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PROCREATION AND POWER IN EARLY AMERICA

Jane Fiegen Green*

MARK E. BRANDON, *STATES OF UNION: FAMILY AND CHANGE IN THE AMERICAN CONSTITUTIONAL ORDER* (2013). Pp. 352. Paperback \$ 37.50.

MARK E. KANN, *TAMING PASSION FOR THE PUBLIC GOOD: POLICING SEX IN THE EARLY REPUBLIC* (2012). Pp. 248. Hardcover \$ 49.00.

M. MICHELLE JARRETT MORRIS, *UNDER HOUSEHOLD GOVERNMENT: SEX AND FAMILY IN PURITAN MASSACHUSETTS* (2013). Pp. 362. Hardcover \$ 49.95.

Why are governments interested in the procreative habits of their citizens? Why especially does a democratic government—ostensibly formed to protect individual rights—concern itself with the private activities of consenting adults? These questions could be raised in debates over same-sex marriage or insurance coverage for contraception in the twenty-first century United States.¹ But three recent books on the intersection of family, sex, and the law show us why the regulation of parents and children has been central to the organization of power since the colonial period.

In light of political struggles for marriage equality, Mark E. Brandon's *States of Union: Families and Change in the American Constitutional Order*² offers legal scholars a broad historical perspective on the impact of family organization. Reaching back to early modern England and drawing connections to contemporary politics, Brandon asks us to consider how much American constitutional order is derived from the ideal and the reality of family formation, and in turn, how much constitutional order has tried to impact family formation. Two other books written by historians, *Under Household Governance: Sex and Family in Puritan Massachusetts* by M. Michelle Jarret Morris, and *Taming Passion for the Public Good: Policing Sex in the Early Republic* by Mark E. Kann,³ allow us to focus on discrete historical circumstances to understand why procreation attracted so much political concern during critical periods of America's self-identity. All three books show

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1. For example, Sarah Lipton-Lubet, *Contraceptive Coverage Under the Affordable Care Act: Dueling Narratives and Their Policy Implications*, 22 AM. U. J. GENDER & SOC. POL'Y & L. 343 (2014); JAYE CEE WHITEHEAD, *THE NUPITAL DEAL: SAME-SEX MARRIAGE AND NEO-LIBERAL GOVERNANCE* (2012).

2. MARK E. BRANDON, *STATES OF UNION: FAMILY CHANGE IN THE AMERICAN CONSTITUTIONAL ORDER* (2013).

3. M. MICHELLE JARRETT MORRIS, *UNDER HOUSEHOLD GOVERNMENT: SEX AND FAMILY IN PURITAN MASSACHUSETTS* (2013); MARK E. KANN, *TAMING PASSION FOR THE PUBLIC GOOD: POLICING SEX IN THE EARLY REPUBLIC* (2013).

us that in early America (here meaning the broad period from colonial settlement through the early republic), family was a legal institution designed to organize the care of children. The designation of paternity created obligations to support children that could relieve the burden on community resources. State efforts to distinguish between legitimate and illegitimate children, and their efforts to encourage the former and discourage the latter, reveal the importance of sexual agency to citizenship.

Mark Brandon offers an examination of the intersection of family law and constitutional order in *States of Union*. His broad synthesis spans over four hundred years of British and American history, showing the ways political theorists have used the legal arrangement of marriage and families to naturalize their constitutional politics. Through his volume, Brandon shows readers why the marital family was significant for creating and justifying political order. Brandon traces the connection between family structure and political order across centuries of American civilization, from the monarchical theory of early modern England to contemporary debates on same-sex marriage. For the purpose of this review, I will focus on his analysis of early America.

