

# FIRST PRINCIPLES

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## The True Origin of Society: The Founders on the Family

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### Abstract

*In the past century, no institution has come under more sustained assault than the family. Radical feminists disparaged the traditional family as a remnant of patriarchy and a threat to autonomy and romantic love, allowing contemporary liberals to redefine the ends of marriage in terms of self-fulfillment and personal growth. While the findings of social science and the teachings of religion lend support to the family, we turn to the American Founders for a stronger, principled defense of traditional marriage and the family. The Founders understood that the family, with the commitment of marriage needed to sustain it, is uniquely equipped to educate and prepare individuals for the responsibilities of citizenship and is therefore critical to the success of the American experiment in self-government.*

Few changes in America's political culture in the past 100 years have been as profound as the changes in how Americans experience family life. Fewer marriages form. Marriage occurs later. Marriages are much more likely to end in divorce. Childlessness is much more common, as is living alone. The total fertility rate has dipped below replacement rates. Living together outside of wedlock has gone from forbidden to rare to almost expected, perhaps as a prelude to marriage and

perhaps not. Surveys show that family no longer has a hold on the human heart as it once did.

Scarcely any area of public policy is unaffected by the decline in marriage and family life. Educational attainment of children raised outside of marriage suffers, the job teachers face is more complicated, and crime is connected with fatherlessness. State aid for children in various forms is often forthcoming, since many think it necessary for the state to step in where families fail. Americans expect the state to provide for old age instead of expecting grown children to provide aid to their parents directly. As the family declines, the state rises to take its place; as the state rises to take its place, the family declines further.

Marriage and family make an *institution* connecting such important human goods as affection, sex, procreation, and parenthood. Marriage is an exercise of freedom, an end in itself, and also a necessary means toward securing a self-governing

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people. Marriage and family life are ends because government is designed to protect the natural rights of the individual, and one of the most important and noble exercises of those rights is consensual marriage and the formation of a family. Marriage and family life are important means as well because they provide invaluable education in and preparation for the responsibilities of self-governing citizenship. Without this moral education, people are poorer, more dependent, and less equipped to become citizens.

The decline of marriage and family life often seems to be the inevitable product of modern ideas and conditions,<sup>1</sup> yet the actions and words of America's Founders show how to reconcile marriage and family life with modern ideas of equality, individual rights, and consent in modern conditions. They also show how marriage and family life provide an essential basis for a self-governing republic.

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## The Founders' vision of family is built on the equality of the sexes and individual consent.

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The American Founders did not speak overmuch about the principles of family life.<sup>2</sup> Family life was not overly corrupted at the time, and there were other pressing issues to address (such as securing independence and writing and ratifying the Constitution). As Professor Nancy Cott explains, their political theory of marriage was “[s]o deeply embedded in political assumptions that it was rarely voiced as a theory.”<sup>3</sup>

The Founders' occasional statements and their actions generally show that they held marriage and

family life to be, in James Wilson's words, “the true origin of society” or the first and most vital foundation on which civil society rests.<sup>4</sup> Many states undertook modest reforms in family law during the Revolutionary period and the early republic. These reforms reveal how, for the Founders, the principles of natural rights affect marriage and family life and how marriage and family life support a republic based on the idea of natural rights.

Further, the American Founders' policies regarding the family derive from their natural rights principles and match their goal of establishing a self-governing republic, so we can reason forward from their principles and backward from their goals. We have sufficient glimpses in practice and defenses in theory to recover the Founders' social vision with respect to the family.

The Founders' vision of family is built on the equality of the sexes and individual consent. Marriage's public purpose or function is the procreation and education of children. This function requires a suitable form, so early laws discouraged or outlawed bigamous, polygamous, adulterous relations as inconsistent with marriage, the proper education of children, and hence the interests of society; public opinion was more severe than the laws. The Founders also made efforts to bring surrounding nations toward the peaceful adoption of monogamous, lifelong marriage.<sup>5</sup>

Cohabitation and its procreative fruits were, as much as possible, integrated into a marriage regime, suggesting that the American Founders sought to protect the connection between marriage and procreation. Nearly everyone married (eventually), and marriage and private life were thought to be noble exercises of individual freedom that lent meaning to life. This despite the fact that infant mortality rates

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1. See, for instance, David Popenoe, *Disturbing the Nest: Family Change and Decline in Modern Societies* (New York: Aldine de Gruyter, 1988), and Mary Eberstadt, *How the West Really Lost God: A New Theory of Secularization* (West Conshohocken, Pa.: Templeton, 2013).
  2. Thomas G. West, *Vindicating the Founders: Race, Sex, Class, and Justice in the Origins of America* (Lanham, Md.: Rowman & Littlefield, 1997), p. 91, shows that the subject of the virtues of family life “was not controversial” for the Founders. See also chapter 8 in Matthew Spalding, *We Still Hold These Truths: Rediscovering Our Principles, Reclaiming Our Future* (Wilmington, Del.: ISI Books, 2009), pp. 135–160. The Founders' reflections on the family appear in legal commentaries, court cases, or educational treatises such as James Wilson's “Lectures on Law” in *Collected Works of James Wilson (1790–1792)*, James Kent's *Commentaries on American Law (1826–1830)*, Benjamin Rush's “Thoughts upon Female Education,” Noah Webster's “On the Education of Youth in America,” and Joseph Story's *Commentaries on the Conflict of Laws*.
  3. Nancy F. Cott, *Public Vows: A History of Marriage and the Nation* (Cambridge, Mass.: Harvard University Press, 2000), p. 9.
  4. James Wilson, “Lectures on Law,” in *Collected Works of James Wilson*, ed. Kermit L. Hall and Mark David Hall (Indianapolis: Liberty Fund, 2007), Vol. 2, Part 2, Chapter 12.
  5. Cott, *Public Vows*, pp. 25–29.
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were so high and many more women died young, both during and after childbirth, than do today.

The Founders sought to protect the traditional family in which a mother and father formed an affectionate union for better or worse and whose chief work was having and raising children. Marriage in the early republic took the idea of union seriously so that the marriage contract transcended the individualistic way of thinking that was characteristic of contracts. Lawmakers during the American Founding period, in keeping with the Western tradition of marriage, adopted coverture laws, which covered the wife under the legal identity of the husband, as a means used to protect this union,<sup>6</sup> though the common and municipal laws and the Founders' theory do not speak with one voice on the need for and depth of coverture to sustain the family's unity.

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### Those who defend the family need not wage war against America's first principles; they must show how these first principles, *properly understood*, support marriage and family.

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Coverture represents the idea that married couples form a community of interest that the married couple freely joins and that protects all members of the family better than alternatives can. It reflects equality because it is freely chosen by men and women; it protects consent because the parties think the community of love and interest protects their lives, liberty, and property. Such laws show that marriage as a union is to be exclusive and, except in extreme cases, permanent.

No matter how much people criticize coverture laws, remnants of the marital unity that those laws sustained and protected remain in our law in various ways (joint tax returns or privileged spousal communication, for instance).

The Founders' idea of marital union came under sustained assault in the 20th century. This assault on the family often disarms those who would defend

the family today because it seems to be done in the name of principles that the American Founders and today's conservatives embrace. Feminist and contemporary liberal critics of marriage and family life appeal to "individual rights," "liberty," "consent," "equality," and "love" as they seek to unwind or minimize commitment to marriage and family life.

