

Introduction

The Contested Place of Religion in Family Law

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This volume comes at an important moment. In the space of three years, the United States Supreme Court decided cases about marriage equality, the government's ability to require contraceptives as part of employer health policies, and the ability of religious actors to step aside from duties that otherwise apply.¹ The cases ranked among the most closely watched of each term. Two of them captured the nation's attention and highlighted the sharp divide on the Court – and among Americans – as to these issues.

In a 5–4 decision, *Obergefell v. Hodges*, the Court recognized same-sex marriage – reimagining the boundaries of marriage, an institution most Americans still see as fundamentally religious.² In *Burwell v. Hobby Lobby*, the Court again split 5–4 and breathed new life into religious claims not to be burdened by government regulation. In both cases, the dissenters questioned not only the validity but also the legitimacy of the majority's reasoning.³ And so did Americans.

¹ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (holding that closely held corporations could not be made to provide contraceptive coverage under the Patient Protection and Affordable Care Act because it would substantially burden their religious exercise and the Obama Administration had a less restrictive means available to it, requiring an insurer provide the contraceptives rather than the employer as it did with objecting religious nonprofit employers); *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (establishing the right to marry for same-sex couples in all U.S. states); *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (remanding to allow parties to find an accommodation that accomplishes government's interests in contraceptive coverage for women while respecting objectors' religious liberty claims).

² *Marriage Update*, RASMUSSEN REPORTS (June 25, 2015), www.rasmussenreports.com/public_content/politics/current_events/marriage/marriage_update (finding that 50% of Americans “consider marriage a religious institution”).

³ *Burwell*, *supra* note 1, at 2793 (Ginsburg, J., dissenting) (“Misguided by its errant premise that [the Religious Freedom Restoration Act] moved beyond the pre-[Employment Division v. Smith] case law, the Court falters at each step of its analysis.”); *Obergefell supra* note 1, at

Hobby Lobby “sent shock waves through America. It seemed to signal that the legal system would side with religious interests in a very broad range of ideological clashes among private parties.”⁴ In the post-*Hobby Lobby* world, free exercise of religion suddenly carried the power to “punch a large hole in the government’s power to enact all kinds of federal social, economic, and welfare programs.”⁵ For *Hobby Lobby*’s critics, “[a]t stake is no less than the social progress made on ‘contraception and abortion, sexual freedom and choice, women’s rights, gay rights, [and] racial discrimination.’”⁶ Especially when social change runs counter to deeply held religious understandings, the fear is that “a stringent interpretation” of statutory protections for religious liberty, such as the federal Religious Freedom Restoration Act (“RFRA”) at the heart of *Hobby Lobby*, would “bring religious objectors ‘out of the woodwork.’”⁷

Obergefell drew equally vocal critics. The decision, religious thought-leaders said, tore at the seams of an “already volatile social fabric.”⁸ For Kentucky Senator Rand Paul, like many Americans, *Obergefell* highlighted the “danger that a government that involves itself in every nook and cranny of our lives [may] now enforce definitions that conflict with sincerely felt religious convictions of others.”⁹ Although a slight majority of Americans support same-sex marriage, the country remains divided on the matter.¹⁰ Some are so

2612 (Roberts, C.J., dissenting) (“The majority’s decision is an act of will, not legal judgment. The right it announces has no basis in the Constitution or this Court’s precedent.”). See also Kar, this volume, for a close reading of *Obergefell*; Helfand, Chapter 2, this volume, and Sepper, Chapter 1, this volume, for close readings of *Hobby Lobby*.

⁴ Dwyer, Chapter 8, this volume.

⁵ Garrett Epps, *The U.S. Supreme Court’s Nonsense Ruling in Zubik*, ATLANTIC, May 16, 2016, www.theatlantic.com/politics/archive/2016/05/the-supreme-courts-non-sensical-ruling-in-zubik/482967/.

⁶ Emma Long, *How Bad Is the Hobby Lobby Ruling?*, HISTORY NEWS NETWORK (July 14, 2014), historynewsnetwork.org/article/156320.

⁷ Eugene Volokh, *Prof. Michael McConnell (Stanford) on the Hobby Lobby Arguments*, WASH. POST (Mar. 27, 2014), www.washingtonpost.com/news/volokh-conspiracy/wp/2014/03/27/prof-michael-mcconnell-stanford-on-the-hobby-lobby-arguments/ (quoting Justice Elena Kagan).

⁸ *Here We Stand: An Evangelical Declaration on Marriage*, THE ETHICS & RELIGIOUS LIBERTY COMMISSION (June 26, 2015), <http://erlc.com/resource-library/statements/here-we-stand-an-evangelical-declaration-on-marriage>.

