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This book is about the constitutional status of family in the American order and how and why that status has changed through the years. My interest in the subject began when I was a law student, many years ago. Griswold v. Connecticut had been decided in the previous decade, and Roe v. Wade was announced just a few years before I encountered it in a course in constitutional law. The Supreme Court’s attempt to link both of these decisions to older cases resting on a doctrine of substantive due process concerning the autonomy and status of the nuclear family—Meyer v. Nebraska and Pierce v. Society of Sisters—was intriguing. For one thing, the economic strand of substantive due process had recently been declared deceased. (Recent developments in our own time, however, suggest that rumors of the death of economic liberty were premature.) For another, it wasn’t clear to me how family made its way into the Constitution in the first place. This book is the product of my efforts to make sense of this development.

It’s a truism (but still true) that scholarship owes much to others. In my case, the list of others is long. Among them are the many scholars who, in myriad ways, have come to the subject before me. The range and quality of that scholarship are humbling, whether it be in American history, family law, religion, feminism, or of course the Constitution. I acknowledge a large debt to them—including (especially) those with whom I’ve disagreed.

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Finally, heartfelt thanks to my family, both nuclear and extended, who’ve encouraged (and sometimes badgered) me to write. Special recognition to Kathryn, my patient spouse, and to Rachel and Evan, who show me daily how rich a life in a family can be.
States of Union
Introduction

Family Values

Forms of human relations that are recognizable as families have been around since the beginning of recorded history. Partly because of this longevity and partly because the functions that families have served can be important, we’ve come to think of “the family” as being basic to human experience, basic even to human flourishing or happiness. Indeed, it is. In fact, it would be difficult to overestimate its significance. But even if it is significant in these ways, is it also, as some have claimed, an institution that is significant for purposes of constitutional structure or constitutional law? By the end of the 1920s, the Supreme Court of the United States had held more than once that family was in fact an institution possessing a constitutional status and that certain relations within that institution were constitutionally protected. This book explores how this came to pass, what it has meant for family to be constitutionally significant, and what the implications of that significance have been (and continue to be) for the polity and for families.

THE MOVEMENT FOR FAMILY VALUES

In the latter half of the twentieth century, the rhetoric of “family values” became a staple of American civic life. Often the rhetoric has suggested a political program, but in truth it’s impossible to talk sensibly about a single program, as the specific concerns that animate the invocation of family values are diverse, reflecting the various aims of a large and disparate collection of groups and scholars. Depending on the source, therefore, one might hear about the nuclear family, sexuality, abortion, pornography, adultery, the roles of women, the welfare of children, domestic economy, familial control of education, the law and practice of divorce, and, more recently, same-sex marriage. These concerns are relevant to this book.
I’m interested in two general aspects of the notion of family values as groups and scholars have deployed it. The first is a pair of assumptions about the relation between family and constitutional order: that the forms and functions of family influence the legal, political, moral, and economic constitution of a society, and that these aspects of the constitution influence, for better or worse, the forms and functions of family.

My second interest is a story that some proponents of family values have told about family, constitutional maintenance, and constitutional change—a story that implicates the role of law in managing the relationship between family and constitutional order. The account is essentially this: across the ages, a particular familial form has held—monogamous, heterosexual, permanent, and reproductive. This family is natural and has helped establish and maintain a kind of civilization, including our own. Law, economy, and culture therefore have historically recognized its fundamentality. But beginning in the 1960s, law altered the landscape on which this family had traditionally flourished. As Mary Ann Glendon has put it, “Legal norms which had remained relatively undisturbed for centuries were discarded or radically altered in the areas of marriage, divorce, family support obligations, inheritance, the relation of parent and child, and the status of children born outside marriage.”

According to some who have criticized these changes, one culprit has been the Supreme Court of the United States, which, since the early twentieth century, has gradually made certain aspects of familial relations matters of constitutional law. In effect, the Court has converted family into a quasi-constitutional institution. It has done so primarily, though not exclusively, through the constitutional doctrine of privacy. Ironically, from the critics’ perspective, this jurisprudence of family—this constitutionalization of the law of family—has weakened the institution of the family by challenging the preconditions for sustaining its traditional forms and functions. And this alteration, in turn, now threatens to unravel the social fabric of the constitutional order.