Brandon sets up his book with an initial chapter discussing the connection between family structure and European ideals of civilization.⁴ He details four “frames” that show why the family “is fundamental to human society” and why it has been the source of “political conflict and contestation.”⁵ He introduces his legal audience to the historical construction of the family and the political notion of “family values.”⁶ In the first substantive chapter of the book, Brandon investigates the scope of English law governing the formation and dissolution of families and the rights and responsibilities of the different members that made up a household.⁷ Drawing from William Blackstone’s *Commentaries on the Laws of England*, Brandon shows how the regulation of families supported English aristocratic order.⁸ The varying obligations and disabilities of master and servant, husband and wife, parent and child, and guardian and ward helped to maintain class hierarchy and guide intergenerational transfers of property.⁹ Because of this concern about the orderly transfer of political power and prestige, the English family was centered on the authority of the patriarch. To protect wealth, English law placed limits on who could make contracts that might divest themselves of property and controlled women’s sexuality to prevent the birth of unexpected heirs.¹⁰ The value of the family was the way it protected accumulated wealth and the political privileges that came with it.

The authoritative family, which focused on the transfer of wealth, matched the economic conditions of early modern England. The demographic and economic changes in the British North American colonies changed family relationships enough to create a fundamental shift in political notions of power and rights.¹¹ Brandon’s account of this

4. BRANDON, *supra* note 2, at 16-31.

5. *Id.* at 17, 31.

6. *Id.* at 16-31.

7. *Id.* at 32-61.

8. *Id.* at 33-35.

9. *Id.* at 35-50.

10. *See id.* at 32-61. The importance of intergenerational land transfer in the organization of family, specifically the conception of childhood, is discussed in HOLLY BREWER, *BY BIRTH OR CONSENT: CHILDREN, LAW, AND THE ANGLO-AMERICAN REVOLUTION IN AUTHORITY* (2007).

11. *Id.* at 62.

social history is limited, leaving the details of how family life changed to other scholars.¹² He offers general references to the rise of companionate marriage and the increased opportunities for young men and women to live away from parents, masters, or guardians.¹³ Brandon demonstrates the shift in ideals of family through changing political rhetoric during the American Revolution. Incorporating Lockean notions of affectionate parental guidance as the center of a republican family, patriots promoted a family metaphor of the relationship between Great Britain and the colonies that emphasized the reciprocal obligations between parent and child.¹⁴ Brandon extends this analysis into the early national period, showing how the framers of the Constitution saw that the natural “ties of affection and kinship that reside[] in family and community” would prevent the rise of a distant, centralized power.¹⁵ As European Americans migrated westward, they used the nuclear family as a tool in their colonization efforts.¹⁶ The freehold, a small plot easily purchased by a modest farmer, was central to the republican family and vital to republican social order in the way it offered economic sufficiency to each mature male citizen and incorporated dependent labor (wife, children, and surplus young adults) under the government of a patriarch.¹⁷

Unlike Morris and Kann, Brandon is able to incorporate the experience of non-white families into his discussion of political change. His chapter on the slaveholding household demonstrates how Southern political theorists used this multi-racial extended family to justify white supremacy.¹⁸ Plantation elites tried to downplay their economic motivations for holding blacks in bondage by discussing slavery as a domestic institution. They rationalized that enslavement protected vulnerable Africans who could find no better place in the social order than as dependents, and that under paternal masters, slaves were treated better than white workers under capitalism.¹⁹ Yet the actual practice of family life among enslaved African Americans defied the rules established by slave owners.²⁰ Brandon also discusses European Americans’ efforts to incorporate and domesticate Native American families.²¹ During the conquest of the western half of the continent, American political leaders viewed the eradication of indigenous practices of communal land ownership and matrilineal families as an essential component of civilizing the region and making it safe

12. Historians’ accounts of the economic changes that precipitated changes in family structure and the experience of youth include: CARL N. DEGLER, *AT ODDS: WOMEN AND THE FAMILY IN AMERICA FROM THE REVOLUTION TO THE PRESENT* (1980); MARY P. RYAN, *CRADLE OF THE MIDDLE CLASS: THE FAMILY IN ONEIDA COUNTY, NEW YORK, 1790-1865* (1983); J. M. OPAL, *BEYOND THE FARM: NATIONAL AMBITIONS IN RURAL NEW ENGLAND* (2011).

