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THE LEGAL HISTORY OF THE FAMILY

Lee E. Teitelbaum*


Governing the Hearth is one of those rare things: an indispensable book within its field. It falls properly within that category for two reasons. One is that it is the first of its kind, a general (although not an exhaustive) history of a formative period in American family law. The second is that, quite apart from novelty, it is very well done. Governing the Hearth is full of insight, interestingly told, and a reference of first resort for the several areas it covers in detail. Professor Grossberg has not uttered the final or even the penultimate word on the subject, but he does have the first word and, for a long time to come, discussions of the legal history of the family will measure themselves and be measured against his analysis.

The subject matter, content, and interpretation of Governing the Hearth all merit consideration in this review. It should be said at the outset that this is a monograph rather than an encyclopedia; there is no pretense to a general history of legal regulation of the family. The book considers only six topics within domestic relations in detail: breach of promise actions, marital licensure requirements, limits on qualifications to marry, limits on procreation, rights of illegitimate children, and doctrines regarding the custody of children. These topics are developed not simply because their histories are interesting (although they are), but rather to illustrate Professor Grossberg's principal themes regarding the American legal history of the family.

Before considering those themes and the supporting evidence drawn from the areas of family law mentioned above, it is pertinent that Professor Grossberg is trained as an historian. This is not meant to suggest that his understanding of legal issues is infirm, because it is not. On the contrary, his analyses are accurate and helpful even for those who are primarily interested in legal doctrinal development. What is important is that Professor Grossberg seeks to explain the legal history of the family according to the view of the history of the family generally accepted by social historians. That view, which is

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explicitly adopted at a number of points in the book, warrants brief summary.

The colonial family, it is generally agreed, was an extension and reflection of the community at large. This notion is conventionally expressed by the preacher's description of the family as "a little church, and a little commonwealth," an expression which is meant to capture two crucial elements of the place of colonial families. One is their interdependence with the greater society, to which they were joined "in a relation of profound reciprocity" such that "one might almost say they [were] continuous with one another."\(^1\) The second element is the sharing by family and society of a common theory of organization. The political theory which informed governance in the commonwealth likewise defined the structure and governance of the family. It does not matter for present purposes whether the principles of family organization followed from the principles generally governing social organization or the reverse; it does matter that both family and general polities assumed a single understanding of good order. That theory, as Professor Grossberg demonstrates, was one of hierarchical order and, particularly, patriarchy, according to which authority is generally vested in the "governor" — a term applied in eighteenth-century usage to both domestic and public sovereigns.

Within the patriarchal family, authority rested with the white, male heads of household who determined the places and activities of others. Wives were expected to defer to the wills of their husbands, a deference supported by the doctrine of marital unity which denied them legal independence and by property laws which accorded husbands the rights generally to use and dispose of their wives' property. Children remained within the home as long as their fathers wished them to do so; they could be apprenticed to others and were generally bound to deliver their earnings to their fathers. Professor Grossberg offers a striking description of the state of mind associated with this kind of authority, taken from a 1712 issue of The Spectator:

> Nothing is more gratifying to the mind of man than power or dominion; and this I think myself amply possessed of, as I am the father of a family. I am perpetually taken up in giving out orders, in prescribing duties, in hearing parties, in administering justice, and in distributing rewards and punishments.\(^2\)

At least in the colonies, patriarchalism was sometimes of an ideal

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2. P. 5 (citing J. Spruill, Women's Life and Work in the Southern Colonies 44 (1938)).
type, if not a stereotype. Professor Grossberg recognizes, as others have, that the pure form of the patriarchal family did not survive transplantation to the new world (if indeed it existed in the old). Colonial life permitted women economic and social freedoms not available in Europe, and the ready availability of land weakened the dependence of older children on their fathers. Moreover, the ideology of the Puritan family was complex and perhaps inconsistent. While the preacher John Robinson described the wife's role as one of "reverent subjection" to the will of her husband, the relation of husband and wife has been described as a union of partners, entailing mutual respect and shared responsibility. Nonetheless, the current theory of the colonial family generally holds that the patriarchal and integrated family endured in theory and substantially in practice.

Toward the end of the eighteenth century came, however, a radical change in the internal relationships and external functions of the family. The household became a refuge from, rather than an extension of, the general community. Not only the locus but the perception of social and economic life changed as industrialization moved the workplace from home to factory or office. The general community was regarded as an egoistic, unrelentingly competitive jungle from which respite was necessary. Social historians agree that it was the home that served that function. Philippe Ariès saw in the industrial family "the private domain, the only place where a person could legitimately escape the inquisitive stare of industrial society." John Demos describes it as "a bastion of peace, of repose, of orderliness, of unwavering devotion to people and principles beyond the self."

The resulting separation between work and home was expressed in spousal roles. Husbands were expected to provide for their families by success in the workplace and to be supportive, although not very active, at home. The wife's domain was the household; her responsibilities suited her special capacities for child-rearing and managing the domestic economy.

