

# RIGHTS, PRIVILEGES, AND THE FUTURE OF MARRIAGE LAW

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## INTRODUCTION

On the occasion of its final triumph, has the cause of marriage equality fallen short? As the smoke clears from the Supreme Court of the United States' decision in *Obergefell v. Hodges*, requiring states to extend legal marriage recognition to same-sex couples, the precise implications of the decision for state marriage laws are yet to be revealed.<sup>1</sup> What is the future of marriage law in this new constitutional order? A tentative answer might be gleaned from the laws of states in which same-sex relations have been given the legal status of "marriage" for some time.<sup>2</sup> A close examination of those laws reveals significant inequalities of duties, rights, presumptions, and other incidents of marriage.<sup>3</sup> Many of the incidents of natural marriage that are codified in positive law have proven strikingly persistent,<sup>4</sup> despite the proliferation in the last decade of

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\* Associate Professor, Faulkner University, Thomas Goode Jones School of Law. This paper grew out of simultaneous conversations with two Jims. James Stoner challenged me to consider the nature of the rights of biological parents at the same time that I was serving as a special Deputy Attorney General of Alabama, advising Assistant Attorney General James Davis about the constitutionality of state marriage laws and discussing the nature of the marriage right. During that work I learned much from Alabama's designated experts, Sherif Girgis and Loren Marks. All four helped me to clarify my thoughts. James Stoner also read a draft and supplied very helpful comments. The *Regent University Law Review* editors provided excellent editorial assistance and I am grateful for their invitation to submit this article to them. The errors are all my own.

<sup>1</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604–05 (2015).

<sup>2</sup> *E.g.*, ME. REV. STAT. ANN. tit. 19-A, § 806 (West, Westlaw through ch. 238, 268–306, 2015 1st Reg. Sess.) (governing proceedings between a husband and wife, using sex-specific terms); MASS. GEN. LAWS ANN. ch. 207, §§ 1–2 (West, Westlaw through ch. 68, 2015 1st Annual Sess.) (prohibiting incestuous marriages in opposite-sex relationships); Marriage Equality Act, ch. 95, § 2, 2011 N.Y. Sess. Laws 723, 723 (McKinney) (requiring that same-relationships be treated as marriage in New York).

<sup>3</sup> See Sacha M. Coupet, "Ain't I a Parent?": *The Exclusion of Kinship Caregivers from the Debate Over Expansions of Parenthood*, 34 N.Y.U. REV. L. & SOC. CHANGE 595, 630 (2010) (contrasting the parental status of married parents, kinship caregiver, and same-sex partners); Jeffrey A. Parness & Zachary Townsend, *Procreative Sex and Same Sex Parents*, 13 GEO. J. GENDER & LAW 591–92, 603 (2012) (noting that "when there are children born of sex, equality and sameness [between same-sex couples and natural marriages] are impossible").

<sup>4</sup> *E.g.*, ME. REV. STAT. ANN. tit. 19-A, § 806 (West, Westlaw through ch. 238, 268–306, 2015 1st Reg. Sess.) (Maine statute governing proceedings between a husband and wife); MASS. GEN. LAWS ANN. ch. 209C, § 6 (West, Westlaw through ch. 67, 2015 1st Annual Sess.)

judicial decisions and statutes declaring that natural marriage and same-sex marriage must be treated equally.<sup>5</sup>

Consider Massachusetts.

- Michael and Wilma are married and reside in Massachusetts. Wilma is unfaithful and becomes pregnant while Michael is away on business. She gives birth to a child. Michael denies that the child is his. Under the presumption of paternity in Massachusetts law,<sup>6</sup> Michael is nevertheless deemed the father, severing the rights and duties of the biological father. All of the rights and duties bound up in the jural relation between father and child now pertain between Michael and Wilma's biological child.
- Wanda and Wolanda are married and reside in Massachusetts. Wolanda is unfaithful and becomes pregnant while Wanda is away on business. She gives birth to a child. Wanda denies that the child is hers.<sup>7</sup> Wanda is neither a "man" nor a "father" within the meaning of the statute,<sup>8</sup> but is she presumed the second parent? The law is unclear.
- Matthew and Mark are married and reside in Massachusetts. Mark is unfaithful while Matthew is away on business and impregnates Wendy, who gives birth to a child. Wendy is the child's legal mother because the paternity presumption statute does not terminate her rights and duties.<sup>9</sup> Is Matthew or Mark the legal father, or someone else? If Mark is the legal father, then it would be by virtue of his biological parentage; he is not married to Wendy, so the presumption does not operate.<sup>10</sup> It seems absurd

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(Massachusetts paternity presumption statute); N.Y. DOM. REL. LAW § 5 (McKinney, Westlaw through L.2015, ch. 1-235) (New York incest prohibition).

<sup>5</sup> *E.g.*, ME. REV. STAT. ANN. tit. 19-A, § 650-A (West, Westlaw through ch. 238, 268-306, 2015 1st Reg. Sess.); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 482 (Conn. 2008); *Garden State Equal. v. Dow*, 82 A.3d 336, 367-68 (N.J. Super. Ct. Law Div. 2013).

<sup>6</sup> MASS. GEN. LAWS ANN. ch. 209C, § 6(a)(1) (West, Westlaw through ch. 68, 2015 1st Annual Sess.).

<sup>7</sup> If Wolanda conceived by artificial insemination with Wanda's consent, then Wanda is deemed by law to be the child's second parent, severing any rights of the biological father. *Hunter v. Rose*, 975 N.E.2d 857, 861-62 (Mass. 2012); *Della Corte v. Ramirez*, 961 N.E.2d 601, 602-03 (Mass. App. Ct. 2012).

<sup>8</sup> The statute identifies the case in which "a man is presumed to be the father of a child." § 6(a) (Westlaw). Perhaps those terms would be interpreted to include a second mother married to the biological mother on the ground that such a construction would serve the statute's purpose of making illegitimate children legitimate. § 1 (Westlaw). On the other hand, the fiction that both biological parents are in the marriage will be difficult to maintain once the child reaches the age of understanding.

<sup>9</sup> *Ops. of the Justices to the Senate*, 802 N.E.2d 565, 577 n.3 (Mass. 2004) (Sosman, J., dissenting).

<sup>10</sup> § 6(a)(1)-(3) (Westlaw).

to suppose that legal paternity would attach to Matthew at all. The presumption of paternity has no application to this couple.

More than a decade after the Massachusetts Supreme Judicial Court ruled that it was irrational for Massachusetts to set marriage and same-sex couples apart from each other,<sup>11</sup> those categories remain persistent in Massachusetts law for these purposes.<sup>12</sup> Unless both the biological father and presumed parent consent, the rights and duties of fathers do not necessarily apply to half of same-sex couples, and the rights and duties of mothers do not apply to the other half, but both complexes of jural relations attach to man-woman marriages.<sup>13</sup>

Or consider New York. The legislation creating same-sex marriage in that state declaims, “[i]t is the intent of the legislature that the marriages of same-sex and different-sex couples be treated equally in all respects under the law.”<sup>14</sup> By calling same-sex marriage and opposite-sex marriage by different names, the statute treats them at least nominally unequally. And the difference is more than nominal; the entire scheme of norms attaching to marriage presupposes natural marriage, and the rationality of many of those norms drops out if marriage is something other than the union of a man and woman.<sup>15</sup> Recently, the high court of New York interpreted New York’s incest prohibition in light of its rational basis that incest carries a risk of genetic defects in potential biological offspring.<sup>16</sup> That justification, too, makes no sense if two men or two women have exactly the same rights and duties of “marriage” as a man and a woman.<sup>17</sup> If the incest norm is to apply to same-sex couples then it must rest on some other rationale.

As in New York, the incest prohibition in Massachusetts positive law<sup>18</sup> is defined by its opposite-sex predicates.<sup>19</sup> It would be hasty to

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<sup>11</sup> *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 968 (Mass. 2003).

<sup>12</sup> See § 6(a)(1)–(5) (Westlaw) (listing circumstances under which “a man is presumed to be the father of a child” based on traditional marriage assumptions).

<sup>13</sup> *Id.*

<sup>14</sup> Marriage Equality Act, ch. 95, § 2, 2011 N.Y. Sess. Laws 723, 723 (McKinney).

<sup>15</sup> Cf. George W. Dent, Jr., *The Defense of Traditional Marriage*, 15 J.L. & POL. 581, 582 (1999) (arguing that several rationales for the legal recognition of marriage apply only to natural marriages, particularly protection of children).

<sup>16</sup> *Nguyen v. Holder*, 21 N.E.3d 1023, 1026 (N.Y. 2014) (Smith, J., concurring) (explaining a rationale for the court’s brief holding).

<sup>17</sup> Mark Strasser, *The Future of Same-Sex Marriage*, 22 U. HAW. L. REV. 119, 140 (2000).

<sup>18</sup> MASS. GEN. LAWS ANN. ch. 272, § 17 (West, Westlaw through Ch. 68, 2015 1st Annual Sess.). Massachusetts also retains its polygamy prohibition. Ch. 207, § 4 (Westlaw).

<sup>19</sup> “No man shall marry his mother, grandmother, daughter, granddaughter, sister . . . .” § 1 (Westlaw). “No woman shall marry her father, grandfather, son, grandson, brother . . . .” § 2 (Westlaw).

suppose that these formal differences between marriage and same-sex marriage in state laws are *merely* formal. Despite the lack of any rational basis for applying the incest prohibition to same-sex couples, New York continues to apply it to naturally-married couples.<sup>20</sup> The nature of marriage as a man-woman union makes the anti-incest norm coherent as a norm, and supplies its rational basis.<sup>21</sup> In New York and Massachusetts, married couples and same-sex married couples are distinctly unequal in some respects, and those differences appear to be grounded in fundamental *reasons*.

So, the result of extending legal recognition to same-sex couples has been to make such couples equal to married couples with respect to some incidents of marriage, but not others. Indeed, despite redefinition of marriage, there remain at least (not accounting for additional revisions to the definition that might be required in the future to meet claims by bisexual and transsexual individuals) three different categories of marriage: man-woman marriages, man-man marriages, and woman-woman marriages.<sup>22</sup>

#### I. FUNDAMENTAL RIGHTS AND CONCESSIONS OF PRIVILEGE

Why have the rights of marriage not distributed completely equally? It seems that lawmakers and courts have thus far overlooked many of the rights and duties of marriage. I suggest that part of the explanation is found in the nature of the rights claims that have been asserted by proponents of marriage equality and were recently affirmed by the Supreme Court.<sup>23</sup> Marriage revisionists and some defenders of natural marriage definitions in law appear to have succumbed to the positivist fallacy.<sup>24</sup> And many rights and duties of marriage are not creations of positive law.

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<sup>20</sup> *E.g.*, *Nguyen*, 21 N.E.3d at 1024 (applying the incest prohibition to an opposite-sex couple, but finding that it was not violated in that particular instance); *People v. Burch*, 684 N.Y.S.2d 101, 101–02 (N.Y. App. Div. 1998) (rejecting the defendant’s argument that the prosecution failed to prove a sexual assault perpetrator was not married to his alleged victims because under the incest prohibition such a marriage would be void).

<sup>21</sup> *See, e.g.*, *Nguyen*, 21 N.E.3d at 1026 (explaining that a primary purpose of incest prohibitions is to prevent genetic defects in offspring).

<sup>22</sup> *Cf.* Dale Carpenter, *A Traditionalist Case for Gay Marriage*, 50 S. TEX. L. REV. 93, 101 (2008) (referring to man-woman, man-man, and woman-woman marriages separately).

<sup>23</sup> *Obergefell*, 135 S. Ct. at 2604–05.

<sup>24</sup> *E.g.*, James L. Musselman, *What’s Love Got to Do with It? A Proposal for Elevating the Status of Marriage by Narrowing Its Definition, While Universally Extending the Rights and Benefits Enjoyed by Married Couples*, 16 DUKE J. GENDER L. & POL’Y 37, 86–87 (2009); Vincent J. Samar, *Privacy and Same-Sex Marriage: The Case for Treating Same-Sex Marriage as a Human Right*, 68 MONT. L. REV. 335, 360–61 (2007).

Though advocates for extending legal marriage recognition to same-sex couples use the language of rights,<sup>25</sup> their reasoning presupposes that the right to marry is a creation of positive law: lawmakers have crafted marriage laws to include only opposite-sex couples; they are able to (and should, in justice) re-craft marriage laws to include same-sex couples.<sup>26</sup> Different lawyers might scrutinize differently the state interests justifying any particular definition of marriage, but it is taken for granted that the jural relations constituting civil marriage are open to alteration because they emanate from positive legal enactments,<sup>27</sup> and that they should be altered if they cannot be justified on the basis of sufficiently weighty interests.<sup>28</sup>

The *United States v. Windsor* majority ratified the positivist view of marriage laws when it characterized the same-sex marriage right as a product of New York's positive laws, enacted by the state's sovereign will in the exercise of its "power in defining the marital relation."<sup>29</sup> Thus, "the state's decision to give this class of persons the right to marry conferred upon them a dignity and status of immense import."<sup>30</sup> The equal status of marriage and same-sex marriage is, in this account, not inherent in the individuals or in the nature of the relations themselves, but rather "conferred by the States in the exercise of their sovereign power."<sup>31</sup>

The *Obergefell* majority replaced the sovereignty of states with the supremacy of a newly-discovered "fundamental right," an extension of the right of intimate association announced in *Lawrence v. Texas*,<sup>32</sup> to enable same-sex couples to define themselves by employing state law in their acts of commitment to each other.<sup>33</sup> This new right, like the *Windsor* Court's characterization of the old marriage right, is a creation of positive law rather than nature, custom, or some source of normativity external to governmental powers.<sup>34</sup> In the Court's characterization of their claim, the *Obergefell* plaintiffs sought "equal dignity in the eyes of the law."<sup>35</sup> The Constitution now confers that dignity on same-sex couples by creating for

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<sup>25</sup> Samar, *supra* note 24, at 360–61.

