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LOVE ON THE OREGON TRAIL:  
WHAT THE STORY OF *MAYNARD V. HILL*  
TEACHES US ABOUT MARRIAGE AND  
DEMOCRATIC SELF-GOVERNANCE

*Steven H. Hobbs\**

I. INTRODUCTION

The Hofstra University School of Law Conference on Marriage, Democracy, and Families (“Conference”) offered an opportunity to reexamine some earlier musing I entertained about the relationship between our private choices to enter and exit marriage and the public concern about the value and utility of marriage in our society. In an article entitled *In Search of Family Values: Constructing a Framework for Jurisprudential Discourse*,<sup>1</sup> I considered the idea of family values and how our constitutional jurisprudence both respects private choice and honors the society’s interest in maintaining the viability and utility of families.

Among other cases, that article examined the landmark case of *Maynard v. Hill*,<sup>2</sup> decided by the United States Supreme Court in 1888, as a backdrop for exploring the legal theory behind the government’s power to regulate marriage and divorce in the interest of society.<sup>3</sup> In short, the case considered the validity of a legislative divorce and its impact on qualifying for a federal land grant program where marriage

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1. Steven H. Hobbs, *In Search of Family Value: Constructing a Framework for Jurisprudential Discourse*, 75 MARQ. L. REV. 529 (1992).

2. 125 U.S. 190 (1888).

3. See Hobbs, *supra* note 1, at 546, 555.

was a prerequisite for obtaining a tract of public land.<sup>4</sup> The land grant program was designed to encourage families to settle in the Oregon Territory. If a settler was married, he received 640 acres, of which 320 acres would be granted to him and 320 acres would be granted to his wife in her name.<sup>5</sup> Since Maynard was divorced during the time period for qualifying for a full grant, he was awarded 320 acres, identified as the west tract of the original claim, because he did not meet the statutory requirements for a full tract.<sup>6</sup> The government then transferred the east tract to other purchasers; in this case, Mr. Hill (and others) gained title.<sup>7</sup> The issue before the Court was that if the legislative divorce was invalid, then Maynard was still married to his first wife during that time period and the other half of the grant should have been awarded to her.<sup>8</sup>

In that previous article, I further borrowed from theologian James Gustafson for a model that expresses the dynamics of the public-private tension in family relationships.<sup>9</sup> Gustafson was concerned about what God was requiring and enabling His children to be and to do.<sup>10</sup> From a theological perspective, Gustafson considered how human beings, both individually and as family members, fit into God's plan for the universe and His Kingdom.<sup>11</sup> The article reformulated his inquiry and considered the question:

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4. See *Maynard*, 125 U.S. at 214; see also Oregon Donation Act of 1850, ch. 76, § 4, 9 Stat. 496, 497.

5. See Oregon Donation Act of 1850, ch. 76, § 4, 9 Stat. 496, 497. For a comprehensive discussion of the Oregon Donation Act of 1850, see Richard H. Chused, *The Oregon Donation Act of 1850 and Nineteenth Century Federal Married Women's Property Law*, 2 LAW & HIST. REV. 44 (1984).

6. See *Maynard*, 125 U.S. at 194.

7. See *id.*

8. See *id.* at 203.

9. See generally 2 JAMES M. GUSTAFSON, *ETHICS FROM A THEOCENTRIC PERSPECTIVE* (1981), discussed in Hobbs, *supra* note 1, at 531-33.

10. Gustafson was concerned with developing an account of ethics centered on Christian ethics, or as he put it from a "theocentric perspective." See GUSTAFSON, *supra* note 9, at 143-46. His fundamental inquiry was stated as follows:

What is God enabling and requiring us, as participants in the patterns and processes of interdependence of life in the world, to be and to do? . . . We, as participants, are to relate ourselves and all things in a manner appropriate to our and their relations to God.

*Id.* at 146. Accordingly, humans are free, moral agents who act and react in the world and can choose how to respond to the circumstances of their lives. Hence, they can choose to act in ways that are directed by their understanding of God's will and ways.

11. Gustafson's account of marriage and family relationships is grounded in the idea that these relationships are gifts which come with certain responsibilities:

Those we love are in a proper sense gifts; their coming to be and their special relations to us flow not from the application of a moral principle or the fulfillment of a duty. We are drawn to others in special ways as part of the processes which meet our needs and bring a measure of fulfillment and joy in human life. They are gifts which bring satisfactions

What is the law and society enabling and requiring us, citizens or members of society, to be and do as participants in the patterns and processes of interdependence in marriage and family life? A secular answer expressed in Gustafson's terms would be that we must relate not only ourselves, as families and family members, but also all things pertaining to family in a manner appropriate to our relationship with society and its laws. This answer acknowledges the fact that through our societal and legal relationships, we are shaping and influencing the very nature of society and law.<sup>12</sup>

First, I still believe that this is a good model to use to examine the topic of marriage, families, and democracy. The focus on patterns and processes of interdependence in marriage and family life calls us to consider who we are as human beings as we enter into interpersonal relationships. Further, studying the patterns and processes of human interactions offers insight into how our humanness motivates and directs our actions. Thus, as we consider how law impacts and regulates intimate and family relationships, we consider how human nature informs our patterns of interpersonal relationships and shapes our democratic discourse on family law.<sup>13</sup>

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to us. We receive them as gifts, and thus are grateful for them; they bring responsibilities to us for their care, and thus our relationships are a basis for duties and obligations to them.

God is enabling and requiring us, as participants in the interdependence of marriage and family, to be stewards, deputies, or custodians of one another and of life itself. We are agents of the divine ordering and empowering of human life in the world. We are "called" to be stewards of many aspects of life through the commitments we make to one another, the duties that arise naturally from our mutual dependence, and the obligations we ratify in the covenant or contract of marriage.

*Id.* at 164-65.

12. Hobbs, *supra* note 1, at 532-33.

13. The interplay between law and human nature and how this interplay frames political discourse in a pluralistic, democratic society forms part of Professor Michael J. Perry's inquiry in his book, *LOVE AND POWER: THE ROLE OF RELIGION AND MORALITY IN AMERICAN POLITICS* (1991). Professor Perry's inquiry stems from a concern about what he identifies as a political discourse about human good and the place morality has in that discourse. *See id.* at 8. While acknowledging that human beings have similarities and differences, he posits that we can think about the question as follows:

The universalist presupposition, however, is that whatever the significant differences among them, human beings have many of the same needs; that some needs are common to all human beings; that, therefore, some things are of value to every human being; that what satisfies a common human need is, at least in normal circumstances, good for any human being; that there are some things that any human being must have or do if he is to live a good or fitting life.

*Id.* at 31.

Accordingly, in the context of family and interpersonal relationships no matter how they are structured, what we are really talking about in our discourse are those things that

The Conference examined our current understanding of marriage and family life, including a consideration of intimate relationships and family patterns and processes that challenge traditional models of family structures.<sup>14</sup> The marital and family regulatory system allows us to pursue matters of the heart, if love and emotional fulfillment be found to animate the desire to enter into familial relationships. For those who marry and form families for reasons motivated by political and social advancement, the same regulatory system applies. Either way we shape our legal system to accommodate the desire to participate in family. Moreover, when the legal system does not accommodate the variety of family constellations, forces in society advocate for changes. The social and legal dynamics of these changes were at the center of the Conference discourse.<sup>15</sup>

At the same time, the freedom to pursue family comes with certain requirements that structure the relationship in a manner that benefits society.<sup>16</sup> The family is charged with the care, maintenance, and education of children. Although much autonomy is granted the family as it cares for its children, the state maintains a watchful eye of protection when the family falls short on financial and emotional support.<sup>17</sup>

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make us human beings. As Professor Perry states, "questions about human good, including the question of what it means to live a truly, fully human life[,] include questions that are indisputably political: questions about the authentically human way to live the collective life, the life in common." *Id.* at 42.

14. See Symposium, *Marriage, Democracy, and Families*, 32 HOFSTRA L. REV. 1 (2003) (collecting articles presented at the Conference).

15. See generally Linda C. McClain, *Intimate Affiliation and Democracy: Beyond Marriage?*, 32 HOFSTRA L. REV. 379 (2003) (summarizing and discussing several Conference papers focused on this topic).

16. This was the view eloquently expressed by Justice Field in *Maynard v. Hill*:

The relation once formed, the law steps in and holds the parties to various obligations and liabilities. It is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress.

125 U.S. 190, 211 (1888).

17. Recognizing that our humanness often reflects our very worst flaws and weaknesses when it comes to our personal relationships, especially those with children, our society has decided that nonetheless all children should be protected from abuse and neglect. The challenge of our society is how to protect children and how to assist families who are attempting to do right by their children.

The true test of American concern about child protection will be whether legislatures and voters are willing to do the hard work of defining where the public responsibility for children's safety begins and ends, and whether they are willing to undertake reforms and then pay what is necessary to make good on the public promise of child protection. Then, the even harder work of learning how to prevent and respond to the tragedy of child abuse and neglect can go forward in earnest.

Mary B. Lamer et al., *Protecting Children from Abuse and Neglect: Analysis and Recommendations*, FUTURE CHILD., Spring 1988, at 4, 19.

Additionally, wealth accumulation and disbursements within familial and interpersonal relationships form the basis for creating economic and financial security. Property ownership and control, in part, are determined by family structure, and rules are made for how property is shared during and after coverture and during and after a nonmarital relationship.<sup>18</sup> Hence, regardless of a desire for privacy, we are a vital part of the larger society and the larger society is a part of us. Necessarily, it is true that it takes a village, or democratic society, to enable us to raise a child and even to support a family unit.<sup>19</sup>

Second, the story of David Maynard, his first wife Lydia, whom he divorced, and his second wife, Catherine, whom he married before the ink dried on his legislative bill of divorce,<sup>20</sup> continues to be fascinating. This is especially true because the whole story of their interrelationships has not yet been fully explored. Research suggests that the facts as presented in the United States Supreme Court case are incomplete and that the true story is much more complex and nuanced.<sup>21</sup> As we certainly can agree, most of the cases we study have broader and deeper stories than the ones printed in the case reporters.

