving v. Virginia, 388 U.S. 1, 13 (1967) (Stewart, J., concurring) (quoting McLaughlin v. Florida, 379 U.S. 184, 198 (Stewart, J., concurring)).

Loving, 388 U.S. at 7–13.

Id. at 12. Responding to an early draft, Justice Hugo Black wrote: “I heartily agree with the equal protection part . . . but having decided the whole case there I see no reason for adding what follows. The case comes so fully under equal protection that I think [that] should end it. Besides there are statements in the due process part with which I would not agree.” Justice Byron White likewise told the Chief Justice that he saw “no reason to reach the due process question.” See Hugo L. Black, Draft Opinion (May 31, 1967) (on file with the Library of Congress, Manuscript Division, Earl Warren Papers, Box 620); Draft Opinion Letter from Byron White to Earl Warren (May 31, 1967) (same).
Marriage is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival. Skinner v. State of Oklahoma, 316 U.S. 535, 541 (1942). See also Maynard v. Hill, 125 U.S. 190 (1888). To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State’s citizens of liberty without due process of law. The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State.615

Behold how swiftly invidious classification and discrimination reenter the Court’s discussion.616 After declaring an independent violation of the fundamental “freedom to marry,” the decision “slips right back into equality rationales.”617 Count one reason, other than sheer brevity, to look askance at this portion of the opinion. The Court’s use of precedent is another. Citing Skinner and Maynard, respectively decided under the Equal Protection and Contracts Clauses, Chief Justice Warren ignored Meyer and Griswold, the only twentieth-century cases in which the Court had derived substantive marital rights from the Due Process Clause.618 The reference to Maynard is especially strange. Presumably it was meant to evoke Justice Field’s deathless pronouncement that marriage has “more to do with the morals and civilization of a people than any other institution,” as if this statement—and the affirmation of legislative supremacy that immediately followed it—had not served for eighty years to shield miscegenation laws from constitutional attack.619

Despite the decision’s oddities, early legal commentary on Loving evinced little surprise at the Court’s near-unanimous enforcement of an unenumerated, substantive entitlement pertaining to marriage—just the kind of right that had moved

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615 Loving, 388 U.S. at 12.

616 The paragraphs are consistent with Justice White’s advice to the Chief Justice: “If the statute satisfied the Equal Protection Clause, I would not hold it a violation of due process as ‘arbitrary.’ On the other hand, since it does not meet equal protection standards, it may automatically be a violation of due process also.” Letter from Byron White to Earl Warren, supra note 614.

617 Sasha Volokh, Is Marriage Really a Liberty Right?, VOLOKH CONSPIRACY (June 26, 2015), http://reason.com/volokh/2015/06/26/is-marriage-really-a-liberty-r [https://perma.cc/2DTB-GWK4]; see also Jane C. Atkinson, Califano v. Jobst, Zablocki v. Redhail, and the Fundamental Right to Marry, 18 J. FAM. L. 587, 594 (1979) (remarking how “easily [one] could argue that the right to marry is so interrelated with the question of racial classifications in Loving as to be merely dicta”).

618 Loving, 388 U.S. at 7.

619 See supra note 332 and accompanying text.
the Justices to such passionate disagreement only three years earlier in *Griswold*.\(^{620}\)

To both the Court and its audiences, *Loving*’s “right to marry” struck a wholly different note than *Griswold*’s “right of marital privacy.” One idea was directly traceable through centuries of legal thought; the other was yesterday’s coinage.

**B. Decline and Fall**

For all of its doctrinal audacity, *Griswold v. Connecticut* was premised no less than *Loving* on an age-old conception of marriage that lived most pristinely in natural law. At that conception’s center, the human relationship to which all other aspects of the right to marry referred, was a tightly circumscribed conjugality.\(^{621}\)

This was the “essential” and “sacred” prerogative that Connecticut claimed the power to “invade” in *Griswold*.\(^{622}\) This is what Virginia sought to deprive couples like Richard and Mildred Loving, and why the deprivation was so cruel. The Lovings’ desire to wed had little if anything to do with government benefits, marital property rules, or any of civil marriage’s myriad and variable incidents.\(^{623}\)

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\(^{620}\) Some commentators had forecasted *Loving*’s due-process holding and, after the fact, most commentators noted it offhandedly (if they mentioned it at all). For scholarly anticipations of this portion of the decision, see David E. Seidelson, *Miscenagenation Statutes and the Supreme Court: A Brief Prediction of What the Court Will Do and Why*, 15 Catholic U. L. Rev. 156, 160, 162, 165–66 (1966); Miller, *supra* note 610, 41, 43–44, n.20; Walter Wadlington, *The Loving Case: Virginia’s Anti-Miscegenation Statute in Historical Perspective*, 52 Va. L. Rev. 1189, 1216 (1966) (noting that the Court had already described “marriage in terms of a right” in *Meyer*, *Skinner*, and *Griswold*). For examples of scholarly nonchalance about *Loving*’s resort to substantive due process, see W.M. Bone

\(^{621}\) See *infra* Parts I and II(A).