The concerns of almost all proponents of family values are animated by religious values. In saying this, I am not suggesting that religion in this context is unidimensional. There is a multitude of religious views on the place of family in the world. But a constellation of religious adherents—including orthodox Roman Catholics, conservative Protestants, and traditionalist Jews—has formed around a commitment to a specific vision of family values. Likewise, I’m not implying that the positions are illegitimate by virtue of their connection to religion. John Rawls and other contemporary liberals have been misguided in their philosophical quest to wall off public forums from religious views. Religious perspectives can’t easily be eliminated, whether by force or law, nor should they be. By their nature, however, sectarian appeals will tend to be limited in their persuasiveness. That fact is part of the reason secular arguments tend to dominate in the civic “marketplace of ideas” in a pluralist society. As a result, many proponents sometimes offer arguments in secular language, despite their religious motivation. In fact, one
striking feature of the current movement for family values is the tendency of some proponents to speak publicly in terms that avoid overt theological language. Still, most positions ultimately rest on a ground of religion. And some are essentially premodern critiques of the values of the Enlightenment.

Consider, for example, a recently published forum sponsored by the Witherspoon Institute, a center for policy that focuses on “the moral foundations of free and democratic societies.”

Titled *The Meaning of Marriage*, the forum was designed “to promote the truth about marriage.” Robert George’s essay explains and defends the “traditional” view—which he calls “one-flesh unity”—that the heart of marriage is a form of sex that is (or could conceivably be) reproductive. Although he doesn’t acknowledge it explicitly in this particular essay, the view originates in biblical sources and in the Catechism of the Catholic Church. As he describes it, cryptically:

Marriage, considered not as a mere legal convention or cultural artifact, but, rather, as a one-flesh communion of persons that is consummated and actualized by acts that are reproductive in type, whether or not they are reproductive in effect, or are motivated, even in part, by a desire to conceive a child, is an intrinsic human good and, precisely as such, provides a more than merely instrumental reason for choice and action. The bodily union of spouses in marital acts is the biological matrix of their marriage as a comprehensive, multilevel sharing of life: that is, a relationship that unites the spouses at the bodily (biological), emotional, dispositional, and even spiritual levels of their being. Marriage, precisely as such a relationship, is naturally ordered to the good of procreation (and is, indeed, uniquely apt for the nurturing and education of children) as well as to the good of spousal unity.

This way of seeing the matter has direct implications for the character or definition of family and for who may marry whom and why. I’ll return to George’s position at the end of the book.

In the same publication, Roger Scruton’s essay on “Sacrilege and Sacrament” is less preoccupied than George’s with prescribing a particular method for having sex, but he is nonetheless keen to present a specific view of the connection between sex and marriage. From the beginning of the emergence of Christian institutions in Europe, he asserts, marriage was conceived to be a permanent sacramental relationship, secured by the sacred erotic tie between spouses. Although ancient Roman law asserted secular control over the institution of marriage, it conceded much, he says, to “religious precedent.” Still, the Roman law did not view marriage as a “radical existential change” of status, as the sacred law did. This defect in Roman law was exemplified by the fact that it permitted divorce. Scruton does not mention Judaic law, which for thousands of years has permitted divorce. In Christendom, however, Scruton argues that the rising power of the papacy “re-captured [marriage] from the secular powers” and “reconsecrated” it as a central institution of the Church. Through the Middle Ages and up to the Renaissance,
then, marriage was the subject of both secular and spiritual jurisdiction, but the Church’s position that marriage was essentially permanent and indissolvable held sway. The Reformation, especially Henry VIII’s in England, chipped away at the “traditional Catholic teaching” that marriage is “an irreversible change of status, not merely within the community but also before God.” But, Scruton says, the key historic moment in the “desecration” of marriage was the French Revolution, when “the state declared itself to be the true broker and undoer of marriages.” He suggests that this secularization of marriage was illicit. “When the state usurped the rite of matrimony, and reshaped what had once been holy law, it was inevitable that it should loosen the marital tie. For the state does not represent the Eternal.” State-sanctioned marriages, he says, are not “real marriages,” because, with the possibility of divorce, the secular relationship lacks the dignity, privileges, and duties of the sacred version. What’s more, the American state’s commitment to permitting contraception and abortion has led the state to “set itself against the goal of reproduction” and has unconsciously led to “the confiscation of hereditary rights.” This in turn threatens to undermine social reproduction and the capacity of civilization to preserve itself.