The fact that today's critics of the family embrace these principles does *not* force those who would defend the family to abandon them. Defenders of the family must revisit what those principles mean and how they interact with one another in marriage and family life. Those who defend the family need not wage war against America's first principles; they must show how these first principles, *properly understood*, support marriage and family.

Marriage and family life are not opposed to the ideas of individual rights or consent or equality or love; contemporary conceptions of these principles are corrupt and partial ideas that have had the effect of undermining the family. Recovering these principles in their richness and depth is what we must do in order to understand the family in its genuine relation to our political order.

### Contemporary Marriage and Traditional Marriage

Before explicating the Founders' views on the family, it is crucial to understand where we are today with respect to the principles of marriage and family life and, in broad outlines, how we got here. This involves first understanding two models of the family. The traditional view of marriage saw men and women joined together as community or union for the purpose of forming a family. One can call this view traditional because, by and large, every society has singled out marital union between a man and a woman involving the raising of children as a favored way of living.<sup>7</sup>

Ironically, the U.S. Supreme Court, in its 1965 *Griswold v. Connecticut* decision, articulated the traditional view even as it invented the right to privacy (out of which would later come the right to abortion and the right to homosexual sodomy). In *Griswold*, the right to privacy protected the decision

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6. As Wilson writes, "the husband and the wife become, in law, only one person: the legal existence of the wife is consolidated into that of the husband." It is the principle of union that gives rise to spousal privilege in our courts, where we think that the interests and identity of wives and husbands are so melded that courts treat spouses as one for the purposes of providing against self-incrimination.

7. David Blankenhorn, *The Future of Marriage* (New York: Encounter Books, 2007), p. 15.

of a couple to purchase contraception and hence to control their common life together. Justice William O. Douglas, writing for the Court, ended the opinion with a paean to traditional marriage:

Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life...a harmony in living... a bilateral loyalty.... Yet it is an association for as noble a purpose as any involved in our prior decisions.<sup>8</sup>

Radical in so many ways, *Griswold* seems consistent with the traditional idea that a couple could be one person in law, where two people associate in a common way of life.

Less than a decade later, in *Eisenstadt v. Baird* (1972), the Supreme Court extended the right to privacy (and hence the right to buy contraception) to individuals per se as opposed to couples. In so doing, it put forward the contemporary view of marriage. As Justice William Brennan, writing for the majority, explained: “The marital couple is not an independent entity, with a mind and heart of its own, but an association of two individuals, each with a separate intellectual and emotional makeup.”<sup>9</sup>

*Griswold* shows that the association aspires to be enduring; *Eisenstadt*’s silence on the topic speaks to its neutrality about whether the association endures. *Griswold* sees the purpose of marriage association as noble, elevated, and involving the transcendence of self; *Eisenstadt* maintains a silence on the purpose of marriage and emphasizes that marriage need not involve the transcendence of self. Generally, *Griswold*, reflecting the traditional view, sees marriage bringing two people into a union for common purposes centered, most obviously, around procreation and the education

of children. *Eisenstadt*, reflecting the contemporary view, sees the individuals defining marriage for themselves without necessarily constituting a union or having common goals.

The contemporary view of marriage as an emotional, perhaps lasting bond, between two independent individuals is shaping our law and arguably has become the predominant American opinion on the purpose of marriage. A quick survey testifies to how widespread the contemporary view has become.

- People see marriage as a strictly private relationship, created by and for the individuals in the couple without any larger social or public purpose.<sup>10</sup>
- Marriage is understood as “a commitment to live up to the rigorous demands of love, to care for each other as best you humanly can.”<sup>11</sup>
- The essence of marriage, explained the Massachusetts Supreme Court in granting homosexuals the right to marry, is “the exclusive commitment of two individuals to each other”; the purposes of that commitment include “love,” “mutual support,” and a way of living that brings “stability to our society.”<sup>12</sup>

As marriage is privatized and its goal becomes amorphous, governments and public opinion have become more open about the form of marriage. Without a serious communal function and without an approved form, the institution of marriage breaks down. Cohabiting and marriage seem equivalent. Same-sex marriage seems viable, if not mandatory. Polygamy or polyandry would seem to require social approval as well. Laws should move “beyond conjugality,” according to Canada’s legal profession—a sentiment echoed in America.<sup>13</sup>

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8. *Griswold v. Connecticut*, 381 U.S. 479 (1965), [http://www.law.cornell.edu/supct/html/historics/USSC\\_CR\\_0381\\_0479\\_ZO.html](http://www.law.cornell.edu/supct/html/historics/USSC_CR_0381_0479_ZO.html).

9. *Eisenstadt v. Baird*, 405 U.S. 438 (1972), <http://laws.lp.findlaw.com/getcase/us/405/438.html>.

10. Blankenhorn, *The Future of Marriage*, p. 19 and passim, surveys representative examples of the contemporary view.

11. E. J. Graff, “What Marriage Means,” *The Advocate*, February 29, 2000, and generally, *What Is Marriage For? The Strange Social History of Our Most Intimate Institution* (Boston: Beacon Press, 1999).

12. *Goodridge v. Department of Public Health*, Massachusetts Supreme Judicial Court (November 18, 2003), pp. 2, 6–7.

13. Law Commission of Canada, *Beyond Conjugality: Recognizing and Supporting Close Personal Adult Relationships*, 2001, <http://dalspace.library.dal.ca/handle/10222/10257?show=full>. See also American Law Institute, *Principles of the Law of Family Dissolution: Analysis and Recommendations*, 2008.

## 20th-Century Critics of the Traditional Family

Driving the push to redefine marriage are feminists, sexual revolutionaries, and advocates of personal autonomy. In their effort to shape public opinion in the direction of the contemporary family, they appeal to what seem to be the principles of the American Founding: individual rights, consent, and equality. They put forward criticisms of the traditional family as a remnant of patriarchy, a threat to autonomy, a submission to nature, and a threat to love. The following section is a condensed account of how we got the contemporary view of marriage.<sup>14</sup>

While all agree that marriage must begin with the meaningful consent of man and woman, feminist critics of marriage believe that the consent of women and the actions of wives and mothers within marriage are subtly shaped by “patriarchy” in what they take to be our male-dominated society. John Stuart Mill puts this thought most forcefully when, in his essay on *The Subjection of Women* (1869), he contends that most forces in society conspire to “enslave [women’s] minds” to wifely and motherly roles.<sup>15</sup> Meaningful consent requires options. The solution to the problem of patriarchy, in the eyes of Mill and subsequent feminist critics, is to create more options for women before they enter marriage and while they are in marriage so that they can be independent in marriage.

The final defeat of patriarchal public opinion requires a conscious reconstruction of public opinion so that women can pursue other options more often. On this view, only if many women pursue options other than motherhood will we know that those who still choose motherhood are doing so freely.

How will we know whether women have genuinely consented to marriage and motherhood? When the environment in which women are educated is entirely free from traces of patriarchy or artificial “sex roles.” And how will we know that the environment is free of traces of patriarchy? When women chose the same things as men. The fact of sex difference is, for feminists, evidence of the continuation of a repressive patriarchal regime.

Realizing the conditions for “genuine consent,” however, has proven to be an elusive goal. As a result,

feminists have deepened their efforts to reconstruct public opinion and reinterpret human experience in a way that downplays the role of biology and nature.