This change in the relation of the family to the general society was associated, Professor Grossberg argues, with the emergence of a distinctive view of the "republican family," which in turn was informed by an emerging republican ideology. The chief elements of this republicanism included dislike for unaccountable authority and governmental activism, the equation of property rights with independence, a commitment to self-government and laissez-faire principles, and a

6. Demos, Images, supra note 1, at 51.
view of human relations that emphasized voluntary consent (pp. 6-7). Although this theory recognized bonds, they flowed from reciprocal obligations rather than from birth or status. The social aspects of this shift are found in an increase in companionate marriage, a recognition of the wife’s equality and soon her superiority within the domestic realm, and a closer, more democratic relation between parents and children.

The principal thrust of Governing the Hearth is to demonstrate the legal aspects of this shift to the republican family. In particular, Professor Grossberg defends the proposition that “[f]or the family, and especially for its law, republicanism was both a founding creed and a continuing frame of reference” (p. 7). The burden of Professor Grossberg’s treatment of legal developments in specific areas is to instantiate this claim, and to this — and to the implications of his analysis — we should now turn.

Professor Grossberg identifies the republican concept of domestic relations with several propositions. The most central of these is reliance on contract as a metaphor for social and economic relations (p. 19). Relations were not determined by the ascribed status of actors but by their intentions. Concomitantly, the household came to be regarded not as an organic unit but as a collection of distinct individuals, each with his or her own claims of right. This conceptualization of relations within the family took root in the immediate post-Revolutionary period and flourished during the first half of the nineteenth century. The second half of that century saw increasing public concern about state regulation of those relations, but not, in Professor Grossberg’s view, an abandonment of republican principles.

This schema is most clearly developed in connection with limitations on marriage. Take, for example, laws regarding recognition of nonceremonial marriages. During the colonial period, informal marriage was possible but restricted by various forms of parental and community oversight. After the Revolution, as Grossberg sees it, courts emphasized the private nature of contracts, and typically described marriage in simple contractual terms. Kent’s Commentaries insisted, “No peculiar ceremonies are requisite by the common law to the valid celebration of the marriage. The consent of the parties is all that is required . . . .” Although there was some dissent from this debatable interpretation of the requirement for common-law marriage, Chancellor Kent’s view generally prevailed, and was supported as well by legislative action to ease rules on entrance to marriage. Even to the extent that those statutes left parents some formal power of consent to marriages by young persons, judges often refused to void the underage marriages although they might hold public officials accountable for their celebration (pp. 77-78).

7. Pp. 70-71 (quoting 2 J. KENT, COMMENTARIES ON AMERICAN LAW 75 (1826)).
Easing the rules for proof of marriage supported, Professor Grossberg argues, the contract view of domestic relations. Persons could express their assent in a variety of ways, and courts and legislatures sought to give effect to their intentions, at least whenever the parties lived together. “The official recognition of irregular marriages,” he observes, “acted as a further step from the patriarchal families of the nation’s colonial past, one more step toward the republican concept of the household as a voluntary collection of separate individuals” (p. 83).

During the latter half of the nineteenth century, however, the balance swung toward state regulation. Divorce rates rose steadily during the nineteenth century, creating deep public concern. Reformers saw in the ready recognition of marriages a principal cause of marital instability and supported restrictive marriage laws as a form of social therapeutics. Their appeals were primarily successful with legislatures; late nineteenth-century statutes increasingly required marital licenses, imposed waiting periods before celebration, and disapproved common-law marriages. Courts were seemingly less ready to join in the reform movement. Few codes expressly made informal marriages void, and a number of judges held that regulations concerning licensure and celebration were only directory. Professor Grossberg interprets this pattern of judicial activity as reflecting a judicial desire to preserve the distinction between public and private realms of life and, particularly, a reluctance to make matrimony entirely a state question (p. 100). However, he also maintains that even the marriage reform movement did not seek to reestablish that patriarchy, but rather to superimpose considerations of “public interest” on the republican base of marriage law (p. 83). Revisions in marital regulations and judicial decisions in the end “maintained the status of marriage as an act between individuals, not families” (p. 97).

Professor Grossberg traces the same themes in connection with laws concerning qualifications for marriage. In some areas, the evidence seems clearly to support this schema. At early common law and during the early republic, for example, mental condition was of minimal concern; it became relevant only when a prospective spouse suffered mental deficiency to such a drastic degree that consent, and therefore contract, was impeached. Insanity was not a ground for annulment or divorce during this period. By the second half of the century, however, real concern was expressed about marriages by the insane or mentally disabled. Feminist and social scientist Elizabeth Cady Stanton, a prominent voice in the eugenics movement, argued that the law of heredity should exclude the physically, intellectually, and morally deficient from entering into marriage (and therefore procreation) (p. 148). George Howard, a sociologist and author of The History of Matrimonial Institutions, complained in 1904 that “under pleas of ‘romantic love’ we blandly yield to sexual attraction in choos-
ing our mates, ignoring the welfare of the race” (p. 148). This concern was ultimately reflected in laws prohibiting the insane, feebleminded, epileptic, and venereally diseased from marrying.