⁹ Rand Paul, *Government Should Get Out of the Marriage Business Altogether*, TIME (June 28, 2015), <http://time.com/3939374/rand-paul-gay-marriage-supreme-court/>.

¹⁰ *See Changing Attitudes on Gay Marriage*, PEW RESEARCH CENTER (May 12, 2016), www.pewforum.org/2016/05/12/changing-attitudes-on-gay-marriage/ (reporting that a majority of Americans in 2016, 55%, supported same-sex marriage compared to more than a third, 37%, who opposed it and that support for same-sex marriage tipped over to a slim majority only in 2011).

bitterly opposed to it that they publicly dissented, as Kentucky clerk Kim Davis did when she refused to perform any marriages and blocked others in her office from doing so.¹¹

These divides carried into the 2016 presidential election. Wide swaths of the country felt disenfranchised by the remainder. Trump voters believed “nobody’s listening to us.”¹² Those disappointed by Donald Trump’s election felt equally lost, “waking up to a whole new world,” a “nightmare,” one father said, for his family.¹³

The struggle for religious liberty animated the 2016 election. With a vacancy on the U.S. Supreme Court after Justice Antonin Scalia’s sudden death six months before, a centerpiece of Trump’s appeal was the ability to name justices who would “uphold[] not only this freedom, but all that [emanates] from it,” as Hobby Lobby CEO David Green explained in *USA Today*.¹⁴ In a speech to the Iowa Faith and Family Coalition in September 2015, then-candidate Trump said: “The first priority of my administration will be to preserve and protect our religious liberty.”¹⁵

Although Trump shrugged off *Obergefell*’s reverberations – saying it’s “been settled, and I’m fine with that”¹⁶ – his base hoped to overturn *Obergefell* and

¹¹ For analysis and reactions, see Adams, Chapter 21, this volume; Goodwin, Chapter 3, this volume; Kar, Chapter 15, this volume; Wilson, Chapter 16, this volume.

¹² See Jeff Guo, *A New Theory for Why Trump Voters Are So Angry – That Actually Makes Sense*, WASH. POST (Nov. 8, 2016), www.washingtonpost.com/news/wonk/wp/2016/11/08/a-new-theory-for-why-trump-voters-are-so-angry-that-actually-makes-sense/?utm_term=.c437e2701b56 (reporting findings by a political science professor that Trump supporters felt “they were not getting their fair share of decision-making power”).

¹³ Matea Gold, Mark Berman, & Renae Merle, “Not My President”: Thousands Protest Trump in Rallies Across the U.S., WASH. POST (Nov. 11, 2016), www.washingtonpost.com/news/post-politics/wp/2016/11/10/not-my-president-thousand-protest-trump-in-rallies-across-the-u-s/?utm_term=.f9ce9a422d83.

¹⁴ David Green, *One Judge Away from Losing Religious Liberty: Hobby Lobby CEO*, USA TODAY (Sep. 1, 2016), www.usatoday.com/story/opinion/2016/09/01/hobby-lobby-religious-freedom-liberty-obamacare-christian-david-green/89597214?hootPostID=2a2ad7db1f58238473e45a4280959e65.

¹⁵ Bradford Richardson, *Trump Stance on Religious Liberty Leaves Social Conservatives Nervous*, WASH. TIMES (Feb. 19, 2017), www.washingtontimes.com/news/2017/feb/19/trump-stance-on-religious-liberty-leaves-social-co/.

¹⁶ Ariane de Vogue, *Trump: Same-Sex Marriage Is “Settled,” but Roe v. Wade Can Be Changed*, CNN (Nov. 15, 2016), www.cnn.com/2016/11/14/politics/trump-gay-marriage-abortion-supreme-court/index.html.

the Supreme Court's landmark abortion decision, *Roe v. Wade*.¹⁷ Opponents believed a Trump presidency would mean exactly that.¹⁸

Trump's naked appeal to religious liberty and the U.S. Supreme Court's composition appears to have made a difference. In exit polls, white Evangelical voters went for Trump by a margin of 80% to 16%, as did a majority of Catholic voters.¹⁹

UNCERTAINTY AROUND MARRIAGE

Even before the election, however, the country witnessed considerable push-back over *Obergefell*'s implementation. State legislators introduced bills to end state-recognized marriage as a way to “get back to government being in its role and religion being in its role.”²⁰ Some legislators proposed scrapping marriage as a legal category in favor of private contracts; others proposed redubbing marriages as domestic partnerships. As this volume shows, changing the state's relationship to marriage raises a thicket of questions about how already married couples will fare and whether couples would take the relationship “as seriously” if the state replaced marriage.²¹ Drawing on Israel's

¹⁷ Mark Berman, *Trump Promised Judges Who Would Overturn Roe v Wade*, WASH. POST (March 21, 2017), www.washingtonpost.com/politics/2017/live-updates/trump-white-house/nel-gorsuch-confirmation-hearings-updates-and-analysis-on-the-supreme-court-nominee/trump-promised-judges-who-would-overturn-roe-v-wade/?utm_term=.07124697546d; Carlos Santoscoy, *FRC's Peter Sprigg Hopeful Trump's Justices Will Overturn Gay Marriage Ruling*, ON TOP MAGAZINE (Dec. 20, 2016), www.ontopmag.com/article/24733/FRCs_Peter_Sprigg_Hopeful_Trumps_Justices_Will_Overturn_Gay_Marriage_Ruling.