Among proponents of family values, one worry is that divorce is too easy to obtain. Some have claimed in fact that American law now permits “unilateral divorce,” as if one spouse might simply decide to leave a marriage and then do it on his or her own motion. This mischaracterizes the laws of the American states. If a spouse wants a divorce s/he must petition a court, allege a proper ground (often that the spouses have irreconcilable differences or that the marriage has irretrievably broken down), and prove the allegation through cogent evidence. Typically, the other spouse may respond to both the allegation and the proof, though the fact that one spouse objects is not in itself a ground for denying a petition for a no-fault divorce. To be sure, the process no longer requires a showing that one or the other party is at fault, although most states still permit an allegation of fault as a ground for divorce. Often, therefore, the process is not overtly adversarial, nor does it require a full-blown trial. But the process is not, in a simple sense, unilateral. Even so, it is easier to divorce than it was a half century ago, and the rate of divorce is much higher than it used to be. Many in the movement have argued that the frequency of divorce has debased marriage, converting it from an enduring sacred covenant, entered in the presence of God, into a terminable legal contract presided over by the state. Marriage, one writer urges, has been redefined as “a bundle of benefits granted by the state.” This, says Jennifer Roback Morse, “means the end of marriage.”

To inhibit divorce, proponents of family values have devised a range of policy prescriptions. One is the option of covenant marriage, which the states of Louisiana, Arkansas, and Arizona have enacted. The covenant serves as a prescribed prenuptial agreement, which prospective spouses may enter into after a period of premarital counseling. The agreement, which is binding only in those states that recognize covenant marriage, commits the couple to dissolving the marriage only
for certain reasons of fault—e.g., adultery, abuse, or conviction of a felony for which imprisonment is imposed—and even then only after undergoing additional counseling. The percentage of couples who have opted for covenant marriage in states that provide for it has been quite low (1 to 2 percent of all marriages). Morse has proposed another device, not yet enacted in any state. She observes that women file the overwhelming majority (around 67 percent) of petitions for divorce in the United States. This was true in the nineteenth century, long before the appearance of no-fault divorce, and continues to be true today. In light of this persistent tendency, Morse wants to address “both public policies and the social climate that steer women to divorce.” One policy that she has proposed is to alter the legal rules governing the custody of children. In short, she proposes a default rule that awards custody solely to the husband-father if the wife-mother is the petitioner. Given the affection that mothers tend to have for their children, Morse reckons that denying them custody of their children “would decrease the probability that the mother files for divorce by about half.”

Contraception, too, has drawn critical attention as a source for marriage’s demise. From Robert George’s deontological perspective, contraception interferes with the “natural” procreative purpose of sexual conjugation and of marriage. Viewed this way, contraception is simply wrong. But even from a utilitarian perspective, contraception might be considered problematic, for it can promote (or at least dis-inhibit) the practice of sex outside of marriage. It can do so because it diminishes the risk of certain consequences, especially the fear of pregnancy and sexually transmissible disease. As a result, it may lower the incentive to marry in the first place, even if fornication were to remain technically illegal. But, according to contraception’s critics, contraception may also exert an insidious force within a marriage. For one thing, it short-circuits reproductive possibility and therefore diffuses the operation of the reproductive motive in a proper marriage. For another, by enabling spouses to have sex outside marriage with fewer inhibitions, lower bodily risks, and less chance of being caught, it weakens marital fidelity. This not only dissipates the sacred eroticism of marriage but also creates psychic (and real) opportunities for infidelity, which in turn provides incentives for divorce. The legality of abortion may work in similar but not identical ways, especially for unmarried women, though it is potentially less private than contraception and a more palpable threat to the generation of new life.