Early acceptance of minimal limitations on marriage, followed by late nineteenth-century revision, also characterized other qualifications for matrimony. With respect to age, there was little need for republicans to shift in the direction of greater freedom to marry. The common-law ages of consent (fourteen for males, twelve for females) were so low that virtually no case of underage marriage can be found. Professor Grossberg does suggest that laws in the republican period were more permissive than had been true at common law, but he does not pursue that point in detail (pp. 105-06). It is, however, quite clear that a substantial effort to raise marital ages arose during the late nineteenth century. Groups with such earnest names as the Social Purity Alliance singled out youthful marriages as a prime source of marital instability, and legislatures responded. By 1906, only seventeen states and territories still used the common-law age minima (p. 142).

The role of courts in this enterprise was, as it had been for common-law marriage, ambiguous, at least as Professor Grossberg sees it. While judges during the Progressive era expressed approval of increased age requirements, they tended to treat youthful marriages as voidable rather than void and as valid (ratified) if the parties continued to live together after both reached the age of consent. This approach, Professor Grossberg suggests, reflected a continuing judicial preference for common-law (judicial) authority which courts invoked whenever a statute could be read to allow them discretion.

*Governing the Hearth* pursues the same schema in its discussion of the law regarding limitations on procreation, particularly contraception and abortion. This story is extraordinarily interesting and well told. During the early republican period, states generally followed the common-law view of abortion which was one of considerable (and initially surprising) toleration. The termination of a fetus before quickening (approximately four to five months) was not criminal and termination even of a quickened fetus was nonfelonious: it was manslaughter rather than murder. More important, only the abortionist and not the mother was punishable. Although England strengthened its laws against abortion in 1803, American jurisdictions did not follow suit and, indeed, some states further relaxed the common law by specifically authorizing therapeutic abortions when necessary to preserve the life of the mother. Professor Grossberg understands this part of the history of abortion law as deference to middle-class desires to limit families and to republican principles of voluntarism, even in childbirth. And it does seem that many middle-class (and other) women had the desire to limit the size of their families; birth rates
dropped significantly from an average of 7.04 live births per woman in 1800 to 5.21 in 1860 and then to 3.56 in 1900 (pp. 156, 170).

This practical toleration of abortion lasted until about the middle of the nineteenth century, when a number of states enacted more restrictive laws. Physicians seem to have taken the lead in this revision; they criticized the "quickening" rule as an absurd distinction based on religious rather than scientific grounds and insisted on their authority to determine when termination of a fetus was appropriate. By the 1880s, the doctors had their way with women and the quickening doctrine began to disappear from criminal codes, although it often retained some relevance for punishment. As Professor Grossberg observes, enlargement of the definition of life for these purposes necessarily compromised the emancipation of women by making "the womb part of the public domain" (p. 186).

The story of contraceptive regulation is a curious one as well. Unlike abortion, there were no laws in this regard at common law or during most of the nineteenth century. Beginning in the 1870s, however, purity campaigners, led by the egregious Anthony Comstock, persuaded federal and state legislatures to label both abortion and contraception obscene and to prohibit at least their public discussion. The swift response to those appeals capped the determination of late nineteenth-century family savers to ban all forms of family limitation. The demands of Comstockery, which were supported by such odd bedfellows as Margaret Sanger and the president of the American Medical Association (pp. 190-91), plainly conflicted with voluntaristic principles and particularly with the view that women should be able to decide when and whether to have children. But, as commonly occurred during the last half of the century, social defense considerations overwhelmed appeals to autonomy.

Here as elsewhere, Professor Grossberg's discussion sharply contrasts the roles of legislatures and courts. "As they did in marriage law," he observes, "legislators responded more decisively to the pressures of reformers than did judges, who retained their self-proclaimed commitments to maintaining doctrinal and institutional continuity as well as protecting the family" (p. 195). And here, perhaps most plainly, Governing the Hearth reveals a seeming bias against courts. To describe the legislative reaction to the purity campaign as "decisive" rather than, for example, "panicky" gives the state legislatures perhaps undue credit, and to suggest that courts were "indecisive" in punishing purveyors of birth control information more readily than they did family members seems a bit harsh.

The last two substantive chapters extend Professor Grossberg's interpretation to parent-child relations. The first does so in connection with the legal treatment of bastardy. It is familiar knowledge that the common law regarded an illegitimate child as filius nullius, barely a
person, who could claim no legal relations with his or her parents or with their relatives. The only parental obligation was one of support imposed by the poor law. The republican version of bastardy law undermined that view in a number of ways. The chances of becoming a bastard were reduced by judicial recognition of common-law marriages and by statutes that declared the offspring of an annulled marriage, or of parents who subsequently married, to be legitimate. A more limited form of acceptance also emerged in statutes that permitted illegitimate children who were acknowledged by formal act to inherit.

It is here that Professor Grossberg most clearly and persuasively traces the links between legal development and republican theory. Bastardization was regarded as unfairly visiting upon innocents the guilt of their parents. The voluntaristic and individualistic principles of post-Revolutionary America seemed to insist that fault was the result of individual choice and could not be ascribed from the acts of others.