<sup>26</sup> *Id.* at 337, 360–61.

<sup>27</sup> *See id.* (stating that marriage is nothing more than "a social construction," and that because the state grants opposite-sex couples the right to marry, that right can and should be extended to same-sex couples).

<sup>28</sup> *Id.* at 360–61.

<sup>29</sup> 133 S. Ct. 2675, 2692 (2013).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 2693. The Court thus rehabilitated a long-discredited jurisprudence of state sovereignty over the norms of domestic relations. *See infra* Part II.E.

<sup>32</sup> 539 U.S. 558 (2003).

<sup>33</sup> *Obergefell*, 135 S. Ct. at 2604–05.

<sup>34</sup> *Id.* at 2602.

<sup>35</sup> *Id.* at 2608.

them the possibility of making “certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs.”<sup>36</sup>

According to this reasoning, the right to marry emanates from the will of the sovereign lawmaker, either the state or the Court itself. Of course, rights that the sovereign power creates the sovereign power can also destroy. If they are not authorized and specified by nature, custom, universal reason, or some source of authority other than the sovereign power, then marriage rights are in a parlous position.<sup>37</sup> Because they impose on the sovereign power no obligation, marriage rights on this account are not properly considered rights at all, but rather what Jeremy Bentham called “concessions of privileges,”<sup>38</sup> which bind the sovereign only insofar as a sovereign can be bound “who has the whole force of the political sanction at his disposal.”<sup>39</sup> In short, from the perspective of the sovereign, “they are not *laws*.”<sup>40</sup>

To be sure, the *Obergefell* decision requires that marriage *equality* is an obligation binding the sovereign—in this context, the states.<sup>41</sup> Precisely because the Court views the dignity and importance of marriage as emanating from state laws, that dignity and importance cannot be denied to same-sex couples, the Court insists.<sup>42</sup> But the requirement of equality does not entail that there must be any privileges of marriage, much less does it specify what such privileges shall be; only that any privileges created by positive law must be distributed equally.<sup>43</sup> The challenge for marriage revisionists is to show that natural marriage and same-sex marriage can and must be made equal without eliminating all the

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<sup>36</sup> *Id.* at 2597.

<sup>37</sup> Cf. James C. Dobson, *Marriage is the Foundation of the Family*, 18 NOTRE DAME J.L. ETHICS & PUB. POL’Y 1, 1–2 (2004) (“If we are willing to entertain the idea that marriage is a human creation, then we must also accept the notion that it is subservient to and pliable by the State.”).

<sup>38</sup> JEREMY BENTHAM, OF LAWS IN GENERAL (H.L.A. Hart ed., 1970) reprinted in THE COLLECTED WORKS OF JEREMY BENTHAM 1, 16 (J.H. Burns ed., 1970).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Obergefell*, 135 S. Ct. at 2604–05.

<sup>42</sup> See *id.* at 2608 (stating that the petitioners seek “equal dignity in the eyes of the law,” that this is a right granted by the Constitution, and holding that dignity must be given to them by extending the positive law definition of marriage to include same-sex couples).

<sup>43</sup> See Michael W. Dowdle, Note, *The Descent of Antidiscrimination: On the Intellectual Origins of the Current Equal Protection Jurisprudence*, 66 N.Y.U. L. REV. 1165, 1203–04 (1991) (arguing that positive law privileges do not have to be granted at all, but equal protection requires that they be distributed equally if they are granted); see also *Obergefell*, 135 S. Ct. at 2612 (Roberts, C.J., dissenting) (noting that the Constitution requires marriage laws to be applied equally, but the question remains as to how marriage is to be defined).

essential norms of marriage. We must inquire whether that can be accomplished, and what would be the implications.

#### A. Modern Fundamental Rights

The Supreme Court of the United States described marriage rights quite differently before its *Windsor* decision. While it has not treated marriage and family norms as fully-conclusive reasons binding the practical deliberations of lawmakers, the Court has nevertheless approached many rights of marriage as if they exist prior to their declaration, codification, and specification within positive law.<sup>44</sup> The Court's marriage jurisprudence prior to *Windsor* consistently expressed or assumed the presupposition that the norms of marriage preceded their declaration and codification in positive law.<sup>45</sup> They were grounded not in paucital jural relations between two people asking for a marriage license, but rather in multital jural relations among parents and between parents and children,<sup>46</sup> which correlate with each other, are mutually dependent, and give rise to duties of non-interference in those who are outside the family.<sup>47</sup>

This complex of jural relations is vested in a discrete group of people—the family, comprised of father-mother-children—to which governments give recognition but did not create and are not free to rearrange.<sup>48</sup> The integrity of the family is a source of obligation that does not owe its existence to positive law, and that fact constrains the freedom of lawmakers to alter positive laws governing the family.<sup>49</sup> The Court has located the foundation of the family's liberty in the freedom to “marry and reproduce[ , which] is ‘older than the Bill of Rights.’”<sup>50</sup> Therefore, “the liberty interest in family privacy has its source, and its contours are ordinarily to be sought, not in state law, but in intrinsic human rights, as they have been understood in ‘this Nation’s history and tradition.’”<sup>51</sup> This, the Court has explained, is the fundamental difference between “the

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<sup>44</sup> *E.g.*, *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 845 (1977).

<sup>45</sup> *E.g.*, *id.*; *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942).

<sup>46</sup> *See Troxel v. Granville*, 530 U.S. 57, 65–66 (2000) (explaining the rights and duties of parents to their children); *Smith*, 431 U.S. at 845 (describing “the liberty interest in family privacy”); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) (noting that parents have a primary role in the nurture and upbringing of their children).

<sup>47</sup> *Moore v. City of E. Cleveland*, 431 U.S. 494, 499 (1977) (plurality opinion).

<sup>48</sup> *Smith*, 431 U.S. at 845; *Moore*, 431 U.S. at 499.

<sup>49</sup> *Smith*, 431 U.S. at 845.

<sup>50</sup> *Id.* (quoting *Griswold*, 381 U.S. at 486).

<sup>51</sup> *Id.* (footnote omitted) (quoting *Moore*, 431 U.S. at 508).

natural family” and “the foster family,” which, unlike the natural family, has its origins in “state law and contractual arrangements.”<sup>52</sup>

Thus, it is not “within the competency of the State” to infringe on fundamental rights of the natural family.<sup>53</sup> For example, to usurp the authority of a parental right-bearer is excluded from the state’s “general power” because the “child is not the mere creature of the State.”<sup>54</sup> The liberty of parents in the “care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests recognized by this Court.”<sup>55</sup> The Court has explained, “[o]ur decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation’s history and tradition.”<sup>56</sup> No government created the family, and governments are not free to intrude within its domain.

Does this make the rights of marriage and the natural family fundamental? The use of the term “fundamental rights” in contemporary American constitutional law is ambiguous.<sup>57</sup> In the idiosyncratic sense employed by the Supreme Court in recent years, particularly the line of decisions following *Lawrence*,<sup>58</sup> the term refers to an often-abstract, two-term liberty interest (*A* has the right to do *x*), that is not a conclusive right, but that can be burdened only to serve a compelling state interest and only if the law burdening the liberty is narrowly tailored—is the least restrictive means—to achieve that interest.<sup>59</sup> An interest given that designation is said to be a “fundamental right” for purposes of the substantive due process emanating from the Fourteenth Amendment.<sup>60</sup>

Yet the norms of marriage preceded substantive due process doctrine by several centuries, and they were declared part of our fundamental law long before the *Lawrence* decision.<sup>61</sup> For purposes of understanding the Court’s marriage jurisprudence, the recent idiosyncratic usage of “fundamental right” is not as interesting or important as the broader jurisprudential phenomenon of rights deemed so fundamental that

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<sup>52</sup> *Id.*

<sup>53</sup> *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925).

<sup>54</sup> *Id.* at 535.

<sup>55</sup> *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

<sup>56</sup> *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion).

<sup>57</sup> See Wendy E. Parmett, *Due Process and Public Health*, J.L. MED. & ETHICS, Winter 2007, at 33, 34 (noting a long-running debate within Supreme Court precedent as to what constitutes a fundamental right).

<sup>58</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>59</sup> *Kerry v. Din*, 135 S. Ct. 2128, 2133 (2015); *Carey v. Population Servs. Int’l*, 431 U.S. 678, 686 (1977).

<sup>60</sup> *Chavez v. Martinez*, 538 U.S. 760, 775 (2003).

<sup>61</sup> *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 845 (1977).

governments and positive lawmakers are not at liberty to infringe or abrogate them at will. That rights grounded in the Bill of Rights and the Fourteenth Amendment do not exhaust the category of fundamental rights is proven by the existence of the Ninth Amendment, which provides that “[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”<sup>62</sup>

Whatever its particular doctrinal significance, a fundamental right for present purposes is one that is part of our fundamental law. In the Court’s language, a fundamental right is so “‘deeply rooted in this Nation’s history,’” “‘traditions,’” and “‘conscience’” that it is “‘implicit in the concept of ordered liberty,’” such that “‘neither liberty nor justice would exist’” if governments were free to eliminate it from positive law or burden its exercise.<sup>63</sup>

This is precisely the approach to fundamental rights that the Court expressly bracketed in *Obergefell*, explaining that, however appropriate it might be in the context of assisted suicide, a different approach is required to define rights of intimate association.<sup>64</sup> The Court explained, “[t]he right to marry is fundamental as a matter of history and tradition, but rights come not from ancient sources alone. They rise, too, from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era.”<sup>65</sup> Whose understanding is that? The Court in *Obergefell* was relying on its understanding, specifically its “‘understanding of what freedom is and must become.’”<sup>66</sup> The liberty interest in intimate association runs parallel to the fundamental marriage norms; it does not grow out of them.<sup>67</sup>

How does this new liberty become what the Court now understands it should be? Only by changing positive law. It is a privilege created by the sovereign lawmaking power of the Supreme Court of the United States.<sup>68</sup>

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<sup>62</sup> U.S. CONST. amend. IX; see also Jeffrey D. Jackson, *Blackstone’s Ninth Amendment: A Historical Common Law Baseline for the Interpretation of Unenumerated Rights*, 62 OKLA. L. REV. 167, 171 (2010) (arguing that the unenumerated rights referred to in the Ninth Amendment should be understood with reference to a common law baseline, especially as specified in Blackstone’s Commentaries).

<sup>63</sup> *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (quoting *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion)); *Palko v. Connecticut*, 302 U.S. 319, 324–26 (1937); *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).

<sup>64</sup> *Obergefell*, 135 S. Ct. at 2602.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 2603.

<sup>67</sup> See Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 B.Y.U. L. REV. 1, 52 (1996) (noting that the concept of marriage is rooted deeply in history and tradition, while the right of intimate association in the context of same-sex relationships is not).

<sup>68</sup> *Obergefell*, 135 S. Ct. at 2629 (Scalia, J., dissenting).

(Exactly what that power is and where it is found in the Constitution remains unclear.)<sup>69</sup> The new liberty privilege of intimate association specified in *Lawrence*, *Windsor*, and *Obergefell* would not exist but for its specification in law; if not statutory law, then decisions of the Supreme Court hastening the development of legislative enactments.<sup>70</sup> The understanding is a *new* understanding; the privilege is a *new* privilege.<sup>71</sup> It would not exist but for the sovereign lawmaker's—in these cases, the Court's—expression of the new understanding.

By contrast, rights that are grounded in our ancient customs, traditions, and conscience are recognized as rights precisely because they precede and transcend positive law.<sup>72</sup> So there are at least two strands of fundamental rights jurisprudence in the Court's decisions.<sup>73</sup> In one strand, traceable through *Lawrence*, *Windsor*, and *Obergefell*, to understand whether a liberty interest is fundamental one must anticipate the Court's evolving understanding of liberty.<sup>74</sup> In the other strand, discernable in *Troxel v. Granville*,<sup>75</sup> *Moore v. City of East Cleveland*,<sup>76</sup> *Loving v. Virginia*,<sup>77</sup> and *Washington v. Glucksberg*,<sup>78</sup> to understand whether a right is fundamental one must look at that part of our law that originates in our nation's history, traditions, and conscience.<sup>79</sup>

### B. Ancient, Rooted Fundamental Rights

Compared to the privileges declared in the *Lawrence-Obergefell* line of cases, a right that is fundamental is a right that originates not in

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<sup>69</sup> *Id.* at 2624, 2626 (Roberts, C.J., dissenting).

<sup>70</sup> Nancy Catherine Marcus, *The Freedom of Intimate Association in the Twenty First Century*, 16 GEO. MASON U. CIV. RTS. L.J. 269, 280 (2006).

<sup>71</sup> *Id.* (describing the origin of the “new” doctrine of intimate association that the Court created in *Griswold v. Connecticut*, 381 U.S. 479 (1965)).

<sup>72</sup> Cf. Patrick McKinley Brennan, *The Place of “Higher Law” in the Quotidian Practice of Law Herein of Practical Reason, Natural Law, Natural Rights, and Sex Toys*, 7 GEO. J.L. & PUB. POL'Y 437, 473 n.150 (2009) (“[T]radition is ordinarily the only—not just one possible—source of insight into the rights that people by nature possess, *assuming* that the object of inquiry via tradition is what precedes tradition, to wit, natural law and natural rights. Until recently, it went without saying that tradition was the courts' entrée to resolving novel questions regarding rights.”).

<sup>73</sup> Compare *Obergefell*, 135 S. Ct. at 2602–04, and *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003), with *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997), and *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion).

<sup>74</sup> *Obergefell*, 135 S. Ct. at 2602; *United States v. Windsor*, 133 S. Ct. 2675, 2692–93 (2013); *Lawrence*, 539 U.S. at 578–79.

<sup>75</sup> 530 U.S. 57, 65 (2000).

<sup>76</sup> *Moore*, 431 U.S. at 503.

<sup>77</sup> 388 U.S. 1, 12 (1967).