13. BRANDON, *supra* note 2, at 68.

14. *See id.* at 69-73. Additional discussions of the family metaphor during the revolution include: JAY FLIEGELMAN, *PRODIGALS AND PILGRIMS: THE AMERICAN REVOLUTION AGAINST PATRIARCHAL AUTHORITY 1750-1800* (1985); MELVIN YAZAWA, *FROM COLONIES TO COMMONWEALTH: FAMILIAL IDEOLOGY AND THE BEGINNINGS OF THE AMERICAN REPUBLIC* (1985).

15. BRANDON, *supra* note 2, at 78.

16. *See id.* at 109; *see also* JOAN E. CASHIN, *A FAMILY VENTURE: MEN AND WOMEN ON THE SOUTHERN FRONTIER* (1994).

17. BRANDON, *supra* note 2, at 110-11.

18. *Id.* at 81-107.

19. *Id.* at 87-88.

20. *Id.* at 90.

21. *Id.* at 135-50.

for white settlement.²² These chapters show how white Americans enforced their own model of family in their efforts to exert political control over vast territories and diverse peoples.

As a synthesis written from a legal perspective, Brandon takes a broad view of history. Relying heavily on John Locke, William Blackstone, and America's 'Founding Fathers,' he also gestures to the social and economic fluctuations that drove changes in family structures and ultimately influenced ideas of power and authority. But to understand how law functioned in the daily life of early Americans, we need a different approach. M. Michelle Jarrett Morris explores the integral, and sometimes unexpected, role families played in the prosecution of sexual crimes during the period of early American settlement in her new monograph *Under Household Government: Sex and Family in Puritan Massachusetts*.²³ By skillfully analyzing court records between 1660 and 1700, Morris shows the colonial patriarchs' fear of illicit sexual activity and the lengths families went to protect their members from state sanction.²⁴

Morris finds that "[f]amily members, not the community at large, provided the backbone of the sexual policing system, and their motivation was often less than moralistic"²⁵ Sexual activity outside of marriage produced children with ambiguous dependency.²⁶ Only through marriage could the community make support of a helpless infant the responsibility of a particular man. Children born out of wedlock became a burden on unprepared families.²⁷ Historians of colonial New England are accustomed to discussing households as economic units and political subdivisions. We are well-versed in the vision of the family as a "little commonwealth" in which a patriarch governed a set of legal and familial dependents based on his control of land and his recognized position before the state.²⁸ But Morris reminds us of the essential *reproductive* role that families played. The legal structure of marriage, and the policing of those who conducted sexual activity outside of it, protected the patriarch from supporting dependents that he did not intend to take on.²⁹

From reading a variety of cases, Morris demonstrates how Puritans used kinship bonds as a source of privilege. Institutions that denied or severed kinship, such as slavery or indentured servitude, produced a form of inequality that existed beyond the degradation of race and class that historians typically consider.³⁰ In a frontier economy based largely

22. *See id.* at 140. For more on assimilation atrocities, *see* DAVID WALLACE ADAMS, EDUCATION FOR EXTINCTION: AMERICAN INDIANS AND THE BOARDING SCHOOL EXPERIENCE, 1875-1928 (1995).

23. MORRIS, *supra* note 3.

24. *Id.* at 2.

25. *Id.* at 6.

26. *Id.*

27. *See id.* at 42-43. For a fascinating account of these burdens, *see* THE EIGHTEENTH CENTURY RECORDS OF THE BOSTON OVERSEERS OF THE POOR (Eric G. Nellis & Anne Decker Cecere eds., 2007).