¹⁸ Jay Michaelson, *Donald Trump's Supreme Court Won't Just Overturn Gay Marriage and Abortion Cases, It Will Strangle the Federal Government*, DAILY BEAST (Nov. 9, 2016), www.thedailybeast.com/donald-trumps-supreme-court-wont-just-overturn-gay-marriage-and-abortion-cases-it-will-strangle-the-federal-government.

¹⁹ Sarah Pulliam Bailey, *White Evangelicals Voted Overwhelmingly for Donald Trump, Exit Polls Show*, WASH. POST (Nov. 9, 2016), www.washingtonpost.com/news/acts-of-faith/wp/2016/11/09/exit-polls-show-white-evangelicals-voted-overwhelmingly-for-donald-trump/?utm_term=.54af2de3a219. *But see* Alec Tyson & Shiva Maniam, *Behind Trump's Victory; Divisions by Race, Gender, Education*, PEW RESEARCH CENTER (Nov. 9, 2016), www.pewresearch.org/fact-tank/2016/11/09/how-the-faithful-voted-a-preliminary-2016-analysis/ (documenting differentials in support for Clinton versus Obama).

²⁰ Alisa Nelson, *Missouri Legislator Says His Bill Would Defuse Some Controversy in Gay Weddings Resolution*, MISSOURINET (Dec. 1, 2016), www.missourinet.com/2016/12/01/missouri-legislator-says-his-bill-would-diffuse-some-controversy-in-gay-weddings-resolution/; Wilson, Chapter 16, this volume (cataloging state law proposals to divorce the state from marriage); H.B. 62, 99th Gen. Assemb., 1st Reg. Sess. (Mo. 2017).

²¹ Wilson, this volume; Summer Ballentine, *A Lawmaker's Solution for Marriage Debate: Remove the State*, AP NEWS (Dec. 30, 2016), <https://apnews.com/efcdc917b4d04b2ba05126c7557d1bf2/lawmakers-solution-marriage-debate-remove-state>.

fragmented system around religious marriage and civil divorce, Professors Karin Yefet and Arianne Barzilay (Chapter 25) probe the workability of unwinding religious and civil marriage as it has been understood in the United States.

What *Obergefell* portended for other claims to marry was not long in coming. Within a week of *Obergefell*, Nathan Collier of *Sisters Wives* fame applied for a marriage license to “legally wed his second wife” – exactly as Chief Justice John Roberts predicted.²² Although Collier claimed no religious affiliation, he claimed a religious conviction: as Professor Robin Kar (Chapter 15) urges, marriage alone holds the transformative power to bind individuals to one another and to bring them into conversation with God. Collier’s religious claim ultimately failed, but only because he could not show that Montana would prosecute him.²³ In a reversal of course for Utah,²⁴ the state has said it will not enforce its constitutional ban on polygamy, absent some other crime or malfeasance.²⁵

Despite parallels drawn by Justice Roberts between polygamy and same-sex marriage, Professor John Witte (Chapter 17) believes the line can be held against polygamy: only polygamy was viewed as a *malum in se* in Western culture. Professor Maura Strassberg (Chapter 18) mounts a modern harm-based case against polygamy’s recognition, showing how the practice harms women and children. She believes those harms would likely suffice to sustain marriage bans on polygamy, if not polygamy as a crime, against challenges under state RFRA – laws patterned on, but not identical to, the federal RFRA, as Utah Senator Stuart Adams (Chapter 21) explains – which twenty-two states have enacted. Professor Patrick Parkinson (Chapter 24) evaluates the status of

²² *Obergefell*, *supra* note 1, at 2621 (Roberts, C.J., dissenting) (“[I]t is striking how much of the majority’s reasoning would apply with equal force to the claim of a fundamental right to plural marriage . . . If a same-sex couple has the constitutional right to marry because their children would otherwise ‘suffer the stigma of knowing their families are somehow lesser,’ why wouldn’t the same reasoning apply to a family of three or more persons raising children?”); Cheryl Wetzstein, “*Sister Wives*.” *Polygamist Nathan Collier Cites Gay Marriage Ruling in Legal Fight*, WASH. TIMES (July 1, 2016), www.washingtontimes.com/news/2015/jul/1/nathan-collier-sister-wives-polygamist-cites-gay-m/.