Biology indicates differences between men and women. These differences led those aligned with the traditional family to expect that men and women would consent to different roles within marriage and family life. By contrast, feminist critics think that previous attempts to bring about genuine consent have been hampered by our inability to imagine the obstacles to consent, including, most crucially, obstacles found in biology. “Biology is not destiny,” a trope of such feminist critics, captures the center of their thought in this respect.

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Feminist critics set out to reinterpret biology so as to minimize differences between men and women and hence free women from the tyranny of their bodies. Abortion, birth control, universal day care, sexual independence, and other efforts to “control nature”—and their hope to separate procreation from marriage generally—encourage, on this view, women to become independent from their biological natures. Once free from their bodies and from public opinion, women will be free to enter any arrangement they please.

The effort to free human beings from nature is but one of the spectacular ways by which the contemporary aspiration for individual autonomy manifests itself. Autonomy is often seen as another word for freedom, but it is a more complete and arbitrary concept. Autonomy reflects the aspiration to make the world into a reflection of human power as a person understands it at a particular time. Autonomy, as contemporary liberals apply it to marriage, consists

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14. For a fuller treatment, see Scott Yenor, *Family Politics: The Idea of Marriage in Modern Political Thought* (Waco: Baylor University Press, 2011).

15. John Stuart Mill, *The Subjection of Women*, in *The Collected Works of John Stuart Mill*, Vol. 21, ed. John M. Robson (Toronto: University of Toronto Press; London: Routledge and Kegan Paul, 1984), p. 271.

of the power individuals have to define marriage for themselves.

The emphasis on autonomy has profound implications for the way most people understand marriage.

*First*, society should not be involved in deciding what form marriage takes or in preventing individuals from forming the kind of associations that they desire.

*Second*, civil government cannot determine the goal of marriage, for its goals might contradict the goals of some individuals.

*Third*, individuals must be free to revisit their previous choices at all times in case those choices shackle the (new) visions that individuals have for their lives.

In the final analysis, autonomy represents the triumph of the urge to divorce liberty from responsibility. Advocates of autonomy believe that individual choice must not be responsible to society or civil government and that individuals must not be held responsible for their previous choices.

Building on this idea is the view that, in contemporary marriage, “love conquer[s] marriage.” Here the vision is that only when social pressure to stay together has evaporated, when the purpose and form of marriage are results of individual choice, where financial independence and having children outside of marriage are possible can we know that people stick together because they love one another. Sticking together is the important thing, not marriage, and sticking together is based on love.

Those who embrace this view appeal to Mae West’s line “Marriage is a fine institution, but I’m not ready for an institution” when arguing that traditional marriage undermines love. True love, on this view, presupposes independence, equality, autonomous choice, and continual consent, while the law, customs, religious teachings, and the idea that marriage serves procreation and the education of children trap people to stay in loveless marriages.

## Two Incomplete Defenses of the Family

Against these developments, two important defenders of the traditional family have arisen: social scientists, producing evidence that marriage and the family are indispensable social institutions, and religious advocates, who see the contemporary thinning of marriage as undermining a permanent, divinely ordained form for man and woman to live with one another. These defenses of the family unite in seeing marriage as an institution, as something that connects human goods for the benefit of all.

We have much to learn from these defenses, but in the final analysis, each set of arguments is incomplete.

### Defense #1: Social Science and the Family

Social scientists investigate relationships or connections. Social scientists studying the family note that the decline of marriage is associated with social ills and troubles for the individuals. In *Life Without Father*, eminent social scientist David Popenoe shows that the “remarkable decline of fatherhood and marriage” has led to the “human carnage of fatherlessness.”<sup>16</sup>

Children without fathers in the home are more likely to have emotional and behavioral problems, to have health problems, to have poor academic performance, to drop out of school, to divorce when they marry, to spend time in jail, to be abused, and to live in poverty. Conversely, social science shows that children benefit from the stability, love, attachment, and responsibility that a married mother and father provide.<sup>17</sup>

Maggie Gallagher and Linda Waite’s *The Case for Marriage: Why Married People Are Happier, Healthier, and Better Off Financially* summarizes research showing that marriage is good for men and women as well.<sup>18</sup> The decline of marriage is also related to the phenomenon of childlessness or the decline in fertility, one that threatens the future of advanced

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16. David Popenoe, *Life Without Father: Compelling New Evidence That Fatherhood and Marriage Are Indispensable for the Good of Children and Society* (New York: Free Press, 1996), Chapters 1 and 2.

17. See the summary of the literature in Institute for American Values, *Why Marriage Matters: Twenty-Six Conclusions from the Social Sciences*, 2nd Edition (New York: Institute for American Values, 2005). See also Popenoe, *Life Without Father*; David Popenoe, *Families Without Fathers: Fathers, Marriage, and Children in American Society* (New Brunswick, N.J.: Transaction, 2009); and David Blankenhorn, *Fatherless America: Confronting America’s Most Pressing Social Problem* (New York: Harper Perennial, 1996).

18. Linda J. Waite and Maggie Gallagher, *The Case for Marriage: Why Married People Are Happier, Healthier, and Better Off Financially* (New York: Broadway, 2001); Andrew J. Cherlin, *The Marriage-Go-Round: The State of Marriage and Family in America Today* (New York: Vintage Books, 2009), pp. 100-101, 167-169.

democracies across the globe. These findings have proven durable across time and space, and few other facts are as well established by social science.

Any attempt to defend the family today must begin with these findings. Feminist critics of the family dismiss or ignore such findings or, through extraordinary intellectual jujitsu and remarkable skepticism about science, try to explain them away.<sup>19</sup> This is but the latest example of their selective use of scientific results in the pursuit of an ideological agenda.

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Yet there are limits to the social science approach. Social science is equipped to discuss whether certain social phenomena are related; it is not equipped to discuss why they are related and is ill-equipped on its own terms to argue that these social facts will remain true.

Social scientists establish the relationship between healthy families and social success and between unhealthy forms of child-rearing and social pathologies as they exist today, but they recognize that, in principle, those relationships could change tomorrow. Social scientists must be open to the idea that another institution could arise to meet

the needs of children or produce children or that the family could fade away. Through different education or socialization, people could come to need marriage and family life less.

Why, therefore, would we expect the findings of social science in the arena of marriage and family life to be permanent?

## **Defense #2: Religion and the Family**

Social scientists who defend the family often notice that family decline has closely tracked the decline of religious faith. They pin their hopes for a revival of marriage and family life on a religious revival because sociological evidence suggests that “religion has long played an important role in promoting marriage and family solidarity.”<sup>20</sup> This highlights the fact that among the greatest defenders of marriage and family life today are religious believers who see an intimate connection between a revealed, created order of a loving God and strong family bonds.