28. The phrase "little commonwealth" comes from JOHN DEMOS, A LITTLE COMMONWEALTH: FAMILY LIFE IN PLYMOUTH COLONY (2d ed. 1999). For other works on Puritan family life, *see* EDMUND S. MORGAN, THE PURITAN FAMILY: RELIGION AND DOMESTIC RELATIONS IN SEVENTEENTH-CENTURY NEW ENGLAND (1966); PHILIP J. GREVEN, FOUR GENERATIONS: POPULATION, LAND AND FAMILY IN COLONIAL ANDOVER, MASSACHUSETTS (1970); HELENA WALL, FIERCE COMMUNION: FAMILY AND COMMUNITY IN EARLY AMERICA (1990); LISA WILSON, YE HEART OF A MAN: THE DOMESTIC LIFE OF MEN IN COLONIAL NEW ENGLAND (1999).

29. MORRIS, *supra* note 3, at 6.

30. *Id.* at 20-21.

on subsistence agriculture, Puritans used family as a form of capital. When a member of the family was involved in a sexual crime, families used their resources to vindicate those of their own lineage.³¹

Morris's cases show that family gave individual colonists a source of power that sometimes worked against the hierarchy of legal status. The reader learns the story of Daniel Warro, an enslaved member of a prominent household who was the reputed father of a child born out of wedlock.³² Although such a charge typically earned a hefty fine or imprisonment, Warro remained under the government of his owner Daniel Goodkin. In contrast, an indentured servant was only rarely able to avail himself of the resources of his or her master in defending himself against such a charge. Warro's own brother Sylvanus, who was living as a quasi-servant when he impregnated another servant, was sold back into slavery to pay his child support fine.³³ The mother in the case, white indentured servant Elizabeth Parker, was unceremoniously removed from her master's household. Morris's cases show that "masters usually expelled erring servants from their households, but continued to shelter and often even protect their slaves from the consequences of their actions."³⁴ Although indentured servants had a higher legal standing, their masters had less of a financial investment in them, which meant they had weaker ties to the family's social capital.

But indentured servants had a claim to natal family that the institution of slavery eliminated. After Elizabeth Parker was exiled from her master's household, she returned to the home of her father.³⁵ Under the protection of a different family, even one that lacked the social status of her former master, Parker was able to keep her bastard son from being indentured away and avoided punishment for her sexual violation.³⁶ Although her father was poor, he was able to govern Parker and her son within his own household.³⁷ In Puritan Massachusetts, the enforcement of sexual constraint was less a concern for piety and chastity than a concern for the economic burden of children on the patriarchal system.³⁸

Morris's world of colonial Massachusetts was divided between masters and dependents. As she describes, "[m]arriage, rather than age, was the portal to adulthood" because it legally tied women and their children to the protection of a man.³⁹ Through marriage, a man signified that he was ready to produce heirs and that he had the financial resources to care for them.⁴⁰ It is through the investigation of sexual crime that Morris is able to reconstruct the significance of household government in the daily lives of Massachusetts colonists.⁴¹ Although the cases she discusses are unusual, they reveal a persistent power of family policing aimed at economic, more than moral, ends. Morris

31. *Id.* at 32.

32. *Id.* at 15-20.

33. *Id.* at 24.

34. *Id.* at 17.

35. *Id.* at 22-24.

36. *Id.*

37. *Id.*

38. *Id.* at 9.

39. *Id.* at 1.

40. For more on household authority, see Carole Shammas, *Anglo-American Household Government in Comparative Perspective*, 52 *THE WM. & MARY Q.* 104 (1995).

41. MORRIS, *supra* note 3, at 2.

shows that family membership was a vital component of social capital in the colonial era, even temporarily overcoming the persistent disabilities of race or gender.