For proponents of family values, the creation of new life is a moral imperative, rooted in the biblical injunction in Genesis to “be fruitful and multiply.” According to some, this command bespeaks the intrinsic value of human life, a value that abortion transgresses. It also suggests a biological basis for the moral obligation running from the present generation to future generations. This natural obligation is the surest guarantee of human welfare, they say, as parents care for their children, and children eventually care for their parents. But concerns about reproduction in the present day go further than these sorts of moral considerations. They embrace also the survival of civilization itself.
INTRODUCTION

On the one hand is a Malthusian worry about the quantity of reproduction. Actually, to say that the worry is Malthusian is in some ways misleading. As Harold James observes, Malthus argued that the central problem of societies was what appeared to be “a perpetual oscillation between happiness and misery.” The root of this boom and bust was population, which in times of prosperity tended to increase exponentially, which in turn produced a struggle for scarce resources, a struggle that could be checked only by catastrophe (like famine or war) or by vicious methods (like infanticide or birth control). What could check this cycle? Malthus considered several possibilities. Two keys were property and (especially) marriage, which could help sustain and limit population in societies both prosperous and poor. James argues, however, that “advanced industrial societies” seem to have learned aspects of Malthus’s lesson only too well, for they are dramatically limiting the number of children who are brought into the world. One reason is that they have come to see the reproduction and maintenance of children strictly in terms of economic cost and opportunity, which compete with the happiness of the marital couple. Given the undeniable costs of raising children, combined with the socialization of the economic risks of old age in advanced societies, large numbers of people are electing to restrict reproduction. According to James, “We [in advanced western societies] are thus plunging into an opposite version of the trap that Malthus had attempted to predict.” The result, he implies, could be catastrophic for civilized society.

A second threat to civilization has to do with worries not merely about quantity, but about the quality of reproduction. The concern here is that too many children are being born and/or raised in circumstances that are less than optimal. Maggie Gallagher blogs and writes extensively on the importance of religion in society and on the “defense of marriage.” She argues that the best home for raising children is a two-parent household in which the parents are married to each other, have a biological connection to the children, do not commit violence, exhibit only moderate conflict, and are religious. Because these homes are not violent or severely conflictual, such children will plainly be less likely to be victims of physical and sexual abuse. She says these homes also produce children who will tend to be less likely to drop out of school, abuse drugs or alcohol, suffer from mental health problems, commit crimes, commit domestic violence, or divorce. In short, children from happy, healthy, peaceful, stable homes will tend to develop into happier, healthier, more peaceable, and more stable persons than will children from miserable, unhealthy, violent, and unstable homes. The rise of sub-optimal homes is socially significant because children from these homes are less likely to possess the character required for republican government, less likely to be self-sufficient, and more likely to sap the strength of the polity with material demands or even through incarceration. Republican society will be unable to reproduce itself. And civilized life will cease.

Every one of the critiques of modernity takes the tenor of an apocalyptic struggle for good, a struggle that becomes all the more intense the closer analysis
moves to same-sex marriage. Consider one of the most prolific scholarly proponents of family values: Lynn D. Wardle. Through the years, Professor Wardle has expressed concerns about many social and legal developments related to family, but one in particular that has captured his attention is same-sex marriage. He sees in recent moves to formalize recognition of same-sex relations a threat to civilization. In one essay, he invokes Moishe the Beadle, a Jew whose memory and experience Elie Wiesel recalls in Night, his bleak and dispiriting account of the Holocaust. Moishe was captured by the Nazis and imprisoned in a concentration camp, but escaped. “Day after day, night after night, he went from one Jewish house to the next, telling his story” and the stories of others who had lost—who were losing—their lives in the camps. “But people not only refused to believe his tales, they refused to listen.” In his warnings against same-sex marriage, Professor Wardle likens himself to Moishe the Beadle. I’ll not comment on this prophetic self-conception, on Wardle’s identification with Moishe the Beadle, nor on his equation of same-sex marriage with the Holocaust, other than to say that each is evidence of just how fundamental opponents of same-sex marriage perceive their position to be.