²³ *Collier et al. v. Fox et al.*, No. 15-CV-83-BLG-SPW-CSO, at *3 (D. Mont. Dec. 8, 2015).

²⁴ In 2006, the Utah Supreme Court sustained a man’s conviction for polygamous cohabitation over Justice Christine Durham’s strident dissent that criminalizing polygamy allows “the state to conduct a fishing expedition for evidence of other crimes.” *State v. Holm*, 137 P.3d 726, 775 (Utah 2006) (Durham, C.J., dissenting in part).

²⁵ Sean Reyes, *Attorney General Statement on U.S. Tenth Circuit Court of Appeals Dismissal of Brown v. Buhman* (Apr. 11, 2016), <http://attorneygeneral.utah.gov/tag/polygamy> (describing his office’s policy as “only prosecut[ing] bigamy crimes against those who induce marriage under false pretenses or if there is a collateral malfeasance, such as fraud, domestic abuse, child abuse, sex abuse, or other abuse”).

secular marriage after same-sex marriage legislation and case law in Australia and Europe. He believes that the lack of “any convincing narrative about what marriage *is*” presages not only credible claims to polygamy but, worse, marriage’s increasing irrelevance.

In this push-and-pull over the state’s authority to police the outlines of marriage as an institution, and to prop it up, Professor Kari Hong (Chapter 14) reminds us that marriage historically conferred a right to be left alone, an essential protection for citizens and democracy. Professor Merle Weiner (Chapter 11) observes, however, that the absence of law can be just as profound as legal regulation itself. When no law encourages romantically involved parents to be supportive hands-on co-parents, whether or not married, they often are not – to the detriment of their children.²⁶

BEYOND MARRIAGE

Far more looms on the horizon than just who may marry. *Obergefell* and *Hobby Lobby* may spur flashpoints over other matters that are core to persons but also impinge on religious beliefs or religious communities. These tensions may extend to matters such as end-of-life decision making, religiously educating children, childrearing decisions involving corporal punishment, treating childhood illnesses by faith alone,²⁷ the ability to structure divorce to reflect religious values,²⁸ circumcision practices, birth control practices,²⁹ modest dress,³⁰ and shared parenting.³¹

The family is the place where we experience the most intimate parts of our lives. As U.S. Senator Orrin Hatch notes in his *Foreword*, the family acts as the bulwark between the state and the individual, serving an “indispensable role in preserving religious freedom.” Within the family, people of faith care deeply about having the autonomy to practice their faith and instill it in their children.³² As the Court recognized in *Obergefell*, decisions concerning

²⁶ A record number of Americans have never married, making the absence of regulation especially problematic. Wendy Wang & Kim Parker, *Record Share of Americans Have Never Married*, PEW RESEARCH CENTER (Sep. 24, 2014), www.pewsocialtrends.org/2014/09/24/record-share-of-americans-have-never-married/; Weiner, Chapter 11, this volume.

²⁷ Offit, Chapter 12, this volume; Wilson & Sanders, Chapter 13, this volume.

²⁸ Bix, Chapter 9, this volume; Brinig, Chapter 10, this volume.

²⁹ Goodwin, Chapter 3, this volume; Lipper, Chapter 5, this volume; Rienzi, Chapter 4, this volume.

³⁰ Uddin, Chapter 26, this volume.

³¹ Weiner, Chapter 11, this volume.

³² Pope John Paul II, *Familiaris Consortio* (1981) (“In matrimony and in the family a complex of interpersonal relationships is set up – married life, fatherhood and motherhood, filiation and fraternity – through which each human person is introduced into the ‘human family’ and into the ‘family of God,’ which is the Church.”).

“family relationships, procreation, childrearing . . . [and] marriage are among the most intimate that an individual can make.”³³

In the legal regulation of the family, the place of religion, which is now contested, spans every stage of an individual’s life and the life cycle of a family: from birth to marriage, family formation, childrearing, and the end of life. The ability to circumcise a child,³⁴ for instance, or to school a child in one’s faith,³⁵ or to respect (or override) a loved one’s religious values in end-of-life care³⁶ reflect and shape a person’s religious identity. The choices made also shape relationships within the family – affecting parental autonomy, child well-being, the protection of vulnerable adults, and society’s interest in the family separate and apart from its interests in the individuals involved. Thus, for many Americans, the family is the crucible where the limits of the state’s power to intervene get worked out.