Colonial New England is a familiar site for scholars to examine the policing of sexual behavior, even though Morris provokes us to reexamine our assumptions about Puritans. During the height of republican sentiment and democratic ideals, scholars might assume that sexuality outside of marriage was not a political concern. To interrogate this assumption, Mark E. Kann examines the fate of sexual policing during the individualist environment of the early republic, in *Taming Passion for the Public Good: Policing Sex in the Early Republic*.⁴² Interpreting reforms to institutions such as marriage and the penal system following the American Revolution, Kann finds that the experiment in liberalism undertaken by the first generation of national leaders actually required the continuation of patriarchal control of sexuality.⁴³

Kann argues that the reconciliation of liberalism and patriarchal authority occurred as early American elites faced the fear of social disorder arising in the vacuum of political and social power created by the American Revolution.⁴⁴ In the absence of traditional authoritative intuitions, and within economic conditions that pulled young people out of the household and into the liberating and anonymous environment of the city, political leaders worried that the newly established citizenry would never develop the virtue and respect for social order that was essential for the nation's experiment with liberalism.⁴⁵ Nothing symbolized this disorder more than youthful sexuality.⁴⁶ Away from parental supervision, young men experimented with premarital sex, forsaking their responsibility as fathers for the liberty of the bachelor's life.⁴⁷ Women also had the opportunity to live outside of a household, both allowing them more sexual activity and also placing them at risk for a premarital pregnancy, which could strain public resources. Early national leaders recognized that liberal society could not function if young people could not control their passions. The liberty promised by liberal political culture required internal restraints, especially on sexual behavior outside of marriage.⁴⁸

Kann follows the response of American elites to the threat of unrestrained sexuality. The expansion of sexual opportunity is not evidence that Americans accepted decreased discipline by father figures. Rather, Kann argues, Americans continued to entrust community discipline to the broad use of patriarchal authority. But he recognizes that male leaders needed to modify their exercise of power to fit the beliefs about legitimacy and consent in the liberal age.⁴⁹ They wielded a "caring paternalism" and used their power to support what they claimed was in the best interest of the individuals whom they corrected and ultimately best promoted the public good.⁵⁰ This softer patriarchalism emphasized persuasion over coercion. But the line between self-restraint and external restraint was not

42. KANN, *supra* note 3.

43. *Id.* at 1.

44. *Id.* 16-18.

45. *Id.* at 24.

46. *Id.* at 19.

47. *Id.*

48. *Id.* at 149-76.

49. *Id.* at 51.

50. *Id.* at 18.

always clear.⁵¹

In surveying the methods elite leaders used to exert patriarchal authority, Kann demonstrates the ways discipline was experienced differently based on gender and class. Elites encouraged middle-class young men to channel their sexuality into monogamous marriage by promising masculine power to those who became husbands and fathers.⁵² Young men, especially the growing populations in urban areas, had the liberty to pursue sexual experimentation with limited consequences.⁵³ However, they could only exert power over others when they exercised discipline over their own passions. Public officials, and even parents, tolerated youthful sexual dalliance on the assumption that young men would constrain their behavior as they matured. Their reward was the receipt of patriarchal power of their own. Once married, they governed the private sphere of their own family with little state supervision.⁵⁴

Within the protected realm of the middle-class family, husbands and fathers took responsibility for controlling the passions of their wives and daughters.⁵⁵ By confining women within the domestic sphere, patriarchal authority promoted the home as a moral space for promoting civic virtue. Women's sexual purity and avoidance of public activity was central to preserving the moral sanctity of the home. Men were responsible for creating the division between the public and private realms. Middle-class women had to restrain their own sexuality in order to help protect the virtue of the domestic sphere, but it was ultimately the responsibility of the male householder to ensure their chastity.⁵⁶ As such, rape was viewed primarily as a crime against the patriarch, not against a woman's bodily integrity.⁵⁷ As Kann argues, "[t]he patriarchal family was the place where parents prepared the new generation for virtuous, productive, law-abiding lives."⁵⁸