Hence the stories of our families are but reflections of our lives as we work them out as participants in the patterns and processes of interdependence of life in the world. The discourses we have, often

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18. For an example of advice for making financial and legal decisions in nontraditional relationships, see LAMBDA LEGAL DEF. & EDUC. FUND, LIFE PLANNING: LEGAL DOCUMENTS AND PROTECTIONS FOR LESBIANS AND GAY MEN (3d prtg. 1998).

19. Consider the lessons that can be learned by observing how other cultures view the concept of a society enabling family to successfully fulfill the obligations of care within a family. For example, Sobonfu Somé shares some of the wisdom of her West African heritage with us:

Because we are human beings, we are restricted as to what we can do or give. So in raising children we definitely need the support of other people. It's like we say in the village: "It takes a whole village to raise a child." It's also true to say, "It takes a whole village to keep parents sane."

When couples have children without a community to support them, they don't have much time to work out whatever is going on between themselves. And so things pile up, and when the children are gone, they suddenly realize that there is a mountain of things that has not been dealt with for years.

SOBONFU SOMÉ, THE SPIRIT OF INTIMACY: ANCIENT AFRICAN TEACHINGS IN THE WAYS OF RELATIONSHIPS 30-31 (1997).

20. See *Maynard*, 125 U.S. at 192-93 (stating that less than a month passed between the divorce and remarriage).

21. Detailed discussions of the lives of David Maynard, Lydia Maynard (David's first wife), and Catherine Maynard (David's second wife) can be found in THOMAS WICKHAM PROSCH, DAVID S. MAYNARD AND CATHERINE T. MAYNARD: BIOGRAPHIES OF TWO OF THE OREGON IMMIGRANTS OF 1850 (1906); WILLIAM C. SPEIDEL, DOC MAYNARD: THE MAN WHO INVENTED SEATTLE (1978) [hereinafter SPEIDEL, DOC MAYNARD]; and WILLIAM C. SPEIDEL, SONS OF THE PROFITS; OR THERE'S NO BUSINESS LIKE GROW BUSINESS: THE SEATTLE STORY 1851-1901 (1967) [hereinafter SPEIDEL, SONS OF THE PROFITS].

infused with moral content, are about who we are, what we want, and how we live out our dreams in the security of family relationships situated in the context of our larger society. We live in the light of the law and yet our very lives continually change the tone of the light. It can shine brightly on our private moments and at other times allows us to work things out in the shadows of our existence, behind closed doors. Consequently, our constitutional jurisprudence is a retelling of stories about families as they interact with society's laws. These legal stories are about how the law enables us to craft our interpersonal relationships with great autonomy and yet requires us to care—financially, socially, and emotionally—for our familial relationships.<sup>22</sup>

*Maynard v. Hill* is such a story. This is a love story about two people who make a love connection along the arduous Oregon Trail. It is also an adventure story about the frontier spirit of America as individuals seek a better life and to improve the fortunes of their families. It is a story lived in the context of Manifest Destiny, the slavery question, and the removal of Native Americans from their lands. It is a story the public is deeply concerned about because of its impact on the lives of others, most notably the children of David and Lydia and the possible purchasers of the disputed land. This story is important because it examines Doctor Maynard's attempt to organize his private affairs of the heart within the context of a public program designed to encourage families—specifically, white, traditional, heterosexual, companionate relationships which have the sanction of law—to come west and tame the frontier in a territory without blacks or Indians.<sup>23</sup>

The public and private intersect at different but related points in this story. Can he obtain a legislative divorce from his first wife whom he

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22. For a discussion of the role of story and storytelling as it relates to law and the human condition, see Steven H. Hobbs, *Ralph Ellison as Oral Storyteller*, 26 OKLA. CITY U. L. REV. 927 (2001). Many writers in the law and literature movement use personal stories as a method of critiquing our legal system.

By this expression we, the readers, also come to know ourselves better, and at a much deeper level. By seeing and understanding the life stories of others, we understand better what motivates us. We see the law and how it shapes and impacts our daily lives. In our reading of these personal narratives we draw a clearer vision of our own personal search for what is unique about ourselves. However, the ultimate goal is to uncover what is universal, what is accessible to others in a way that allows them to walk around in our shoes.

*Id.* at 930 (footnote omitted). Similarly, the stories that we uncover in our family law cases open us to a wider understanding of how we humans move and interact in the world.

23. See *supra* note 5 and accompanying text (noting how *families* were encouraged to move into Oregon); *infra* notes 181-85 and accompanying text (discussing the intended all-white nature of Oregon).

left in Ohio? Can he obtain a government-sponsored land grant for which he puts forth his second wife, a woman he met on the Oregon Trail, as the basis of satisfying the requirements of the grant that one must have been married by a certain date to receive the largest possible grant of land? Does the territorial legislature have the power to grant a legislative divorce? Does such an act violate any provisions of the Constitution? Does the first wife, or her heirs, have any property rights under the land grant program that may have accrued as a result of her marriage to Maynard? These questions call into focus the myriad patterns of interrelated lives and the processes by which individuals shape and reshape their relationships and their lives.

This Article will examine these patterns and processes by taking a more detailed look at the interrelationships of those parties. First, we will reconsider the story of David's divorce and the story of his love affair with Catherine, his new wife. Then we will consider the underlying land dispute and the circumstances that led to the initial litigation. Next, we will briefly consider how the story of different legislative initiatives, the divorce, and the land grant program, captured the attention of the courts. And finally, the Article concludes with some reflections on how these stories intersect and considers the possible deeper meanings of the stories.

## II. THE LOVE STORY

### A. *Love Lost*

The United States Supreme Court begins its analysis of the *Maynard v. Hill* case with a restatement of the facts as presented in the underlying complaint. The Court states:

In 1828 David S. Maynard and Lydia A. Maynard intermarried in the State of Vermont, and lived there together as husband and wife until 1850, when they removed to Ohio. . . . In 1850 the husband left his family in Ohio and started overland for California, under a promise to his wife that he would either return or send for her and the children within two years, and that in the meantime he would send her the means of support. He left her without such means, and never afterwards contributed anything for her support or that of the children.<sup>24</sup>

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24. *Maynard*, 125 U.S. at 191-92 (1888).



The Maynards had two children, Henry and Frances.<sup>25</sup> They were substituted as parties to the case after their mother died in 1879.<sup>26</sup> In reading the case so far, one would think that the family headed west and David dumped them off in Ohio while he continued on west. Further, the Court emphasizes the fact that David left his family without support.<sup>27</sup> While the Court chastised David Maynard, it nonetheless concluded that “the loose morals and shameless conduct of the husband can have no bearing upon the question of the existence or absence of power in the Assembly to pass the act [of divorce].”<sup>28</sup> Further drawing from the complaint, the Court presumed “that no cause existed for the divorce, and that it was obtained without the knowledge of the wife.”<sup>29</sup> Framed as such, the Court upheld the legislative divorce allowing Hill and others to perfect their interest in the east tract of the original grant to David Maynard.<sup>30</sup>

Now let us proceed to telling a different version of the story. David and Lydia Maynard were indeed married in Vermont in 1828.<sup>31</sup> They moved to Ohio in 1834, not 1850, and settled outside of Cleveland, at the time one of the largest cities in the United States.<sup>32</sup> David and Lydia had two children, Henry, born in 1830, and Frances, born in 1831.<sup>33</sup> Maynard, a trained physician, set up his practice in Cleveland and eventually became one of the leaders of the city.<sup>34</sup> He assisted in platting the streets for Cleveland,<sup>35</sup> a skill that proved useful when platting the streets in Seattle.<sup>36</sup> Being an entrepreneurial type, Maynard established a hospital, set up a medical school, and was involved in other ventures as

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25. *See id.* at 192.

26. *See id.*

27. The Court observed:

The facts mentioned as to the neglect of the husband to send to his wife, whom he left in Ohio, any means for her support or that of her children, in disregard of his promise, shows conduct meriting the strongest reprobation, and if the facts stated had been brought to the attention of Congress, that body might and probably would have annulled the act.

*Id.* at 209-10.

28. *Id.* at 210.

29. *Id.* at 209.

30. *See id.* at 214, 216.

31. *See* SPEIDEL, DOC MAYNARD, *supra* note 21, at 9.

32. *See* REC. NO. 4780, Petition for Divorce of D. S. Maynard (1852) [hereinafter Maynard Divorce Petition] (petition to the Oregon territorial legislature) (transcribed copy on file with author), *reprinted in* SPEIDEL, DOC MAYNARD, *supra* note 21, at 112-14.

33. *See* SPEIDEL, DOC MAYNARD, *supra* note 21, at 9.

34. *See id.* at 11-15.

35. *See id.* at 13.

36. *See* SPEIDEL, SONS OF THE PROFITS, *supra* note 21, at 217-18.

well.<sup>37</sup> Unfortunately, some of these ventures did not succeed for various reasons, including bank failures.<sup>38</sup> His financial ruin led him to consider a move to California in 1849, but he essentially waited too long to catch the great gold rush.<sup>39</sup> He decided to head to California in 1850, but ended up heading to Oregon, perhaps inspired by the land grant program or by the serendipitous meeting of Catherine Broshears.<sup>40</sup> According to one source he tied up his family affairs in this manner:

In coming to this determination [to head west] he was moved . . . by the disaffection of his wife, whose nagging and faultfinding had become well-nigh unendurable. He collected such moneys as he could, simplified his affairs, and fixed his wife, and two now grown children as comfortably as possible, leaving everything to them but the merest pittance.<sup>41</sup>

Whatever the financial conditions for Lydia, their children were indeed grown and not in need of support.

### B. Love Found

Maynard headed out to St. Joseph, Missouri, the jumping off place for wagon trains heading out on the Oregon Trail and kept a diary of his travels.<sup>42</sup> His plan was to travel by horse with a mule carrying medical supplies so that he could earn his keep on the trail by offering medical services, assisting with hunting, and scouting for water sources.<sup>43</sup> As his

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37. See SPEIDEL, DOC MAYNARD, *supra* note 21, at 14-15.