The U.S. Supreme Court has long acknowledged a “private realm of family life which the state cannot enter[.]”³⁷ where the “custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.”³⁸ When state regulation threatens to encroach on religious practice, moreover, the family’s already strong claims against legal intrusion thicken. As the Court remarked in *Prince v. Massachusetts*:

To make accommodation between these freedoms and an exercise of state authority always is delicate . . . On one side is the obviously earnest claim for freedom of conscience and religious practice. With it is allied the parent’s claim to authority in her own household and in the rearing of her children. The parent’s conflict with the state over control of the child and his training is serious enough when only secular matters are concerned. *It becomes the more so when an element of religious conviction enters.* Against these sacred private interests, basic in a democracy, stand the interests of society to protect the welfare of children.³⁹

Professor James Dwyer (Chapter 8) questions the wisdom of conferring on parents an “other-determining” power over their children. Protecting parental decisions to homeschool children, for example, saddles some children with state-sanctioned disabilities, especially girls who may be straightjacketed into “conventional and severely limited social roles.” Despite the Supreme Court’s

³³ Obergefell, *supra* note 1, at 2599 (2015).

³⁴ Rassbach, Chapter 7, this volume.

³⁵ Dwyer, Chapter 8, this volume.

³⁶ Cahn & Zietlow, Chapter 20, this volume; Kaplan, Chapter 19, this volume.

³⁷ *Smith v. Organization of Foster Families*, 431 U.S. 816, 862–63 (1977) (Stewart, J., concurring).

³⁸ *Prince*, 321 U.S. at 166.

³⁹ *Id.* at 165 (emphasis added).

nominal respect for families making internal decisions, its constitutional jurisprudence is more nuanced: parental authority does not extend to causing harm to their children.⁴⁰

Like Dwyer, feminists and others have long recognized that the marital family is “a sphere divorced from the legal order[,]” inviting the “subordination of women.”⁴¹ Professor Michele Goodwin (Chapter 3) and attorney Gregory Lipper (Chapter 5) extend this critique to a metastasizing number of conscience claims by pharmacists and other providers that impede women from purchasing emergency contraceptives. In Goodwin’s words, conscience slips over from asking to be left alone to operating as a “mighty sword,” prevailing over secular interests including access to healthcare and nondiscrimination.⁴² And as Professor Richard Kaplan (Chapter 19) shows, “conscience” clauses operate not just at the beginning of life but also at the end, allowing physicians *not* to follow a patient’s desires about end-of-life care for any reason, including the *provider’s* own religious views.⁴³ Pushing back, Professor Mark Rienzi (Chapter 4), senior counsel for Little Sisters of the Poor in *Zubik v. Burwell*, maintains that the state’s interests can be accomplished without encroaching on providers’ beliefs.

Within the family, the human costs of religious conviction are often borne by children. As Dr. Paul Offit (Chapter 12) documents in this volume, across the U.S., “parents are legally empowered to rely upon their religious beliefs and ‘faith-healing’ practices as an antidote to when their children contract preventable and treatable illnesses.” In this respect, the family encapsulates in miniature the driving concern after *Hobby Lobby* and *Zubik*: the potential for harm to others when society gives thick protection to religion.

That said, legislators have given wide berth to religious practices in the family. Forty-seven states have exempted parents from duties to vaccinate children against wholly preventable diseases if vaccinating conflicts with the parents’ religious beliefs or philosophical views.⁴⁴ Legislators have largely not scaled back these laws despite their tragic consequences. For example, children have died in fundamentalist communities from Pennsylvania to Idaho; in Idaho, child mortality rates are ten times greater than rates in the rest of the state.⁴⁵

⁴⁰ Wilson & Sanders, Chapter 13, this volume (analyzing *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510 (1925); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Wisconsin v. Yoder*, 406 U.S. 205, 230–234 (1972)).

⁴¹ Elizabeth M. Schneider & Nadine Taub, *Perspectives on Women’s Subordination and the Role of Law*, in *THE POLITICS OF LAW* (David Kairys, ed., 1982).

⁴² Goodwin, Chapter 3, this volume.

⁴³ Kaplan, Chapter 19, this volume.

⁴⁴ Offit, Figure 12.1, this volume.

⁴⁵ Wilson & Sanders, Chapter 13, this volume.

Faith-healing practices have contributed to a resurgence of once-eradicated diseases including measles, leading California and Vermont in 2016 to repeal their religious or personal belief exemptions to vaccination requirements.⁴⁶

States have, however, moderated the latitude given to parents in the realm of corporal punishment. In the late 1990s, forty-eight states authorized parents to discipline children in accordance with biblical passages instructing them to not withhold “correction from the child: for if thou beatest him with the rod, he shall not die.”⁴⁷ In a description of the law that has been sorely missing in recent national discussions, this volume shows that by 2017, forty-four states and the District of Columbia allowed corporal punishment. These states generally bracket acceptable discipline to not using “excessive force” or causing “substantial injury.”⁴⁸

In one sense, continuing solicitude for religious practices is not surprising. Even as religiosity in the U.S. ebbs,⁴⁹ America remains deeply spiritual. More than 75% of Americans identify with a faith tradition.⁵⁰ More than half say religion is “very important” in their own lives.⁵¹ But contributors to this volume ask whether governments have gotten it right.