The privacy of the middle-class family gave men patriarchal authority and allowed fathers to avoid the scrutiny of public officials.⁵⁹ This was not the case for the lower classes. People who lived at the margins of society faced the direct coercive discipline of patriarchal authority.⁶⁰ Political elites used their policing power to incarcerate working-class men and women who violated sexual mores, particularly in the commercialized sex trade. They focused their attention on men and women who were chronic offenders, those who seemed incapable of self-government.⁶¹ But even these efforts at self-control were incomplete. Political leaders were never zealous in their prosecution of prostitution or other public sexual behaviors.⁶²

The importance of privacy for avoiding state discipline is an underdeveloped aspect

51. *Id.* at 68. See also RODNEY HESSINGER, *SEDUCED, ABANDONED, AND REBORN: VISIONS OF YOUTH IN MIDDLE-CLASS AMERICA, 1780-1850* (2005).

52. KANN, *supra* note 3, at 78.

53. *Id.* at 79.

54. *Id.* at 103.

55. *Id.* at 51.

56. *Id.* at 106.

57. *Id.* at 126-27.

58. *Id.* at 61.

59. *Id.* at 103.

60. *Id.* at 22.

61. *Id.* at 129.

62. *Id.* at 129-60.

of Kann's discussion. Our understanding of the scope and limits of sexual policy would benefit from an examination of the boundaries that the state placed on its sphere of influence. In Morris's account, the Puritan family network protected sexual offenders after the fact.⁶³ But Kann's nineteenth-century families had the privacy to avoid public sanction in the first place.⁶⁴ The rise of the middle-class family afforded gender and class privileges for engaging in sexual behavior with limited oversight. Examining the social history of privacy in conjunction with political interest in sexuality could show that privacy was granted to those who were viewed as legitimate sexual agents.⁶⁵

Brandon, Morris, and Kann take different approaches to legal history based on their sources. Morris draws primarily on court transcripts, which allows her to investigate the social history of the law—the way formal rules and regulations constrained individual behavior.⁶⁶ Mann and Brandon, to the extent that they rely on primary sources, use legal theorists to outline the intellectual history of the law. In his discussion of the “unquestioned” but “limited” authority of patriarchy in early nineteenth-century America, Kann makes an important distinction between the belief in authority and the exercise of authority.⁶⁷ He argues that we should not judge the strength of patriarchal authority by the number of fornicators put in prison, the rate of pregnancy before wedlock, or the number of brothels in operation. Those numbers show that sexual policy was weak.⁶⁸ But that does not indicate a weakness in patriarchy, or in the acceptance that sexual behavior should be controlled.⁶⁹ But my preference for social history asks: Can we really consider patriarchal authority so “unquestioned,” as Kann claims, if it was never tested? Morris is able to document the strength of patriarchy through its actual application, revealing that “community policing” was far less widespread than our stereotype of Puritans imagines.⁷⁰

From their own perspectives, these books link procreation to political power in ways that can benefit scholars in a variety of subfields and disciplines. To integrate these important works, we must first address some questions of language. Each author interprets *patriarchal authority* as a dominant force or ideology that operates on its subjects and guides their assumptions and constrains their actions. Yet the masculine power of Puritan elders functioned very differently—both in ideal and in practice—than that of the democratic citizens of the early republic. Morris locates patriarchal authority in the rule of householders over their dependents—which included children, kin, and unrelated servants.⁷¹ Kann, however, defines patriarchy as “the government of fathers.”⁷² The economic and political power of nineteenth-century fathers came less from their control of dependent labor than from their breadwinner status.⁷³ But can patriarchy exist without

63. MORRIS, *supra* note 3, at 4.

64. KANN, *supra* note 3, at 103.

65. An example of this line of inquiry in twentieth-century American history includes DAVID J. GARROW, *LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF ROE V. WADE* (1994).

66. MORRIS, *supra* note 3, at 2.

67. KANN, *supra* note 3, at 21, 167.

68. *Id.* at 15-16.

69. *Id.* at 33.