A voluntaristic element also appears in a second aspect of the history of bastardy in this country. Not only did republican legislatures and courts reduce the chances of being born a bastard by changing the definition of legitimacy, they created certain family rights even for children whom they did not legitimate. In the first place, courts supported maternal rights to custody of children born out of wedlock as against the putative father and, in doing so, created a set of reciprocal duties between at least one parent and an illegitimate child. Modification of poor laws to allow the child to be a charge of the mother’s residence rather than his or her place of birth tended in much the same direction, as courts found it “agreeable to the law of nature and reason” to treat an illegitimate child as part of the mother’s family (pp. 210-11). Legislatures concomitantly revised inheritance laws to permit bastards to take from their mothers, an alteration which was in some places quite expressly related to a more general republican desire to eliminate those descent laws (such as primogeniture) which favored one child over others and perpetuated intrafamilial dependency. The principles of descent were regarded in at least some states as founded on human affections rather than accident of birth, and the law set out to recognize that bond by endowing illegitimate children with inheritable blood at least from their mothers (p. 214).

The changes found in other areas of family law during the latter half of the nineteenth century do not, however, appear in the law of bastardy. That states did not retrench in respect of bastardy supports Professor Grossberg’s general interpretation that late nineteenth-century zeal to reform family law did not seek a return to patriarchy. Indeed, some of those reformers advocated further expanding the rights of illegitimates by establishing a link between the child and his
father, a campaign which was generally unsuccessful and divided even the reformers. The issue was presented as a conflict between individual rights and support for the family as an institution, and in the Progressive period the former routinely gave way to the latter.

The last substantive chapter is a detailed and invaluable essay on custody rights. In this area, Professor Grossberg says, "[L]aw . . . took to its logical conclusion the republican vision of the family as a collection of individuals each with his or her own needs and rights" (p. 234). The hierarchical concept of the family, which gave fathers near-plenary authority over children, fell before three developments: acceptance of principles of child nurture (the "best interests of the child") to circumscribe paternal custody rights and support maternal claims; reliance on those same principles to permit surrogate parents to replace natural parents as custodians; and creation (through adoption) of an "artificial" family based on voluntarism rather than blood. By the turn of the twentieth century, public and legal opinion agreed that parental claims were contingent and that parentship was not a matter of status or property right but a kind of limited trusteeship for the benefit of the child. Parental fitness, rather than paternal right, became the focus of custody disputes, an approach which in turn supposed that the interests of children are independent of those of the parents. Emphasis on the rights of young persons, which Professor Grossberg describes as an "adversarial" view of the family, together with the broad discretion that approach encouraged, "constituted yet another way in which traditional family law was upset by republican beliefs and practices" (pp. 283-84).

The final chapter of Governing the Hearth focuses on a theme sounded throughout the book, but perhaps most fully and persuasively developed in the chapter on custody rights: the emergence of a "judicial patriarchy." It is significant that when courts created the custody principles described above, they did not simply replace paternal authority with maternal power. True, a presumption that mothers were the best custodians of children emerged in courts and was supported by a large body of social opinion regarding the altruism and purity of women. However, that presumption was never conclusive. The ultimate custodial principle was the child's best interests, a doctrine which placed with courts (and not parents) the responsibility for deciding with whom a child should be placed and, correlatively, for defining what forms of parental conduct were appropriate.

In fact, Professor Grossberg argues, patriarchy did not disappear during the nineteenth century, but was replaced by a judicial authority with many of the same characteristics. Although the claims of women

8. Common law doctrine assigned to fathers sole custodial authority over their legitimate children. Mothers were entitled to respect from, but not control over, their offspring. See 2 J. Kent, Commentaries on American Law 193-94 (2d ed. 1832).
(and children) were more readily recognized in the nineteenth century than previously, their position was never more than one of partial capacity. In deciding when women were entitled to custody and what kinds of support they could claim, courts continued to employ assumptions associated with the separate spheres of men and women. Judges thus "allowed for an expanded feminine presence in the legal order, but in a way that ensured that women's domestic powers would not be translated into extensive external political and economic authority" (p. 301).

Finally, Professor Grossberg closes with some general observations on the impact of judicial patriarchy. One such impact was the creation of a language for thinking about the family: a topic Grossberg regrettably does not pursue in any detail (p. 302). Another was the adoption of an adversarial method for approaching disputes regarding families. The tendency was to define the family as a collection of distinct legal personalities with potentially antagonistic relations: husband versus wife, parent versus child, state versus father. This focus on the contending parties in turn prevented a clear articulation of the public's role in family governance; legitimate community interests were lost in the focus on the contention of individual rights and their mediation by common-law authority (p. 303). The implications of this strategy can be found in the development of the juvenile court and in much of the course of family law during this century.

This summary, even though it is relatively long, only touches the surface of some parts of some of the stories told in Governing the Hearth. It should make clear, however, that we owe Professor Grossberg a number of debts. One is for providing massive and careful research in several areas within family law. Another is for imposing a form of intellectual order on that mass of material that will allow evaluation of the currents of legislative and judicial development within the field. A third debt is due his effort to relate legal developments to ideologies within traditional legal sources (legislatures and courts) and outside those sources, permitting us a sense of the multiplicity of communities and forces which contributed to family law.