38. Prosch describes the times as follows:

[Maynard] was energetic, and he made efforts and investments in various directions. Of these the most notable was the establishment of a medical school, in which at one time were one hundred and fifty students. . . . Beginning about that time and extending up to the period of the civil war, there was much trouble with the currency, and in 1837 occurred a great financial crash and crisis, in which the business of the nation was rent and broken as never before, the effects upon the people being direful indeed. . . . Especially was this true of men like Maynard, who were free and open-handed, helpful of others, careless of the morrow, and who were heavily leaned upon by acquaintances in the support of their schemes. Maynard became responsible for another man to the extent of \$30,000. The business failed, and in the wreck, Maynard was financially ruined.

PROSCH, *supra* note 21, at 6-7.

39. See *id.* at 7.

40. See SPEIDEL, DOC MAYNARD, *supra* note 21, at 19, 49.

41. PROSCH, *supra* note 21, at 7.

42. The diary is reproduced in part in Prosch's biography of the Maynards, *supra* note 23, at 8-23, and is also found in Thomas W. Prosch, *Diary of Dr. David S. Maynard While Crossing the Plains in 1850*, 1 WASH. HIST. Q., Oct. 50 (1906).

43. Prosch describes Maynard's efforts as follows:

He had a mule, a buffalo robe, a gun, a few medicines, his surgical instruments and several books. He connected himself with a party, depending upon his wits, his

diary suggests, life on the Oregon Trail was treacherous. The emigrants had to contend with poor weather conditions, the arduous task of hauling their belongings over difficult terrain, the difficulty of finding fresh water sources, crossing rain-swollen rivers, and the fear of attacks by Indians as the wagon train invaded their territory.<sup>44</sup> Many suffered injuries and death as a result of accidents.<sup>45</sup> Moreover, with hundreds of emigrants making the trek, sanitary conditions along the trail were abysmal. Cholera spread with devastating results.<sup>46</sup>

It is not clear from the journal entries exactly what arrangements he made as to the company of wagons with which he traveled. At times he rode by himself and at times he indicated that he joined with a specific wagon train.<sup>47</sup> My sense is that he quickly gained a reputation for providing medical services and had a rather fluid arrangement with the fellow travelers he encountered.<sup>48</sup> Here is an excerpt that not only demonstrates the impact of cholera, but also details how he met the woman who would become his second wife:

June 7.—Start late. Find plenty of doctoring to do. Stop at noon to attend some persons sick with cholera. One was dead before I got there, and two died before the next morning. They paid me \$8.75. Deceased were named Israel Broshears and William Broshears and Mrs. Morton, the last being mother to the bereaved widow of Israel Broshears. We are 85 or 90 miles west of Fort Kearney.

June 8.—Left the camp of distress on the open prairie at half past 4 in the morning. The widow was ill both in body and mind. I gave them slight encouragement by promising to return and assist them along. I overtook our company at noon twenty miles away. Went back and met the others in trouble enough. I traveled with them until night. Again overtook our company three miles ahead. Made my arrangements to be

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professional skill, his talent for doing things, his good humor and his general usefulness wherever placed, to carry him through to the other shore in safety and reasonable comfort.

PROSCH, *supra* note 21, at 8.

44. *See id.* at 8-23. Maynard's diary presents a continuous litany of such problems.

45. *See, e.g., id.* at 20 (diary entry for Sept. 17).

46. *See, e.g., id.* at 9 (diary entries for May 21-22, 29).

47. *See, e.g., id.* (diary entry for May 28) (indicating Maynard was traveling "alone," but keeping track of a nearby wagon train).

48. In Maynard's diary, he noted that the journey began on May 16, 1850 when he crossed the Missouri River at St. Joseph. *See id.* at 8. His entries through the rest of May detail the daily tasks of traveling and camping, the medical services he provided, and identified the various persons and wagon trains he encountered. *See id.* at 8-9.

ready to shift my duds to the widow's wagon when they come up in the morning.<sup>49</sup>

One can surmise that the Morton-Broshears had been traveling with one company when sickness overcame them.<sup>50</sup> Doc Maynard, who had been traveling with another company, not only assisted them, but he also took it upon himself to be, in essence, their guardian angel.<sup>51</sup> First, Maynard assisted with the burial of the deceased members of the party.<sup>52</sup> Then, he took up the task of learning to drive a team of oxen.<sup>53</sup> Finally, Maynard was faced with the overwhelming responsibility of organizing a group of strangers and getting them back on task to proceed to Oregon. In his review of Maynard's diary, Thomas Prosch notes a thirteen-day gap in the journal and offers this speculation:

It is to be supposed that the troubles were so many and the labors so great incident to the peculiar situation in which he found himself that he then was unable to keep the diary written up as he did before and after the events in connection with the unfortunate Morton-Broshears party. Seven members of the party died there and then, Mrs. Broshears losing not only her husband and mother but three other relatives, and being left is [sic] a most forlorn and helpless condition. The sympathy and assistance she required from the doctor, who subsequently became her second husband, accounts reasonably for this much to be regretted omission in the narrative.<sup>54</sup>

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49. *Id.* at 10-11.

50. The name is spelled "Broshears" in the journal but is spelled "Brashears" in other accounts including the judicial opinions.

51. Apparently, when Doctor Maynard stopped to assist the Broshears and Morton, Catherine's mother implored him to look after her daughter:

When near Fort Kearney, the latter part of the first week in June, Israel Broshears was taken with cholera, and after him six members of their party, with fatal results. They inquired for a doctor at once, and were told of one who was riding along on a mule not far away. He was called, being taken first to Mrs. Morton, who was then near death. "Never mind me," she said, "but look after my widowed daughter, my daughter with the blind husband and the others. You can do nothing for me. I am going. Help them, Doctor. Don't desert my children."

PROSCH, *supra* note 21, at 66.

52. *See id.* at 67.

53. *See* SPEIDEL, DOC MAYNARD, *supra* note 21, at 30-32.

54. PROSCH, *supra* note 21, at 11. However, Speidel offers another possibility:

Truth impels me to point out another aspect of the human condition with regard to the omissions in the doctor's diary. The chances are that as a precautionary measure, anyone displaying any symptoms of cholera got the full treatment from the doctor on the grounds that it was a lot better to be safe than sorry. So the calomel was passed out with careless abandon. The purgative treatment was followed by the accepted dosages of an

Throughout the rest of the journal there are only two specific references to Mrs. Broshears, although it is obvious that he is traveling with her family and assisting with all of the chores of the trail. One entry describes how one of the oxen named Lion had several gravel stones in his foot and needed tending:

July 25—Left camp at 6:30, after throwing [down] Lion and doctoring his foot, which Mrs. Broshears, George and myself did alone.<sup>55</sup>

In the entries for June through August, Maynard referred several times to George Benton, who drove the wagon for Susanna and Samuel Rider, the sister and blind brother-in-law of Catherine Broshears.<sup>56</sup> They were working together on the trail, and there was mention of sharing a tent with George as their primary sleeping place.<sup>57</sup> Later in the journal, a second reference to Mrs. Broshears indicates a deepening level of comfort between the two of them:

August 28—Started this morning at 2, and came on four miles to sulphur springs. Here we stopped and breakfasted ourselves and team. Then moved on ten miles to Birch Creek, at 1 o'clock. Mrs. B. drove the cattle and let me take a nap in her bed.<sup>58</sup>

Both of these entries suggest that Catherine Broshears was no longer “ill . . . in body and mind.”<sup>59</sup> She had the strength and fortitude to continue the trek to Oregon. Other sources report that Catherine and David were growing closer. Catherine was traveling with her sister, Susanna Rider, who by one account took a fancy to Doc Maynard, but was rudely rebuffed when she found Catherine in David’s arms.<sup>60</sup> This

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opium based tonic to sooth the irritated linings of the collective intestines in the party . . .  
Leaving everybody in a happy state of euphoria.

SPEIDEL, DOC MAYNARD, *supra* note 21, at 33 (ellipsis in original).

55. PROSCH, *supra* note 21, at 14.

56. *See id.* at 11-15. Benton had originally intended to go to California, but was persuaded to continue to help the Riders. *See id.* at 15, 68; SPEIDEL, DOC MAYNARD, *supra* note 21, at 49. Prosch gives this account of Benton:

George Benton, a nephew of Senator Thomas H. Benton, had started with another party which met disaster in the river South Platte. Several wagons and animals were lost at a supposed ford, where the water was both deep and strong. Benton saved his life and his horse, but lost all else, including shoes, coat and hat, and being left entirely alone on one side of the river. He, perhaps, saved the Broshears-Morton people a similar misfortune by pointing out the danger, and he immediately took service with them at \$18 a month and clothes, the latter being an advance payment that was absolutely necessary.

PROSCH, *supra* note 21, at 68.

57. *See* PROSCH, *supra* note 21, at 55.

58. *Id.* at 18.

59. *Id.* at 10 (diary entry for June 8).

60. *See* SPEIDEL, DOC MAYNARD, *supra* note 21, at 47.

created some tension in the Morton-Broshears family,<sup>61</sup> and after they had settled in Olympia in September 1850, the family vigorously opposed the relationship between the two.<sup>62</sup> However, Catherine “told her relatives that she would marry Dr. Maynard or no one.”<sup>63</sup>

On September 25, 1850, the party arrived in Olympia, the home of Michael Simmons, Catherine and Susanna’s brother.<sup>64</sup> At this point in the story, Maynard’s activities reflect the entrepreneurial spirit that was the essence of his personality. He bought and sold dry goods, cut cordwood for sale in California, and struck up a friendship with Chief Seattle of the Suquamish Indians, which led to a short-lived salmon canning business.<sup>65</sup> He traveled and scouted out the territory north of Olympia before deciding to stake a land claim in the middle portion of the Puget Sound at the recommendation of Chief Seattle.<sup>66</sup> He joined with several other enterprising men to make their settlement the

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61. The tensions between the two sisters increased to the point that during the latter part of July, they ceased traveling together. *See id.* at 47-49; *see also* PROSCH, *supra* note 21, at 14 (diary entry for July 27, noting the split).

62. Prosch explains that Catherine’s family tried to match her up with other eligible bachelors:

Her people speedily saw the trend of affairs, and they tried to direct it into quarters to suit themselves and their own ideas of propriety and personal desirability. They found out that the beginning of a romance had developed on the plains, east of the Rocky Mountains, and that it had attained with the passage of weeks and months such life and strength as to be quite serious. Knowing that Dr. Maynard was a married man, from his own admissions, they disapproved the bent of inclination shown by him and their widowed sister. They made suggestions of other men, introduced them, and did what they could to break up the contemplated alliance between Maynard and Mrs. Broshears.