Catholic teachers, notably Pope John Paul II, have emphasized how a “civilization of love” based on divinely ordained marriage has been eclipsed in a “civilization of use” to the detriment of human happiness and fulfillment. Love leads us to give our lives to others—to a spouse and to one’s children—while the civilization of use tries to redefine institutions of marriage and family life to suit our creative will.<sup>21</sup> Evangelical Protestants and Mormons, for different theological reasons, have also defended marriage against attempts to undermine its permanence, exclusivity, and child-centered loving purpose.<sup>22</sup>

Religious believers from these traditions are more likely to see their marriage and parenting as

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19. See Judith Stacy, *In the Name of the Family: Rethinking Family Values in the Postmodern Age* (Boston: Beacon Press, 1997), pp. 52–62; Martha Albertson Fineman, *The Autonomy Myth: A Theory of Dependency* (New York: New Press, 2005), p. 85; Linda McLain, *The Place of Families: Fostering Capacity, Equality, and Responsibility* (Cambridge, Mass.: Harvard University Press, 2006), pp. 128–129; and Elizabeth Brake, *Minimizing Marriage: Marriage, Morality, and the Law* (New York: Oxford University Press, 2012), pp. 145–151.
20. David Popenoe, *War over the Family* (New Brunswick, N.J.: Transaction, 2008), p. 110; see also Popenoe, *Life Without Father*, pp. 85, 116, 118–119, 227.
21. See Pope John Paul II (Karol Wojtyła), *Love and Responsibility* (New York: Farrar, Straus and Giroux, 1981 [1960]); “Letter to Families,” Papal letter given in Rome on February 2, 1994, [http://www.vatican.va/holy\\_father/john\\_paul\\_ii/letters/1994/documents/hf\\_jp-ii\\_let\\_02021994\\_families\\_en.html](http://www.vatican.va/holy_father/john_paul_ii/letters/1994/documents/hf_jp-ii_let_02021994_families_en.html); and “Familiaris Consortio,” Apostolic exhortation given in Rome on November 22, 1981, [http://www.vatican.va/holy\\_father/john\\_paul\\_ii/apost\\_exhortations/documents/hf\\_jp-ii\\_exh\\_19811122\\_familiaris-consortio\\_en.html](http://www.vatican.va/holy_father/john_paul_ii/apost_exhortations/documents/hf_jp-ii_exh_19811122_familiaris-consortio_en.html). For a discussion of the Catholic vision, see Yenor, *Family Politics*, Chapter 11.
22. For a survey of Protestant thinking, see W. Bradford Wilcox, *Soft Patriarchs, New Men: How Christianity Shapes Fathers and Husbands* (Chicago: University of Chicago Press, 2004), Chapter 2. See, for instance, Jerry Falwell, *Listen, America!* (Garden City, N.Y.: Doubleday, 1980), and James Dobson, *Love Must Be Tough: New Hope for Marriages in Crisis* (Carol Stream, Ill.: Tyndale House, 2007). Mormon thinking is seen in President Gordon Hinkley’s “A Proclamation to the World,” released September 23, 1995, <https://www.lds.org/topics/family-proclamation>.
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products of duty as opposed to products of autonomous choice and to respect the institution as something reflecting a natural or created order as opposed to something that human beings can remake to conform to their wills. Marriage and family life require a species of sacrificial love and a moral disposition conducive to educating children to virtue. This self-sacrificial love is often a fruit of religious faith.

This religious defense of the family is consistent with what the American Founders teach. They saw a connection between morality, religion, and the family.<sup>23</sup> For example, the Northwest Ordinance of 1787, one of the four organic laws of the country, dedicates land for the establishment of schools and religious instruction: “Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.”<sup>24</sup>

These larger concepts—religion and morality—are brought to an individual level through the family. Education and especially moral education happens in schools and churches, to be sure, but these institutions support parents. As John Adams writes:

[T]he foundations of national morality must be laid in private Families. In vain are Schools, Accademics [*sic*] and universities instituted, if loose Principles and licentious habits are impressed upon Children in their earliest years.... How is it possible that Children can have any just Sense of the sacred Obligations of Morality or Religion, if, from their earliest Infancy, they learn that their mothers live in habitual Infidelity to their fathers, and their fathers in as constant Infidelity to their Mothers.<sup>25</sup>

Schools and churches aid families as they seek to educate their children toward the productive self-government that the Founders thought necessary for a free people. Families would provide much of the essential education in the self-control, frugality,

fair play, persuasion (as opposed to violence), and respectful consideration of others (as well as economic skills and a spirit of confident independence) necessary for self-governing citizens. Schools reinforce that primary education with an emphasis on appreciating the history and principles that support those virtues. Churches, in turn, emphasize the duties that one person owes another and the parallels between charity and enlightened liberality.

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## The American Founders evaluated religious faith and family life according to how they would reflect, promote, and fulfill the institutions of free government.

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Furthermore, marriage itself, where a man and a woman form a durable union, seems explicable best in terms beyond the conception of a civil contract; religious language and imagery most clearly support the experience of marital unity. As James Wilson writes, “Peculiar as it is, however, among human institutions, it seems not uncongenial to the spirit of a declaration from a source higher than human—‘They twain shall be one flesh.’”<sup>26</sup>

While the Founders see the family’s relation to religious conviction and moral teaching, they do not provide a revealed defense of the family. Most crucially, the Founders were not indiscriminate in their praise of religion as it relates to the family. They rejected the polygamy and the subordination of woman characteristic of Islam and Native American practice and the neglect of women characteristic of the Greek family, though those family types reflected religious belief.

The American Founders thought that an exclusively faith-based defense of the family would not suffice, in part because of the diversity of religious

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23. “[T]he first transactions of a nation, like those of an individual upon his first entrance into life,” George Washington wrote as he discussed the ratification of the Constitution, “make the deepest impression, and are to form the leading traits in its character.” George Washington to John Armstrong, April 25, 1788, TeachingAmericanHistory.org, <http://teachingamericanhistory.org/library/document/letter-to-john-armstrong/> (emphasis added).

24. Northwest Ordinance, July 13, 1787, Section 14, Article 3, [http://avalon.law.yale.edu/18th\\_century/nworder.asp](http://avalon.law.yale.edu/18th_century/nworder.asp).

25. John Adams, Entry of June 2, 1778, in *Diary and Autobiography of John Adams*, ed. Lyman H. Butterfield (Cambridge, Mass.: Belknap Press of Harvard University Press, 1962), Vol. 4, p. 123.

26. Wilson, “Lectures on Law,” *Collected Works*, Vol. 2, Part 2, Chapter 12.



teachings on the family. They judged something akin to the traditional family to be best and knew that such a judgment was historically controversial. They advocated for a particular social teaching and justified it against alternatives.

This means that the American Founders evaluated religious faith and family life according to how they would reflect, promote, and fulfill the institutions of free government. Their social teaching is founded on reason and reveals the first principles of their teaching on the family.

### First Principles of the Family

The Founders realized that the family was more a reflection of the public's opinions than it was a function of law or economics. James Wilson, for example, writes that, upon the subject of marriage, "every thing, that might be wished, cannot, we fear, be expected from the operation of human laws. Much must be left to the influence of that legitimate honour, which we have described as the inseparable friend and companion of virtue."<sup>27</sup>

This does not mean that we are without beacons to guide our way through the Founders' thoughts on the family. We can discover what the Founders thought about the family by investigating their principles, by examining the laws with which they protected their vision of the family, and by making inferences—from their goal of establishing a self-governing citizenry to the institutions that are necessary or convenient to sustain that vision.

### Founders' Principle #1: Consent

Marital consent is inseparable from America's first principles of liberty and equality. Because all men and women are created free and equal, each must assent to the terms of legitimate political, economic, and marital relationships. In marriage, consent signifies the equal dignity of the sexes and the view that marriage must be grounded in the affections and mutual respect of the spouses; consent

testifies to and results from such affections. It also encourages spouses to think about the character of their future spouses, which implies an affirmative judgment on the character of each.