There is a fourth debt to be acknowledged as well — to Professor Grossberg's clarity and candor in setting out his own assumptions, which invites independent inquiry into the analyses he himself employs. The remainder of this review addresses questions raised by Governing the Hearth, not so much to quarrel with Professor Grossberg's interpretations as to see how rich a seam he has opened for all of us.

One general question is whether it is true, as seems to be implicit in his general analysis, that the legal history of the family can adequately be understood in the terms customarily employed by social historians. I have argued at length in another place that the fit between them is
far from perfect. The social history of the family supposes a movement from a household closely integrated with the general community to one sharply removed from that community, serving as a refuge from political and economic life. Perhaps that description can be supported to a degree for the first half of the nineteenth century, but it is hard to reconcile with legal developments — even those presented by Professor Grossberg — during the latter part of the century. The obvious analogue in law to social discourse regarding the separation of public and private spheres would be a diminution in direct regulation of the private realm: that is, of the conduct of family members. That does not seem to be the case, however, at least after the Civil War.

On the contrary, both public opinion and official action increasingly sought to regulate directly various aspects of the formation and conduct of domestic relations. Informal marriages were increasingly disapproved and bureaucratic supervision installed; mental and physical requirements for marriage came to be specified. Minimal age requirements for marriage increased significantly. During the same period, activities within the family were regulated by laws making abortion at any stage criminal and by prohibiting the distribution of information concerning contraception. The revision of custody laws and the recognition of adoption also did little to preserve a separate sphere or refuge. Removing sole custodial authority from fathers may well have destroyed a traditional element of patriarchy, but it also converted a private (if patriarchal) system for decisionmaking into a question of sound public policy. It became the business of courts to determine the best interests of children, which in turn meant that public agencies would decide what conduct and circumstances were desirable in child-rearing and what were not.

For its part, adoption may have permitted parties to create new families on a voluntaristic basis, but at the same moment it made the creation of those families a public enterprise. This was true both as a matter of purpose and as a matter of result. Adoption was intended by many supporters to be an alternative to inadequate institutional forms of child placement and a bulwark against the threat to good order associated with the plight of homeless, neglected, and delinquent children. Indeed, as Professor Grossberg points out (p. 273) adoption was often viewed in the late nineteenth century as a panacea for the ills besetting American households, which could be remedied by the substitution of new (adequate) families for old (inadequate) ones. There is no little irony, and some real significance, in the fact that the Puritans employed much the same strategy of social control when they placed inadequately cared-for children with good homes in the community. And that irony makes it difficult to see the emergence of adoption as reflecting a "privatization" of the nineteenth-century family.

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In result, the recognition of adoption also had distinctly public aspects. Judges had to satisfy themselves that any particular placement would promote the public interest and, particularly, that it would serve the child's welfare (pp. 273-74). This undertaking required official review of the conduct and qualifications of prospective parents and, as time went on, the assistance of the newly risen social work profession, which itself was concerned with realizing the public interest in the welfare of the young and disabled.

One might add to these instances of public involvement in the constitution and supervision of families the advent of compulsory education and the juvenile court, which are not much treated in *Governing the Hearth*. These developments involved even more direct assertions of public concern with and authority over the ways in which children were reared, and are hard to reconcile with a view of the family as something separate and removed from the general community.

I do not go so far as to say that, in fact, governmental power was greater during the period when social historians see the family as a refuge. That claim would require a specific and limited definition of governmental power, understood as authority by prescriptive and proscriptive rules, which I do not wish to defend. However, it is also hard to argue that privatization has any real meaning in connection with the legal history of the family during the nineteenth century. And, indeed, it is even hard to argue that the concept has any generally defensible meaning.

An even larger set of questions concerns the strength, consistency, and durability of the republican vision of the family. Professor Grossberg argues, as we have seen, that republicanism was the organizing principle of family law throughout the nineteenth century. That ideology, he seeks to show, directly informed legal rules and doctrines during the early part of the period and was not overcome even when, during the latter part of the century, direct governmental regulation of families became more evident.

However, assessing the clarity and consistency of republican ideology, or at least of its implications for the legal regulation of domestic relations, presents some real difficulty. Professor Grossberg describes that ideology largely by reference to a set of associations: status is opposed to contract; patriarchy to voluntarism. The inference seems to be that status, patriarchy, and authority are generally opposed to contract, autonomy, and privacy. Thus, we are told, the patriarchalism of colonial domestic relations was replaced by the republican principle of contractualism, "whose lode star was the untrammeled autonomy of the individual will" (p. 19).

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10. See id. at 1147-57 for a discussion of these developments in connection with the "privatization" issue.

11. See id. at 1165-80.
The contract metaphor and the principle of voluntarism were surely important during the republican period, both generally and in law. This was true of talk regarding political relationships, education, and spousal relations. What is not quite so clear is that the rejection of patriarchalism also implied a general rejection of authority, as the “lode star” language seems to suggest.