<sup>78</sup> *Glucksberg*, 521 U.S. at 720–21.

<sup>79</sup> *Id.*

positive law, but rather in other sources of authority, which lawmakers disregard at their, and our, peril.<sup>80</sup> In our Anglo-American legal tradition, those sources are primarily divine law, natural law, and customs so ancient that “the memory of man runneth not to the contrary.”<sup>81</sup> Rights and duties that are natural, divinely ordained, or part of our ancient traditions and customs are part of our fundamental law.<sup>82</sup> They would be rights and duties—they would have the authority of law—even if no sovereign lawgiver ever recognized them as law or codified them in statutes or constitutions.<sup>83</sup> To the extent that positive law incorporates those rights and duties, it is not creating them or giving them any additional normative directiveness.<sup>84</sup> Rather, positive law is, in Blackstone’s parlance, merely “declaratory” of those norms.<sup>85</sup>

Many of those norms, though not all, are beyond the reach of positive law, particularly those specified by divine and natural law.<sup>86</sup> In his *Commentaries on the Laws of England*, Blackstone insisted that the municipal lawgiver’s power to declare law is constrained:

[N]o human legislature has power to abridge or destroy [natural rights], unless the owner shall himself commit some act that amounts to a forfeiture. Neither do divine or natural *duties* (such as, for instance, the worship of God, the maintenance of children, and the like) receive any stronger sanction from being also declared to be duties by the law of the land. The case is the same as to crimes and misdemeanors, that are forbidden by the superior laws, and therefore stiled *mala in se*, such as murder, theft, and perjury; which contract no additional turpitude from being declared unlawful by the inferior legislature. For that legislature in all these cases acts only, as was before observed, in subordination to the great lawgiver, transcribing and publishing his precepts. So that, upon the whole, the declaratory part of the municipal law has no force or operation at all, with regard to actions that are naturally and intrinsically right or wrong.<sup>87</sup>

The legal doctrines declaratory of those norms, along with the customary law of England, were brought to the American colonies and formed the basis of our laws at the time of the Founding, with some modifications to

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<sup>80</sup> 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND \*54 (St. George Tucker ed., Augustus M. Kelley 1969) (1803).

<sup>81</sup> *Id.* at \*54, \*63, \*76.

<sup>82</sup> *See, e.g.,* *Duncan v. Louisiana*, 391 U.S. 145, 148, 151–53, 157–58 (1968) (holding that a right to trial by jury is a fundamental right applicable to the states because it is rooted in American tradition and customs).

<sup>83</sup> 1 BLACKSTONE, *supra* note 80, at \*54.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at \*42.

<sup>86</sup> *Id.* at \*54.

<sup>87</sup> *Id.*

reflect the change from monarchy to republican government.<sup>88</sup> And what Blackstone called “superior” law<sup>89</sup> emerges as part of the “fundamental” law in a definite strand of the Supreme Court’s rights jurisprudence, which the Court summarized in *Moore*<sup>90</sup> and especially in *Glucksberg*.<sup>91</sup>

Thus, divine and natural rights and duties, along with ancient general and local customs—and not merely our written Constitution—form our fundamental law. James Stoner has explained:

Supposing that law is the decree of the sovereign power, or a social rule made according to a rule of recognition, or public policy written and formalized, we think of the Constitution as fundamental because it establishes the rules by which laws are made, as well as rules that limit lawmaking. At the time of the Founding, by contrast, common or unwritten law was the basis of the law in all the colonies, with legislation understood as its supplement or its corrective.<sup>92</sup>

After independence, the states chose to retain and adopt the common law, adapting it to the customs and practices of their own people.<sup>93</sup> The foundational legal order underlying state constitutions and the United States Constitution was established by common law norms and institutions.<sup>94</sup> “Political discontinuity overlay a basic continuity of legal order . . . .”<sup>95</sup>

As Stoner observes, not everyone uses the term “fundamental law” today to mean what it meant at the Founding.<sup>96</sup> Yet, the older strand of reasoning about fundamental law, firmly grounded in our conscience, traditions, and customs, persists in the Supreme Court’s fundamental rights jurisprudence, somewhat uncomfortably, alongside its better-known cousins—substantive due process doctrine and Supremacy Clause jurisprudence.<sup>97</sup> As Justice Powell noted in *Moore*, the Court’s due process jurisprudence strikes a balance between our fundamental legal continuity with the common law and the overlying political discontinuity from England, adopting “what history teaches are the traditions from which

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<sup>88</sup> JAMES R. STONER, JR., COMMON-LAW LIBERTY: RETHINKING AMERICAN CONSTITUTIONALISM 15 (2003).

<sup>89</sup> 1 BLACKSTONE, *supra* note 80, at \*54.

<sup>90</sup> *Moore v. City of E. Cleveland*, 431 U.S. 494, 503–04 n.10–12 (1977) (plurality opinion).

<sup>91</sup> *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997).

<sup>92</sup> STONER, *supra* note 88, at 79.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> See *supra* notes 73–79 and accompanying text.

[our nation] developed as well as the traditions from which it broke.”<sup>98</sup> American legal tradition reflects both of those developments. “A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound.”<sup>99</sup>

In *Glucksberg*, for example, the Court rejected a claim that the Constitution contains a fundamental right to assistance in committing suicide<sup>100</sup> in large part because our unbroken common law tradition condemns suicide as *malum in se*, a crime that is inherently wrong, not merely because positive law prohibits it.<sup>101</sup> There can be no fundamental right to receive assistance in suicide because the law declares the pre-existing divine and natural duties not to kill oneself and not to assist another’s self-destruction.<sup>102</sup> The states did not adopt the forfeiture and dishonor that English common law imposed upon suicides because the burden of those punishments fell not on the suicide, but on his family, victimizing them a second time for an act they did not commit.<sup>103</sup> The progression of this tradition moves upon the continued unbroken validity of laws prohibiting someone from *assisting* another’s suicide.<sup>104</sup>

This broad, ancient, and rooted understanding of fundamental rights presupposes domains of authority outside the competency of the state.<sup>105</sup> Those domains of authority settle and specify the jural relations—both paucital (e.g., wife’s right to husband’s fidelity, landlord’s right to receive rent from tenant)<sup>106</sup> and multital (e.g., father-mother-children’s right to remain a family, joint tenants A-B-C-Ds’ right to exclude non-owners from Blackacre)<sup>107</sup>—of those within the domains, subject to the norms and institutions that the common law has devised to impose boundaries of

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<sup>98</sup> *Moore v. City of E. Cleveland*, 431 U.S. 494, 501 (1977) (plurality opinion) (quoting *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)).

<sup>99</sup> *Id.* (quoting *Poe v. Ullman*, 367 U.S. at 542 (Harlan, J., dissenting)).

<sup>100</sup> *Washington v. Glucksberg*, 521 U.S. 702, 735 (1997).

<sup>101</sup> *Id.* at 711–12; 4 BLACKSTONE, *supra* note 80, at \*189.

<sup>102</sup> 4 BLACKSTONE, *supra* note 80, at \*189.

<sup>103</sup> *Glucksberg*, 521 U.S. at 713.

<sup>104</sup> *Id.* at 716.

<sup>105</sup> 1 BLACKSTONE, *supra* note 80, at \*54.

<sup>106</sup> WESLEY NEWCOMB HOHFELD, *Fundamental Legal Conceptions as Applied in Judicial Reasoning II*, in *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING* 70, 72 (Walter Wheeler Cook ed., 1923).

<sup>107</sup> *Id.*

reasonableness on the norms.<sup>108</sup> Even the state, a government of general jurisdiction, has no power to usurp the authority of these domains.<sup>109</sup>

The authorities giving rise to fundamental rights might be unwritten or intangible authorities such as conscience,<sup>110</sup> custom or common law,<sup>111</sup> maxims and other background principles of common law,<sup>112</sup> natural rights and duties,<sup>113</sup> right reason or “immutable principles of justice”;<sup>114</sup> or they might be more concrete, such as a jury verdict in a civil action<sup>115</sup> or a parent’s decisions concerning the education of her children.<sup>116</sup> Someone other than the government generates the norms on which fundamental rights are grounded, and the government has a duty to leave those norms in place, except for very particular and strong reasons and perhaps without exception at all.<sup>117</sup> What reasons count as sufficiently strong (or, in particular Fourteenth Amendment terminology, “compelling”)<sup>118</sup> and which governments owe the duty (governments of general jurisdiction, such as states, or enumerated powers, such as the national government) is beyond the scope of this Article. In other words, that a right is fundamental within my analysis does not entail that it has been incorporated against the states by the Fourteenth Amendment. Nor does it entail that it is absolute.

What this Article calls “fundamental rights” (and “fundamental duties”) are akin to, but more particular than, the common law concept of

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<sup>108</sup> See ADAM J. MACLEOD, PROPERTY AND PRACTICAL REASON 239, 241 (2015) (arguing that property as a common law institution is governed only secondarily by the authority of positive law, and primarily by private ordering through the exercise of practical reason).

<sup>109</sup> 1 BLACKSTONE, *supra* note 80, at \*54.

<sup>110</sup> See *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972) (holding that a law could not compel an individual to act in a manner “at odds” with his or her fundamental religious beliefs); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 645 (1943) (Murphy, J., concurring) (explaining that the Constitution protects the freedom to worship “according to the dictates of one’s conscience”).

<sup>111</sup> *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

<sup>112</sup> *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029–30 (1992).

<sup>113</sup> *Meyer*, 262 U.S. at 399–400.

<sup>114</sup> *Powell v. Alabama*, 287 U.S. 45, 71 (1932) (quoting *Holden v. Hardy*, 169 U.S. 366, 389 (1898)).

<sup>115</sup> See FED. R. CIV. P. 38 (preserving the right to a trial by a jury and detailing the procedure for demanding a jury trial in a civil suit).

<sup>116</sup> *Meyer*, 262 U.S. at 399–400.

<sup>117</sup> See *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (holding both that fundamental rights are “deeply rooted in . . . history and tradition” and that fundamental rights may only be infringed upon if the infringement is “narrowly tailored to serve a compelling state interest” (quoting *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion); *Reno v. Flores*, 507 U.S. 292, 302 (1993)).

<sup>118</sup> *Reno*, 507 U.S. at 301–02.

fundamental law.<sup>119</sup> Both ideas share exclusionary reasons for action—“rules of action” in common law terminology<sup>120</sup>—that emanate from sources of authority other than the state’s sovereignty to enact positive laws.<sup>121</sup> Fundamental rights are not “civil rights,” as opposed to “social rights,” as that distinction appears in some nineteenth-century jurisprudence;<sup>122</sup> it is not a matter of rights having the force of law rather than mere social pressure. Fundamental rights are legal rights, like civil rights and privileges codified in positive law. The domains of authority in the common law tradition are plural, and therefore law-making and law-infringing authorities are plural.<sup>123</sup> It is not only state action that can specify a right or duty over which it has authority, or trample a right or duty over which it has no authority.<sup>124</sup> The common law doctrine of public accommodations, for example, supposes that patrons enjoy a license not to be excluded without a good reason.<sup>125</sup> The owner of the public accommodation, though not a state actor, specifies the right by his invitation to the public, and is forbidden to infringe the right.<sup>126</sup>

This Article uses the term “fundamental right” to refer to a liberty secured by immunities and claim-rights, a claim-right, a power, or some other right that imposes upon some government, positive lawmaker, or other external domain of authority duties limiting that authority’s or sovereign’s power to act. Generally, a fundamental right is secure as a right because it forbids the external authority’s or sovereign’s power to impose new reasons for action on the right holder. The duty might consist of a categorical (though not always absolute) requirement not to disrupt the jural relations that the claim-right secures.<sup>127</sup> The jural relations within the domain might not yet be fully specified, but the holders of the liberty retain the authority to act on the basis of the underlying norms

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<sup>119</sup> STONER, *supra* note 88, at 79.

<sup>120</sup> 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW \*472 (O.W. Holmes, Jr., ed., 12th ed. 1873).

<sup>121</sup> See *supra* notes 92–95 and accompanying text.

<sup>122</sup> The Civil Rights Cases, 109 U.S. 3, 22 (1883) (explaining that the Thirteenth Amendment did not modify social rights, but rather fundamental rights). These fundamental rights were called civil rights. *Id.*

<sup>123</sup> See *supra* notes 105–08 and accompanying text.

<sup>124</sup> 4 BLACKSTONE, *supra* note 80, at \*5 (explaining the distinction between a public wrong, or violation of the law, and a private wrong, in which one individual infringes upon the rights of another).

<sup>125</sup> 3 BLACKSTONE, *supra* note 80, at \*212; see also *Coger v. Nw. Union Packet Co.*, 37 Iowa 145, 153 (1873) (explaining that race is not a sufficient reason to exclude a patron from a place of business).

<sup>126</sup> 3 BLACKSTONE, *supra* note 80, at \*212.

<sup>127</sup> See *supra* notes 105–09 and accompanying text.

and to specify new norms within the boundaries of their authority.<sup>128</sup> Those boundaries are marked by the limitations inherent in their authority (e.g., the right of a mother to instruct her own children but not someone else's children),<sup>129</sup> the fundamental rights of other domains of authority (e.g., prohibitions against nuisance),<sup>130</sup> and those external limitations that the state lawfully places on the exercise of one's liberty (e.g., the uncontroversial criminal prohibitions against *malum in se* offenses such as murder, theft, and enslavement).<sup>131</sup>

In short, there are fundamental rights because law-making, law-adjudicating, and law-executing sovereigns have duties. So, for example, in *Troxel v. Granville*, the Court struck down a state statute authorizing any person "to subject any decision by a parent concerning visitation of the parent's children to state-court review," on the ground that the statute violated the "fundamental parental right" to direct the upbringing of the parent's child.<sup>132</sup> The constitutional infirmity resulted from authorizing a petitioner and a judge to substitute their own judgment for the parent's, so that the parent's judgment about the well-being of the child had no normative force.<sup>133</sup> The Court explained:

Should the judge disagree with the parent's estimation of the child's best interests, the judge's view necessarily prevails. Thus, in practical effect, in the State of Washington a court can disregard and overturn *any* decision by a fit custodial parent concerning visitation whenever a third party affected by the decision files a visitation petition, based solely on the judge's determination of the child's best interests.<sup>134</sup>

The fundamental parental right means that non-parents, including judges, are not free to intrude into the deliberations and decisions of a fit parent.<sup>135</sup> The judgment of the parent about the child's well-being and the rights and duties that arise from that judgment operate as an exclusionary reason for action of some binding force.<sup>136</sup>

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<sup>128</sup> See *supra* note 108 and accompanying text.