THE BOOK

This book tests some of the claims of proponents of family values. It does so by examining aspects of the relations between family (or families) and the American constitutional order. I am not attempting, however, a comprehensive or exhaustive history of family in America. Nor do I want to present a systematic normative framework for resolving specific legal disputes among individual, family, and state. Instead I offer discrete glimpses into American familial households across time. I also look at the legal and constitutional norms that have aimed to govern those households and the lives within them. These glimpses will shed light on the relations between family and the constitutional state, and I believe they will also tell us something about the character of constitutional change more generally. Among the things that we’ll learn is that relations between family and the constitutional state have been simultaneously sympathetic and antagonistic, depending partly on timing and partly on the form of family that’s at issue. We’ll see that law is not consistently effective in regulating relations between family and the constitutional order. And we’ll see that, to the extent that law is effective, its effects are not always desirable—though much of the judgment about desirability depends on where one stands historically, socially, geographically, and ethically. The book unfolds as follows:

Chapter 1 asks why people have long considered family, however it’s defined, to be important. The answer, as we’ve seen in the discussion of family values, is that many people have seen it as basic to civilization. This term “civilization” is loaded, of course. The sources for the belief that family is constitutive of a civilized life are at least fourfold. (1) Family is woven into religious accounts not only
of a proper life but also of the creation of the universe. These accounts are ideologically meaningful and practically potent. (2) People have also recognized that family has been a central institution in the evolution of human societies. Whether the story of evolution is one of descent, of progress, or simply of change, family has been at the center of the narrative. (3) Family is an arena in which power is exercised, in ways both visible and hidden. Power may be expressed through the accumulation of resources that are used in connection with (or against) the “outside world” and through the regulation of life within the household itself. (4) Finally, family is psychologically significant. It is one of the basic social forces in forming and maintaining human personality.

To make these points, however, is not to explain how or why family might be constitutionally significant or even a proper subject for law within the American order. Chapter 2 begins to explain. It traces the origins of the American law of family to the English common law, broadly conceived. The law of England provided a normative template for one traditional view of family. It established and defined status relations within the household. One of these—master and servant—may seem jarring to our eyes, but its legal presence demonstrated the ways in which the familial household was a basic unit of economic production. Other statuses are less jarring: husband and wife, parent and child, and guardian and ward. Each of these statuses entailed specific duties and entitlements, which English law recognized and sometimes enforced. Embedded in these duties and entitlements were assumptions about both gender and class, assumptions so potent that we may fairly call them constitutive. One of the most important areas of legal regulation involved norms surrounding marriage—who could marry whom, what formalities they had to comply with, what privileges and obligations spouses owed each other, and how and why a marriage could be dissolved. Among the benefits (and burdens) of marriage was sex. Technically, sexual acts outside marriage were prohibited. The prohibition was more lax for men than for women, but even for women enforcement was inconsistent. Still the norm remained, in part to be used (when it was used) as a tool for social order and control. Another aspect of social control involved law’s linkage of family to property, especially land. The link was apt not only because most land was held in familial households, but also because English rules were peculiarly preoccupied with the intergenerational transfer of wealth (mainly to male children). Chapter 2 describes these aspects of English law in some detail and shows how they were rationalized to maintain a particular kind of patriarchal social order.