The idea that individuals can hold religious liberty claims against society, or the application of laws, is difficult for many; it becomes even harder to swallow when it comes to religious groups. In *Hobby Lobby*, arguably the claim that most exercised the public was that a corporation could even have

⁴⁶ California S.B. 277 (2015); Vt. Legis. Serv. 98 (West); VT. STAT. ANN. tit 18 § 1122 (West 2016) (retaining a religious exemption); see also Sarah Breitenbach, *States Make It Harder to Skip Vaccines*, VALLEY NEWS (May 29, 2016), www.vnews.com/To-combat-disease-states-make-it-harder-to-skip-vaccines-2486243.

⁴⁷ Proverbs 23:13 (King James version); Susan H. Bitensky, *Spare the Rod, Embrace Our Humanity: Toward a New Legal Regime Prohibiting Corporal Punishment of Children*, 31 U. MICH. J.L. REFORM 353 (1997–1998). See also Proverbs 29:15 (King James version) (“The rod and reproof give wisdom: but a child left to himself bringeth his mother to shame.”); Proverbs 13:24 (King James version) (“He that spareth his rod hateth his son: but he that loveth him chasteneth him betimes.”).

⁴⁸ Wilson & Sanders, Figure 13.4, this volume; Appendix 1.

⁴⁹ Individuals with no religious affiliation, or “nones,” comprise nearly a quarter of our population, 23%, up from 16% in 2007. Michael Lipka, *A Closer Look at America’s Rapidly Growing Religious “Nones,”* PEW RESEARCH CENTER (May 13, 2015), www.pewresearch.org/fact-tank/2015/05/13/a-closer-look-at-americas-rapidly-growing-religious-nones/.

⁵⁰ *Religious Landscape Study*, PEW RESEARCH CENTER (2014), www.pewforum.org/religious-landscape-study/#religions. Religious communities have become less homogenous as members fragment in their views of contraceptives, same-sex marriage, abortion, and other matters; Michael Lipka, *10 Facts About Religion in America*, PEW RESEARCH CENTER (Aug. 27, 2015), www.pewresearch.org/fact-tank/2015/08/27/10-facts-about-religion-in-america/.

⁵¹ In a 2016 Gallup poll from 2016, 53% of people said they would consider religion to be “very important” in their own lives. *Religion*, Gallup (2016), www.gallup.com/poll/1690/religion.aspx.

a religious belief worthy of legal protection – a skepticism that runs across this volume.⁵² As is true of the litigation over contraceptive coverage, religious communities assert a distinct claim to perpetuate their norms and identities, whether in childrearing, by mediating disputes using religious norms, or circumcising male children as a symbol of belonging in the community.⁵³ Once-uncontroversial questions have become controversial. As attorney Eric Rassbach (Chapter 7) shows, the New York City Health Department, like grassroots movements in Massachusetts and California, has sought to ban certain forms of male circumcision, a religious practice important to both the Jewish and Muslim faiths.

The question of group rights is hard. The state's regulation of the family may be seen as stamping out practices core to a community's identity or beyond the state's competence to decide. This can extend to matters as mundane as modest dress or as central to religious belonging as male circumcision.⁵⁴ Whether and how to regulate are further complicated by the fact that what is seen as acceptable within the family may differ not just by religion but also by race, upbringing, and ethnic identity.⁵⁵ How parents resolve disputes, bring up their children, or baptize or fold their children into the community are not mere cultural and religious expressions. Like other practices that foster intentional communities of believers,⁵⁶ these religious practices operate as a kind of priming of receptivity to the community's particular worldview, making the ability to follow one's convictions about parenting not just a difference of opinion but also an existential concern.⁵⁷

These questions are made all the more difficult by the fact that faith communities can undergo a renaissance in their own thinking. The Scottish

⁵² See, e.g., Sepper, Chapter 1, this volume (“Despite claims to the contrary, resistance to corporate exemption does not mean Americans have rejected religious accommodation, religious liberty, or religion itself.”); Lipper, Chapter 5, this volume; see generally *THE RISE OF CORPORATE RELIGIOUS LIBERTY* (Micah Schwartzman et al., eds., 2016).

⁵³ Bix, Chapter 9, this volume; Brinig, Chapter 10, this volume.