<sup>129</sup> 1 BLACKSTONE, *supra* note 80, at \*447.

<sup>130</sup> 3 BLACKSTONE, *supra* note 80, at \*216.

<sup>131</sup> See 4 BLACKSTONE, *supra* note 80, at \*5 (explaining that crimes are public wrongs that are a breach of one's duty to the entire community).

<sup>132</sup> 530 U.S. 57, 67 (2000).

<sup>133</sup> See *id.* (holding that a state statute that does not give any presumptive weight to a parent's decision regarding the visitation interest of a child violates that parent's fundamental rights).

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 66-68.

<sup>136</sup> *Id.*

### C. Concessions of Privilege

Though legal scholars have largely neglected this broader, common law understanding of fundamental rights over the last century or so, the distinction between fundamental rights and concessions of privilege performs real work for lawyers, and its persistent currency testifies to its utility.<sup>137</sup> Consider how different property incidents are treated for constitutional purposes in Anglo-American law. When a government deprives an owner of the use of his land, the law forbidding the use is a taking of property unless the use was ruled out of the owner's estate by background principles of property law.<sup>138</sup> A law that simply codifies rights and duties previously settled by common law norms and institutions disturbs no property rights,<sup>139</sup> while a law that eradicates incidents of the owner's use not prohibited by common law norms and authorities alters the estate of ownership and is reviewed under whatever scrutiny is applied to the particular expropriation of property.<sup>140</sup> At common law, the government has no right to deprive the owner of property that existing law has not already denied to the owner, unless the government pays just compensation, even if it lawfully exercises a recognized power.<sup>141</sup> In other words, governments take property rights and duties as they find them, and they must internalize the costs of altering those jural relations that comprise private property.

Again, this is not a point about the doctrinal significance of property rights under the Takings and Due Process Clauses of the Fifth and Fourteenth Amendments. In other words, to say that a right is grounded in law more fundamental than positive law is not to say that its abrogation or burdening by state action should be reviewed with any particular level

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<sup>137</sup> See, e.g., *Sherwin v. Mackie*, 111 N.W.2d 56, 60–61 (Mich. 1961) (noting the distinction between vested rights protected by the Due Process Clause and concessions or privileges, which may be withheld by the state); *Pa. Game Comm'n v. Marich*, 666 A.2d 253, 255–57 (Pa. 1995) (holding that a hunting license is a privilege that can be revoked by the state, not a property interest protected under the Due Process Clause); *King v. Wyo. Div. of Criminal Investigation*, 89 P.3d 341, 350–52 (Wyo. 2004) (holding that a concealed weapons permit is not a fundamental right protected under the Due Process Clause, but rather a privilege granted by the state).

<sup>138</sup> *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029–30 (1992).

<sup>139</sup> See *id.* (explaining that compensation is not required when a state law was merely making explicit what was already understood under the common law); *Hadacheck v. Sebastian*, 239 U.S. 394, 410–11 (1915) (holding that a city may broadly exercise police power in limiting land use within a city).

<sup>140</sup> *Lucas*, 505 U.S. at 1029–30; *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982).

<sup>141</sup> *Sinnickson v. Johnson*, 17 N.J.L. 129, 137 (1839); *People v. Platt*, 17 Johns. 195, 202 (N.Y. Sup. Ct. 1819); *Gardner v. Trs. of Newburgh*, 2 Johns. Ch. 162, 164 (N.Y. Ch. 1816); *Burmah Oil Co. v. Lord Advocate* [1964] AC 75, 83; *Attorney-General v. De Keyser's Royal Hotel, Ltd.* [1920] AC 508, 519.

of judicial scrutiny. The point is limited to the observation that state and federal governments are constrained in their power to usurp the authority of common law institutions of ordering—owners, civil juries, customs, licensees and tenants, etc.—to settle and specify the jural relations governing the use and management of things, at least insofar as their exercise of power must be consistent with reason.<sup>142</sup>

Not all incidents of property ownership are property rights; some are concessions of privilege.<sup>143</sup> These include equitable and statutory privileges of redemption.<sup>144</sup> The equity of redemption in English law was extended only at the discretion of a court in equity upon terms that could not be established a priori,<sup>145</sup> but which were generally quite favorable to the mortgagor.<sup>146</sup> In American law, the foreclosure of mortgages developed as a summary proceeding and the terms of redemption were much more circumscribed.<sup>147</sup> To ameliorate the plight of mortgagors, state legislatures have from time-to-time created statutory redemption privileges, especially during times of economic hardship.<sup>148</sup> During various depressions, legislatures enacted extended redemption periods, which were repealed after the depressions ended without constitutional incident.<sup>149</sup>

Today, a state's redemption statute might designate something called a "right of redemption,"<sup>150</sup> but actually create a privilege. So, for example, one statute expressly provides:

The statutory rights of redemption given or conferred by this article are mere personal privileges and not property or property rights. The privileges must be exercised in the mode and manner prescribed by statute and may not be waived in a deed of trust, judgment, or mortgage, or in any agreement before foreclosure or execution sale. The right of privilege conferred under this article is not subject to levy and sale under execution or attachment nor is it subject to alienation except in the cases provided for in this article; but if the right or privilege is perfected by redemption as provided in this article, then, and not until

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<sup>142</sup> See *supra* notes 105–09 and accompanying text.

<sup>143</sup> See, e.g., *Hamilton v. Hamilton*, 154 P. 717, 723–24 (Mont. 1916) (holding that the right of redemption is not subject to sale because it is a personal privilege and not a property right); cf. *Stevenson v. King*, 10 So. 2d 825, 826 (Ala. 1942) (stating that a compulsory arbitration statute was "a mere personal privilege and not a property right" and therefore could be regulated by the legislature).

<sup>144</sup> *Stevenson*, 10 So. 2d at 826; *Hamilton*, 154 P. at 723–24.

<sup>145</sup> *Campbell v. Holyland*, [1877] 7 Ch D 166, 172.

<sup>146</sup> Sheldon Tefft, *The Myth of Strict Foreclosure*, 4 U. CHI. L. REV. 575, 587 (1937).

<sup>147</sup> *Id.* at 588.

<sup>148</sup> *Id.* at 589.

<sup>149</sup> *Id.*

<sup>150</sup> E.g., ALA. CODE § 6-5-248 (West, Westlaw through 2015 Reg. and 1st Special Sess., Act 2015-520).

then, it becomes property or rights of property subject to levy, sale, alienation, or other disposition, except as is expressly authorized by statute.<sup>151</sup>

The significance of this distinction between right and privilege relates primarily to private law duties: a property right is alienable, while the privilege of redemption is not.<sup>152</sup> But the distinction also has constitutional significance. A constitutional right to a civil jury trial does not extend to vindication of the redemption privilege.<sup>153</sup> Because redemption is a privilege and not a property right, it must be exercised in whatever proceeding the legislature provides:

No such right existed in common law. It was entirely within the competency of the Legislature to determine the conditions upon which the right could be granted. The right of trial by jury, according to the forms of the common law, does not include newly created rights to be effectuated by statutory proceedings.<sup>154</sup>

Furthermore, the Supreme Court of the United States has held that an *extension* of the privilege of redemption does not violate constitutionally protected rights,<sup>155</sup> suggesting that, whatever might be true of the right to foreclose, any entitlement to summary foreclosure proceedings held by the mortgagee is also a privilege, and not a fundamental right.<sup>156</sup>

Private usufructs in state-owned property are also exercised as privileges, not rights.<sup>157</sup> Where the government is the owner of property, any private liberties to use the resource are revocable at the government's will; private citizens do not enjoy legal claims to the incidents of ownership.<sup>158</sup> Thus, a government that forbids a use of public land previously made by private citizens deprives no one of property rights.<sup>159</sup> “[T]he government has, with respect to its own lands, the rights of an ordinary proprietor, to maintain its possession and to prosecute

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<sup>151</sup> § 6-5-250 (Westlaw).

<sup>152</sup> *Stevenson v. King*, 10 So. 2d 825, 826 (Ala. 1942).

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 415–16, 447–48 (1934).

<sup>156</sup> *See id.* at 446–47 (noting redemption is a statutory construction that is altered through the court's equity only if it is determined that the restriction falls outside of the state's protective power).

<sup>157</sup> *Cf.* Kate Shelby, *Taking Public Interests in Private Property Seriously: How the Supreme Court Short-Changes Public Property Rights in Regulatory Takings Cases*, 24 J. LAND USE & ENVTL. L. 45, 51–53 (2008) (explaining that water ways are often owned by the state and individual rights to such state owned property is subject to the overriding community interest).

<sup>158</sup> *See, e.g., Moore v. MacMillan* [1977] 2 NZLR 81 (SC) at 82, 90–91 (N.Z.) (discussing the impossibility of individual rights in Crown-owned land).

<sup>159</sup> *Light v. United States*, 220 U.S. 523, 535 (1911).

trespassers. It may deal with such lands precisely as a private individual may deal with his farming property.”<sup>160</sup>

As these examples show, it is simplistic to say of property that it is always a fundamental right, just as it is simplistic to say that it is merely a privilege that the state allows owners to exercise and that can be completely defeased where private uses “cease to serve the public interest.”<sup>161</sup> Some property rights are fundamental (whatever their doctrinal significance under takings and due process rules) in the sense of being established and settled by authorities other than the state,<sup>162</sup> while some are entirely products of positive law, and are properly considered mere concessions of privilege.<sup>163</sup>

## II. FUNDAMENTAL RIGHTS AND CONCESSIONS OF PRIVILEGES IN MARRIAGE AND PARENTAGE

Why is the right to marry considered a fundamental right in American constitutional jurisprudence? It is not an absolute right, nor was it included in the famous due process trio of life, liberty, and property. According to Blackstone and the other common law jurists, not all civil rights and duties are fundamental, though some are.<sup>164</sup> Civil rights to life and limb, liberty of movement, and private property ownership are protected by law in exchange for the subject’s relinquishment of the rights he would have enjoyed in a state of nature.<sup>165</sup> Blackstone and American jurists, such as James Kent, called these “absolute rights,”<sup>166</sup> meaning that no person could be deprived of them except according to the law of the land, and only after being afforded that process which is due to one whose absolute rights are placed in jeopardy by the institution authorized to adjudicate the entitlement.<sup>167</sup>

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<sup>160</sup> *Camfield v. United States*, 167 U.S. 518, 524 (1897).

<sup>161</sup> KEVIN GRAY & SUSAN FRANCIS GRAY, *ELEMENTS OF LAND LAW* 109–12, 112 n.2 (5th ed. 2009).

<sup>162</sup> MACLEOD, *supra* note 108, at 198–99.

<sup>163</sup> Compare Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 *YALE L.J.* 1672, 1736–37, 1765–66 (2012) (arguing that the distinction between vested rights and positive privilege is a result of separation of powers), with Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 *YALE L.J.* 408, 423–27, 446–52 (2010) (showing an antecedent to fundamental-rights jurisprudence in vested rights and natural right jurisprudence protecting property from legislative expropriation).

<sup>164</sup> 1 BLACKSTONE, *supra* note 80, at \*123.

<sup>165</sup> See *id.* at \*125 (noting that when individuals subject themselves to society they surrender certain natural rights).

<sup>166</sup> *Id.*; 2 KENT, *supra* note 120, at \*1.

<sup>167</sup> 2 KENT, *supra* note 120, at \*12–13.

*A. History of Rights and Duties*

The rights and duties of marriage and biological parentage (to which American jurists such as Kent added religious liberties of religious opinion, worship, and sanctity of conscience)<sup>168</sup> are even more directly fundamental than civil rights of life, liberty, and property.<sup>169</sup> They are not civil rights; they are among those divine and natural rights and duties that positive law merely declares, and does not create.<sup>170</sup> Civil marriage is a species of contract, Blackstone explained, but the rights and duties of civil marriage do not exhaust the rights and duties of marriage.<sup>171</sup> Most of the rights and duties of marriage are settled and specified by ecclesiastical courts and other religious authorities, and by nature and nature's God.<sup>172</sup>

Thus, the entire complex of jural relations among husband, wife, and children within the biological family is what we would today call fundamental. For Blackstone, "the most universal relation in nature" is that between biological parent and child, and it proceeds from the first natural relation, that between husband and wife.<sup>173</sup> "The main end and design of marriage" is "to ascertain and fix upon some certain person, to whom the care, the protection, the maintenance, and the education of the children should belong . . . ."<sup>174</sup>

So, in our Anglo-American legal tradition, the marital relation comprises divine and natural rights and duties (which are fundamental by virtue of being part of our fundamental law), and rights and duties by virtue of being specified as conclusive reasons for action by authorities other than the state. The municipal law adds secondary securities to those rights and duties by vesting in the family a right not to have its integrity harmed by outsiders.<sup>175</sup> In addition to parental rights, the common law developed actions for alienation of affections, as well as actions for kidnapping, spousal privileges, and other legal incidents that stand guard around the marital and parental relations.<sup>176</sup> The right of marriage is the

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<sup>168</sup> *Id.* at \*34, \*75.

<sup>169</sup> 1 BLACKSTONE, *supra* note 80, at \*41, \*433, \*446.

<sup>170</sup> 2 KENT, *supra* note 120, at \*75.