. . . Mrs. Rider [Catherine’s sister] threatened to shoot Dr. Maynard.

PROSCH, *supra* note 21, at 70.

63. *Id.* at 71.

64. Maynard’s diary records the moment of arrival at journey’s end:

September 25.—With an early start, made our way twenty miles to Mr. S. S. Ford’s for dinner. From this we made our way through dense forest and uneven plain twenty-five miles to M. T. Simmons’s, our place of destination, where we were received with that degree of brotherly kindness which seemed to rest our weary limbs, and promise an asylum for us in our worn-out pilgrimage.

*Id.* at 20-21.

65. *See id.* at 24-29.

66. Prosch records how this decision was made:

Seattle told Maynard that he knew a better place than Olympia for him. At this place was a harbor that would permit ships to enter at any time and get close to shore. There was a river, and near by a lake, while not far off was a road over the mountains. The soil was good, there was great hunting, and the fishing was the very best. More Indians were in that neighborhood than anywhere else, and they would work for him, trade with him and make him rich.

*Id.* at 27.

principle place of business on the Sound.<sup>67</sup> It was Maynard who persuaded the other settlers to name the settlement Seattle, after the great Chief.<sup>68</sup> He sponsored legislation in the territorial legislature to carve out a new county called King County (after the newly elected United States Vice President) and had the legislature designate his land claim as the county seat.<sup>69</sup> He also had himself appointed Justice of the Peace, County Notary,<sup>70</sup> and was named Indian Agent in charge of removing the Indians from Seattle.<sup>71</sup> As these actions might suggest, he had become one of the leaders of the Territory and had considerable influence in the legislature. All of which leads us to how he obtained his

67. According to Speidel, Maynard's experience in Cleveland informed his vision of a great city in the Northwest: "What the doctor looked for when he finally got to the Pacific Northwest was a good site at the mouth of a river that furnished transportation for the products of a rich hinterland to a large body of water where there were small towns which needed those products." SPEIDEL, *DOC MAYNARD*, *supra* note 21, at 15. Maynard helped recruit Henry Yesler to the town so that Yesler could build a sawmill and relinquished a part of his land grant to Yesler so that Yesler could have a way to get his timber to the harbor. *See* PROSCH, *supra* note 21, at 29-30.

68. *See* SPEIDEL, *DOC MAYNARD*, *supra* note 21, at 2, 83-84.

69. Maynard urged the creation of new counties in the Puget Sound region. . . . Pierce and King were named in honor of the two men elected the month before (November, 1852), President and Vice President of the United States. In the King County bill Maynard secured a provision locating the county seat upon his donation claim, and another fixing his house as the place for the holding of the next election.

PROSCH, *supra* note 21, at 33.

70. *See id.* at 30-32.

71. Maynard was appointed Indian Agent in 1855 and was charged with moving the Duwamish Indians over to the west side of the Puget Sound. *See* WASHINGTONIANS: A BIOGRAPHICAL PORTRAIT OF THE STATE 110 (David Brewster & David M. Buerge eds., 1988). In a letter to son Henry, Maynard explains the challenges that he faced in this critical time of the city's development:

I assure you there is little comfort in this state of war and confusion, continually watching these devils lest they *rote* off your scalp. Notwithstanding the uncomfortable position I have occupied for the last 5 or 6 months, I feel amply paid when I witness the expression of the public to this effect. That although I have occupied the most dangerous post of any in the field, I have succeeded in quelling the spirit of war and established a friendly feeling with the determination to remain so with over 700 Indians, which number if added to the hostiles in the field would ere this have cleared our country of pale faces.

*Id.*

Catherine Maynard also assisted with the issues surrounding the Indian conflicts during this period. With the assistance of some cooperative Indians, Catherine acted as spy by going to Seattle and informing the authorities when the hostile Indians might attack:

Dr. Maynard was then on the Indian reservation in Kitsap county. You couldn't get a white man to stay with him, so I made up my mind that I would go with him. It was while there that I commence to carry what was known as the express. In other words, I brought the war news from the reservation to Seattle. A white man could not have done it. They would have killed him. I had to be very careful myself.

*Aged Mrs. Maynard*, SEATTLE DAILY TIMES, July 4, 1896, at 6.

legislative divorce, clearing the way for him to marry Catherine Broshears.

### C. *Putting Asunder*

In order to obtain a divorce, an applicant would submit a petition requesting the legislature to act.<sup>72</sup> Additionally, the applicant would submit any other information, usually in the form of affidavits, which might guide the legislature as it makes a decision.<sup>73</sup> The petition would be assigned to an appropriate committee and then go through the normal legislative process for enacting legislation.<sup>74</sup> Accordingly, the actual act of divorce offers little insight into the drama that inspired the petition. As reproduced in the United States Supreme Court opinion, the act is very short:

“An act to provide for the dissolution of the bonds of matrimony heretofore existing between D. S. Maynard and Lydia A. Maynard, his wife.

“SEC. 1. Be it enacted by the Legislative Assembly of the Territory of Oregon, That the bonds of matrimony heretofore existing between D. S. Maynard and Lydia A. Maynard be, and the same are, hereby dissolved.

“Passed the House of Representatives Dec. 22d, 1852.

“B. F. HARDING,

“*Speaker of the House of Representatives.*

“Passed the Council Dec. 22d, 1852.

“M. P. DEADY,

“*President Council.*”<sup>75</sup>

This author has obtained a copy of the petition and other accompanying submissions from the Oregon State Archives in Salem, Oregon.<sup>76</sup> The petition stated the date of the marriage, the various

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72. Divorces were granted by the Oregon Territorial Legislature from 1844 until 1859, when the new State of Oregon included a provision in its constitution declaring that the legislative divorces would no longer be enacted. See Addie Dyal & Mickey Keillor, *Divorce in Early Oregon*, BEAVER BRIEFS, Apr. 1976, at 13.

73. See *id.*

74. See *id.*

75. *Maynard v. Hill*, 125 U.S. 190, 192 (1888).

76. The materials come from the records of the territorial legislature and are all identified by an entry number indicating its receipt into the records. The author has transcribed copies of these materials on file.



residences of the parties, and an acknowledgment of the two children born of the marriage.<sup>77</sup> Maynard indicated in his petition “that he desires to bring them to Oregon.”<sup>78</sup> The latter fact was substantiated by other correspondences Maynard had, particularly with his son.<sup>79</sup> Maynard then presented his case against his wife:

And your petitioner further represents to your Honorable Body, that he and his aforesaid companion continued to live together as man and wife until the spring of 1841 that in the month of April of the Year last aforesaid on returning home from visiting a patient at about the hour of ten o'clock in the night found his wife lying with a certain John Hemrick in an obscene manner. That the undersigned had previously doubted her chastity but had never before seen anything positively confirming his suspicions, at which time the usual relations existing between man and wife ceased.<sup>80</sup>

Maynard then claimed that he did not earlier seek a divorce because of his children.<sup>81</sup> Additionally, he declared that he had never abused his wife, nor failed to provide for her.<sup>82</sup> In fact he stated that when he left for Oregon, “he left her provided with a comfortable home and a means of living independently. Which home the undersigned learns that she is now residing upon.”<sup>83</sup>

Moreover, he attempted to procure witnesses to substantiate his claim but none would come to Oregon from Ohio, or in some cases from California. As evidence of his efforts, he offered to the legislature a letter written by a W.C. Oliver highlighting attempts to obtain evidence

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77. See Maynard Divorce Petition, *supra* note 32; SPEIDEL, DOC MAYNARD, *supra* note 21, at 112-13.

78. Maynard Divorce Petition, *supra* note 32; SPEIDEL, DOC MAYNARD, *supra* note 21, at 113.

79. A copy of one such correspondence to Maynard's son, Henry, is included in WASHINGTONIANS, *supra* note 71, at 110-11. In his diary, Maynard notes that he wrote to Henry on July 14, 1850 and “[p]aid 50 cents to carry it to St. Joseph.” PROSCH, *supra* note 21, at 13. One source notes that Maynard's great, great, great grandson, Chris Maynard Braaten, discovered many letters written by Dr. Maynard and that “[t]he letters written from 1850 through 1873 urged his two children to leave Ohio and join him in Seattle.” *Letters of Seattle's Doc Maynard Found by Boeing Employee Kin*, BOEING NEWS, Jan. 4, 1979, at 4.

80. Maynard Divorce Petition, *supra* note 32; SPEIDEL, DOC MAYNARD, *supra* note 21, at 113.

81. See Maynard Divorce Petition, *supra* note 32; SPEIDEL, DOC MAYNARD, *supra* note 21, at 113.

82. See Maynard Divorce Petition, *supra* note 32; SPEIDEL, DOC MAYNARD, *supra* note 21, at 114.

83. Maynard Divorce Petition, *supra* note 32; SPEIDEL, DOC MAYNARD, *supra* note 21, at 114.

of the alleged adultery.<sup>84</sup> Oliver was responding to a letter written by Maynard on May 25, 1852.<sup>85</sup> In this response, Oliver observed:

I have seen and talked with Sprague Brown and others on the subject and whilst we all agree in opinion that your wife has been in time past and still is addicted to habits of adultery, yet this is only our opinion it is true that it is the belief of the community generally that she is unchaste yet how can her want of chastity be proven, who will [sware] that he had carnal connection with her?<sup>86</sup>

Oliver learned that a William Craig, who was then in California, might possibly testify to the fact that he saw Lydia and one Ormsby “*kissing* and that too in the bushes.”<sup>87</sup> Again, the difficulty would be to find Craig in California. Oliver reluctantly concluded that Maynard would not have sufficient evidence to bring a divorce case in court and transmitted the following observation:

The truth is Doctor that people here are unwilling to give evidence of the matter she is shrewd and sly and keeps good lookout and another thing her friends and relatives here are respected very much and on their account people hate to say what they know or believe about her.<sup>88</sup>

Oliver also noted that he interviewed Lydia and reported that she was happy without David and that she acknowledged that David had never mistreated her.<sup>89</sup>

84. See REC. NO. 4781, Affidavit of W.C. Oliver (letter) (1852) [hereinafter Oliver Affidavit] (submission to Oregon territorial legislature accompanying Maynard Divorce Petition, *supra* note 32) (transcribed copy on file with author), *reprinted in* SPEIDEL, DOC MAYNARD, *supra* note 21, at 114-16.