Take, as an example, the association between contractualism and autonomy in the area where it most obviously arises: entrance into marriage. It is true that legal rules during the republican period tended to sustain nonceremonial marriages, marriages by minor children, and marriages where one spouse had made misleading statements to the other. These are taken as evidence of increased spousal autonomy and respect for voluntarism. That is surely one way to look at things and, moreover, that view can be supported by contemporary social and legal discourse. It does not follow, however, that these rules and doctrines reflected a general abandonment of authority or that their sole significance lay in an increased ambit of personal freedom for spouses.

At least the first two developments surely made it more likely that couples would be held to be married than had earlier been the case. It is less obvious that their autonomy — their range of life chances — was enhanced thereby. One could claim that the principal effect of this body of law was to bind the youth who impetuously stumbled into matrimony, and the cohabitant who never gave marriage much serious thought, to a relationship rightly regarded during the early years of the nineteenth century as virtually indissoluble. Moreover, republican political and educative principles can be understood as approving that result. Generally speaking, the essence of republicanism was not unqualified autonomy but the freedom to choose one's bond. The point of the Revolution was not simply to dissolve an intolerable union but to create a more perfect one, founded upon voluntarism. The same theory held at the level of domestic governance. Both Locke and Rousseau, whose works were widely invoked by republican Americans, were much concerned with displacing patriarchal relations within the family. Neither, however, identified independence for children with the dissolution of the family or its bonds. "The point [of recognizing freedom]," Jay Fliegelman observes, "was not so much to create autonomous individuals, as individuals who could and would participate in society." The assumption was that, given independence, the family would not dissolve but "reorganize on a voluntaristic, equalitarian, affectional, and, consequently, more permanent basis."13

Indeed, the problem of reconciling liberty and authority was a cen-

13. Id. at 33.
tral and pervasive issue in politics, both national and familial. Rous­
seau's uncomfortable notion of the volonté générale — the general will into which individual wills must somehow be subsumed — exemplifies the difficulties of this accommodation for governance in the general society. At the domestic level, accommodation was sought by chang­ing the understanding of how authority should be exercised. Locke urged education founded not on appeals to authority or precept but on the force of example. His concern, however, was not with eliminating or even circumscribing parental authority, but with rendering it more effective by removing the element of direct coercion. Rational self­sufficiency and habits of right conduct must still be inculcated through guidance, without which young minds might be misinformed and misled.

Although Rousseau, unlike Locke, assumed the innate goodness of man's nature, he also recognized clearly the role of authority in child­
rearing. Whereas freedom is the central theme of his Social Contract, Emile celebrates the wise use of power in education. Like Locke, Rousseau rejected precept and overt authority; learning is best accomplished through pursuit of one's natural inclinations. However, those inclinations are to be guided covertly, by conditioning rather than co­ercion. This transformation in no way denies the legitimacy of author­ity; few literary figures appear more powerful than Emile's tutor who speaks for Rousseau in saying proudly: "You can't guess how docile Emile, at age 20 is . . . . I leave him, admittedly, the consciousness of independence, but never has he been more completely subjected to me, for he is subject because he wishes to be."

The dilemma of liberty and authority was central not only to theo­ries of pedagogy, which were understood as relevant to both national and domestic governance, but to the millennial aspirations of the new republic. Many colonials (and a number of Europeans) believed that the new world and especially the republic embodied the best hope for realizing social progress toward perfection. Voltaire's Philosophical Letters portrays America as the "improvement of all that was excel­lent in England," and Condorcet looked to America as the basis for predicting what the final phase of human improvement would look like. Americans themselves shared this conviction even before the Revolution and, by the second half of the nineteenth century, as Rob­ert Nisbet has observed, "the concept of progress had become almost as sacred to Americans of all classes as any formal religious precept. What tended to be stately philosophical wisdom . . . in . . . France or

14. Id. at 14.
15. Id. at 12-15.
England was grass-roots evangelism in America.”

For some, as for Adam Smith, progress in the republic was equated with the steady advance of individual freedom in the world. For others, however, it was not so much autonomy as equality that mattered, and power was necessary to the assurance of equal opportunity and to the unfolding of the national potential. Benjamin Rush, for example, clearly recognized the tension between revolutionary ideals and the necessities of government as he urged the creation of public schools to correct the indulgence or ignorance of parents. He believed that these schools should develop self-discipline in children through the early inculcation of strict obedience to authority. Plainly, such a program involved not only authority but the authority of government, which Dr. Rush justified in Rousseauian terms. While republicanism must recognize the sovereignty of individual wills, he argued, those wills must also accept the authority of the general will. And it was only through education that the republic could hope to fit the wills to each other and thereby produce “regularity and unison in government.” Public education thus assumed some diminution in the autonomy of parents but it also served the interests of children, by removing inequalities flowing from differential parental capacities, and served the interests of the community, by improving the capacities of succeeding generations.