The order to be maintained was not merely social but political, too. In fact, familial norms came to a head in the Crown. For one thing, norms of status, sex, property, and inheritance provided guidance for royal succession and governed relations with and within the “royal family.” For another, family was a metaphor for political authority generally and the status of the Crown specifically. The metaphor began to lose its resonance, however, in colonial North America. This is not to imply that the metaphor wasn’t strained already, even in England. John Locke,
for example, had reconceived the relation between family and political authority in the latter half of the seventeenth century. But by the time of the colonial secession from Britain, social conditions and political aspirations in the colonies made traditional English uses of family as a template for politics increasingly incongruous. Three social conditions, occurring largely outside the normative bounds that law prescribed, helped to undermine English uses and to reinforce an ideology of republicanism as it emerged in the colonies: relative class-based equality, modest movement in the direction of equality of gender, and, relevant to both, the increasingly frequent practice of exit from established households. Chapter 3 shows how these changes supplied ammunition for a rhetorical assault on the “mother country” and for creating a new constitutional order. Reflecting these changes, the text of the Constitution contained some provisions designed to stifle the emergence of aristocratic familial forms. And, according to John Jay, part of the reason for the Constitution’s new and complex institutional design was to thwart the rise of dynasties and inhibit familial self-dealing, corruption, and aggrandizement in and through government. Some founders hinted, weakly, that families—or a particular social order more generally—might reinforce the status of states vis-à-vis the national government. Although these considerations weren’t trivial, they tended to demonstrate just how far the United States had moved away from the ancient notion that polity was built on family.

Still, the Constitution acknowledged and even entrenched one particular form of family: the slaveholding household. To be sure, slavery didn’t square neatly with republican values, as it tended to be brutish, despotic, and hierarchical. Even some defenders referred to it as “peculiar.” Still, it was legally protected, and, for decades after the constitutional founding, slaveholding households were present in every region of the country. Besides, if it was inconsistent with republicanism, slavery was compatible with other values in the constitutional order. One, as we’ll see also in Chapter 5, was patriarchy. Another was the Aristotelian view of the (slaveholding) family as the basic unit of economic production. A third was that the legal regulation of slavery was a device for maintaining and securing a racialist social order, for enforcing formally a view of “the proper status of the Negro in our form of civilization.” Chapter 4 describes the slaveholding household, how it fit within the American order, and how slaves carved out forms of family despite the fact that law inhibited them from doing so. The chapter also shows that, despite the nation’s constitutional commitment to slavery, the political structure that dispersed the bulk of regulatory authority among the several states ironically became a device for slavery’s concentration in the southern region and hence for its gradual marginalization in the country. This geographic division presaged a political and constitutional conflict, which erupted in the form of civil war. That war was waged over competing forms of family. Chapter 4 closes with a discussion of the post–Civil War regulation and prohibition of interracial sex and marriage, even after the Constitution was amended to prohibit slavery and to provide basic rights to all persons whatever their race.
Many of the social changes that had made republican ideology seem sensible in the Revolutionary era occurred beyond the cover of law. Still, family was in important respects a legal creature in the colonies. It was certainly so after the constitutional founding. But, slavery aside, family was largely invisible as a constitutional matter after the founding. One possible reason was that family simply went without saying as a basic social institution. Despite its variations and the changes it had undergone in North America, family was, in various forms and fashions, a presumed part of the social order. Another reason was that the regulation of family fell mainly within the province of the states. This was so even before the Tenth Amendment confirmed the alleged “truism” (we would later be told) that the states reserved those governmental powers that the Constitution hadn’t assigned to the nation. As states’ regulations unfolded, a version of an old idea surfaced, invigorated, in American law: patriarchy. Its appearance demonstrated that all was not liberty and equality within the American marital family, regardless of what the social prerequisites and the rhetorical point of the Declaration of Independence had been. One way in which law insinuated itself into marital families was its active prescription of gendered roles. It did so in several ways, including but not limited to the common law’s disabling doctrine of coverture. Even after the death of a husband, however, a widow’s legal disabilities could persist, enforced partly through a variety of legal norms and institutions and partly through formal and informal restrictions on women’s access to gainful employment. Though law permitted separation or divorce, statutes imposed barriers to exit. For a variety of reasons, these barriers tended to be felt more keenly by women than by men. Backed by cultural expectations, then, law played a powerful role in reinforcing gender. And gendered families helped maintain the patriarchal republican order.