<sup>171</sup> See 1 BLACKSTONE, *supra* note 80, at \*433, \*442, \*444 (explaining the civil marriage but noting that the "holiness" of marriage is left to ecclesiastical law as the civil courts do not have the ability to make judgments on all aspects of marriage).

<sup>172</sup> *Id.* at \*433–34, \*442, \*444.

<sup>173</sup> *Id.* at \*446.

<sup>174</sup> *Id.* at \*455.

<sup>175</sup> *Id.* at \*441.

<sup>176</sup> Michele Crissman, *Alienation of Affections: An Ancient Tort—But Still Alive in South Dakota*, 48 S.D. L. REV. 518, 518 (2003); John L. Diamond, *Kidnapping: A Modern Definition*, 13 AM. J. CRIM. L. 1, 1 (1985); Martin D. Litt & Susan B. Dussault, *The Spousal Privileges*, COLO. LAW., Jan. 1997, at 61.

right to honor one's marital and parental obligations free from outside interference.<sup>177</sup>

### B. Modern Jurisprudence

In the nineteenth and twentieth centuries, the most comprehensive threat to the family's integrity came not from adulterers and kidnappers but from a growing regulatory state, which claimed increasing power to regulate family life.<sup>178</sup> So it is no surprise that the family's right of integrity came to be asserted against government in cases such as *Meyer v. Nebraska*<sup>179</sup> and *Loving v. Virginia*.<sup>180</sup> Those cases rest upon the broad common law understanding of fundamental rights as pre-existing positive law, which merely declares and does not create them.<sup>181</sup> The fundamental rights of marriage and parentage impose upon governments a duty not to disrupt the integrity of the biological family,<sup>182</sup> except where the members of the family have relinquished their rights by neglecting or violating their natural duties to each other, and then only after they have been afforded due process.<sup>183</sup>

In this more recent jurisprudence, the fundamental right of marriage continues to secure the integrity of the intact, biological family—a phenomenon that the state encounters and does not create.<sup>184</sup> The relations within the biological family give rise to natural duties.<sup>185</sup> These arise out of the nature of the family group, “consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization.”<sup>186</sup> Because the duties are grounded in nature and not the will

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<sup>177</sup> *Griswold v. Connecticut*, 381 U.S. 479, 495–96 (1965).

<sup>178</sup> See Ann Laquer Estin, *Family Governance in the Age of Divorce*, 1998 UTAH L. REV. 211, 213, 215 (1998) (explaining that despite the claim that the family is a private institution, during the nineteenth century the state began to substantially regulate many aspects of the family, including courtship, marriage, and divorce).

<sup>179</sup> 262 U.S. 390, 399 (1923).

<sup>180</sup> 388 U.S. 1, 12 (1967).

<sup>181</sup> *Id.*; *Meyer*, 262 U.S. at 399–401.

<sup>182</sup> *Griswold*, 381 U.S. at 495–96; *Meyer*, 262 U.S. at 399.

<sup>183</sup> Note, *Child Neglect: Due Process for the Parent*, 70 COLUM. L. REV. 465, 465, 470 (1970).

<sup>184</sup> *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

<sup>185</sup> *Meyer*, 262 U.S. at 400.

<sup>186</sup> *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885). Recently a rich scholarly literature has grown up around this conception of the family using the term “conjugal marriage.” See, e.g., ROBERT P. GEORGE, IN DEFENSE OF NATURAL LAW 139, 141 (1999); PATRICK LEE & ROBERT P. GEORGE, CONJUGAL UNION: WHAT MARRIAGE IS AND WHY IT MATTERS 5 (2014); Sherif Girgis, Robert P. George & Ryan T. Anderson, *What is Marriage?*, 34 HARV. J.L. & PUB. POL'Y

of the lawmaker, the state has no power to reconstitute the family at will.<sup>187</sup> Thus, the collective families proposed by Plato and practiced in Sparta are “wholly different from those upon which our institutions rest.”<sup>188</sup>

Before *Windsor* and *Obergefell*, the Supreme Court consistently and continually re-affirmed this understanding of the marriage right as grounded in the nature of the biological relations, even in recent decades.<sup>189</sup> The biological family and the network of extended kinship that radiates out from it are “venerable” and “deserving of constitutional recognition.”<sup>190</sup> The rights securing the family’s integrity are “intrinsic human rights” that are deeply rooted in our “Nation’s history and tradition.”<sup>191</sup> The “biological bond between parent and child is meaningful,” and the right of a biological parent “is an interest far more precious than any property right.”<sup>192</sup>

This is why the Court has said that it is not “within the competency of the State” to infringe the fundamental rights of marriage and the natural family.<sup>193</sup> It was this tradition, grounded in the much older Anglo-American common law tradition, that the Court referred to in *Loving v. Virginia*, when it struck down Virginia’s law burdening the fundamental right of a man and woman of different races to marry.<sup>194</sup>

The biological mother-father-child triad has a fundamental claim-right to legal recognition, which correlates with a fundamental duty of the state to extend that legal recognition.<sup>195</sup> So, altering the jural relations within the biological family is not entirely within the police powers of the state (much less the enumerated powers of the United States government).<sup>196</sup> Those powers have limits because the rights of natural

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245, 262–63 (2011); Patrick Lee & Robert P. George, *What Sex Can Be: Self-Alienation, Illusion, or One-Flesh Union*, 42 AM. J. JURIS. 135, 135 (1997).

<sup>187</sup> See *Meyer*, 262 U.S. at 399–400 (holding that the state has no authority to interfere with an individual’s fundamental rights, which includes the individual’s right to privacy in his or her family life).

<sup>188</sup> *Id.* at 401–02.

<sup>189</sup> See *infra* notes 301–06 and accompanying text.

<sup>190</sup> *Moore v. City of E. Cleveland*, 431 U.S. 494, 504 (1977).

<sup>191</sup> *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 845 (1977) (quoting *Moore*, 431 U.S. at 503).

<sup>192</sup> *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2574–75 (2013) (Sotomayor, J., dissenting) (quoting *Santosky v. Kramer*, 455 U.S. 745, 758–59 (1982)).

<sup>193</sup> *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925).

<sup>194</sup> 388 U.S. 1, 12 (1967).

<sup>195</sup> See *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) (recognizing marriage and procreation are fundamental rights that the state must protect while holding that Oklahoma’s law sterilizing criminals was unconstitutional).

<sup>196</sup> *Id.*

marriage and biological parenting are among “the basic civil rights of man” and governments are not free to alter or abridge them.<sup>197</sup>

For example, a state cannot constrain the rights of marriage by adding a duty not to marry a person of a different race.<sup>198</sup> The stated explanation for this limit might appear to be merely prudential: “Marriage and procreation are fundamental to the very existence and survival of the race.”<sup>199</sup> But human procreation can continue with or without marital norms. The Court’s linking of marriage and procreation is not merely to ensure that humans will be born in the future, but to ensure that they will be born in a distinct institutional and cultural setting that has its own multital jural relations.<sup>200</sup> The Court leaves those jural relations intact because it is *obligated* to do so in its role as fiduciary of the political community.<sup>201</sup> This makes the rights of marriage and parentage unlike the privilege of adoption and the incident of the paternity presumption in an important sense (though not all senses, as shown below).<sup>202</sup>

### C. Privileges and Positive Incidents of Familial Relations

While the fundamental relations constituting marriage and biological parenting existed radically prior to the state and to positive law, the jural relations of adoption are entirely products of positive law.<sup>203</sup> As the Eleventh Circuit Court of Appeals has stated, “[u]nlike biological parentage, which precedes and transcends formal recognition by the state, adoption is wholly a creature of the state.”<sup>204</sup> Therefore, the practice of adoption is not a fundamental right, but rather a privilege created by state law.<sup>205</sup>

Similarly, the presumption of paternity is a privilege created by positive law.<sup>206</sup> The common law presumption was a legal fiction designed to strike a balance between marital stability and the fundamental rights and duties of biological fathers to their children.<sup>207</sup> When the fiction could

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<sup>197</sup> *Id.*

<sup>198</sup> *Loving*, 388 U.S. at 12.

<sup>199</sup> *Skinner*, 316 U.S. at 541.

<sup>200</sup> *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618–19 (1984).

<sup>201</sup> *See Skinner*, 316 U.S. at 536, 541–42 (explaining that marriage and procreation are fundamental rights and applying strict scrutiny to protect those rights).

<sup>202</sup> *See Lofton v. Sec’y of Dep’t of Children & Family Servs.*, 358 F.3d 804, 809 (11th Cir. 2004) (explaining that adoption is not a fundamental right like marriage and parentage but rather the product of state law).

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> *Id.* at 811–12.

<sup>206</sup> Veronica Sue Gunderson, *Personal Responsibility in Parentage: An Argument Against the Marital Presumption*, 11 U.C. DAVIS J. JUV. L. & POL’Y 337–42 (2007).

<sup>207</sup> *Id.* at 343–44, 347.

not be maintained, as when the husband was away at the time of birth and for more than a year prior, the presumption could be overcome.<sup>208</sup> Modern statutory paternity presumptions, such as the Massachusetts statute discussed above<sup>209</sup> and the Uniform Parentage Act,<sup>210</sup> take the fiction farther. They place both substantive and procedural limitations upon the rights of the biological father (and therefore on the rights of the child to have legal recognition of the biological father).<sup>211</sup> The resulting status of the husband as father is propped up by positive rules designed to maintain an artificial but stable relation, in large part to serve the well-being of the child.<sup>212</sup>

Yet even in the realm of privileges, fundamental rights and duties exert normative force in shaping the positive privileges and obligations.<sup>213</sup> The privileges of adoption (and their correlative duties) mimic the fundamental rights of man-woman marriage and biological parentage.<sup>214</sup> As the United States Supreme Court noted in *Smith v. Organization of Foster Families for Equality & Reform* and the Eleventh Circuit noted in *Lofton v. Secretary of Department of Children & Family Services*, by operation of state law, adoption is the “legal equivalent of biological parenthood.”<sup>215</sup> For this reason and others, all family structures other

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<sup>208</sup> *Id.* at 341.

<sup>209</sup> MASS. GEN. LAWS ANN. ch. 209C, § 6(a)(1) (West, Westlaw through ch. 92, 2015 1st Ann. Sess.).

<sup>210</sup> UNIF. PARENTAGE ACT §204(a) (2000) (amended 2002).

<sup>211</sup> § 204; Paula Roberts, *Biology and Beyond: The Case for Passage of the New Uniform Parentage Act*, 35 FAM. L. Q. 41, 57–60 (2001) (discussing the codification of the presumption of paternity).

<sup>212</sup> Roberts, *supra* note 211, at 42–43.

<sup>213</sup> In one state, Alabama, the positive enactments that either expressly codify or presuppose the fundamental law of marriage as the union of a man and a woman include statutes governing marital and domestic relations, e.g., ALA. CODE § 30-4-9 (West, Westlaw through Act 2015-520, 2015 Reg. & 1st Spec. Sess.); the presumption of paternity, § 26-17-204 (Westlaw); other rules for establishment of the parent-child relationship, § 26-17-201 (Westlaw); laws governing consent to adopt, § 26-10A-7 (Westlaw); all other laws governing adoption, § 26-10A (Westlaw); termination of parental rights, § 12-15-319 (Westlaw); all laws that presuppose different people occupying the positions of “father,” “mother,” “husband,” and “wife,” e.g., § 40-7-17 (Westlaw); laws governing intestate distribution, the spousal share, § 43-8-41 (Westlaw), and the share of pretermitted children, § 43-8-91 (Westlaw); legal protections for non-marital children, § 26-17-202 (Westlaw); registration of births, § 22-9A-7 (Westlaw); conflict-of-interest rules and other ethical standards prohibiting marital relations, § 45-28-70(f)(1) (Westlaw); as well as laws presupposing biological kin relations, § 38-12-2(c)(1) (Westlaw).

<sup>214</sup> Lynn D. Wardle, A Critical Analysis of Interstate Recognition of Lesbian Adoptions, 3 AVE MARIA L. REV. 561, 564 (2005).

<sup>215</sup> *Lofton v. Sec’y of Dep’t of Children & Family Servs.*, 358 F.3d 804, 812 (11th Cir. 2004) (quoting *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 844 n.51 (1977)).

than the biological family that receive recognition in state laws have historically been arranged to privilege those that most closely resemble the biological family, either by substituting biological kin for missing parents or substituting a second parent in the same office as the missing parent.<sup>216</sup>

To illustrate, consider the adoption laws of a state that has not redefined marriage to include same-sex couples. Alabama law provides for parallel adoption schemes in order to provide for the loss of either one or both parents.<sup>217</sup> Both schemes are designed to approximate, to the greatest extent possible, the intact, biological family structure.<sup>218</sup> The statute allows either an “adult person” or a “husband and wife jointly who are adults” to petition a court for authority to adopt a minor.<sup>219</sup> (By contrast, “[a]ny adult may petition the court to adopt another adult . . . .”)<sup>220</sup> A step-parent may also adopt a minor if he or she is married to the child’s parent and the biological parent of the same office (father or mother, respectively) has died or relinquished the rights and duties of parentage.<sup>221</sup> Thus, the adoption statute incorporates by reference Alabama’s definition of marriage.

Where one biological parent is missing in the life of the child, Alabama law will recognize in place of that missing parent an adult who can step into the same office—mother or father—and is married to the present biological parent.<sup>222</sup> For example, where a child’s biological father is missing, the law will allow a man who marries the biological mother to adopt the child. Where the child’s biological mother is missing, the law will allow a woman who marries the biological father to adopt the child. Where both biological parents are missing, the law facilitates adoption by a single person or married couple who will most closely approximate the intact, biological family.<sup>223</sup> Where a married man and woman are willing, fit, and available to adopt, the state considers this a better alternative than leaving the child in foster care or the state’s custody.<sup>224</sup> Where a

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<sup>216</sup> See *id.* at 809–14 (discussing the Supreme Court’s historic preference for biological families in discussing the parent-child relationship within adoption).