85. See *id.*; SPEIDEL, DOC MAYNARD, *supra* note 21, at 114.

86. Oliver Affidavit, *supra* note 84 (brackets in original); SPEIDEL, DOC MAYNARD, *supra* note 21, at 115.

87. Oliver Affidavit, *supra* note 84; SPEIDEL, DOC MAYNARD, *supra* note 21, at 116. Oliver apparently talked with Ormsby without any success in getting him to testify. Oliver reports:

Ormsby says to me in confidence that he could sware to her want of chastity but that he would flee his county of [sic] die in jail before he would tell what he knows or says that he well knows you deserve a divorce in every sense of the word but that he cannot and will not divulge anything that he knows on the subject and so say the others.

Oliver Affidavit, *supra* note 84; SPEIDEL, DOC MAYNARD, *supra* note 21, at 115.

88. Oliver Affidavit, *supra* note 84; SPEIDEL, DOC MAYNARD, *supra* note 21, at 115.

89.

I saw her a short time since and asked her if she had got any letters from you she said no but that you wrote regularly to Henry [their son]. She said she had written one letter to you since you had gone to Oregon just to let you know that she was as independent as ever she was and declared that she was much happier in your absence than she had ever been in your society said you had been jealous of her for many years and she hoped you would remain in Oregon the remainder of your life.

Oliver Affidavit, *supra* note 84; SPEIDEL, DOC MAYNARD, *supra* note 21, at 115.

On these submissions the petition was successfully moved through the legislature, but not without opposition. Isaac N. Ebey, a member of the select committee charged with reviewing Maynard's petition, filed a minority report challenging the constitutional validity of the legislative divorce.<sup>90</sup> Mr. Ebey urged that "[t]he position assumed by the report of the committee, in favor of the prayer of the petitioner, is, in the opinion of the minority, not tenable, either upon principles of sound morality or law."<sup>91</sup> His argument was that a marriage contract, even denominated as a civil contract, was to be treated like any other contract which could not be impaired by the legislature.<sup>92</sup> He cited, as authoritative sources, legal commentators and the United States Supreme Court, especially the Dartmouth College case.<sup>93</sup> Ebey concludes the following:

It will not be denied that to impair a contract, or to change its character by an act of the Legislature, would be wholly void. The petitioner states that he was lawfully married in the state of Vermont. The Supreme Court of the United States has said, that if an act be done under a law, a succeeding legislature cannot undo it.<sup>94</sup>

As further evidence he stated "that in the case of *State vs. Fry*, 4th Missouri Reports, the Supreme Court of that State has declared, that an act of the General Assembly granting divorces is unconstitutional."<sup>95</sup> He also noted that when Florida's territorial legislature passed acts of divorce, "upon being submitted to the Congress of the United States, [the divorces] were declared null and void. See act of Congress, 15th May, 1826, chap. 46, vol.4, p. 167."<sup>96</sup> He surmised that even though other state legislatures may have passed such an act in the past, nonetheless, such practices did not make it any more constitutional.<sup>97</sup> Of course, Ebey's minority report framed the issues that would be raised in the judicial challenges that followed.

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90. MR. EBHEY'S REPORT FROM THE MINORITY OF THE COMMITTEE ON D. S. MAYNARD'S BILL FOR DIVORCE, NO. 4779 (Or. Dec. 15, 1852) [hereinafter EBHEY MINORITY REPORT]. A photocopy of the report by Mr. Ebey is on file with the author. Ebey's opposition is also noted in PROSCH, *supra* note 21, at 33. *But see infra* notes 98-102 and accompanying text.

91. EBHEY MINORITY REPORT, *supra* note 90, at 1.

92. *See id.* at 1-2.

93. *See id.* at 2. Ebey's reliance on the Dartmouth case is mystifying. The Court specifically stated therein that the Impairment Clause of the Constitution did not apply to marriages, even though marriage was considered a contract, and called divorce "a power peculiarly appropriate to domestic legislation." *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 600-01 (1819).

94. EBHEY MINORITY REPORT, *supra* note 90, at 2.

95. *Id.* at 3.

96. *Id.*

97. *See id.* at 2-3.

Isaac Ebey's minority report, while well-written, contradicts the fact that, as a part of Maynard's divorce petition, Ebey had submitted an affidavit attesting to Maynard's good character.<sup>98</sup> In his biography of Maynard, Speidel argues that Ebey's opposition was based on personal issues. According to Speidel, Ebey had left his wife in Missouri for a long time and when she finally came to Oregon Territory, she saw very little of him.<sup>99</sup> She became upset when she learned that her husband had sponsored Maynard's divorce petition.<sup>100</sup> Speidel reports that Ebey explained the minority report to Maynard by saying, "I've got to keep the home fires burning. You're going to get your divorce, but this minority report gets me off the hook with my wife."<sup>101</sup> The payoff for Maynard was a bill sponsored by Ebey for the creation of King County and the other administrative perks that Maynard received from the legislature.<sup>102</sup>

Hence, Doc Maynard was freed from the bonds of what was, by his words, a most intolerable situation.<sup>103</sup> Years after Maynard's death, the United States Supreme Court would agree as to the wisdom of letting him out of his first marriage when it found:

Many causes may arise, physical, moral, and intellectual—such as the contracting by one of the parties of an incurable disease like leprosy, or confirmed insanity or hopeless idiocy, or a conviction of a felony—which would render the continuance of the marriage relation

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98. This may certify that I have been acquainted with the bearer Doc. D.S. Maynard since some time in the Autumn of 1851 and am happy in saying that I consider him a man of honest moral principles and believe that he is considered as such among his acquaintances in general.

REC. NO. 4768, Affidavit of T.R. Ebey (1852) (submission to the Oregon territorial legislature accompanying Maynard Divorce Petition, *supra* note 32) (transcribed copy on file with author), reprinted in SPEIDEL, DOC MAYNARD, *supra* note 21, at 69; see also SPEIDEL, DOC MAYNARD, *supra* note 21, at 68-69, 117. "T.R.," in the title of this document, presumably stands for Territory Representative.

99. See SPEIDEL, DOC MAYNARD, *supra* note 21, at 118.

100. See *id.*

101. *Id.*

102. See *id.* at 118-19.

103. Finally, your petitioner would humbly represent to your Honorable Body, that as it is impossible that he and his wife can ever again live together, and as it is at present and perhaps ever will be out of the power of your petitioner to procure the testimony which might be required in a court of chancery to entitle the undersigned to a divorce from his said wife, and believing that his sufferings of mind have been long and patiently and believing before God and man, that he is justly entitled to the relief which he seeks . . .

Maynard Divorce Petition, *supra* note 32; SPEIDEL, DOC MAYNARD, *supra* note 21, at 113-14.

intolerable to the other party and productive of no possible benefit to society.<sup>104</sup>

He married Catherine Broshears on January 15, 1853 and had, what by all accounts was, a successful marriage with her.<sup>105</sup> However, he was not quite through with his relationship to Lydia Maynard, as the next part of the story will reveal.

### III. THE STORY OF THE LAND DISPUTE

When one reads the United States Supreme Court opinion, one has the impression that the land dispute was created when David Maynard first attempted to perfect his land claim by listing Catherine Broshears as his wife. The government land office initially issued the west tract to David and the east tract to Catherine.<sup>106</sup> That land claim was “annulled by the Commissioner of the General Land Office, on the ground that, as it then appeared, and was supposed to be the fact, Lydia A. Maynard, the first wife, was dead, and that her heirs were therefore entitled to half of the claim.”<sup>107</sup> To complicate matters further, Lydia appeared in Oregon to assert her claim for the east tract.<sup>108</sup> After a series of administrative reviews, her claim was defeated because it was found that, at the time of the divorce, “the husband possessed only an inchoate interest in the lands, and whether it should ever become a vested interest depended upon his future compliance with the conditions prescribed by the statute; that his first wife accordingly possessed no vested interest in the property.”<sup>109</sup> Subsequently, the east tract was declared to be public land and patents were issued to Hill and Lewis.<sup>110</sup>

However, as with the divorce, there is more to this story. One should first note that the legitimacy of Lydia Maynard’s land claim was asserted in two separate causes of action against different, and apparently unrelated, defendants. The first was against a man named

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104. *Maynard v. Hill*, 125 U.S. 190, 205 (1888).

105. *See id.* at 193; PROSCH, *supra* note 21, at 34.

106. *See Maynard*, 125 U.S. at 193.

107. *Id.* at 193-94. Section eight of the Oregon Donation Act of 1850 actually provided for the heirs to inherit the land if the settler died before completing the four years of cultivating the land and complying with all of the other conditions of the Act. *See Oregon Donation Act of 1850*, ch. 76, § 4, 9 Stat. 496, 499.

108. *See Maynard*, 125 U.S. at 194.

109. *Id.*

110. *See id.* Lewis was, along with Hill, one of the defendants in *Maynard*. *See id.*

Valentine<sup>111</sup> and the second was against Hill and Lewis,<sup>112</sup> all alleged holders of government land patents to portions of the east tract.

In each case, the Supreme Court of the Territory of Washington assessed the claim in terms of the facts just described, including the assertion that David and Lydia Maynard moved to Ohio in 1850 and David left her there.<sup>113</sup> The essence of the claims was that the holders of the land patents held them as trustees for Lydia Maynard, the bona fide owner of the land.<sup>114</sup> The claims were made based on an argument that either the legislative divorce was invalid or, under a reading of the Oregon Donation Act, Lydia Maynard earned the right to perfect her patent on the east tract.<sup>115</sup> The District Court sustained a demurrer in each case and appeals were taken to the Supreme Court of the Territory of Washington.<sup>116</sup> By the time *Maynard v. Hill* reached the Supreme Court of the Territory of Washington a second time, the late Lydia Maynard's children had been substituted as parties.<sup>117</sup> *Maynard v. Hill* was appealed to the United States Supreme Court.