Plainly, then, the rejection of patriarchalism did not mean the general rejection of authority. It certainly entailed the rejection of certain forms of authority and certain results of patriarchal authority, most notably the latter’s acceptance of and indeed emphasis on inequalities through birth. However, authority both within the family and within the general society continued to be accepted. Moreover, the authority of the household remained important to the governance of the community. While the household may not have been the mirror of public government, families were still considered the primary units of governance. And, as long as the household’s centrality to society was acknowledged — which it was throughout the nineteenth century as before — the separation between general and domestic welfare could never be sharply maintained. Voluntarism was indeed important to entrance into relationships and, it seemed, the best hope for survival of those relationships. It was not the only principle of republican life, however.

These observations suggest that even the early republican period was not wholly committed to the celebration of autonomy. They may

18. Id. at 204.

also help us understand the apparent reversals of policy which charac-
terized domestic relations law during the second half of the nineteenth
century. Take, once again, entrance into marriage. By mid-century,
emphasis on the contractual nature of marriage had diminished or at
least been given a different meaning. Courts and commentators rou-
tinely insisted that marriage was not merely a civil contract but a sta-
tus or social institution as well. Concomitantly, restrictions on access
to that estate were widely imposed. As Professor Grossberg shows,
informal marriages were increasingly disfavored; age limitations in-
creased dramatically in most jurisdictions, restrictions on marriage by
persons with mental and physical disabilities widely appeared, and
strict rules regarding interracial and plural marriages continued in
force. In what seems a contradiction to the story he has just told,
Professor Grossberg concludes that “the post-Revolutionary republi-
can base of nuptial law was never fully demolished” (p. 24). Marriage
law remained wedded (his pun) to the assumptions that individual
choice was the norm, that state intervention was justified only as a last
resort in special situations, and that the judiciary was charged with
mediating disputes along the public and private boundaries of the law
(p. 24).

If we associate republicanism simply with the contractual meta-
phor and voluntarism, this claim seems hard to defend. The precise
thrust of late nineteenth-century law was to diminish the capacities of
persons to marry whom they wanted when they wanted. If, however,
republicanism is associated not with lack of public authority but with
the lack of a particular kind of authority (patriarchalism and ascrip-
tion), then it seems right to say that the republican base remained in-
tact. Government undertook the tutor’s role in Emile, although
without much of the subtlety. Experience seemed to have shown that
“romantic love” was too often pursued indiscreetly, and that guidance
— sometimes firm guidance — was required for those who sought to
enter this most important of relationships. The cure for perceived fail-
ures in domestic life was not a return to ascriptive principles of au-
thority but to what may have been understood as a more active
tutorial role.

That is not to say that antirepublicanistic impulses did not exist. It
is hard to associate the eugenics movement or, in another area, Com-
stockery with any form of reliance on individual choice. A case can be
made for the durability of republican principles, however, if the
facilitative and social defense aspects of those principles are also
recognized.

The authoritarian aspect of republicanism presents itself even more
clearly in connection with the development of child custody law, juve-
nile courts, and public education. We have already seen Dr. Rush’s
concern with educating children for republicanism, a theme taken up
in various ways by almost every child-caring agency during the nine­teenth century. In great part, the assumption of public responsibility for education rested precisely on the assumption that society could best be improved through conditioning, the “invisible hand” of En­lightenment political and educational theory. To the increasingly great extent that parents — and particularly immigrant parents not accustomed to American values — seemed unable to discharge that essential tutorial responsibility, some other agency had to step in. The state eagerly assumed that task.20 The same principles informed the juvenile court movement, which claimed clinical and educative rather than punitive functions and sought merely to do for children what their parents, had they been capable or willing, should have done.21 And, as Professor Grossberg convincingly shows, adoption and child custody practices confirmed governmental concern for the socializa­tion of children by reserving to the state the power to decide which potential custodian was best capable of performing that crucial function.

A number of other issues raised by Professor Grossberg’s account would reward detailed consideration. The role of courts in the repub­lican enterprise is surely one of these. Governing the Hearth both sheds much light on the operation of (mostly appellate) courts in do­mestic relations matters and suggests some interesting questions about their function. A recurrent theme of his discussion is the tendency of courts, particularly during the latter part of the nineteenth century, to act as millstones around the neck of reform movements and legisla­tures — often to the end of assuming themselves the patriarchal author­ity which republicanism had wrested from heads of households. Whether it is right to regard the behavior of courts as “patriarchal,” or merely as a reflection of the dark side of Enlightenment and repub­lican ideology, is one question well worth exploring.

Characterization of nineteenth-century judicial authority in patri­archal terms seems most justified in connection with the creation of common-law doctrines placing with courts a discretion previously

20. The continuity of Enlightenment principles in public education throughout the nine­teenth century can be sensed through Richard Hofstadter’s summary of John Dewey’s views: “If a democratic society is truly to serve all its members, it must devise schools in which, at the germinal point in childhood, these members will be able to cultivate their capacities and, instead of simply reproducing the qualities of the larger society, will learn how to improve them.” R. HOFSTADTER, ANTI-INTELLECTUALISM IN AMERICAN LIFE 362-63 (1963). Dewey himself ob­served that public schools would do “systematically and in a large, intelligent, and competent way what for various reasons can be done in most households only in a comparatively meager and haphazard manner.” J. DEWEY, THE SCHOOL AND SOCIETY 47-53 (1900), quoted in 2 CHILDREN AND YOUTH IN AMERICA 1117, 1119 (R. Bremner ed. 1971).