<sup>217</sup> § 26-10A-5 (Westlaw).

<sup>218</sup> See generally *In re Adoption of K.R.S.*, 109 So. 3d 176, 176–78 n.1 (Ala. Civ. App. 2012) (preventing a same-sex spouse from adopting her wife’s child under Alabama Code § 26-10A-27, for many reasons including that the mother had not relinquished her parental rights).

<sup>219</sup> § 26-10A-5(a) (Westlaw).

<sup>220</sup> § 26-10A-5(b) (Westlaw).

<sup>221</sup> §§ 26-10A-7, 26-10A-10, 26-10A-27 (Westlaw).

<sup>222</sup> § 26-10A-27 (Westlaw).

<sup>223</sup> § 26-10A-5(a) (Westlaw).

<sup>224</sup> *Lofton v. Sec’y of Dep’t of Children & Family Servs.*, 358 F.3d 804, 810, 818 (11th Cir. 2004).

married man and woman are not available or not fit, adoption by a single person is sometimes the best option.<sup>225</sup>

To extend adoption to same-sex couples is not as simple as redefining marriage because Alabama's adoption statutes maintain distinct and separate offices for father and mother, and presuppose no more than one of each.<sup>226</sup> Father is defined in the statute as, "[a] male person who is the biological father of the minor or is treated by law as the father."<sup>227</sup> Mother is defined as, "[a] female person who is the biological mother of the minor or is treated by law as the mother."<sup>228</sup> These two offices are distinct in the adoption statutes in part because of the requirement of obtaining consent from biological parents and the presumed father (if he is not the biological father) to an adoption.<sup>229</sup> And those requirements incorporate, among other incidents, the presumption of paternity.<sup>230</sup> Only where a marriage with a child ends and the wife marries a man who claims to be (and is) the child's biological father, the consent of the first husband is not required to allow the biological father to adopt the child.<sup>231</sup> In other words, only a biological father can terminate the rights and duties of a presumed father without the presumed father's consent.<sup>232</sup>

The right of the presumed or biological father to withhold consent from adoption of his children is the right that Justice Sotomayor characterized as "an interest far more precious than any property right."<sup>233</sup> The duty that it imposes upon both the state and would-be parents is justified on the basis of the duties that the father owes to the

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<sup>225</sup> *Id.* at 810, 820.

<sup>226</sup> *See* § 26-10A-5 (Westlaw) (stating that a single adult or a jointly married husband and wife may adopt a child while any adult may adopt another adult); § 26-10A-27 (Westlaw) (stating that any spouse may adopt his or her spouse's child).

<sup>227</sup> § 26-10A-2(5) (Westlaw).

<sup>228</sup> § 26-10A-2(8) (Westlaw).

<sup>229</sup> § 26-10A-7(a)(2)–(3) (Westlaw).

<sup>230</sup> § 26-10A-7(a)(3) (Westlaw).

<sup>231</sup> The provision states:

Provided however, in cases, where one who purports to be the biological father marries the biological mother, on petition of the parties, the court shall order paternity tests to determine the true biological father. If the court determines by substantial evidence that the biological father is the man married to the biological mother, then the biological father shall be allowed to adopt the child without the consent of the man who was married to the biological mother at the time of the conception or birth of the child, or both, when the court finds the adoption to be in the best interest of the child.

§ 26-10A-5(a)(3) (Westlaw).

<sup>232</sup> *See* § 26-17-204 (Westlaw) ("A presumption of paternity established under this section may be rebutted only . . . by a court decree establishing paternity of the child by another man.").

<sup>233</sup> *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2574–75 (2013) (Sotomayor, J., dissenting).

child.<sup>234</sup> “Corresponding to the right of control, it is the natural duty of the parent” to the child.<sup>235</sup> The fundamental right to the integrity of the family is inseparable from this “high duty” that parents owe to their children.<sup>236</sup> Both duty and right are fundamental and radically prior to their recognition in positive law.<sup>237</sup> The state is not free to disregard or infringe on the father’s right because it must not interfere with the father’s duties.<sup>238</sup> Witness the persistently separate offices in Massachusetts law for “father” and “mother”<sup>239</sup> nearly twelve years after the Massachusetts high court redefined marriage in state law.<sup>240</sup>

The offices of “father” and “mother” cannot, in reason, be fully fungible for each other in a state’s adoption laws because the rights and duties of biological parents are fundamental. The creation of a non-biological, legal parent-child relationship must proceed in two steps. First, the biological parent must (if living) consent to breaking the fundamental jural relations with the child.<sup>241</sup> This requirement of consent is an incident of the parent’s fundamental right.<sup>242</sup> Second, the state must consent to recognizing a new parental relationship, vesting the jural relations of parent-child in the adoptive or presumed parent.<sup>243</sup> This requirement of consent is an incident of the state’s power as the source of the concession of privilege.<sup>244</sup> If the state decides to substitute a second mother for a father in the concession of privilege, then it has the power to do so, as

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<sup>234</sup> *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925).

<sup>235</sup> *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923).

<sup>236</sup> *Pierce*, 268 U.S. at 535.

<sup>237</sup> See *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (recognizing the fundamental rights of parents to make decisions about the care, custody, and control of their children).

<sup>238</sup> *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

<sup>239</sup> Compare MASS. GEN. LAWS ANN. ch. 209C, § 6(a)–(b) (West, Westlaw through 1998 Main Vol.) (assuming the stations of mother and father as of 1998), with MASS. GEN. LAWS ANN. ch. 209C, § 6(a)–(b) (West, Westlaw through ch. 1–45, 47–67 of 2015 1st Ann. Sess.) (stating identical provisions assuming stations of mother and father).

<sup>240</sup> *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003).

<sup>241</sup> 1 DONALD T. KRAMER, LEGAL RIGHTS OF CHILDREN § 6:5, Westlaw (2d ed., database updated Nov. 2014).

<sup>242</sup> See *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 27 (1981) (explaining that parents have a “commanding” interest for accuracy and justice when terminating their parental rights).

<sup>243</sup> See *Lofton v. Sec’y of Dep’t of Children & Family Servs.*, 358 F.3d 804, 810–11 (11th Cir. 2004) (explaining that the state is responsible for determining whether a child will be placed with an adoptive family).

<sup>244</sup> See *id.* at 809–10 (explaining that the state is responsible for determining the placement of a child as a function of its role as the child’s stand-in parent).

Massachusetts has shown.<sup>245</sup> But it does not have the power to destroy the fundamental rights of the biological parents.<sup>246</sup>

#### *D. Fundamental Rights of the Child*

The common law has long tied the rights of the children to the marital rights of the biological parents as security for the natural duties that parents owe to their children.<sup>247</sup> Blackstone and Kent understood parental rights and parental duties to be inextricably bound to each other and grounded in prior obligations to God.<sup>248</sup> The law did not create the family; it supported it.<sup>249</sup> This view informed the framers of the United States Constitution, who “saw it as a vice that monarchy transgressed against the integrity of life’s separate realms and sought to make the king the father of the State.”<sup>250</sup>

For Blackstone, the source of parental authority was the trio of natural duties that married parents owe to their children: maintenance, protection, and education.<sup>251</sup> The “most universal relation in nature” is that between biological parent and child, and it proceeds from the first natural relation, that between husband and wife.<sup>252</sup> “The main end and design of marriage” is to “ascertain and fix upon some certain person, to whom the care, the protection, the maintenance, and the education of the children should belong.”<sup>253</sup> The right of marriage is thus grounded in parental *obligation*, which in turn is grounded in the fixed nature of a fundamental human relation—the union of a man and a woman.<sup>254</sup> That is a radically different conception of the right of marriage than the right announced in *Obergefell*—a right of individuals to employ positive

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<sup>245</sup> Adoption of Tammy, 619 N.E.2d 315, 315–16, 319 n.5 (Mass. 1995).

<sup>246</sup> See *supra* notes 182–83 and accompanying text.

<sup>247</sup> 1 BLACKSTONE, *supra* note 80, at \*446–47; 2 KENT, *supra* note 120, at \*189–90, 193.

<sup>248</sup> 1 BLACKSTONE, *supra* note 80, at \*446–47; 2 KENT, *supra* note 120, at \*203 n.(c) (explaining that parental rights arise from the law of nature and that it is the “will of God” that they exercise their duty as parents).

<sup>249</sup> Stoner explains that for common law jurists, “no human law could make a family Christian, but the law was designed to protect the Christian family or, at the very least, was not intended to unsettle or undermine it.” STONER, *supra* note 88, at 83. This conception of the family was commonly understood at the time of the American founding and the adoption of the Constitution. David F. Forte, *The Framers’ Idea of Marriage and Family*, in *THE MEANING OF MARRIAGE: FAMILY, STATE, MARKET, AND MORALS* 100, 102 (Robert P. George & Jean Bethke Elshtain eds., 2003) (“[T]o the men and women of that generation, the family was a given: its structure, its stability, roles, and values accepted by all.”).

<sup>250</sup> STONER, *supra* note 88, at 83.

<sup>251</sup> 1 BLACKSTONE, *supra* note 80, at \*446, \*452.

<sup>252</sup> *Id.* at \*433, \*446.

<sup>253</sup> *Id.* at \*455.

<sup>254</sup> *Id.* at \*446–47.

marriage laws in their acts of self-definition and companionship, a “two-person union unlike any other in its importance to the committed individuals.”<sup>255</sup> Positive marriage laws produce new options and new opportunities to define oneself by entering officially-sanctioned bonds to the person of one’s choice.<sup>256</sup>

For Blackstone and Kent, the norms of marriage are not created by individual choice for individual ends, nor by positive law. Rather, the duties are duties of natural law,<sup>257</sup> providence,<sup>258</sup> and “the voice of nature.”<sup>259</sup> Positive law is only a security for preexisting duties.<sup>260</sup> The “municipal laws of all well-regulated states have taken care to enforce” the natural duties of parents to their children by putting particular legal powers in the parents’ hands;<sup>261</sup> these enable parents to better discharge their natural duties.<sup>262</sup> And the positive law is a *secondary* security for parental duties to children, for “providence has done it more effectually than any laws, by implanting in the breast of every parent that natural . . . insuperable degree of affection, which not even the deformity of person or mind, not even the wickedness, ingratitude, and rebellion of children, can totally suppress or extinguish.”<sup>263</sup>

Recently, some have read these authorities to suggest that biological parents do not have fundamental rights to the relationship with their children, but instead hold custody as a privilege, a trust conceded to them by the state.<sup>264</sup> For example, Jeffrey Shulman argues that parents hold custody of their children as trustees of the state, and therefore the rights and duties bound up in the parent-child relation are subsidiary to the parents’ duties to the state.<sup>265</sup> He reads these propositions into common

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<sup>255</sup> *Obergefell*, 135 S.Ct. at 2599.

<sup>256</sup> *Id.* at 2597.

<sup>257</sup> 1 BLACKSTONE, *supra* note 80, at \*446–47.

<sup>258</sup> *Id.* at \*447; 2 KENT, *supra* note 120, at \*189.

<sup>259</sup> 2 KENT, *supra* note 120, at \*189.

<sup>260</sup> See 1 BLACKSTONE, *supra* note 80, at \*447 (explaining that municipal law reinforces natural parental obligations); 2 KENT, *supra* note 120, at \*189 (explaining that the natural responsibilities of a parent are reinforced by civil law).

<sup>261</sup> 1 BLACKSTONE, *supra* note 80, at \*447.

<sup>262</sup> *Id.* at \*452.

<sup>263</sup> *Id.* at \*447; see also 2 KENT, *supra* note 120, at \*190 (“The obligation of parental duty is so well secured by the strength of natural affection, that it seldom requires to be enforced by human laws.”). Today this security is known as “kin altruism.” Don Browning & Elizabeth Marquardt, *What About the Children? Liberal Cautions on Same-Sex Marriage*, in THE MEANING OF MARRIAGE, *supra* note 249, at 29, 36.

<sup>264</sup> See Barbara Bennett Woodhouse, “Who Owns the Child?”: Meyer and Pierce and the Child as Property, 33 WM. & MARY L. REV. 995, 1001–02 (1992) (arguing that children should have individual rights and a relationship to “the national family”).

<sup>265</sup> Jeffrey Shulman, *The Parent as (Mere) Educational Trustee: Whose Education Is It, Anyway?*, 89 NEB. L. REV. 290, 299 (2010).

law jurists such as Blackstone, Kent, and Story.<sup>266</sup> A moment's reflection reveals the implausibility of this reading. The state cannot create children—governments do not procreate—and politicians and bureaucrats lack the parents' natural incentives to provide for the well-being of their children.<sup>267</sup> And anyone who thinks that the state is in a better position to direct the upbringing of children than the children's parents would do well to contemplate why the state does not simply make all children its wards.

The fundamental right of the child is not a right to turn out to be an educated, useful citizen for the state or a useful laborer for its workforce,<sup>268</sup> but a concrete right to have formalized and secure relations with her biological parents or, failing that, with her mother and mother's husband.<sup>269</sup> The "establishment of the parent-child relationship is the most fundamental right a child possesses to be equated in importance with personal liberty and the most basic of constitutional rights."<sup>270</sup> Indeed, it is "a child's most fundamental right next to life itself."<sup>271</sup>

Shulman's argument is made to look plausible by a sleight of hand. In the common law treatises that he cites, parents of course *do* hold custody of their children, and not property rights in them.<sup>272</sup> They are custodians of their children in a manner analogous to a bailment of tangible goods or trustees of an estate.<sup>273</sup> But to suggest that they hold children as bailees for the state is to neglect or ignore the very first duty of the common law, which of course, runs to nature's God and his laws, and the very first duty of parents, which runs to their biological children.<sup>274</sup> This is plain in the authorities that Shulman cites.<sup>275</sup> Shulman inexplicably portrays the notion of a primary duty to God as a *departure*

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<sup>266</sup> *Id.* at 305–09.