Consent is ultimately a sign of individual responsibility and ownership of the decision to join the marriage, as each individual makes a judgment about the match and how the goals of marriage are accomplished. Consent buckles love and responsibility to marriage while reflecting individual freedom and equality. As Wilson explains, "To this [marriage] contract the agreement of the parties, the essence of every rational contract, is indispensably required."<sup>28</sup>

This vision of consent guided American law and society during the Revolutionary period and beyond. American states increasingly required that marriages be based on what we might call "informed consent," and all states for the first time established an "age of consent" (ranging from 12 years old to 18) for marriage to ensure that spouses could understand the significance of the actions they were about to take.<sup>29</sup> Deception and compulsion were grounds for divorce or annulment. No one could be forced to marry by violence or with threats.

Marriage ceremonies were helpful as public displays of consensual vows, although in most jurisdictions, couples fulfilling marriage's purpose without having had the marriage solemnized were bound by the obligations of married life through legal proceedings. Couples that did not hew to the expectation that marriage ceremonies should precede the bearing of children were nevertheless brought into the marriage culture. State laws and judicial mandates accommodated self-marriage or "common law marriage" to oblige couples to adopt what historian Nancy F. Cott (a critic of traditional marriage) calls "a particular definition of 'matrimony' and its 'duties and obligations.'"<sup>30</sup> The willingness to "legalize" children born before marriages took place reinforced the link between procreation and marriage.

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27. Ibid. See also James Kent, *Commentaries on American Law* (Cambridge, Mass.: Da Capo, 1971 [1826-1830]), Vol. 2, pp. 159-160: "The wants and weaknesses of children render it necessary that some person maintain them, and the voice of nature has pointed out the parent as the most fit and proper person. The laws and customs of all nations have enforced this plain precept of universal law.... The obligation of parental duty is so well secured by the strength of natural affection that it seldom requires to be enforced by human law."

28. Wilson, "Lectures on Law," *Collected Works*, Vol. 2, Part 2, Chapter 12.

29. Michael Grossberg, *Governing the Hearth: Law and the Family in Nineteenth-Century America* (Chapel Hill: University of North Carolina Press, 1985), pp. 105-108.

30. Cott, *Public Vows*, p 40, and Grossberg, *Governing the Hearth*, pp. 65-83.

Consent being central to the formation of marriage, the Founding principles of liberty and equality also acknowledge that the parties can agree to dissolve a marriage and divorce.<sup>31</sup> As Wilson writes in his *Treatise on Law* (a summary of the American approach to common law), it is “frequently obvious” for husbands or wives to receive a “divorce from the chains of matrimony.”<sup>32</sup>

Divorce, however, was not to be granted on a whim. Divorces could be granted if one of the parties fled physically or strayed morally or if continuing the marriage would threaten the natural right to life of the partners. “Of causes which are slight or trivial,” Wilson writes, “a divorce should, by no means, be permitted [lest] the most tender of human connexions was degraded to a transient society of profit or pleasure.”<sup>33</sup> There is a parallel between allowing divorce in limited, extreme cases and the right to revolution in politics. People should not revolt, in the words of the Declaration of Independence, for “light and transient causes,” nor should a couple divorce without compelling reasons related to the marital purpose.<sup>34</sup>

These justifications for divorce flesh out what the Founders mean by consent. Consent is not following one’s passion or feeling wherever they lead only to change again a moment later. It is not transient, spontaneous, or whimsical. Such arbitrary consent need not last more than a second, and it undermines the stability of individual character and all individual promises and relationships that exist through time. A consent allowing for divorce on “slight or trivial” grounds might end a marriage at the first signs of difficulties or unforeseen challenges.

Never can any two people predict all the joys and miseries, accomplishments and heartaches that define a life together. Instead, as we see in Wilson, marriage reflects and promotes a stabilizing consent, a consent that endures in time, through better and worse, and hence is a partnership on which husbands and wives can largely depend. Durable consent is linked to responsibility, a virtue tied to the idea of self-government.

The Founders distinguished between liberty and license, between a person free to make choices and live with the consequences and a person who chooses arbitrarily or based on passing fancies. Consent is a vehicle for encouraging judgment about the suitability of one’s partner and taking responsibility for one’s actions. Responsibility has backward and forward aspects. Looking backward, people see their reasons for giving consent to a marriage. Looking forward, people are responsible for past decisions and project them into the future.

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### The Founders distinguished between liberty and license, between a person free to make choices and live with the consequences and a person who chooses arbitrarily or based on passing fancies.

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This is what it means to be responsible for one’s choices or to consent. Consent melded to responsibility—where individuals are responsible for their previous choice—stabilizes marriage and the individuals in it by emphasizing the government of the self, while consent divorced from responsibility leads to unstable individuals, transient unions, and ultimately a community whose people are not capable of governing themselves.

One of the American principles—individual consent—promotes sensible marriage policy. Furthermore, responsibility linked to consent recognizes that individuals are responsible for the consequences of their marriage; i.e., the procreation and education of children.

The states’ approaches to divorce reinforced this concept of durable consent. Divorce was a public act available for public purposes. Most states allowed divorce only on the grounds that the public purpose of marriage was undermined by the wrongful actions of a husband or wife. New Hampshire had

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31. Norma Basch, “From the Bonds of Empire to the Bonds of Matrimony,” in *Devising Liberty: Preserving and Creating Freedom in the New American Republic*, ed. David Thomas Konig (Palo Alto: Stanford University Press, 1995), pp. 217–242, catalogues the states’ modest changes in divorce law and the relationship that change bears to the deepening of America’s Founding principles. See West, *Vindicating the Founders*, p. 100.

32. Wilson, “Lectures on Law,” *Collected Works*, Vol. 2, Part 2, Chapter 12.

33. *Ibid.*

34. See Cott, *Public Vows*, pp. 46–49, and Basch, “From the Bonds of Empire to the Bonds of Matrimony.”

among the most permissive grounds for divorce in the Revolutionary Era, but even it allowed judges to grant divorces only in cases of impotence, incest, bigamy, adultery, abandonment for three years, and extreme cruelty.<sup>35</sup> South Carolina did not grant divorce at all. Other states fell within these extremes.<sup>36</sup>

Divorce law, in the words of Chief Justice John Marshall, enabled “some tribunal, not to impair a marriage contract, but to liberate one of the parties because [the marriage contract] had been broken by the other.”<sup>37</sup> Fault-based terms for divorce show that the statesmen and representatives of the Founding era, in Norma Basch’s words, did “envision a world of no-fault,” but that world “caused them no end of consternation.”<sup>38</sup> The idea that husbands and wives could easily shed domestic duties would undermine the marital bond and contradict their understanding of consent.

The importance of fault-based grounds lay in how they reinforced traditional ideas of marriage.

- Pennsylvania’s divorce statute, for instance, begins by averring that it serves “the design of marriage, and the wish of the parties entering into that state that it should continue during their joint lives.”
- Impotence as a ground for divorce means that the couple cannot fulfill the purposes of marriage surrounding the bearing and raising of children.
- Abandonment means that mutual support in the service of education and a union is part of the public concern for marriage.
- Adultery or bigamy as grounds means that fidelity is a part of the public vision of marriage.

- Extreme cruelty as a grounds for divorce means that marriage must be consistent with the right to life and liberty.