One reason for the geographic isolation of slavery was a competing form of family—white, nuclear, and largely agrarian—which was the nation’s vanguard for settling the western frontier. As Chapter 5 demonstrates, families that participated in westward migration performed ambivalent legal and constitutional functions. On the one hand, migratory families functioned as institutions for extending and maintaining the dominion of the United States across the continent, self-consciously carrying with them a kind of civilization. At the same time, they challenged two important values of the order. First, they resisted the western expansion of slavery. Often, this resistance was for reasons not of high-minded morality, but of material self-interest. Second, they challenged the gendered roles that law prescribed everywhere else in the country. The reasons these families could challenge these roles were complicated, but one prominent reason was the relative weakness of legal norms and institutions on the frontier. This weakness, combined with the relative isolation of migratory households, provided greater degrees of freedom in the forms that households took. For example, same-sex households—some covert, some not—appeared with surprising frequency in the
West. Even within nuclear heterosexual households, formal marriage wasn’t always required. In fact, complying with formalities was sometimes impossible, as legally designated authorities were rarities in some places. Still another reason for the practical challenge to gendered roles on the frontier emerged from the privation that households faced there. In short, necessity often required that men’s and women’s roles be negotiated within the family, instead of comporting with legal norms or cultural expectations. Negotiation in turn promoted a semblance of equality. As law, government, and civilization took hold in the West, women’s equality contracted there, but it did not disappear. Eventually, an egalitarian sensibility would make its way eastward, with effects both subtle and substantial.

For many years after the constitutional founding, the nation did not decisively take sides in the competition between slaveholding families and white nuclear families on the frontier. Very early in American history, however, the nation did assert a plain preference in dealing with another familial form—that of the native tribes. Chapter 6 investigates American policy toward native families. From the perspective of the constitutional order, the tribes presented more than one problem. First, they were an impediment to the sort of continental dominion that the nation increasingly saw as its destiny. In short, they were in the way. Second, the tribes had odd notions of property. To put it differently, they had no conception of “private” property, at least not in land. Instead, their approach to land was simultaneously fluid (especially for nomadic tribes) and communistic. This actually made it easier for the constitutional order to seize tribal lands, as there was no messy legal title to consider; ironically, however, tribal lands were more difficult to regulate after tribes were placed on legally prescribed reservations, as title to communal land was not easily alienable. Finally, and most directly relevant to my study, familial forms and practices of whites were unfamiliar to many tribes. Relationships within a tribe tended to be consanguine, not nuclear, and matrilineal, not predominately patriarchal. Divorce was easy. And sexual mores were more permissive than were European-American norms. How to deal with the tribes? National policy took roughly three forms until the end of the nineteenth century. The first was pacification, which the order achieved through treaties or through conquest. The second was to remove and/or confine the tribes on discrete tracts of reserved land. The third was to assert direct national control over the education of children of the tribes. The explicit aim of this third policy was civilization, within two particular senses of the word. It aimed to dismantle tribal associations and property and to replace them with bourgeois nuclear families living on alienable parcels. And it aimed to transform children of the tribes into children of the nation-state, to instill in them a new, particular civic personality. To achieve the first, the nation employed the policy of “allotment.” To achieve the latter, the nation interceded directly between Indian children and their families to impose an aggressive policy of native education. This was the first systematic effort by the American national government to provide education for children. And it
became in some ways a model for general state-sponsored programs of education that arose in the late nineteenth and early twentieth centuries. As the chapter will show, the consequences for constitutionalism were mixed.

Native households were not the only familial units to face extensive legal regulation in the nineteenth century. Chapters 7 and 8 consider two familial types that found themselves at odds with an increasingly muscular use of law: communalist and polygamous families. Both of these types tended to be religiously motivated offshoots of Protestant Christianity, subject to strong charismatic leaders, with roots in New England. What they also shared—not only with each other but also with the interracial unions discussed in Chapter 4—was that they became objects of a particular moral concern: who was having sex with whom. Chapter 7 and especially Chapter 8 show how a growing preoccupation with sex and sexuality, combined with a heightened sense of what counted as a normal family motivated coercive legal regulation of these uncommon families.