70. MORRIS, *supra* note 3, at 28.

71. *Id.* at 6.

72. *Id.* at 1.

73. See generally JEANNE BOYDSTON, *HOME AND WORK: HOUSEWORK, WAGES, AND THE IDEOLOGY OF*

the household? Whether in Puritan Massachusetts or post-Revolutionary America, certain men had authority over some men and all women. But the characteristics that separated these dominant men from the dependent members of society changed substantially from the seventeenth to the nineteenth century. After the Revolution, Americans' investment in liberalism created a new basis of authority for elite men's power over others. Men claimed authority not through their birthright, but through their own merit.⁷⁴ They created a political system based on consent, rather than coercion. These principles eroded the deference and property-based hierarchy of the colonial period.

The patriarchy of the early nineteenth century operated through subtler means. It aimed to control the younger generation that was let loose from the bonds of the household that governed behavior in the colonial period. With the slow but steady decline of subsistence agriculture and the growth of urban production centers, youths and young adults increasingly left their households to enter into labor contracts outside the domestic relationships faced by young servants in Morris's account. Yet the extent that this change can be described as a "decline of patriarchy," as some scholars contend, is questioned here.⁷⁵ Kann's synthesis unites an impressive array of top scholarship in the history of the early republic to provide a counterweight to the "decline-of-patriarchy" narrative.⁷⁶ This interpretation of the Revolutionary and post-Revolutionary era argues that fathers and older men lost power during the Reformation, the Enlightenment, and the beginning of commercialization. As Europeans invested more in the importance of consent—in religion and family, as well as in government—they questioned the seemingly arbitrary power of male leaders.⁷⁷ This erosion of patriarchy occurred in the form of companionate marriage, in which the union between a man and woman was viewed as a joining of equals.⁷⁸ Patriarchy also declined as young people had more opportunities to seek education and employment away from their parents. The Revolution itself is viewed as a moment of patriarchal rejection, as a youthful nation threw off the power of a king—the ultimate patriarch.

Kann acknowledges these changes and the scholars that brought them to our attention. Specifically, Kann addresses the work of Richard Godbeer, who argued that Americans in the early eighteenth century experienced a "sexual revolution" in the wake of their political independence.⁷⁹ But Kann's purpose is to remind us of the "resiliency of patriarchal authority, imagery, meanings, metaphors, and practices . . ."⁸⁰ The power of political elites to regulate sexual behavior confirms that any liberties Americans gained were "uneven, incomplete, and limited . . ."⁸¹ Even Godbeer acknowledged that "public

LABOR IN THE EARLY REPUBLIC (1990).

74. For more on the beginning of "self-made manhood," see E. ANTHONY ROTUNDO, *AMERICAN MANHOOD: TRANSFORMATIONS IN MASCULINITY FROM THE REVOLUTION TO THE MODERN ERA* (1993).

75. The "decline of patriarchal authority" narrative comes from FLIEGELMAN, *supra* note 14; see also GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* (1992).

76. KANN, *supra* note 3, at 229.

77. BREWER, *supra* note 10, at 129-49.

78. KANN, *supra* note 3, at 29.

79. RICHARD GODBEER, *SEXUAL REVOLUTION IN EARLY AMERICA* (2002).

80. KANN, *supra* note 3, at 33.

81. *Id.* at 27.

leaders ‘stressed the need for moral virtue as the lifeblood of free institutions.’”⁸²

The shift from patriarchy to paternalism is critical for understanding the changes in citizenship that Brandon, Morris, and Kann ultimately describe. In early America, the only rights-bearing citizens were those who were mature enough to be exempt from paternal oversight. What changed between the colonial and early national periods was the way individuals showed that they no longer required paternal oversight. In the colonial period, men needed to be the master of a household before they could claim political leadership.⁸³ The American Revolution questioned property ownership as the primary measure of independence, opening new measures of maturity through character. The purpose of government was to support the process of maturation for those who could develop reason and enforce social order on those who could not. Thus, early American political culture was simultaneously paternal for young middle-class men and patriarchal for women, non-whites, and the poor.