Both the United States Supreme Court and the Supreme Court for the Territory of Washington stated that Lydia Maynard appeared at the register of lands office to assert her claim.<sup>118</sup> How did she know that she had a claim? How and why did she make the trip to Seattle? There is another version of this story that is not reflected in any of the court opinions, but is reflected in then contemporary newspaper accounts of the land dispute.<sup>119</sup> Apparently, a certain Colonel C. H. Larrabee, who practiced law in Seattle, actually started the land dispute, according to a report in *The Weekly Intelligencer*:

Considerable excitement was aroused in this city last week upon it being ascertained that Col. Larrabee and one or two others, as it is stated, had succeeded in obtaining 'color of title' to some 320 acres of land adjacent to this place, which has for a long time been held under warranty deeds from Dr. Maynard or his grantees. The tract in question embraces the east half of the Maynard Donation Claim. The title which

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111. *Maynard v. Valentine*, 3 P. 195 (Wash. 1880).

112. *Maynard v. Hill*, 5 P. 717 (Wash. 1884), *aff'd*, 125 U.S. 190 (1888).

113. *See Maynard v. Hill*, 5 P. at 719; *Maynard v. Valentine*, 3 P. at 195.

114. *See Maynard v. Valentine*, 3 P. at 196.

115. *See Maynard v. Hill*, 5 P. at 718-19; *Maynard v. Valentine*, 3 P. at 197.

116. *See Maynard v. Hill*, 5 P. at 717; *Maynard v. Valentine*, 3 P. at 196.

117. *See Maynard v. Hill*, 5 P. at 717.

118. *See Maynard v. Hill*, 125 U.S. at 194; *Maynard v. Valentine*, 3 P. at 196.

119. Additionally, the basic facts of the land dispute are chronicled in PROSCH, *supra* note 21, at 54-58. Prosch identifies many of the parties including J. Vance Lewis and W. C. Hill. *See id.* at 58.

these would be land sharks, whoever they are, rely upon for obtaining the ownership of the lands, which many of our honest citizens have in good faith paid hard-earned money for, has been obtained from a former wife of Dr. Maynard, from whom he divorced within six months after the location was made, and who was never herself a resident of this Territory.<sup>120</sup>

The report goes on to suggest that Larrabee and the others “hunt up the divorced woman [and] obtain for a nominal consideration all her supposed rights.”<sup>121</sup> With an awareness that the land office had cancelled any grant of the east tract to Doc Maynard and his second wife, the “land grabbers” would attempt to lay claim to the east tract.<sup>122</sup>

In the July 15, 1872 edition of *The Weekly Intelligencer*, an in-depth exposé of Larrabee’s scheme to get control of the east tract was published.<sup>123</sup> Larrabee’s plan was to obtain financial backing from individuals who would be willing to invest in the plan to obtain this valuable property.<sup>124</sup> Apparently one of Larrabee’s associates tracked Lydia to Wisconsin and wrangled a deed to her interest, if any, in the east tract for the “paltry sum of \$500.”<sup>125</sup> To further complicate matters, much of the land in dispute on the east tract had been sold by David and Catherine Maynard to “innocent purchasers, and that many of these purchasers had made valuable improvement upon the same.”<sup>126</sup> It appeared that Doc Maynard was a shameless promoter of Seattle and would assist anyone willing to make a contribution to the city’s growth.<sup>127</sup>

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120. *The Intelligencer*, WKLY. INTELLIGENCER (Seattle), Nov. 27, 1871, at 3.

121. *Id.*

122. *See id.*

123. *The Maynard Land Case and Its Dishonest Instigator*, WKLY. INTELLIGENCER (Seattle), July 15, 1872, at 2.

124. Now the facts in the case are these: About a year ago last Spring, this man Larrabee was informed from the research of another party than himself of the alleged defect in this title, and it doubtless occurring to him, if he could strike any one with money that would join in with him, that some advantage might be taken of it. . . . [H]e approached two gentlemen of this city, who were apprised of the same alleged defect, and proposed to them that they should buy up the first wife’s interest, they all knowing that she was still living, stating, as an inducement, that “we can make some money out of it.” This was how he “urged our citizens to perfect” their titles, after his discovery. His proposition was indignantly spurned by these gentlemen.

*Id.*

125. *Id.*

126. *Id.*

127. *See* PROSCH, *supra* note 21, at 38-39.

*The Weekly Intelligencer* further reported that Lydia Maynard's trip was financed by Larrabee and his associates.<sup>128</sup> It was reported by other sources that Lydia Maynard resided with David and Catherine during her time in Seattle.<sup>129</sup> One of the legends told about David Maynard's reaction to his first wife's arrival in Seattle is quite remarkable: "Doctor Maynard's reaction was debonair. He repaired to the barber shop and said to the barber: 'Spruce me up good, because I am about to treat this town to the dangdest sight it's ever seen. I am going to walk down Front Street with a wife on each arm.'"<sup>130</sup>

At the end of the land dispute, truth apparently won out over shysterdom. *The Seattle Press-Times* made the following observation:

It was a matter of profound regret to the legal fraternity that this long, protracted litigation, (1855-1893) involving property of this extent and value managed to occupy the attention of the land office and the courts for so many years and yet added little to the wealth of any of the members of the bar.

With the exception of Mr. Hill, the various claimants were, as a rule, poor people with little ready cash to expend in litigation, no matter how brilliant the prize at stake; so much of the important legal work in the case was rendered on the familiar contingent fee basis, and the particular 'contingency' failed to materialize.<sup>131</sup>

Ironically, this case lasted almost a half a century.<sup>132</sup> The property involved constituted some of the most valuable real estate in Seattle and impacted the interests of many persons, including the heirs of David and Lydia Maynard.<sup>133</sup> Yet, the origins of the controversy can be traced back to the disintegration of an Ohio marriage and the blossoming of a love

128. Touching Larrabee's misrepresentations concerning the appearance of the first wife at the land office to prove her claim and of the award which was made of it to her, months after she had been deprived of all interests in it, we have only to say that she was brought out here and induced so to do by those three men, and that she derived no benefit from the decision; and, to dispose of his statement that the east half of the claim is mostly held by non-residents for speculative purposes, and that the facts are that not a single rood of that land is owned by a non-resident—and that he was aware of it when he said to the contrary.

*The Maynard Land Case and Its Dishonest Instigator*, *supra* note 123.

129. I have discovered no reports detailing exactly how long Lydia stayed in Seattle; however, Prosch reports that she returned to Wisconsin. See PROSCH, *supra* note 21, at 60.

130. NARD JONES, *Colorful Doctor Maynard*, in 1 NARD JONES, *NORTHWEST NARRATIVES: STORIES OF WASHINGTON HISTORY* 213 (1961).

131. *The Bystander*, *By the Way*, SEATTLE PRESS-TIMES, Aug. 3, 1893, at 2.

132. *See id.*

133. See PROSCH, *supra* note 21, at 38-39.



relationship following the tragic death of a spouse along the Oregon Trail.

#### IV. THE STORY OF LEGISLATIVE INITIATIVE

The United States Supreme Court extensively considered the historical legitimacy of legislative divorces.<sup>134</sup> First, it asked whether or not a territorial legislature had the necessary authority to enact such legislation.<sup>135</sup> The Court refers to the organic statute creating the Territory of Oregon:

The act of Congress creating the Territory of Oregon, and establishing a government for it, passed on the 14th of August, 1848, vested the legislative power and authority of the Territory in an Assembly, consisting of two boards; a Council and a House of Representatives. It declared . . . that the legislative power of the Territory should "extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States."<sup>136</sup>

In determining whether a legislative divorce was a rightful subject of legislation, the Court conducted an exhaustive review of divorce from a historical perspective.<sup>137</sup> The Court consulted recognized law treatises for the period<sup>138</sup> and the decisions of various state courts.<sup>139</sup> The Court concluded:

We are, therefore, justified in holding—more, we are compelled to hold, that the granting of divorces was a rightful subject of legislation according to the prevailing judicial opinion of the country, and the understanding of the profession, at the time the organic act of Oregon was passed by Congress.<sup>140</sup>

The Court next considered whether or not the legislative divorce violated the United States Constitution by impairing the contract of marriage.<sup>141</sup> The Court was very clear that the marriage contract was not

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134. For an account of the history of divorce, including legislative divorce, available at the time *Maynard v. Hill* was decided by the United States Supreme Court, see THEODORE D. WOOLSEY, *DIVORCE AND DIVORCE LEGISLATION ESPECIALLY IN THE UNITED STATES*. (2d rev. ed., Lawbook Exchange 2000) (1882) (originally titled *DIVORCE AND DIVORCE LEGISLATION*).

135. See *Maynard v. Hill*, 125 U.S. 190, 203-10 (1888).

136. *Id.* at 203 (citations omitted).

137. See *id.* at 204-09.

138. The Court consulted Bishop's *Treatise on Marriage and Divorce*, Cooley's *Treatise on Constitutional Limitations*, and Kent's *Commentaries*. See *id.* at 206.

139. See *id.* at 206-09.

140. *Id.* at 209.

141. See *id.* at 210-14.

one contemplated by section ten of Article I of the Constitution.<sup>142</sup> The Court further expounded on the nature of marriage as a civil contract.<sup>143</sup> The Court cites numerous examples of how other courts and authorities have considered marriage, while indeed entered into or contracted by two willing parties, to be a social institution created by the law for the benefit of society.<sup>144</sup> The public purpose of marriage is strongly articulated by Justice Field:

The consent of the parties is of course essential to its existence, but when the contract to marry is executed by the marriage, a relation between the parties is created which they cannot change. Other contracts may be modified, restricted, or enlarged, or entirely released upon the consent of the parties. Not so with marriage. The relation once formed, the law steps in and holds the parties to various obligations and liabilities. It is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress.<sup>145</sup>

Finally, notwithstanding the divorce, the Court considered whether Lydia Maynard had acquired any claim to some property rights under the Oregon Donation Act.<sup>146</sup> The claim was made that since her husband was married to her at the time that he settled on the land and began to cultivate it for the requisite four-year period, that she thus acquired a right in her own name to the east tract.<sup>147</sup> Inherent in this claim is the idea that, by virtue of her marriage to David Maynard, she would qualify as a settler. However, she was never domiciled in the territory and she could not qualify as a settler because she was not a white male citizen.<sup>148</sup>

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142. Justice Field observed:

As was said by Chief Justice Marshall in the *Dartmouth College Case*, not by way of judgment, but in answer to objections urged to positions taken: "The provision of the Constitution never has been understood to embrace other contracts than those which respect property or some object of value, and confer rights which may be asserted in a court of justice. It never has been understood to restrict the general right of the legislature to legislate on the subject of divorces."