<sup>267</sup> See 1 BLACKSTONE, *supra* note 80, at \*447 (explaining that biological parents are more likely to fulfill their parental duties because of a God-given affection for their children instead of municipal law).

<sup>268</sup> I thank James Stoner for this latter phrase. As he pointed out to me, this is most often what the state seems to want.

<sup>269</sup> See *supra* notes 251–54 and accompanying text.

<sup>270</sup> *Ruddock v. Ohls*, 154 Cal. Rptr. 87, 91 (Cal. Ct. App. 1979).

<sup>271</sup> *Id.* at 92.

<sup>272</sup> See 1 BLACKSTONE, *supra* note 80, at \*448; see also 2 KENT, *supra* note 120, at \*193.

<sup>273</sup> Compare *Bailment*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining a relationship where property is held for a specific purpose), with 1 BLACKSTONE, *supra* note 80, at \*446–47 (stating that parents voluntarily entered into an obligation when they begot their child, creating a responsibility to provide for them).

<sup>274</sup> 1 BLACKSTONE, *supra* note 80, at \*42, \*433, \*446.

<sup>275</sup> See, e.g., Shulman, *supra* note 265, at 306 nn.88–93 (citing both Blackstone and Kent repeatedly).

from Blackstone and Kent.<sup>276</sup> Whatever one might think about Blackstone's theology, one cannot attribute Shulman's politics to Blackstone.

Parents hold custody of children as bailees of God, as common law jurists have taken pains to explain, because God alone enjoys sovereignty over all human norms and relations.<sup>277</sup> One can construct a statist account of children's rights only by ignoring the most important features of the authorities on which that account is constructed. For Blackstone, all human sovereignty is subject to God's sovereignty and is held and exercised on God's behalf, including both the authority of parents and the sovereignty of the state.<sup>278</sup> For Kent, divine sovereignty is a more impersonal "Providence," but the natural rights and duties of the father-mother-child triad are grounded in it.<sup>279</sup> Blackstone explained that the authority of parents over their children is derived from their natural duties.<sup>280</sup> Those duties, in turn, are derived from the law of nature,<sup>281</sup> which is "superior in obligation" to any human law, and given to humans by God to govern their deliberations.<sup>282</sup> God is necessarily sovereign over all human affairs because humans are dependent upon him for their existence.<sup>283</sup>

Shulman's account also misses the nature of the jural relations themselves. The right that correlates to the parents' natural duties is held by the *child*, not by the state.<sup>284</sup> The nature of the child's fundamental right is precisely a right to have a legal connection with his or her biological *parents*, which secures parental duties to support and educate the child.<sup>285</sup> The state steps in on the child's behalf only where the child's well-being is seriously jeopardized.<sup>286</sup> The state does not have power to substitute its own judgment for parents' judgment when it deems its own

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<sup>276</sup> See *id.* at 300 (positing it is anachronistic to read Blackstone and Kent in support of an absolute, sacred parental right to educate children).

<sup>277</sup> 1 BLACKSTONE, *supra* note 80, at \*38–39, 446–47.

<sup>278</sup> *Id.* at \*41.

<sup>279</sup> 2 KENT, *supra* note 120, at \*189.

<sup>280</sup> 1 BLACKSTONE, *supra* note 80, at \*452.

<sup>281</sup> *Id.* at \*446–47, \*450.

<sup>282</sup> *Id.* at \*41.

<sup>283</sup> *Id.* at \*39.

<sup>284</sup> See *id.* at \*452–53 ("A father has no other power over his son's *estate*, than as his trustee or guardian . . ."); 2 KENT, *supra* note 120, at \*194 (writing that, where a father attempts to remove his child from the custody of a third person by habeas corpus, the child will decide the dispute if the child has reached sufficient maturity to judge for himself).

<sup>285</sup> See 1 BLACKSTONE, *supra* note 80, at \*446–47, \*450 (stating that children have a right to be maintained by the parents who beget them and who have a duty to educate them).

<sup>286</sup> *Santosky v. Kramer*, 455 U.S. 745, 760 (1982).

judgment superior because it is not a party to the multital jural relation of which the family consists.<sup>287</sup>

The common law's treatment of the parent-child relationship, as rooted in fundamental law, is not arbitrary or grounded only in theological commitments.<sup>288</sup> Philosopher Melissa Moschella has argued that parental authority is primary and pre-political because it "has an independent source in the nature of the parent-child relationship itself."<sup>289</sup> The relationship between a child and each of her biological parents is unique and non-fungible, and at least some of the child's needs can be met only by her biological parents.<sup>290</sup> The special, personal obligations of parents to their natural children is grounded in their interconnections at the bodily level—the parents are the but-for causes of the child's bodily existence—and are fulfilled at the psychological, intellectual, and volitional levels by the provision of that unique love that is *parental* love.<sup>291</sup>

The state thus has strong *reasons* to respect and encourage strong ties between children and their natural parents.<sup>292</sup> Those reasons will not be conclusive in cases of abuse and severe neglect, but they are strong reasons nonetheless.<sup>293</sup> The state has a particularly keen interest in deferring to the biological mother, who nurtures the child from conception.<sup>294</sup> Often overlooked is the state's duty to defer to the jural relation between father and child.<sup>295</sup> That the state benefits from giving legal recognition to the father's rights and duties is not what brings the rights and duties into being.<sup>296</sup> But the state does have strong reasons to recognize the father's rights and duties.<sup>297</sup>

In other words, it is not only positive law that orders marital and familial relations in society, but also rights and duties arising out of norms

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<sup>287</sup> *Supra* notes 48–53 and accompanying text.

<sup>288</sup> *See, e.g.*, 1 BLACKSTONE, *supra* note 80, at \*447 (explaining that the common law established the institution of marriage based on the need to readily ascertain who is obligated to provide for a child).

<sup>289</sup> Melissa Moschella, *Natural Law, Parental Rights and Education Policy*, 59 AM. J. JURIS. 197, 201 (2014).

<sup>290</sup> *Id.* at 204–05.

<sup>291</sup> *Id.* at 207–08. Adoptive parents can voluntarily assume such obligations, though adoptive parental duties are not pre-political in the same way.

<sup>292</sup> *Prince v. Massachusetts*, 321 U.S. 158, 166–67 (1944).

<sup>293</sup> *Troxel v. Granville*, 530 U.S. 57, 68–69 (2000).

<sup>294</sup> *See Goodridge v. Dep't. of Pub. Health*, 798 N.E.2d 941, 996 (Mass. 2003) (Cordy, J., dissenting) (articulating that the mother has a relationship with her child originating from pregnancy and childbirth).

<sup>295</sup> *See id.* (noting that there is no corollary process for the father-child relationship like the mother-child relationship).

<sup>296</sup> 1 BLACKSTONE, *supra* note 80, at \*446–67; 2 KENT, *supra* note 120, at \*189–90.

<sup>297</sup> *Roberts, supra* note 211, at 53–54 (listing reasons for which the presumption of fatherhood is in place that primarily concern the welfare of the child).

and institutions of ordering other than the state.<sup>298</sup> Governments disrupt those rights and duties at their peril. The best way for the state to enable parents to honor their natural duties to their children is to secure the fundamental right of parents to direct the upbringing of their children and to encourage parents and potential parents to be and remain committed to each other.<sup>299</sup>

### *E. Obergefell Invocations*

In contrast to the fundamental rights and duties of the natural family, which have proven persistent despite their inconsistency with full equality between marriage and same-sex marriage,<sup>300</sup> the doctrine of *Windsor* and *Obergefell* appears unstable. It rests upon legal doctrines that were overturned before in American history. Most of the authorities invoked in *Obergefell* actually contradict the Court's positivist assumptions, and those that do support the doctrine are not authorities with which *Obergefell*'s supporters should want to be associated.

The fundamental-law jurisprudence of the *Meyer-Pierce-Loving-Smith-Moore-Troxel* line of cases was echoed in other decisions, such as *Zablocki v. Redhail*,<sup>301</sup> *Turner v. Safley*,<sup>302</sup> *M.L.B. v. S.L.J.*,<sup>303</sup> and *Cleveland Board of Education v. LaFleur*.<sup>304</sup> As the *Obergefell* majority conceded, all of those cases either declared or accepted the definition of the marriage right to be a man-woman union.<sup>305</sup> They affirmed that the contours of marriage are derived from the nature of procreation and propagation of the human race, that it is a pre-political institution rather than a creation of positive law, and that it is therefore beyond the competence of courts and legislatures to alter.<sup>306</sup> Only by re-imagining the reasoning of those cases could the *Obergefell* majority have recast the conception of the marriage right declared in those cases as an individual right to make "personal choice regarding marriage" in the exercise of

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<sup>298</sup> 1 BLACKSTONE, *supra* note 80, at \*447.

<sup>299</sup> See *supra* notes 200–01 and accompanying text.

<sup>300</sup> See *supra* notes 239–40 and accompanying text (discussing the rights still associated with the terms "mother" and "father" after Massachusetts recognized nearly a decade earlier same-sex marriage).

<sup>301</sup> 434 U.S. 374, 383–84, 386 (1978).

<sup>302</sup> 482 U.S. 78, 94–96 (1987).

<sup>303</sup> 519 U.S. 102, 116–17 (1996).

<sup>304</sup> 414 U.S. 632, 639–40 (1974).

<sup>305</sup> *Obergefell*, 135 S. Ct. at 2598.

<sup>306</sup> See, e.g., *Zablocki*, 434 U.S. at 383–84, 386–87.

personal “autonomy,”<sup>307</sup> which the Court found state lawmakers have sovereign power to confer.<sup>308</sup>

The *Obergefell* majority acknowledged those precedents, but ultimately eschewed the jurisprudence because it found “other, more instructive precedents,” namely the Court’s reproductive-rights and sexual-intimacy cases.<sup>309</sup> Of course, none of those cases challenged the definition of marriage as a man-woman union.<sup>310</sup> Ultimately, the “other, more instructive precedents” boil down to dicta taken selectively from the *Zablocki* decision and the Court’s nineteenth-century decision in *Maynard v. Hill*,<sup>311</sup> which the *Obergefell* majority opinion draws heavily upon.<sup>312</sup>

This is a thin foundation, as most of the *Zablocki* opinion treats marriage as a natural and pre-political institution.<sup>313</sup> Yet, the *Zablocki* Court briefly alluded to the doctrine of *Maynard*,<sup>314</sup> a decision of the Supreme Court that nationalized the state-sovereignty jurisprudence of the antebellum and Civil War periods.<sup>315</sup> And the *Obergefell* majority expressly endorses *Maynard*’s characterization of marriage as “a great public institution,” which the polity governs.<sup>316</sup>

*Maynard* adopted the earlier reasoning of state high courts, which asserted an unfettered sovereignty of state lawmakers to settle, specify, and even to create and abrogate the rights and duties of domestic and social relations, including marriage, parentage, and slavery.<sup>317</sup> That doctrine had currency during the periods leading up to and during the Civil War.<sup>318</sup> The idea was that domestic relations are governed exclusively by the positive laws of nations and states, so that the rights,

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<sup>307</sup> See, e.g., *Obergefell*, 135 S. Ct. at 2599 (connecting an individual right to marriage through *Loving* and *Zablocki*).

<sup>308</sup> See *id.* at 2604–05 (holding “same-sex couples may exercise the fundamental right to marry” and discussing the democratic discourse leading to the decision).

<sup>309</sup> *Id.* at 2598–99.

<sup>310</sup> See *M.L.B. v. S.L.J.*, 519 U.S. 102, 106–07 (1996) (challenging the right to appeal from a termination of parental rights); *Turner v. Safley*, 482 U.S. 78, 81 (1987) (challenging a prohibition on marriage between male and female inmates); *Zablocki*, 434 U.S. at 375 (challenging a statute that forbade marriage when child support went unpaid); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639–40 (1974) (challenging a school board rule that imposed mandatory maternity leave).

<sup>311</sup> 125 U.S. 190 (1888).

<sup>312</sup> *Obergefell*, 135 S. Ct. at 2598–601.

<sup>313</sup> *Zablocki*, 434 U.S. at 383–84.

<sup>314</sup> *Id.* at 384.

<sup>315</sup> See *Maynard*, 125 U.S. at 204–09 (finding that the competency to enact legislation relating to marriage, slavery, and parentage remained in the purview of the state).

<sup>316</sup> *Obergefell*, 125 S. Ct. at 2601 (quoting *Maynard*, 125 U.S. at 213).

<sup>317</sup> *Maynard*, 125 U.S. at 204–09.

<sup>318</sup> *Id.*

duties, and obligations of husband-wife, father-child, and master-slave can be created and abrogated by the sovereign lawmaker at will.<sup>319</sup>

As the high court of Rhode Island expressed the doctrine, the rights and duties governing marriage, parent-child relations, and slavery are entirely within the “exclusive sovereignty and jurisdiction” of every “nation and state,” which may “except so far as checked by constitution or treaty, create by law new rights in, or impose new duties upon, the parties to these relations, or lessen both rights and duties, or abrogate *them*, and so the *legal* obligation of the relation which involves them, altogether.”<sup>320</sup> The Rhode Island court conceded that the analogy between slavery and marriage was not exact; a nation’s or state’s sovereignty over the slavery relation was even *more* comprehensive than its sovereignty over the norms of marriage.<sup>321</sup> The court reasoned “that slavery is a partial and peculiar institution, not generally recognized by the policy of civilized nations; whereas marriage, in some form, is coextensive with the race.”<sup>322</sup> Therefore, the sovereign power of any nation or state to create and abolish the rights and duties of marriage is limited by its obligation to respect the rights and duties of the citizens of other nations and states.<sup>323</sup>

By invoking *Maynard*, the *Obergefell* majority put itself at odds with the jurisprudence of *Loving*. The *Loving* Court expressly rejected the *Maynard* doctrine as inconsistent with the Fourteenth Amendment.<sup>324</sup> *Maynard* could be read only for the narrow proposition that the norms of the marital relation are subject to a state’s police power and the *Maynard* doctrine itself could not be sustained after the Court’s decisions in *Meyer* and *Skinner*.<sup>325</sup>

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<sup>319</sup> The Maine court expressed this positivist view with some emphasis, asserting that the rights of marriage “are determined by the will of the sovereign” so that the rules governing marriage “are such as the law determines from time to time, and none other.” *Adams v. Palmer*, 51 Me. 481, 483 (1863). The high court of Kentucky likewise reasoned:

Of the nature of the marriage contract—which, *sui generis*, differs from all other contracts; and can not be dissolved by the parties; but may be by the sovereign power, exercised in legislative or judicial form, as the cause may justify, with or without the consent of both parties; and is not within the constitutional inhibition of legislative acts impairing the obligation of contracts.