Brandon, Morris, and Kann each point to the political stakes Americans have placed on procreation from the beginning of European settlement through the Revolutionary Era, and even up to our own time. Political order was based on family structures in which an elite few were granted legal and economic power over those deemed immature. Instead of viewing patriarchy through its power over production, here we see the reproductive authority of patriarchy. Sexual potency was a significant source of power. The head of the family was the one who sired children. Morris writes that in colonial Massachusetts “patriarchal authority was tied to sexual performance.”⁸⁴ Women could divorce an impotent man and unmarried men remained dependents under household government.⁸⁵ This expectation of sexuality and citizenship continued after the Revolution and the introduction of republican political culture. As Kann writes, “[r]espectable and mature American men were expected to tame their own sexual behavior . . . by surrendering to social pressure to exercise manly self-restraint and good husbandry.”⁸⁶ Although a man could have authority without mastery over others, his sexual power was a key indication of his maturity, and thus his citizenship.

At the same time, early American political leaders feared licentious sexuality.⁸⁷ Sexual prowess needed to be controlled within the domestic union of husband and wife. By controlling the legitimacy of children through marriage, early American leaders hoped to protect their political structure. Citizenship required the acceptance of sexual agency, but also demanded that sexual activity would take place in a controlled manner.⁸⁸ Even today, opponents of marriage equality proclaim the superiority of heterosexual unions, which warrants exclusive legal privileges, on account of sexual virility defined through “organic bodily union” and the supposedly complementary reproductive and gender roles

82. *Id.* (quoting GODBEER, *supra* note 79, at 15).

83. JOHN GILBERT MCCURDY, *CITIZEN BACHELORS: MANHOOD AND THE CREATION OF THE UNITED STATES* 2 (2009).

84. MORRIS, *supra* note 3, at 83.

85. *Id.*

86. KANN, *supra* note 3, at 11.

87. *Id.* at 153.

88. *See also* MARGOT CANADAY, *THE STRAIGHT STATE: SEXUALITY AND CITIZENSHIP IN TWENTIETH-CENTURY AMERICA*, *POLITICS AND SOCIETY IN TWENTIETH-CENTURY AMERICA* 8-9 (2009).

of men and women.⁸⁹ Marriage and family law codified power relations between those the state recognized as mature and those it viewed as immature. Through family, the state avoids taking responsibility for the vulnerable members of the community.

Brandon, Morris, and Kann address the continued debate about the nature of equality in the early period of democracy. What liberty did the American Revolution offer and to whom? Separately, and especially together, these books show that political liberalism was a project aimed at improving the participation of adult white men.⁹⁰ Liberalism was compatible with the control of necessary subordinates because women and children did not have the particular character traits—here seen as sexual potency—that allowed them to function as independent citizens.

89. Sherif Girgis, Robert P. George, & Ryan T. Anderson, *What Is Marriage?*, 34 HARV. J.L. & PUB. POL'Y, 245, 272 (2011). By fetishizing the procreative possibilities of heterosexual intercourse differences between men and women, opponents deny same-sex couples legal rights on the pretense that marriage is an institution designed to channel procreative sex into a relationship that supports unintentionally conceived children. These arguments have been dismissed in circuit court rulings, especially by Judge Posner. *See Baskin v. Borgan* 766 F.3d 648 (7th Cir. 2014). Thanks to Prof. Linda McClain for her thoughts on this point.

90. *See also* BARBARA YOUNG WELKE, *LAW AND THE BORDERS OF BELONGING IN THE LONG NINETEENTH CENTURY UNITED STATES* (2010). The significance of able-bodiedness is an important component of Welke's work. The impact of sexual impotence as a disability is discussed only briefly by Morris, but could be a topic for future scholarship.