The normalized family received a constitutional stamp of approval in the early twentieth century in two notable decisions of the Supreme Court: 

*Meyer v. Nebraska* and *Pierce v. Society of Sisters*. It’s a popular conception that these decisions marked the beginning of the Court’s foray into the business of constitutionalizing aspects of the law of family. In fact, as the opening section of Chapter 1 suggests and the discussion of polygamy in Chapter 8 illustrates, the Court had long been deciding cases that developed and applied an American law of family. Chapter 9 discusses the emergence and evolution of a familial jurisprudence as applied to disputes over property, inheritance, work, reproduction, the status of women, the status of children (including illegitimates), the regulation of sex and sexuality, and the legal limits to and constitutional significance of marriage. Here we return to the discussion of family values with which this Introduction began. Chapter 9 observes that, prior to the 1960s, families in America had not been undisturbed for centuries but had continually been changing, sometimes in significant ways. At times, changes occurred through law. More frequently, they occurred outside legal norms or even against them. What’s more, the legal rules pertaining to family had themselves changed well before the 1960s. Consider, for example, the rules pertaining to inheritance, bastardy, adoption, and divorce. To be sure, some ancient rules persisted in some places, rules like prohibitions of interracial marriage, the prohibition against the use of contraception, and cultural and legal impediments to women’s access to a full range of employment outside the home. Chapter 9 shows how the Supreme Court’s decisions bore on these norms and practices. The chapter argues that, to the extent that the lives of families changed in the latter half of the twentieth century, the Court’s decisions were not the sole cause of change. For those decisions were responding to—and in many cases consolidating—antecedent cultural, political, economic, ethical, and technological changes in society. These social changes were not primarily the products of a moral (nor an amoral) revolution in the 1960s, but were consistent
with institutions and values to which the American constitutional order was long committed as a matter of principle.

The book’s Conclusion returns to another theme drawn from the discussion of family values: the meanings of marriage. This chapter focuses on same-sex marriage, which is plainly the most contentious issue in current battles over family. It considers the development of same-sex marriage as a political and legal issue in our time. Although doctrinal and logical props for holding same-sex marriage to be a constitutional right have been present for some time, it may well be that, if there is to be a secure foundation for same-sex marriage, it will be laid not through constitutional law, but through the gradual accretion of change in law writ small and in a constitutional culture that is partially autonomous from law.

The Epilogue takes up the holding and reasoning of two cases that the Supreme Court decided at the end of the October 2012 term: United States v. Windsor (involving the constitutionality of a provision of the federal Defense of Marriage Act) and Hollingsworth v. Perry (involving a challenge to California’s prohibition of same-sex marriage). This final chapter considers the implications of those decisions for the future of same-sex marriage and for constitutional change.
1

Family and Civilization

THE AMERICAN CONSTITUTIONAL ORDER

David and Lydia Maynard were married in Vermont in 1828. They had two children. In 1850, the Maynards moved to Ohio. From there, David departed, bound, he said, for California. He promised to send his wife money for support during his absence and vowed that, once he was settled, he would return or send for the family. He never sent the promised support; nor did he return or send for his wife and children; nor did he go to California. Instead, he moved to the Oregon Territory, settled on a homestead (claiming the tract as a married man), and petitioned the territorial legislature ex parte for a divorce from Lydia. The legislature granted the divorce. Twenty-four days later, David married Catherine Brashears. After residing on the tract for the requisite four years, he petitioned the United States to have title vested in him. (In his petition, he apparently swore falsely that his first wife had died.) The petition granted, David continued to live on the tract with Catherine until he died intestate in 1873, leaving no children from the second marriage. As sometimes happens, the death of a familial relative incited competition for his worldly possessions. Lydia and the children challenged the validity of David’s divorce and contested Catherine’s title to the land. The first family lost at trial and again on appeal to the territorial supreme court. It lost a third time before the Supreme Court of the United States, but not before the Court pronounced the marital family to be “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.”

The irony of this pronouncement was apparently lost on the Court. It is tempting, therefore, to dismiss the Court’s celebration of marriage as a cynical flourish designed to give the impression that the Court was defending an institution or value that it was actually undercutting. There’s much to support this