21. Judge Cabot of the Boston Juvenile Court urged the public to “[r]emember the fathers and mothers have failed, or the child has no business [in the court], and it is when they failed that the state opened this way to receive them, into the court, and said, 'This is the way in which we want you to grow.'” Cabot, The Detention of Children as a Part of Treatment. in THE CHILD, THE CLINIC AND THE COURT 246, 249 (J. Addams ed. 1925).
vested in fathers (as with child custody). That description is, however, problematic even in this case. Patriarchy seems to imply, among other things, near-plenary discretion arising out of one’s status. The “best interests” doctrine surely did create considerable judicial discretion; however, discretion in itself does not mean patriarchal authority. Often, judicial discretion is the product of legislative decision rather than an aspect of some distinctively judicial “right” or “power.” This at least came to be true of custodial decisions, as legislatures rapidly adopted the “best interests” standard. Moreover, judges may well have regarded their custodial decisions not as reflecting an inherent authority in this regard, but rather as the exercise of a discretion which was justified by instrumental goals outside of their own claims to authority. It also seems significant that appellate courts routinely developed subsidiary doctrines — such as the tender-years presumption and the maternal preference — which often closely approximated “bright-line rules” and served as sharp limits on the exercise of trial court discretion.

It is even less clear that the narrow construction of ambiguous statutes (as with inheritance) or the protection of procedural rights for abortionists reflect any sense of patriarchal power. No doubt these decisions served to restrict the reach of changes in the law sought by lay and legislative proponents of reform. However, the tension between what proponents of a law wish, what the legislature enacts, and what courts understand by that enactment is a legal process problem which arose before and continues after the nineteenth-century concern for republican principles. Much of what seems conservative or recalcitrant in the behavior of judges may reflect not patriarchalism but a distinctively legal culture or ideology, which bears only the most complex relationship to other ideologies and requires independent inquiry.

Another matter that warrants far more extensive discussion than can be attempted here is the vision of the home which emerged in social and legal discourse during the nineteenth century. In legal understanding, as Professor Grossberg interprets it, the republican family was not an organic unit but a collection of individuals, each with his or her own claims of rights. He offers a great deal of convincing evidence for this conceptualization. Further support, were any needed, could be found in the constant talk (particularly toward the end of the nineteenth century) about the rights of children to education, socialization, and nurture employed by advocates of compulsory education, the juvenile court, and child labor laws. This reconceptualization of the family in individualistic terms bears further exploration along several avenues. One such avenue concerns the nature of “rights talk” in this area. Particularly in connection with children, discourse about rights cannot simply be identified with claims of autonomy or choice for the rights-holders. Indeed, its thrust is in quite the other direction. Compulsory education, child labor laws, and the like were
justified in great part by the desire to prevent children from asserting independence, or being left independent, before they were ready. Nobody believed that children could or should choose whether to attend school or receive proper guidance; these were rights to opportunity rather than to substantive freedom. The function of rights talk here is to authorize official supervision when parents failed, not to deny the appropriateness of control by some agency. 22

It would be worth considering whether rights talk in connection with women also means something other than autonomy, and Professor Grossberg suggests that it does. He observes that the tendency at least of courts was to empower women not simply to act, but to act according to specific nineteenth-century ("Victorian") values. When one also considers the widespread use then and now of talk about the family as an "entity," a very complex conceptualization of the relationship between the idea of the family and the roles of its members begins to emerge.

A second and related aspect of the nineteenth-century reconceptualization of the family has to do with the adequacy of that reconceptualization itself. An inquiry of this sort is of great current importance because that theory still greatly influences current thought about the family and its relation to law. It is worth asking whether a legal view of the family as a collection of individuals ultimately is satisfying or sensible. The tendency has been to express this approach in terms of classical liberal rights talk, which contrasts sharply with a simultaneous tendency to speak of the family as an entity which is somehow entitled to privacy or autonomy. An argument can be made that it is not coherent to regard the family both as an entity with its own claims and as a collection of individual actors with their own rights. In addition, something may seem unsatisfying about both of these views, which fail to capture either the integrity or the plurality of domestic relations. 23 But this is an issue, like the others barely sketched above, which is mentioned here only in order to suggest the richness of the questions Professor Grossberg's work provokes.

It is impossible to say which is more exciting: what Governing the Hearth sets out or what it leads its readers to think about. Early on I suggested that this will not be the last word on the subject. That may be the best praise to give any book. We will all be indebted to Professor Grossberg not only today, for what he has said, but tomorrow for what other historians and lawyers will say.


23. For discussion touching on this issue, see Teitelbaum, Moral Discourse and Family Law, 84 MICH. L. REV. 430 (1985).