\(^{623}\) Richard Loving famously advised his attorney, “Tell the Court I love my wife, and it is just unfair that I can’t live with her in Virginia.” *Loving* Oral Argument, *supra* note 598,
sought was, or then seemed, eternally necessary and unique to the institution: the
duty to share a home and a bed, and the opportunity to parent legitimate offspring.\textsuperscript{624} Hence a federal district court’s determination only six years later that \textit{Loving} gave
dividends imprisoned for life no basis to challenge regulations forbidding them to
marry: “Those aspects of marriage which make it ‘one of the basic civil rights of
man’—cohabitation, sexual intercourse, and the begetting and raising of children—
are unavailable to [prisoners] in [that] situation . . . .”\textsuperscript{625}

The \textit{Loving}s’ liberty claim under the Due Process Clause was intelligible in
1967 because the Court and much of its public still imagined civil marriage’s
defining attributes to be those of natural marriage. And so they were, legally, in the
vast majority of states. But the resemblance was fading fast. In 1955, a draft of the
American Law Institute’s much-anticipated Model Penal Code had advocated
“removing adultery and fornication entirely from the area of criminality.”\textsuperscript{626} State
legislatures began implementing this guidance in 1961,\textsuperscript{627} repealing prohibitions of
fornication, adultery, and sodomy that, if not totally moribund, were drastically
unenforced.\textsuperscript{628} Spurred by rapidly changing moral norms, social practices, and

\begin{itemize}
\item at 9. For accounts of the Lovings’ relationship, see \textit{The Loving} Story (Icarus Films 2011); 
\textit{Cheryl Cashin, Loving: Interracial Intimacy in America and the Threat to White
Supremacy} 100–19 (2017); \textit{Peter Wallerstein, Race, Sex, and the Freedom to
\item \textsuperscript{624} As Michigan’s Attorney General tried to explain in defense of that state’s same-sex
marriage ban, “in \textit{Loving}, if the couple could not get married, they could not . . . enjoy private
intimacy at all because it was subject to criminal prosecution and jail time.” Transcript of
\item \textsuperscript{625} \textit{Johnson v. Rockefeller}, 365 F. Supp. 377 (S.D.N.Y. 1973). The U.S. Supreme Court
482 U.S. 78, 95–96 (1987), the Court stood by that affirmation but held that prisoners
generally retain the right to marry when “the limitations imposed by prison life” make sexual
relations impossible. On one hand, \textit{Turner} expressly declined to endorse \textit{Johnson}'s rationale;
on the other hand, it saw fit to mention that “most inmate marriages are formed in the
expectation that they will ultimately be fully consummated.”
\item \textsuperscript{626} \textit{Model Penal Code} § 207.1, n.1 (Am. L. Inst., Tent. Draft No. 4), April 25, 1955; 
\textit{see also Model Penal Code} §§ 145–46 (Am. L. Inst., Proposed Official Draft), May 4,
1962 (recommending decriminalization of “private homosexuality not involving force,
imposition or corruption of the young”).
\item \textsuperscript{627} Paul H. Robinson & Markus D. Dubber, \textit{The American Model Penal Code: A Brief
drafts of the MPC and the “host of . . . recodifications” that followed the Code’s formal
promulgation in 1962).
\item \textsuperscript{628} \textit{See Model Penal Code, Comments on Article 207 – Sexual Offenses} 12, 13, 18
(Am. L. Inst., Council Draft No. 8) 1955 (finding “no need to retain dead-letter adultery and
fornication statutes”).
\end{itemize}
political conditions, this wave of statutory reform only intensified in the decade after *Loving*.

By the time the Supreme Court next held a state law to violate the constitutional right to marry, that tribunal had done much to help the Sexual Revolution along. Even as it ruled in *Zablocki v. Redhail* (1978) that the State of Wisconsin couldn’t condition a marriage license on applicants’ fulfillment of child-support obligations, the Court’s own recent decisions had drastically undermined the once-exclusive claim to legitimate sex and procreation that had made license to marry so crucial. Less than a year after *Loving*, *Levy v. Louisiana* (1968) became the first in a line of cases establishing illegitimacy as a presumptively invidious classification under the Equal Protection Clause. In the same month that *Eisenstadt v. Baird* (1971) extended *Griswold’s* marital privacy right to nonmarital couples, again under the Equal Protection Clause, *Boddie v. Connecticut* at least glanced toward—on some readings required—a right, of all things, to divorce. And between 1968 and 1978, the Court invalidated a range of gender-based distinctions in marriage and family law, announced a right to abortion, and afforded limited protection to individuals’ choices about whether and with whom to cohabit.