*Id.* at 210.

143. *See id.* at 210-11.

144. *See id.* at 211-12.

145. *Id.* at 211.

146. *See id.* at 214-16. In *Maynard v. Valentine*, the Supreme Court of the Territory of Washington considered whether Lydia Maynard had any independent right to a land claim under the Oregon Donation Act: "The question is this: Had the appellant, as Maynard's wife, at the time of the divorce act, any perfect right of property to the land in controversy vested in her which the operation of that act must not be suffered to impair?" 3 P. 195, 203 (1880).

147. *See Maynard v. Hill*, 125 U.S. at 214-16.

148. *See Oregon Donation Act of 1850, ch. 76, § 4, 9 Stat. 496, 497.*

The Court, citing a previous case that had considered the land grant statute, held:

“The statutory grant was to the settler, but if he was married, the donation, when perfected, inured to the benefit of himself and his wife in equal parts. The wife could not be a settler. She got nothing except through her husband.”

When, therefore, the act was passed divorcing the husband and wife, he had no vested interest in the land, and she could have no interest greater than his.<sup>149</sup>

Hence, no distinctive property rights in the land claim inured to her prior to her divorce.

Regardless, one should also note that any other property rights she may have possessed during coverture could not have been defeated by the legislative divorce.<sup>150</sup> So the divorce did not defeat her ability to claim property rights apart from the land grant, if any. Accordingly, Lydia Maynard, and her heirs and assigns, had no right to claim an interest in the east tract by virtue of the legislative divorce acquired by David and her inability to establish a land claim in her own right.<sup>151</sup>

## V. THE INTERRELATED FABRICS OF THESE STORIES

One is left to ponder the deeper meanings of these stories. At first glance, *Maynard v. Hill* appears to be a case of a husband who abandoned his wife and children, deprived them of a valuable property right, and had such “loose morals and shameless conduct” that he took up with another woman.<sup>152</sup> Certainly, Justice Field, in his opinion, presented an engaging historical review of legislative divorces<sup>153</sup> which today would seem quite anomalous. And he bequeaths to us wonderful language about the institution of marriage and its importance to society. Justice Field, in discussing the civil nature of the marriage contract, reminds us that

[t]he relation once formed, the law steps in and holds the parties to various obligations and liabilities. It is an institution, in the

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149. *Maynard v. Hill*, 125 U.S. at 216 (quoting *Vance v. Burbank*, 101 U.S. 514, 521 (1879)).

150. The Court noted, particularly in the impairment of contract context, that “[i]f the act declaring the divorce should attempt to interfere with rights of property vested in either party, a different question would be presented.” *Id.* at 206.

151. *See id.* at 216.

152. *See id.* at 210.

153. *See id.* at 204-09.

maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress.<sup>154</sup>

He further expresses the importance of the family to society by quoting a case from Maine:

“It is, rather, a social relation like that of parent and child, the obligations of which arise not from the consent of concurring minds, but are the creation of the law itself; a relation the most important, as affecting the happiness of individuals, the first step from barbarism to incipient civilization, the purest tie of social life and the true basis of human progress.”<sup>155</sup>

Although the case masks a dramatic love story, the opinion hints at the reality of a robust debate about marriage, family, and democracy.<sup>156</sup> The first aspect of the debate is the very legitimacy of divorce, legislative or otherwise. There has always been a tension about the legitimacy of legislative divorce.<sup>157</sup> In *Maynard v. Hill*, Justice Wingard of the Supreme Court of the Territory of Washington dissented from the majority opinion, although he does not indicate the basis for his dissent.<sup>158</sup> An unidentified bachelor wrote a moving letter to the local newspaper decrying the seemingly cavalier attitude with which individuals have abandoned their marriages and families.<sup>159</sup> He noted that “[w]ithin the last twenty days the consciences of sixty-six individuals have been relieved from the obligation imposed by ‘plighted troth,’ and vows of eternal fidelity.”<sup>160</sup> He suggested that the legislative divorce process, when practiced with such frequency, would cause mass confusion as to determining one’s family tree:

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154. *Id.* at 211.

155. *Id.* at 211-12 (quoting *Adams v. Palmer*, 51 Me. 480, 484-85 (1863)).

156. The Court in *Maynard v. Hill* understood that the debate about legislative divorces should take place in other forums: “We are not at liberty to inquire into the wisdom of our existing law on this subject, nor into the expediency of such frequent interference by the legislature. We can only inquire into the constitutionality of the act under consideration.” *Id.* at 207 (quoting *Starr v. Pease*, 8 Conn. 541, 548 (1831)). The debate is also noted in HENDRIK HARTOG, *MAN AND WIFE IN AMERICA: A HISTORY* 70-73, 261-63 (2000).

157. Representative Ebey’s Minority Report in the *Maynard* divorce offers an example of that tension. See *supra* notes 96-103 and accompanying text.

158. Justice Wingard’s dissent was concise: “It does not appear, except inferentially, that I dissented from the decision in the case of *Maynard v. Valentine*, 2 Wash. T. 3; but I did dissent therefrom, and I dissent from the majority opinion in this case.” *Maynard v. Hill*, 5 P. 717, 720 (1884).

159. A Bachelor, Letter, *OR. STATESMAN*, Feb. 8, 1859, at 2.

160. *Id.*

If the evil continues, a man of the next generation will be able to include half of his acquaintances a “relation by marriage” and the “rest of mankind” as blood kin. He will also require to be well versed in legislative history and dates in order to make an approximate guess as to who had the best opportunities to be his father or mother.<sup>161</sup>

The bachelor was not alone in his criticism of the practice of legislative divorce. The Methodist Episcopal Conference of Oregon (“Methodist Episcopal Conference”) was reported to have petitioned the legislature “to limit the causes of divorce to the only scriptural one—unfaithfulness to the marriage vows.”<sup>162</sup>

The Methodist Episcopal Conference denounced the historical process of granting legislative divorces by stating “[w]hen the law allows a divorce to be obtained by consent of the parties—for an *ex parte* proceeding is often nothing more—marriage is not many degrees removed from the worst type of polygamy or Mormonism.”<sup>163</sup> The newspaper account of the legislative petition criticized the Methodist Episcopal Conference for not speaking out until after the new Oregon State Constitution had prohibited legislative divorces in 1860.<sup>164</sup> Other newspaper accounts also reflected the critique that legislative divorces were too freely given. In one divorce, the petitioner, Elijah Dodson, in a letter to his councilman, asked the legislature not to act on his petition:

Dear Sir: After my best respects, I wish to inform you that my old woman has returned and I have found her all right, and if our petition has not been taken up, be so good as not to take it up, and not proceed any further without my order. Yours Respectfully, Elijah and Susan Dodson.<sup>165</sup>

A debate was held among the legislators as to whether or not they should pass the divorce bill regardless of the request of the petitioner in order “to rebuke the spirit of trifling the House had manifested respecting divorces.”<sup>166</sup> One legislator noted that, “[i]f the parties didn’t like living apart it wouldn’t cost them more than five minutes time, and ten dollars in money to get married again.”<sup>167</sup> The bill was tabled by a motion that passed fourteen to eleven and was never acted upon.<sup>168</sup>

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161. *Id.*

162. OR. STATESMAN, Oct. 10, 1864, at 1.

163. *Id.*

164. *See id.*

165. OR. STATESMAN, Feb. 8, 1859, at 2.

166. *Id.*

167. *Id.*

168. *See id.*

The second aspect of the debate is really one of actions, not merely words. The actions demonstrate how individuals shape their lives in the mix of monumental changes in society. Clearly, the story of families moving to what in essence was the nation's last frontier says much about our wanderlust and the desire to push the boundaries of experience and opportunity. Emigration to the Northwest presented an opportunity to start over, indeed to create the world, both public and private, anew. Prosch adeptly captured the spirit of a new start:

Men came to the Pacific coast for the purpose of getting away from unhappy family conditions, for the making of new starts in life, for their own betterment and the betterment of the world. What would have occurred at home had they not come cannot be told. It is just as well to be charitable in looking at these things. Several of the King County pioneers were in this respect as grievous offenders as Maynard, and if the facts were all known would probably be thought much more so.<sup>169</sup>

Prosch suggests that emigrants were motivated by bad situations in their families of origin and the chance to improve their fortunes in life. He asks us not to make judgments about their motives because these leaders of the community have made important and lasting contributions to our collective welfare. Implicit in this statement is the recognition that the patterns and processes of human interpersonal relationships come in a myriad of formations.

Reviewing the petitions for legislative divorces in Oregon, one gets a sense of a hopefulness implicit in a new start. David Maynard, having suffered great financial losses, left a marriage in shambles and sought that piece of the American Dream that says anything is possible here.<sup>170</sup> Catherine Broshears was moving west with her extended family when tragedy struck—they too were looking for a fresh start.<sup>171</sup> Speidel speculates that Catherine may not have had the best of marriages, which may in part explain her being ready for a more fulfilling personal relationship.<sup>172</sup> David offered her solace, hope, and a fresh start to develop her own life without the strictures of a tight family unit.

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169. PROSCH, *supra* note 21, at 32.

170. See *supra* text accompanying notes 38-40.

171. According to Speidel, Catherine's family had been rich planters from Kentucky who owned several plantations and many slaves, but had suffered financial ruin after the War of 1812. See SPEIDEL, DOC MAYNARD, *supra* note 21, at 50-52; see also PROSCH, *supra* note 21, at 65-66.

172. She admitted that it was a little soon after the death of Israel. On the other hand, this was the age of enlightenment. She and Israel had not been getting on that well in the

For some, the Oregon Trail represented another form of a new start. Consider the historical context. With the establishment of the Oregon Territory, the United States filled in its ocean to ocean borders.<sup>173</sup> Caught up in the slave debate, Oregon was to be admitted to the Union as a slave-free territory.<sup>174</sup> The early provisional legislature included in its organizing laws a provision that excluded blacks from the territory.<sup>175</sup> That provision was carried forward into the Oregon State Constitution.<sup>176</sup> One should note that this was not the case for the Washington Territory when the original territory was split into two parts following a territorial convention in 1852.<sup>177</sup> The land north of the

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previous few years. After all she was only sixteen when she and Israel had been married. She still was a young woman, etc., etc.