The requirement that these grounds for divorce be established in a public forum—whether in court or in the legislature itself—shows the public concern to support a particular public definition of marriage.<sup>39</sup> The fact that states established grounds for divorce reflected a concern with the principles of liberty and equality and reinforced the vision of marriage’s public purposes and the indispensable means of achieving them. The fact that states were reluctant to go beyond these serious grounds demonstrates their insistence on the connection between consent and responsibility and on a marriage fulfilling its purposes.

## Founders’ Principle #2: Limited Government and the Traditional Family Form

Limited government rests on the distinction between civil government and civil society. The idea behind limited government is for government to establish the atmosphere of freedom within which individuals or private associations live and govern themselves. In the United States, the national government is doubly limited. It is limited, as all government is, by the God-given immutable rights to “life, liberty, and the pursuit of happiness.” It is also limited by the Constitution, which delegates to it only certain enumerated powers.

States are less constrained under the Constitution’s division of powers: They exercise police powers and a traditional power over “health, safety, and morals” consistent with the goals of the Declaration. Under these powers, states regulate society,

35. *Mary F. v. Samuel F.*, 1 N.H. 198, 200 (1818). For a detailed cataloguing of all of the grounds for divorce in the states embraced in the first 125 years of the American republic, see George Elliott Howard, *A History of Matrimonial Institutions Chiefly in England and the United States* (Chicago: University of Chicago Press, 1904), Vol. 3, pp. 3-144.

36. There was a territorial divorce law for the Northwest Territory. “A Law respecting Divorce,” passed in 1795, held that “divorces shall be decreed...where either of the parties had a former wife or husband alive, at the time of the solemnizing the second marriage; or impotency or adultery in either of the parties.” See *Laws of the Northwest Territory, 1788-1800*, ed. Theodore Calvin Pease (Springfield, Ill.: 1925), pp. 258-259. Twelve of 16 states and the Northwest Territory provided legal processes for divorce before 1800; see Basch, “From the Bonds of Empire to the Bonds of Matrimony,” p. 222.

37. *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 629 (1819). See Hendrik A. Hartog, “Marital Exits and Marital Expectations in Nineteenth Century America,” *Georgetown Law Journal*, Vol. 80 (1991-1992), pp. 113-117.

38. Basch, “From the Bonds of Empire to the Bonds of Matrimony,” p. 235.

39. See *ibid.*, pp. 237-242, on the limits of divorce consciously adopted throughout the early republic.

including the family. Laws related to age of consent, divorce, property, and the form of marriage are generally state decisions.

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## Parents in the traditional family do not view children as property (as was typical under aristocratic arrangements), but rather as a trust over whom they exercise temporary and limited power.

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Marriages become families; for this reason, states are interested in protecting and promoting marriage. Civil magistrates are concerned with marriage because its purpose is “the procreation and the education” of children, and these children are future members of society. The parent-child relationship is the only important human relationship that is not and cannot be based strictly on consent. Parents do not consent to have a particular child, and no child consents to a particular set of parents. Civil government is interested in marriage also for its own perpetuation. Marriage must culminate in a family arrangement to which children would consent if they were rational and knew their interest in a proper education toward self-government.

Parents in the traditional family do not view children as property (as was typical under aristocratic arrangements), but rather as a trust over whom they exercise temporary and limited power. The traditional family consists of a husband/father and wife/mother who exercise temporary, supportive, limited governance over their children for the purpose of cultivating independence and self-government. “The formidable power of the Roman father,” who exercised absolute and arbitrary power over the lives of his wife and children, “is unknown,” as James Wilson observes, in the United States or under the common law.<sup>40</sup>

Against the aristocratic approach, which sees children in perpetual dependence on the family,

parents in the traditional family know there comes a day when their children govern themselves. Parents in the traditional family educate children, aiming toward independence of mind. This means educating children to think for themselves, control their passions, harness their own energies in productive labor, and learn social mores with the hopes of achieving a level of civic equality with their parents.

As a trust, natural parenthood is, in extreme cases of desertion or cruelty, revocable so that parents that abuse their trust can have their temporary powers forfeited or transferred. For this reason, American states pioneered adoption as a means of securing the best interests of the child (as opposed to adoption for the aristocratic purposes of securing political or economic heirs).<sup>41</sup>

All of these goals require careful provision and supervision appropriate to a child’s age and unique attributes. James Wilson again captures the sense of the American Founders’ approach: “It is the duty of parents to maintain their children decently, and according to their circumstances; to protect them according to the dictates of prudence; and to educate them according to the suggestions of a judicious and zealous regard for their usefulness, their respectability, and their happiness.”<sup>42</sup> Parents are in the best position to provide such supervision because they are much more committed to their children as their own and know their children best through constant contact.

What is more important, the love and tender affections that make for marriage are the perfect school for the love and parental affection necessary for parenthood: Marriage, in other words, is a school for parenthood. Wilson writes, “The sentiments of parental affection are generally warm and tender, in proportion to those of conjugal love.”<sup>43</sup> The Founders reflected a sober approach to social teaching that seeks to build on elements of human nature wherein human beings tend to love their own while not completely ignoring the possibility of parents abusing their trust in extreme cases.

The Founders rely on the traditional family because they realize that mothers and fathers bring

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40. Wilson, “Lectures on Law,” *Collected Works*, Vol. 2, Part 2, Chapter 12.

41. Grossberg, *Governing the Hearth*, pp. 236–237, 271–280.

42. Wilson, “Lectures on Law,” *Collected Works*, Vol. 2, Part 2, Chapter 12.

43. *Ibid.*

unique attributes to the practice of rearing children. This is why they endorse the idea that a husband and wife are essential to the upbringing of children toward the virtues of self-government. Several American Founders, notably Noah Webster and Benjamin Rush, describe characteristics of mothers and fathers in a way that reveals how each contributes to a complementary mixture of maternal welcoming and partisanship and paternal risk-taking and adventurousness that promotes independent self-government.

- Webster hoped that the education of women would “enable them to implant in the tender mind such sentiments of virtue, propriety, and dignity as are suited to the freedom of our governments.”<sup>44</sup>
- Rush elaborates on much the same point in his “Thoughts upon Female Education”: “The state of property in America renders it necessary for the greatest part of our citizens to employ themselves in different occupations for the advancement of their fortunes. This cannot be done without the assistance of the female members of the community.”

Too great an emphasis on the welcoming (more typical of mothers) leads to slavish dependence; too great an emphasis on adventurousness (more typical of fathers) leads to an inability to govern the passions and follow a law. While these traits may not exist to the same degree in all parents, these natural tendencies are dependable enough to lead the Founders to see the virtues in traditional marriage. Common-law decisions about child custody and parental duties often reflected just such thinking.<sup>45</sup>

The contemporary tendency is to take the Founders’ view that marriage and parenthood are limited in duration and scope and to seek to limit the duration and scope further. Since the Founders moved away from the aristocratic or Roman family, contemporary critics hold, they would countenance greater moves away from the traditional family. Since the Founders’ family seeks to cultivate independence in children, contemporary critics seek to

make children independent of the family earlier and earlier and thus take this important educative function away from the married couple.

These critical views are connected to a corruption of America’s original educational vision. The new view sees education as mostly technical or as an automatic process of development or as social indoctrination. The Founders defended the family as one of the chief educational institutions fostering genuine self-government, emphasizing self-control instead of the later Progressive or Deweyan emphasis on “social control.” They kept the family limited but empowered with a job that it is best suited by nature to achieve. They see the family education limited in duration but necessary and ennobling for its duration.