*Maguire v. Maguire*, 37 Ky. (7 Dana) 181, 184 (1838), *abrogated by* *Rowley v. Lampe*, 331 S.W.2d 887 (Ky. 1960).

<sup>320</sup> *Ditson v. Ditson*, 4 R.I. 87, 101–02 (1856).

<sup>321</sup> *Id.* at 102.

<sup>322</sup> *Id.* at 102–03.

<sup>323</sup> *Id.*

<sup>324</sup> *Loving v. Virginia*, 388 U.S. 1, 7 (1967).

<sup>325</sup> *Id.* (“While the state court is no doubt correct in asserting that marriage is a social relation subject to the State’s police power, *Maynard v. Hill*, 125 U.S. 190 (1888), the State does not contend in its argument before this Court that its powers to regulate marriage are unlimited notwithstanding the commands of the Fourteenth Amendment. Nor could it do so

It is not difficult to see why the *Maynard* doctrine fell out of favor. And it is curious, to say the least, that the Court has once again adopted a view of sovereign power over social relations that has long been viewed with opprobrium. Yet, the *Obergefell* majority's invocation of *Maynard* does not look like a coincidence; something like the *Maynard* doctrine is necessary to the premise that the marital relation can be redefined by state positive law (*Windsor*) or federal judicial decision (*Obergefell*).<sup>326</sup>

And the *Obergefell* majority goes beyond *Windsor* and *Maynard*. It arrogates the power to constitutionalize not only a positivist conception of the marriage right's source and authority, but also the very contours of the relation itself drawn by the states that the Court favors and against the states whose laws it disfavors.<sup>327</sup> Chief Justice Roberts pointed out in his *Obergefell* dissent that the Court first arrogated this power in *Dred Scott v. Sandford*.<sup>328</sup> And the Court's same-sex marriage jurisprudence seems unstable in the way that its *Dred Scott* decision was unstable. *Dred Scott*'s assertion of judicial supremacy met the resistance of Abraham Lincoln, who rejected the Court's unlawful arrogation of the power of judicial supremacy.<sup>329</sup> *Obergefell* rests upon the same conception of the judicial power.

#### CONCLUSION

It is not just *Obergefell*'s conception of judicial power that renders the ruling unstable. The *Maynard-Windsor-Obergefell* conception of rights and duties as concessions of privilege created (and destroyed) by the

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in light of *Meyer v. Nebraska*, 262 U.S. 390 (1923), and *Skinner v. Oklahoma*, 316 U.S. 535 (1942).”)

<sup>326</sup> Chief Justice Roberts described the majority's ruling as “an act of will, not legal judgment,” that “orders the transformation of a social institution that has formed the basis of human society for millennia, for the Kalahari Bushmen and the Han Chinese, the Carthaginians and the Aztecs. Just who do we think we are?” *Obergefell*, 135 S. Ct. at 2612 (Roberts, C.J., dissenting).

<sup>327</sup> See *Obergefell*, 135 S. Ct. at 2617–18 (Roberts, C.J., dissenting) (quoting *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963)) (“The doctrine that . . . due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely, we later explained, ‘has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.’”).

<sup>328</sup> *Id.* at 2616–17 (citing *Dred Scott v. Sandford*, 19 How. 393 (1857)). The Chief Justice pressed a different substantive due process analogy at greater length, concluding that ultimately, “only one precedent offers any support for the majority's methodology: *Lochner v. New York*.” *Id.* at 2620–21 (citing *Lochner v. New York*, 198 U.S. 45 (1905)); cf. Sherif Girgis, *Windsor: Lochnerizing on Marriage?*, 64 CASE W. RES. L. REV. 971, 995 (2014) (arguing that the Court heavily relied on *Lochner* when it found the Defense of Marriage Act to be unconstitutional).

<sup>329</sup> Abraham Lincoln, Lincoln's First Inaugural Address (March 4, 1861), in 1 DOCUMENTS OF AMERICAN HISTORY 385, 387 (Henry Steele Commager ed., 1973).

sovereign powers of nations and states leaves the institution of same-sex marriage vulnerable to constitutional challenge, and even to modest changes in positive law.<sup>330</sup> Concessions of privileges can be abrogated, and one Court's understanding of dignity and autonomy can be discarded by a later Court, particularly where it stands in tension with rights and duties grounded in fundamental law—history, tradition, and conscience.<sup>331</sup> In this light, it is instructive that the privileges of slave owners to treat other human beings as “property” were abrogated without affecting any vested rights or implicating any constitutional protections for property and contract.<sup>332</sup> Because slavery is anathema to the fundamental norms of the common law, the existence of that peculiar institution owed its existence entirely to positive law and could be limited and even abolished without legal consequence.<sup>333</sup> The Thirteenth Amendment restored the pre-political rights and duties of our fundamental law,<sup>334</sup> which persisted in spite of efforts by slave states and the Supreme Court to expand the definition of “property” to include blacks.<sup>335</sup>

This raises challenging questions for the marriage equality project. If marriage revision entails making the privileges of marriage and same-sex marriage equal, and if the rights and duties of biological marriage and natural parentage are fundamental rights, then what does marriage equality mean? Even though a majority of the United States Supreme Court declared unconstitutional all remaining state laws which presuppose marriage by its natural and historical contours as the union of a man and woman,<sup>336</sup> the fundamental rights and duties of marriage and the privileges of same-sex marriage are likely to co-exist for some time. States simply cannot eliminate the fundamental norms of the biological family. This co-existence is likely to be uncomfortable both for persons in same-sex marriages and for individuals and groups that adhere

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<sup>330</sup> See *supra* notes 29–43, 317 and accompanying text.

<sup>331</sup> See *supra* notes 37–40 and accompanying text.

<sup>332</sup> *Buckner v. Street*, 4 F. Cas. 578, 581–82 (E.D. Ark. 1871).

<sup>333</sup> *Forbes v. Cochrane*, (1824) 107 Eng. Rep. 448, 453–54; *Somerset v. Stewart* (1772) 98 Eng. Rep. 499, 510.

<sup>334</sup> U.S. CONST. amend. XIII.

<sup>335</sup> *Dred Scott v. Sandford*, 19 How. 393, 406, 408 (1857).

<sup>336</sup> *Obergefell*, 135 S.Ct. at 2607–08. *But cf.* COLO. REV. STAT. § 14-2-104 (LexisNexis, LEXIS through 1st Reg. Sess., 70th Gen. Assemb., 2015); GA. CODE ANN. § 19-3-3.1 (LexisNexis, LEXIS through 2015 Reg. Sess.); LA. CIV. CODE ANN. art. 86 (West, Westlaw through Tit. 1, 2, 4, 5, 7, 8, 10, 16, 19, 20, 21, 24, 41, 50, 52, 53, 54, and 55, of 2015 Reg. Sess.); ME. REV. STAT. ANN. tit. 19-A, § 650 (West, Westlaw through ch. 238, 268, through ch. 377, 1st Reg. Sess., 2015); MISS. CODE ANN. § 93-1-5 (LexisNexis, LEXIS through 2015 Reg. Sess.); N.D. CENT. CODE § 14-03-01 (LexisNexis, LEXIS through 2015 Reg. Leg. Sess.).

to the historical definition of marriage for moral or religious reasons, not to mention for children.<sup>337</sup>

What additional concessions of privilege can be extended to make this new marriage experiment more tolerable for all? Perhaps, as some scholars have suggested, marriage will no longer be a unitary institution, valid (or not) for all purposes, but instead states will differentiate different incidents for different marital and marriage-like institutions.<sup>338</sup>

Yet that seems unlikely in the short term. The burden of crafting such fine-tuned norms and institutions would fall most heavily on legislatures.<sup>339</sup> And the absence of any sense, much less consensus, about the ends or purposes of various romantic unions prevents coherent political action at present.<sup>340</sup> It seems more likely that the fundamental norms of the common law—the natural duties and rights of the mother-father-child triad—will reassert themselves by necessity as states come to grips with the devastating consequences of fatherlessness in our post-marriage culture. President Obama has noted:

We know the statistics—that children who grow up without a father are five times more likely to live in poverty and commit crime; nine times more likely to drop out of schools and 20 times more likely to end up in prison. They are more likely to have behavioral problems, or run away from home or become teenage parents themselves. And the foundations of our community are weaker because of it.<sup>341</sup>

Justice Cordy explained in his *Goodridge* dissent how the natural rights and duties of fatherhood address this concern: “Whereas the

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<sup>337</sup> See, e.g., *Elane Photography, L.L.C. v. Willock*, 309 P.3d 53, 59–61 (N.M. 2013) (holding that a commercial photography business was liable for discrimination on the basis of sexual orientation, regardless of the business owner’s religious belief that marriage is a man-woman union and despite undisputed evidence that the owners were willing to serve same-sex attracted persons); See generally RYAN T. ANDERSON, *TRUTH OVERRULED: THE FUTURE OF MARRIAGE AND RELIGIOUS FREEDOM* (2015) (discussing the ramifications of marriage and freedom of religion in light of *Obergefell*).

<sup>338</sup> Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965, 1971 (1997).

<sup>339</sup> See *Obergefell*, 135 S. Ct. at 2611 (Roberts, C.J., dissenting) (explaining that it is historically the responsibility of the state legislatures to define marriage).

<sup>340</sup> See Laura Meckler, *New Gay-Rights Push Faces Uphill Climb in Congress*, WALL ST. J. (Jul. 7, 2015), <http://www.wsj.com/articles/new-gay-rights-push-faces-uphill-climb-in-congress-1436313522> (reporting insufficient support in Congress to pass legislation prohibiting sexual orientation discrimination in jobs, financial transactions, housing, and other aspects of public life); Justin Wm. Moyer, *Bobby Jindal Promises Executive Order Critics Say Allows Discrimination Against Same-Sex Couples*, WASH. POST (May 20, 2015), <https://www.washingtonpost.com/news/morning-mix/wp/2015/05/20/bobby-jindal-promises-executive-order-allowing-discrimination-against-same-sex-couples> (discussing the failed Louisiana Marriage and Conscience Act).

<sup>341</sup> Politico Staff, *Text of Obama’s Fatherhood Speech*, POLITICO (Jun. 15, 2008, 1:40 PM), <http://www.politico.com/news/stories/0608/11094.html>.

relationship between mother and child is demonstratively and predictably created and recognizable through the biological process of pregnancy and childbirth, there is no corresponding process for creating a relationship between father and child.”<sup>342</sup> Marriage, with its attendant complex of jural relations between father and children, fills the gap “by formally binding the husband-father to his wife and child, and imposing on him the responsibilities of fatherhood. The alternative, a society without the institution of marriage, in which heterosexual intercourse, procreation, and child care are largely disconnected processes, would be chaotic.”<sup>343</sup>

That chaos must create incentives to reconsider whether the baby has been tossed out with the bathwater. Years after eliminating the distinctions between mother and father from their definitions of marriage, states such as Massachusetts and New York have not fully come to terms with the implications of their experimentation on marriage and family law.<sup>344</sup> And, it is significant that those states have not eliminated the incidents of marriage that presuppose the natural duties of biological parents.<sup>345</sup>

This will be even more apparent if states get out of the marriage licensing business altogether, as some are proposing.<sup>346</sup> The elimination of positive laws governing marriage will not leave a vacuum. The fundamental incidents of marriage pre-existed state licensing schemes, and the repeal of those schemes need not deprive courts of the resources that the common law developed over centuries to address the practical problem of tying fathers to the mother-child dyad and securing the rights of men and woman to honor their obligations to each other and to their children.

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<sup>342</sup> *Goodridge v. Dep't. of Pub. Health*, 798 N.E.2d 941, 996 (Mass. 2003) (Cordy, J., dissenting).

<sup>343</sup> *Id.* (citations omitted).

<sup>344</sup> *See, e.g., id.* at 963 (expressing that the jurisprudence for incidentals involved in the dissolution of same-sex marriage is undeveloped); *Q.M. v. B.C.*, 995 N.Y.S.2d 470, 474 (N.Y. Fam. Ct. 2014) (“Thus, while the language of Domestic Relations Law § 10–a requires same-sex married couples to be treated the same as all other married couples, it does not preclude differentiation based on essential biology.”).

<sup>345</sup> *See, e.g., MASS. GEN. LAWS. ANN. ch. 209C, § 6* (West, Westlaw through ch. 92, 2015 1st Annual Sess.); *N.Y. DOM. REL. LAW § 5* (McKinney, Westlaw through 2015, Chs. 1 to 235).

<sup>346</sup> *See* Sheryl Gay Stolberg, *Kentucky Clerk Defies Court on Marriage Licenses for Gay Couples*, N.Y. TIMES (Aug. 13, 2015), [http://www.nytimes.com/2015/08/14/us/kentucky-rowan-county-same-sex-marriage-licenses-kim-davis.html?\\_r=0](http://www.nytimes.com/2015/08/14/us/kentucky-rowan-county-same-sex-marriage-licenses-kim-davis.html?_r=0) (“In Alabama, probate judges in 13 of 67 counties are . . . declining to issue marriage licenses to anyone . . . . And State Senator Greg Albritton is calling for the state to get out of the marriage license business.”).