SPEIDEL, DOC MAYNARD, *supra* note 21, at 53.

173. Oregon Territory was added to the public lands of the United States after the signing of a treaty with the British on June 15, 1846. *See Treaty in Regard to Limits Westward of the Rocky Mountains*, June 15, 1846, U.S.-Gr. Brit., 9 Stat. 869; *see also* PAUL W. GATES, *HISTORY OF PUBLIC LAND LAW DEVELOPMENT* 84 (1968).

American claims to the Pacific Northwest rested solidly on Captain Robert Gray's discovery of the Columbia River, the Lewis and Clark expedition, the transfer of Spanish rights to the United States, John Jacob Astor's establishment of Astoria, and the journeys of missionaries Jason Lee and Marcus Whitman and adventures such as Hall Jackson Kelley and Nathaniel Wyeth to Oregon. Increasing numbers of American settlers followed the Oregon Trail looking for the choice land that Whitman, Lee, Kelley, and Wyeth had described.

*Id.*

174. [A]lthough Oregon did not wish to be a slave state, neither did it wish to admit free Negroes, mulattoes, and Chinese. This put it in the same position as most southern states; furthermore, it was Democratic and pro-slavery Democratic at that. It elected as its delegate, and later as its first Senator, Joseph Lane, who has been characterized by Allan Nevins as "an able secessionist orator of North Carolina birth, unscrupulous and imperious" and essential to maintaining Democratic control in the Upper House.

GATES, *supra* note 173, at 308.

175. The history of Oregon is based on the desire of the emigrants to keep slavery and blacks out of the region. This is documented in ELIZABETH MCLAGAN, *A PECULIAR PARADISE: A HISTORY OF BLACKS IN OREGON, 1788-1940* (1980). McLagan notes the dogged determination to keep Oregon a white "paradise":

From the beginning of governmental organization in Oregon the question of slavery and the rights of free black people were discussed and debated. Slavery existed, although consistently prohibited by law. Exclusion laws designed to prevent black people from coming to Oregon were passed twice during the 1840's, considered several times and finally passed as part of the state constitution in 1857.

*Id.* at 24 (endnote omitted).

176. In November, 1857, the voters approved the constitution by a vote of 7,195 to 3,215. Slavery was defeated by a vote of 2,645 yes to 7,727 no. The exclusion clause, which on the ballot read "Do you vote for free Negroes in Oregon? Yes, or No," received the highest number of favorable votes, 8,640 voting for exclusion, 1,081 against.

*Id.* at 53 (endnote omitted).

177. *See An Act to Establish the Territorial Government of Washington*, ch. 90, 10 Stat. 172 (1853). In fact, the first Washington Territorial Legislature successfully petitioned Congress to

Columbia River eventually became the State of Washington.<sup>178</sup> Under the original exclusion law, any slaves brought into the territory were freed and expelled, and any black emigrant traveling on the Oregon Trail would have to continue on into the Washington Territory.<sup>179</sup> In fact, this led to the creation of the all-black town of Centralia, Washington.<sup>180</sup>

The Oregon Donation Act of 1850 was designed to mirror the desires of Oregonians to establish an all-white community. Only white male settlers or half-breed Indians could claim a land grant.<sup>181</sup> In the broader context of the political climate of the times, the Oregon territory was created as a rebuttal to the abolitionists in that it would not only tackle the slave question, but it would also prevent the problem of living amongst free blacks. Peter Burnett, who settled in Oregon in 1843, wrote back to newspapers in his home state of Missouri that the absence of free Negroes was what motivated him to come to Oregon: ““The object is to *keep* clear of this most troublesome class of population. We are in a new world, under most favorable circumstances, and we wish to avoid most of these great evils that have so much afflicted the United States and other countries.””<sup>182</sup>

Without stretching too far afield, one also notes that in 1850 Congress passed the Fugitive Slave Law of 1850, with its emphasis on promoting the property rights of slaveholders and denying the freedom of captives who run away to freedom.<sup>183</sup> All of this is to say that the democratic apparatus of the times had to address multiple and complicated issues.

Given this context, the concluding observation of the Supreme Court of the Territory of Washington in *Maynard v. Valentine* takes on a deeper meaning. The court, in summing up the purpose of the Oregon Donation Act of 1850, said “[d]oubtless, double donations were offered

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validate the land claim of a black settler, George Washington Bush. See An Act for the Relief of George Bush, of Thurston County, Washington Territory, ch. 63, 10 Stat. 848 (1855); Office of the Washington Secretary of State, *George Washington Bush*, at [http://www.secstate.wa.gov/office/bush\\_20030227.aspx](http://www.secstate.wa.gov/office/bush_20030227.aspx). See PROSCH, *supra* note 21, at 30-31 and SPEIDEL, DOC MAYNARD, *supra* note 21, at 107-12, for details of the territorial convention.

178. See GATES, *supra* note 173, at 312-13.

179. See MCLAGAN, *supra* note 175, at 25-26.

180. See *id.* at 27.

181. See Oregon Donation Act of 1850, ch. 76, § 4, 9 Stat. 496, 497.

182. MCLAGAN, *supra* note 175, at 29 (quoting Peter Burnett, Letter, JEFFERSONIAN INQUIRER (Jefferson City), Oct. 23, 1845). McLagan explained that Peter Burnett introduced the exclusion as a member of the Legislative Committee in 1844 and later unsuccessfully proposed similar legislation in California after he moved there and became its first governor in 1850. See *id.* at 29-30.

183. See Fugitive Slave Law of 1850, ch. 60, § 6, 9 Stat. 462, 463-64.



to promote double settlement. The aim was to plant and endow families in Oregon.”<sup>184</sup>

Implicitly, the families that were to be planted and endowed with 640 acres of government land would be families headed by a white male. A deliberate, political choice was made to create a society of a particular form of family. Within this created world, new patterns and processes of interdependence would develop. Individuals and families would be freed from the necessity of living and interrelating with those who were not like them. Maynard was not immune to this sentiment as one author notes in discussing Maynard’s creation of the first hospital in Seattle: “The hospital was in trouble because he insisted upon treating Indians therein, as well as settlers. Here again was a streak of paradox in Maynard, for he was nearly a Secessionist; his feeling of brotherhood for the Indians did not extend to a like feeling for the Negro.”<sup>185</sup>

One supposes that such sentiment in the nineteenth century fueled, in part, the discourse on family, marriage, and democracy.

## VI. CONCLUSION

As stated earlier, *Maynard v. Hill* offers an opportunity to consider some of the patterns and processes of interdependence in marriage and family life in a democratic society. Of great import is the observation that we as human beings enter into intimate, private, interpersonal relationships against a backdrop of laws designed to shape and support those relationships. The law is an articulation of the democratic will of sovereign people who, from time to time, act to accommodate the private choices of individuals. Moreover, as *Maynard v. Hill* suggests, the discourse on private choices about marriage and family is guided by referring to the Constitution’s principles on individual liberty balanced against the government’s ability to enact social legislation on marriage and family.<sup>186</sup>

Part of the patterns and processes of interdependence in marriage and family life is that human relationships change and society is called upon to deal with the consequences of those changes. Who could have conceived that a major constitutional law case on the distribution and ownership of valuable government land would originate from an Oregon Trail love affair? However, the story is so American because it captures

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184. *Maynard v. Valentine*, 3 P. 195, 204 (Wash. 1880).

185. NARD JONES, *More About Maynard*, in 2 NARD JONES, NORTHWEST NARRATIVES: STORIES OF WASHINGTON HISTORY 270, 270 (1961).

186. See *supra* notes 141-45 and accompanying text.

the adventurous spirit that fueled our nation-building and our experiment in democratic self-government. It is a wonderful example of Ralph Ellison's observation that "[t]he Constitution is a script by which we seek to act out the drama of democracy, and the stage upon which we enact our roles."<sup>187</sup>

The Maynards' love story is also American because it reflects positive and negative American values. The *Maynard* case considers the positive values of individual liberty and self-determination in the choice of family relationships. The case articulates the standards by which the United States Supreme Court analyzes marriage and family issues in terms of privacy and liberty. The case also demonstrates the democratic power of our central government to "promote the general welfare" of the nation and its people by supporting individual and collective efforts to pursue economic prosperity.

On the other hand, the *Maynard* case symbolizes some of the negative values that were also imbedded in our Constitution at the creation of our nation. First, our push to inhabit the land came at great cost to the First Americans who had long occupied the land and had created a unique culture. Furthermore, the people of African descent, who were not considered citizens within the new democracy, were excluded from the great government land giveaway.<sup>188</sup> This omission would, in part, provide the seeds for the national turmoil of the Civil War and would challenge the nation's democratic ideals for generations to come. And finally, the land grant program, with its emphasis on white, married males, only made provision for land ownership by white females who could claim through their husbands.<sup>189</sup> Divorce cut off the rights of married females, and single females, who may have made valuable contributions to the development of the Northwest. Hence, many voices in the democratic patterns and processes of American society were muted by laws designed to promote interpersonal relationships.

And finally, the story of David and Catherine Maynard is such a human story. At its core, it is a love story full of passion and commitment, reflecting their humanness and the vulnerability that comes from being open to love. While the relationship was born out of the tragic death of Catherine's husband and the sadness of David's divorce, it nonetheless symbolizes the resilience of the human spirit and the

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187. RALPH ELLISON, *Perspective of Literature*, THE COLLECTED ESSAYS OF RALPH ELLISON 766, 773 (John F. Callahan ed., 1995).

188. See Oregon Donation Act of 1850, ch. 76, § 4, 9 Stat. 496, 497.

189. See *id.*

capacity to form emotional bonds. In essence, humans can find love and commitment in whatever circumstances they find themselves and with whomever should strike their fancy. The hope of the *Maynard* case is that our constitutional democracy will allow, promote, and nurture human love relationships, however and wherever they are found. For in the final analysis, such relationships are indeed the glue that bonds our society together.