⁵⁴ Rassbach, Chapter 7, this volume; Uddin, Chapter 26, this volume.

⁵⁵ Bix, Chapter 9, this volume; Brinig, Chapter 10, this volume; Uddin, Chapter 26, this volume; Wilson & Sanders, Chapter 13, this volume.

⁵⁶ Steve Weatherbe, *Is This the Solution Christians Need to Survive the Collapse of the West?* LIFE SITE NEWS (Mar. 9, 2017), www.lifesitenews.com/news/interview-author-rod-dreher-explains-why-we-need-benedict-option-to-survive (quoting Rod Dreher, author of *THE BENEDICT OPTION: A STRATEGY FOR CHRISTIANS IN A POST-CHRISTIAN NATION*, as urging Christians to “hold on even more strongly to the truths of the faith because there will be even more pressure in the public square to conform to this post-Christian orthodoxy, to abandon our faith, to apostatize”).

⁵⁷ See Binyamin Appelbaum, *What the Hobby Lobby Ruling Means for America*, N.Y. TIMES MAG. (July 22, 2014), www.nytimes.com/2014/07/27/magazine/what-the-hobby-lobby-ruling-means-for-america.html?mcubz=0.

Episcopal Church and the Norwegian Lutheran Church decided in 2017 to perform same-sex marriages.⁵⁸ Faith communities can also hold nuanced positions. In this volume, Professor William Eskridge (Chapter 23) shows that the Church of Jesus Christ of the Latter-day Saints, commonly known as the Mormon Church, opposed same-sex marriage during California's Proposition 8. The Church later became a driving force behind Utah's landmark nondiscrimination protections for the LGBT community.

The Mormon Church's approach to two related, but distinct questions – marriage and LGBT nondiscrimination protections – is an important example of the ongoing dialogue between faith communities, cultural norms, and the law. Professor Weiner (Chapter 11) points to numerous examples of religious stakeholders engaging the political process to influence the legal regulation of the family. As Senator Adams (Chapter 21) chronicles, religious stakeholders played a crucial role in helping Utah's legislature chart the uncharted territory left by *Obergefell* and lower court decisions preceding it, which granted the right to marry but did *not* resolve a host of downstream questions. Echoing Adams, Professor Anthony Kreis (Chapter 22) gives a careful historical account of the dismantling of interracial marriage bans in the U.S., showing that court decisions work in tandem with legislation to propel civil rights movements.

LOOKING FORWARD

Against this swirling mix of religious beliefs, secular values, and legal regulation of the family, this volume steps back to provide a comprehensive look at the tensions between religious freedom, equal rights, and the state's protective function. Contributors explain how the U.S. Supreme Court's decisions about marriage equality, contraception, the parent-child relationship, and religious exercise set the stage for ongoing disputes.

The volume's contributors straddle two fields, (1) law and religion and (2) family law. PART I opens with religious liberty scholars Professors Elizabeth Sepper (Chapter 1) and Michael Helfand (Chapter 2) unpacking insights from *Hobby Lobby* and *Zubik* for the questions explored in the remainder of the book. PARTS II–V evaluate religious claims at various

⁵⁸ *Scottish Episcopal Church to Allow Same-Sex Marriage*, AP NEWS (June 9, 2017), <https://apnews.com/788ec9bbdf334e88af93ccedb67b617c/Scottish-Episcopal-Church-to-allow-same-sex-weddings>; Gwladys Fouche, *Norway's Lutheran Church Embraces Same-Sex Marriage*, REUTERS (Jan. 31, 2017), www.reuters.com/article/us-norway-gaymarriage-idUSKBN15E1O2.

junctures in the life of a family: at birth, during childrearing, at marriage, and at the end of life. PART VI takes a wider lens to the evolution of the law, showing how the foundational views of marriage, family, and equal rights in faith traditions have influenced, and been influenced by, the wider culture. This part shows that neither legislatures nor courts act in isolation, a phenomenon that has deeper implications for the protection of sexual minorities and other vulnerable populations. PART VII offers international perspectives on the sustainability of marriage, respect for minority cultures, and the workability of proposals to fundamentally transform the state's relationship to marriage.

The voices collected here are a microcosm of the country. Represented are longtime advocates of religious freedom: Professors Rienzi (Chapter 4) and Helfand (Chapters 2 and 6); Senator Hatch (Foreword) who, together with Senator Edward Kennedy, co-sponsored RFRA in 1993; the Deputy General Counsel to the Becket Fund for Religious Liberty, Eric Rassbach (Chapter 7); and the director of strategy for the Center for Islam and Religious Freedom, Asma Uddin (Chapter 26). They are equally matched by vigorous opponents of special accommodations for religion: Dr. Paul Offit (Chapter 12), author of the *New York Times* bestseller *Bad Faith: When Religious Belief Undermines Modern Medicine*; Professors Goodwin (Chapter 3), Sepper (Chapter 21), and Dwyer (Chapter); and Greg Lipper (Chapter 5), formerly senior litigation counsel at Americans United for Separation of Church and State.