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633 401 U.S. 371, 383 (1971) (“[A] State may not . . . pre-empt the right to dissolve this legal relationship without affording all citizens access to the means it has prescribed for doing so . . . .’’); *see also* Berg, *supra* note 470 (claiming that *Boddie* effectively recognized a “fundamental right to divorce’’); Karst, *supra* note 470 (citing *Boddie* for the proposition that divorce implicates “all the values that make marriage a ‘fundamental’ interest’’ and suggesting that fault requirements are likely unconstitutional).


636 Moore v. East Cleveland, 431 U.S. 494, 506 (1977); *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528 (1973); *cf. Belle Terre v. Boraas*, 416 U.S. 1, 9 (1975) (upholding a single-family zoning ordinance, but noting that, since the restriction applied only to groups of three or more, it reflected “no animosity toward unmarried couples’’). *Belle Terre* has been widely disparaged as “incompatible with the Court’s modern associational rights jurisprudence.”
Zablocki invoked some of these fresh precedents, admitting no tension between them and the scheme of sexual regulation in which Wisconsin’s harsh child-support law was situated. 637 “[I]f appellee’s right to procreate means anything it all,” the Court stressed, “it must imply some right to enter the only relationship in which the State . . . allows sexual relations to legally take place.”638 Never mind that judges were already folding Loving’s right to marry into an “emerging right of privacy” capacious enough to embrace nonmarital sex. 639 Those intrepid rulings would be vindicated a quarter-century later, in Lawrence v. Texas (2003), whose libertarian doctrine on “matters pertaining to sex,” said the Court, was “apparent” from a short line of cases ending in 1977.640 Following the lead of numerous state legislatures and courts, and ratifying the lived expectations of most Americans, Lawrence enshrined under the federal Constitution a right to sex without marriage—the precise antithesis of natural law’s positive right to marry.641

CONCLUSION: AFTER OBERGEFELL

The original meanings of the right to marry have been legally superseded and—some more than others—widely forgotten. But they aren’t lost in every sense. They aren’t lost to history. The annals of American legal thought abound in evidence of the marriage right’s provenance and meaning in natural law. This Article has taken a first pass at collecting, interpreting, and synthesizing that evidence. It has developed a vocabulary for classifying and describing the main facets of the natural right to marry. And it has traced the right’s genealogy in American jurisprudence over nearly two centuries.

We’ve seen that the natural right to marry was a right, first and foremost, to marriage—a necessarily and exclusively sexual relationship, potentially procreative, wherein a man and woman were privileged to share a home and raise a family. This conjugal structure was “entered through, and only through, the door of


639 State v. Pilcher, 242 N.W.2d 348, 356 (Iowa 1976) (invalidating a sodomy law insofar as it applied to heterosexual intimacies between consenting adults).
640 Lawrence v. Texas, 539 U.S. 558, 578 (2003) (stating that Bowers v. Hardwick, 478 U.S. 186 (1986), “was not correct when it was decided” and naming Carey v. Population Services International, 431 U. S. 678 (1977), as the last of three decisions that “should have been controlling in Bowers,” as Justice John Paul Stevens had urged at the time).
641 See supra Section II.A.
contract," a threshold that natural law guarded with several guarantees of autonomy. Individuals couldn’t marry except by their own free will. When they did so, a simple exchange of consent was all the ceremony nature required. In some quarters it was also thought that, apart from a few limitations imposed by natural law itself, any eligible man could marry any eligible woman. Then, having entered the hallowed estate of matrimony, husband and wife were entitled to stay there. A marriage valid where celebrated was valid everywhere; and the union was indissoluble, if at all, without at least one party’s fault or consent.

Whether respected or flouted by positive law, the natural right to marry was a recurrent touchstone in classical deliberations on the practical regulation of civil marriage. In addition to limited due-process protections against unwarranted dissolution (developed mainly in litigation over migratory divorce), two natural rights of marriage, conjugality and mate selection, eventually worked their way into twentieth-century constitutional doctrine. The first of these was recognized most prominently in *Skinner v. Oklahoma* (1942), an equal-protection case that ranked “marriage and procreation” among “the basic civil rights of man.” Loving v. Virginia (1967) was the case that vindicated a right to marry the person of one’s choice.