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**The Founders realize that mothers and fathers bring unique attributes to the practice of rearing children. This is why they endorse the idea that a husband and wife are essential to the upbringing of children toward the virtues of self-government.**

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Critics of the Founders’ social teaching in this respect actually oppose the Founders’ goal of a productive, self-governing people and seek to subvert the means that is closely tied to that goal. Even after nearly a century of attacks on this traditional family form, however, it is difficult to conclude that the Founders were incorrect in their judgment.

### **Founders’ Principle #3: Limited Government and the Function of Marriage**

The maintenance of limited government presumes that individuals have the capacity, education, economic skills, and civic knowledge necessary for self-government—and these are cultivated best within the traditional family. Governments and civil society are concerned that the form of the family cultivates self-government. This is the reason

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44. For discussions of sex differences in Webster, Rush, and others and the profound implications of the need to educate all citizens, see Lorraine Smith Pangle and Thomas L. Pangle, *The Learning of Liberty: The Educational Ideas of the American Founders* (Lawrence: University of Kansas Press, 1993), pp. 101–105; for reporting of social history in the Founding era on sex differences, see West, *Vindicating the Founders*, pp. 102–105.

45. Grossberg, *Governing the Hearth*, pp. 248–253.

that states in the early republic favored the traditional family arrangements over patriarchal family arrangements, polygamous or bigamous marriage, and associations of free love. Families occupied the front line in the moral education of youth, a task that matters greatly to the health of the republic.

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## The monogamous, heterosexual, durable union between a man and woman becomes the *sine qua non* institution for perpetuating the republic.

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No one captured the purpose of marriage with greater clarity and force than John Locke, the British Enlightenment philosopher who exercised a profound influence on the Founding. The goals of conjugal society, according to Locke's *Two Treatises of Government*, are "procreation and the bringing up of children till they could shift for themselves" and the "continuation of the species."<sup>46</sup> Early states captured this important function of marriage in their divorce statutes, which, for the most part,<sup>47</sup> included impotence as a fault-based ground for divorce. Impotence is a legitimate ground for divorce only because marriage's public purpose centers on procreation. Cruelty, also a ground for divorce in most jurisdictions, is a ground for divorce in part because it renders the home a poor educational environment for children.

The indispensable and related purposes of procreation and education are much more definitive than the amorphous emotional ties that many today believe to be the purpose of marriage. The monogamous, heterosexual, durable union between a man and woman becomes the *sine qua non* institution for

perpetuating the republic. Indeed, if marriage did not accomplish that indispensable goal, it is hard to see which institution would fulfill such a task. Would the task not go unfulfilled?

When families cannot accomplish their child-centered goals, there are insuperable and not altogether unnecessary moves to increase the supervisory and welfare powers of states. When families cannot educate children, states must educate them, and when families cannot care for children, states must build nets for child welfare.

There are reasons to be suspicious about the capacity of the state to take into account individual differences in children as well as parents do. We should also be worried about whether governments will care about preparing children for independence as much as parents will. Self-governing citizens are much more likely to achieve economic, social, and political independence as adults, so the family as the institution that prepares for self-government plays an indispensable role in maintaining the limits on state powers. The family is the first, most effective, and most efficient "social safety net" because it prepares children for future equal citizenship and independence.

### The Family and Human Nature

The American Founders initiated a "revolution of sober expectations."<sup>48</sup> They were not seeking to transform human nature as the radical revolutionaries of France, Russia, or China were or in a different way as American Progressives were. They took the moral and physical characteristics of human nature as they appeared and provided institutions of government and in society that manage human proclivities toward virtues and vices. They realized that in founding a new government, they were acknowledging marital and family relations that antedate government for the most part and have a foundation in the natural

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46. John Locke, *Two Treatises of Government*, ed. Peter Laslett (Cambridge: Cambridge University Press, 1988), pp. 319-322.

47. See Howard, *History of Matrimonial Institutions*, Vol. 3, pp. 5-144. Some states, including South Carolina, Georgia, Delaware, and Virginia, did not permit divorce through court proceedings, so they did not specify grounds for legislative divorce. Impotence was a legitimate ground for divorce in Massachusetts (1786, p. 5); New Hampshire (1791, p. 11); Rhode Island (1798, p. 14); Vermont in the assumption period (1779, p. 15); Maryland (1842, p. 56); North Carolina (1814, p. 57); Tennessee (1799, p. 58); Alabama as a territory (1803, p. 62); Mississippi as a territory (1803, p. 64); Missouri as a territory (1807, p. 66); New York (1827, p. 103); Pennsylvania (1785, p. 107); and all states in the Northwest Territory in 1795 (p. 113). Only New Jersey omitted impotence as a grounds for divorce in the early republic, though it added it later (1874, p. 106). Delaware added divorce by court proceedings in 1832 and adopted impotence as grounds at the same time (p. 111). Some states refer to impotence as "marital incapacity."

48. Martin Diamond, "A Revolution of Sober Expectations," in *As Far as Republican Principles Will Admit*, ed. William Schambra (Washington: AEI Press, 1992).

order of things. Marriage, Joseph Story writes, “is the parent, and not the child of society; the source of civility and a sort of seminary of the republic.”<sup>49</sup>

The most famous example of the Founders’ sobriety is seen in their defense of America’s political separation of powers and the principles of representative government. The Founders recognize that there is a degree of virtue and vice in human nature, and they defend institutions designed to keep people responsible for their deeds and misdeeds and to protect civil society from corruption. People may wish these tendencies away, but the Founders acknowledged them and built institutions with them in mind.

One can see the Founders’ sobriety in action in their endorsement of the traditional family. Nature poses several challenges that the family, of all institutions, ameliorates.

*First*, sex leads to babies, and married sex partners are much more likely to care genuinely for the fruits of sexual relations. Parents are more likely to spend the necessary time and energy on their own children, and the traditional family cultivates self-government. Linking sex and marriage also promotes a degree of self-government in parents as they learn to govern their passions and place their private sexual practice into the broader context of a shared life. Parents see children as products of their shared life and are more likely to see themselves as responsible for the child’s future.

*Second*, children need mothers and fathers. Children are born first in a condition of physical helplessness and later in great need of education toward self-government. Men and women bring different attributes not only to the physical procreation of children, but also to the education of children. Women tend to be more nurturing, partisan, and caring by disposition, while men tend to be more adventurous, independent, and rule oriented. Their unique contributions to education prepare for self-government: a mixture of welcoming and preparation for the world.

*Third*, without children, the fruits of a married couple’s shared life and love, society itself cannot continue, so civil society generally has an interest in providing space and encouragement to procreative affection. Marriage is the best home for procreative acts that are necessary to propagate the species

and repopulate society with educated citizens. One would expect, on the Founders’ terms, the decline of marriage to track the decline in fertility and a strong marriage culture to promote adequate numbers of children for the future peopling of society.