In addition to those at the forefront of legal battles to expand (or contract) religious autonomy, the volume includes important voices missing in many academic works: federal and state legislators, the groups that principally decide how much solicitude governments accord religion. Serious scholars of the family round out the book, together with a number of rising stars: journalist and Reverend Amy Zeittlow (Chapter 20) and Professors Barzilay (Chapter 25), Bix (Chapter 9), Brinig (Chapter 10), Cahn (Chapter 20), Eskridge (Chapter 23), Kreis (Chapter 22), Parkinson (Chapter 24), Sanders (Chapter 13), Strassberg (Chapter 18), Wilson (Chapter 16), Witte (Chapter 17), and Yefet (Chapter 25). Comparative perspectives from Israel, Australia, France, and Europe underscore that tensions between religious and secular values cross international boundaries.

Each chapter stands alone. But unlike other volumes, dialogue – and sometimes pointed debate – runs throughout, surfacing differences between thinkers who have sometimes litigated against one another or intersected in other ways. Many chapters react to the Trump Administration's early indications about how it will resolve questions impinging on religious freedom, not

least of which are the claims by the Little Sisters of the Poor and others to step aside from the contraceptive coverage mandate.⁵⁹

A number of chapters also offer initial observations about the recent confirmation of Justice Neil Gorsuch to the U.S. Supreme Court. The composition of the Supreme Court obviously matters to the resolution of cases, especially if President Trump makes additional replacements during his presidency.⁶⁰ Still, the Supreme Court does not overturn precedents lightly, and it is hard to predict which cases might be trimmed as a result of new facts before the Court.⁶¹ Paring seems a far more likely outcome than overturning binding precedent such as *Obergefell*, as Justice Gorsuch indicated in his confirmation hearings.⁶²

In short, *The Contested Place of Religion in Family Law* begins a long-overdue conversation on questions that have rippled across the nation.

⁵⁹ President Trump's Executive Order on Religious Freedom provides scant detail, so it remains unclear whether religious objectors such as the Little Sisters will be wholly exempted – meaning their employees receive no coverage from anyone – or if, now that the Little Sisters “have won,” the Trump Administration will direct insurers or another group to pay for employees' contraceptive coverage, as the Obama Administration did. See Amber Athey, *Trump to Little Sisters of the Poor: “Long Ordeal” Is Over*, DAILY CALLER (May 4, 2017), <http://dailycaller.com/2017/05/04/trump-to-little-sisters-of-the-poor-long-ordeal-is-over-video/>; White House, *Presidential Executive Order Promoting Free Speech and Religious Liberty* (May 4, 2017), www.whitehouse.gov/the-press-office/2017/05/04/presidential-executive-order-promoting-free-speech-and-religious-liberty; Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 76 Fed. Reg. 149, 46621, (August 3, 2011) (exempting churches entirely); Sarah Posner, *Leaked Draft of Trump's Religious Freedom Order Reveals Sweeping Plans to Legalize Discrimination*, THE NATION (Feb. 1, 2017), www.thenation.com/article/leaked-draft-of-trumps-religious-freedom-order-reveals-sweeping-plans-to-legalize-discrimination/.

⁶⁰ Lawrence Hurley & Andrew Chung, *Fearing Trump's Next Move, Liberals Urge Supreme Court Conservative Kennedy to Stay*, REUTERS (Jun. 1, 2017), www.reuters.com/article/us-usa-court-kennedy-idUSKBN18S4LT; Paul Bedard, *Source: Trump “Expects” Four More Supreme Court Picks*, WASH. EXAMINER (Apr. 7, 2017), www.washingtonexaminer.com/trump-expects-to-name-5-supreme-court-justices/article/2619660.

⁶¹ Lee Epstein, William M. Landes, & Adam Liptak, *The Decision to Depart (or Not) from Constitutional Precedent: An Empirical Study of the Roberts Court*, 90 N.Y.U. L. REV. 1115, 1122–27 (2015) (reviewing studies on various issues related to overruling precedent that demonstrate that overruling Court decisions is extremely rare).

⁶² Jacob Pramuk, *Neil Gorsuch: Supreme Court Has Said Same-Sex Marriage Is “Protected by the Constitution,”* CNBC (Mar. 21, 2017), www.cnbc.com/2017/03/21/neil-gorsuch-supreme-court-has-said-same-sex-marriage-is-protected-by-the-constitution.html.