*Loving* appeared at the dawn of a new era in American family law. Through statutory and constitutional reform, marriage was stripped in subsequent years and decades of the exclusive claims to licit sex and legitimate procreation that had defined the institution since time immemorial. Admittedly, the demise of the marriage right’s original, conjugal meaning—American law’s renunciation, that is, of the ideal upon which each and every aspect of the natural right to marry was founded—doesn’t conclusively prove that its contemporary avatar is philosophically bankrupt. But it’s hard to imagine stronger evidence to that effect. Were it not for a Supreme Court that persists in cloaking its decisions in this antiquated doctrinal garb, who would dream that *Loving*’s right to marry survives the implosion of its core content? Essences are not so easily replaced.

The spectral remnant of a defunct legal regime, the constitutional right to marry is a problem of more than theoretical interest. It has tangible consequences, beginning with an inherent bias toward the regulatory status quo. Recall the scholars who hypothesize civil marriage’s abolition in order to test the notion of a positive right to marry. Quite sensibly, those thinkers ask whether the state can “get out of the marriage business” in order to ascertain what, if anything, that business might be. The tenacious pretense of a constitutional right to civil marriage signals that

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642 1 BISHOP, COMMENTARIES (4th ed. 1864), supra note 12, at § 121.
644  See supra notes 6–8 and accompanying text.
there’s a live bird at the end of that goose chase. It sends the chilling (if usually subliminal) message that, somehow or other, we’re stuck with the institution we have.

Even as Obergefell v. Hodges dealt the coup de grâce to natural marriage’s inscription in constitutional law, its endorsement of a fundamental right to marry implicitly warned of limits to further experimentation. Yes, Justice Anthony Kennedy’s glorification of wedlock was appalling for all of reasons given by Obergefell’s early, left-of-center critics. But the decision’s sentimental moralism was more than a regrettable rhetorical choice; it was a discursive mode perfectly suited to the ruling’s regressive reliance on the right to marry. Surely that doctrinal fault merits condemnation at least as strong the opinion’s pompous dicta. After all, for all its prestige, the Court is merely a participant in our culture’s ubiquitous mythology of marriage; but no person or institution bears greater responsibility for promulgating the myth of the constitutional right to marry.

Bernstein ed., 2006); Tebbe & Widiss, supra note 7, at 1405; Nussbaum, supra note 7, at 672 (2010); Tamara Metz, Untying the Knot: Marriage, the State, and the Case for Their Divorce 120 (2010); Nicolas, supra note 8, at 129.

Opponents of same-sex marriage are correct on this score. See Robert P. George, Conscience and Its Enemies 133–34 (2013) (acknowledging that “a culture of divorce, the widespread practice of nonmarital sexual cohabitation, the normalization of nonmarital childbearing, and other practices . . . weakened people’s grasp of marriage as a conjugal union,” but lamenting that same-sex marriage “completes the rout”); David Novak, Response to Martha Nussbaum’s “A Right to Marry?,” 98 Cal. L. Rev. 709, 712 (2010) (arguing that marriage, when “redefined” to include same-sex unions, “loses any essential continuity with what previously has gone by the name ‘marriage,’” and that therefore “one must wonder whether the continued use of the . . . name . . . does not turn [it] into a homonym.”); George W. Dent, Jr., Meaningless Marriage: The Incoherent Legacy of Obergefell v. Hodges, 17 Appalachian J.L. 1, 21 (2017) (“Recognition of same-sex marriage destroys [the institution’s] traditional core meaning and offers no replacement.”).

Mercifully, Obergefell did hold that prohibitions of same-sex marriage violate the Equal Protection Clause, not just a “right to marry [that] is fundamental under the Due Process Clause.” Yet Justice Kennedy’s relatively brief discussion of equality, aside from being interwoven with and muddied by musings on the “profound . . . synergy” between “the two Clauses,” was not nearly so compelling or useful as the more straightforward explanations he eschewed. Why gay marriage bans unconstitutionally discriminate on the basis of sex and sexual orientation; why they deny “equal access” to an important civil (not constitutional) right; why they impermissibly burden individuals’ freedom to choose same-sex relations and relationships. Such missed opportunities are probably the most immediate and concrete costs of maintaining the illusion of a constitutional right to marry. When a court invalidates a law on that basis, it perforce rules incorrectly. When “marriage” has ceased to have any necessary meaning, a right-to-marry opinion conceals the true moral and legal stakes of a dispute and stifles development of more suitable doctrine.

Unmoored from its origin in natural law, the fundamental right to marry is logically and ideologically incoherent. Its continued recitation obscures salutary developments in family and constitutional law, obstructs further progress, and limits political imagination about a flawed but mutable institution. Is it not time to give up this ghost? If we cease scrambling for a definition of what marriage is and must remain, we might finally begin to learn the freedom that comes without one.

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649 Id. at 2603–04 ("[T]he Equal Protection Clause, like the Due Process Clause, prohibits this unjustified infringement of the fundamental right to marry.").
651 See Tebbe & Widiss, supra note 7, at 1377.