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**Marriage and family life are not just what feels right today, but what ensures the survival of the political community into the future. This is part of securing the “blessings of liberty to ourselves and our posterity.”**

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None of this is to say that sexual intercourse, procreation, and the education of children must go together every time and in the same way. As the Founders well knew, parents die, thus breaking the link between procreation and education. They also knew that children were born outside of marriage and sought to cast a wide net in their embrace of “self-marriage,” or common-law marriage. Nevertheless, society must have a means of tying these physical facts together, and traditional marriage accomplishes this goal. Marriage and family life are not just what feels right today, but what ensures the survival of the political community into the future. This is part of securing, in the words of the Constitution’s Preamble, the “blessings of liberty to ourselves and our posterity [emphasis added].”

Even today, after the traditional family has come under attack in waves for over half a century, most children are born to and live with their biological parents. Alas, the differences between those born within traditional families and those born outside of traditional families are growing with each generation to the detriment of the latter. These facts point to the wisdom of the traditional approach of the Founders.

There is no better, more inclusive human institution to deal with the natural facts of life than the traditional family. As the Massachusetts Supreme Court held in *Milford v. Worcester* (1810), civil marriage “intended to regulate, chasten, and refine, the

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49. Joseph Story, *Commentaries on the Conflict of Laws*, 3rd Edition (Boston: Little and Brown, 1846), p. 193.

intercourse between the sexes; and to multiply, preserve, and improve the species.”<sup>50</sup>

### How to Think About the Family Today

Critics of the traditional family may see themselves as heirs of the Founders’ principles and believe that they are following through on the promise of the American Revolution in a more consistent and hence nobler way. They believe they are making consent purer and the sole basis of marriage.

Today’s critics believe they are continuing the destruction of patriarchy in destroying institutions that they believe reflect male privilege. They are liberating children from the autocracy of their parents or their fathers, thus promoting independence and self-sufficiency. The Founders opened the door on divorce a little; today’s critics of marriage keep the door swinging open. The Founders made possible marriage based on affection (as opposed to property); today’s reforms complete the idea that love makes the family.

This story is present implicitly in nearly every feminist history of marriage and the family, and this narrative reveals a way of thinking in which the traditional family appears to be on the wrong side of history.<sup>51</sup> Yet this narrative is questionable on two important grounds.

*First*, it ignores that the Founders sought to educate toward republican citizenship and self-government and thought the traditional family accomplished this goal most effectively. Parents are situated to oversee the formation of moral and intellectual habits that prepare children for independent life. This involves, first, self-control and respect for the rights of others and, later, the exercise of judgment in the public arena, the ability to supply one’s own needs in private life and ultimately to be able to educate one’s own children to self-government. This is a crucial personal part of self-government.

Today’s critics have a different vision of education in mind—one that emphasizes the equality in sympathy or indiscriminate toleration as its goal. Contemporary and Progressive critics of the traditional family would lessen the family’s effects on children with the aim of opening young minds to

greater social control. Children would no longer be taught to govern themselves; they would be “socialized” or instilled with the values predominant at the time of their education. Today’s educational goals of social control amount to de-emphasizing the Founders’ goal of self-government.

*Second*, today’s liberals may be more consistent (in a manner of speaking) in attempting to establish all social relationships on the basis of freedom and equality, but the Founders had good reasons to embrace more complex conceptions of these ideas and to put forward a social teaching based on a more complex understanding of them. They thought reasonable consent fostered responsibility, a virtue necessary for the exercise of freedom. Today’s emphasis on pure consent, however, erodes responsibility and ignores the virtues of republican freedom.

- The Founders thought that certain facts (for example, that children need mothers and fathers, and society needs future citizens) were permanent features of life and accommodated their teaching to those facts. Today’s critics ignore the problem of future citizens and deny that children require anything special from education that could be provided by mothers and fathers.
- The Founders thought that some institution had to be concerned with children. Today’s critics hope children will be produced without an institution focused on propagation.
- The Founders saw that human beings are complex mixtures of body and spirit. Today’s critics see the body as a limit on their freedom.
- The Founders’ Constitution, dedicated to securing individual liberty, understood that liberty was good only if it was reasonable and exercised within the limits of human power. They drew a distinction between liberty and license. Today’s critics are less interested in acknowledging the limits of human power.

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50. 7 Mass. 48, 52. For contemporary evidence for this position, see Lynn Wardle, “‘Multiply and Replenish’: Considering Same-Sex Marriage in Light of the State Interests in Marital Procreation,” *Harvard Journal of Law and Public Policy*, Vol. 24, No. 3 (Summer 2001), pp. 771, 778-780, and James Q. Wilson, *The Marriage Problem: How Our Culture Has Weakened Families* (New York: HarperCollins, 2003), pp. 28, 40, 66-67.

51. See, for example, Cott, *Public Vows*, and Stephanie Coontz, *Marriage, A History: How Love Conquered Marriage* (New York: Penguin, 2006).



The narrative of “development” that “overcomes” the Founders’ teaching is a rejection of the Founders’ sobriety and their educational goals. There is nothing inevitable about the development as it has happened. Nothing central to defending or revitalizing marriage and family life must contradict the Founders’ principles, properly understood.

As we defend the Founders’ social teaching against their critics today, we do well to keep several guiding principles in mind.

**1. The traditional family is built on equality in consent.** The fact that men and women must assent is proof of their equal dignity and importance in the marital community. If genuine consent means that men and women must each have other options so that they can choose marriage among alternatives, such conditions are clearly secured in today’s America.

**2. The traditional family accounts for nature’s enduring challenges.** Nature’s challenges are permanent, and every society must confront them. All attempts to ignore or work around those challenges are bound to fail to the detriment of individual lives and our future as a society. Children are helpless in infancy and needful of much education as preparation for republican citizenship. Society needs a future stock of children to replenish and rejuvenate itself. Men and women bring different physical and psychological features to the task of parenthood.

The traditional family is grounded in these facts and takes them into account. These private institutions can deal best with the challenges of nature. If the nuclear family is not going to be concerned with procreation, continuation of the species, and education, which institution is going to be concerned with procreation and education? If none, then how can society survive and individuals thrive?

**3. Strong families make possible limited government.** Marriage and family life provide a

front line for the cultivation of self-governing citizens; each can be ballast in a world of change, and each can provide security in a world that is not always secure. Marriage and family life perform indispensable tasks that keep the size and scope of government limited. They provide noble exercises for individual freedom consistent with natural equality. They give us consent with responsibility and equality with difference.

Joseph Story, Associate Justice of the Supreme Court, wrote an anonymous entry in the *American Encyclopedia* entitled “Natural Law” that shows how marriage and family life build on the resources of nature and provide great personal and social benefits:

Marriage is an institution, which may properly be deemed to arise from the law of nature. It promotes the private comfort of both parties, and especially of the female sex. It tends to the procreation of the greatest number of healthy citizens, and to their proper maintenance and education. It secures the peace of society, by cutting off a great source of contention, by assigning to one man the exclusive right to one woman. It promotes the cause of sound morals, by cultivating domestic affections and virtues. It distributes the whole of society into families, and creates a permanent union of interests, and a mutual guardianship of the same. It binds children by indissoluble ties, and adds new securities to the good order of society, by connecting the happiness of the whole family with the good behavior of all. It furnishes additional motives for honest industry and economy in private life, and for a deeper love of the country of our birth.<sup>52</sup>

If the Founders are correct, America’s experiment in self-government depends on revivifying the strength of marriage and the family.

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52. Joseph Story, entry on “Natural Law” in the *Encyclopædia Americana*, ed. Francis Lieber, Vol. IX (Philadelphia: Carey and Lea, 1832), p. 152.