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Edited by Robin Fretwell Wilson
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THE CONTESTED PLACE OF RELIGION IN FAMILY LAW

Like many beliefs, religious views matter across an individual's life and the life cycle of a family – from birth to marriage, through child-rearing, and, eventually, death. This volume examines clashes over religious liberty within the personal realm of the family. Against swirling religious beliefs, secular values, and legal regulation, this volume offers a forward-looking examination of tensions between religious freedom and the state's protective function. Contributors unpack some of the Court's recent decisions and explain how they set the stage for ongoing disputes. They evaluate religious claims around birth control, circumcision, modesty, religious education, marriage, polygamy, shared parenting, corporal punishment, faith healing, divorce, and the end of life. Authors span legislators, attorneys, academics, journalists, ministers, physicians, child advocates, and representatives of minority faiths. *The Contested Place of Religion in Family Law* begins an overdue conversation on questions dividing the nation.

Robin Fretwell Wilson is the Roger and Stephany Joslin Professor of Law and Director of the Program in Family Law and Policy at the University of Illinois College of Law.

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ROBIN FRETWELL WILSON

University of Illinois College of Law



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To The Honorable E. Grady Jolly

*For opening a window to me on what it means to be a scholar of the law and
the value of a life spent in service.*

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Notes on Contributors

Senator J. Stuart Adams is Senate Majority Whip in the Utah State Senate. Elected to the Utah Senate in 2009, Senator Adams also served in the Utah House of Representatives and on the Layton City Council. During the 2015 legislative session, Senator Adams was the sponsor and lead negotiator of the three religious liberties bills that together formed the landmark Utah Compromise. The former chairman of the Utah Transportation Commission, Senator Adams currently chairs the Military Installation Development Authority. A graduate of the University of Utah, Senator Adams is a partner in the Adams Company, a real estate, construction, and development firm.

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Brian H. Bix is Frederick W. Thomas Professor of Law and Philosophy at the University of Minnesota. He received his JD from Harvard University and his DPhil from Oxford University. Professor Bix works in family law, contract law, and legal philosophy. He is a member of the American Law Institute and was the Reporter for the Uniform Premarital and Marital Agreements Act. His publications include *OXFORD INTRODUCTIONS TO US LAW: FAMILY LAW* (2013) and *JURISPRUDENCE: THEORY AND CONTEXT* (7th ed., 2015). Professor Bix is a past Chair of the Section on Family and Juvenile Law of the Association of American Law Schools.

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James G. Dwyer is Arthur B. Hanson Professor of Law at William & Mary Law School, where he has taught Family Law and Youth Law since 2000. He is the author of *RELIGIOUS SCHOOLS v. CHILDREN’S RIGHTS* (1998), which argues for greater regulation of religious schools, and of *VOUCHERS WITHIN REASON: A CHILD-CENTERED APPROACH TO EDUCATION REFORM* (2001), which argues (on the surface, paradoxically) for state financial support of religious schools. He is also the coauthor of *HOMESCHOOLING: AN HISTORICAL AND PHILOSOPHICAL ANALYSIS* (forthcoming). His other publications theorize children’s rights in relation to unfit parents and dysfunctional communities and topics of religiously motivated parenting and the position of children in liberal political theory. Dwyer is the past chair of and currently serves on the Executive Committee of the AALS Section on Children and the Law.

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William N. Eskridge, Jr., is John A. Garver Professor of Jurisprudence at Yale Law School. He has authored dozens of articles and several books on statutory interpretation; the most recent is *INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION* (2016). Professor Eskridge has also written dozens of articles and several books on the rights of sexual and gender minorities, including *DISHONORABLE PASSIONS: SODOMY LAW IN AMERICA, 1861–2003* (2008); *GAY MARRIAGE: FOR BETTER OR FOR WORSE? WHAT WE HAVE LEARNED FROM THE EVIDENCE* (2006) (with Darren Spedale); *EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS* (2002); *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* (1999); and *SEXUALITY, GENDER, AND THE LAW* (1997, 2003, 2005) (with Nan Hunter). His current project (with Christopher Riano) is a study of the marriage equality debate, 1967–2017. In 2015, Professor Eskridge received the inaugural Harry Krause Lifetime Achievement Award in Family Law.

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appearing in the *Los Angeles Times*, *New York Times*, *Gene Watch*, *Christian Science Monitor*, *Cleveland Plain Dealer*, *Houston Chronicle*, *Chicago Sun Times*, *Washington Post*, *AlterNet*, and *Forbes Magazine*.

Senator Orrin Hatch is President Pro Tempore of the United States Senate, sworn in on January 6, 2015. Senator Hatch has served during the administrations of six Presidents and alongside nine Senate Majority Leaders. One of the most effective and bipartisan lawmakers of all time, Senator Hatch has authored 112 bills, and cosponsored 638 bills that have become law. Senator Hatch is responsible for many of the most consequential laws of the modern era on religious liberty, including the Religious Freedom Restoration Act of 1993 – a bill he coauthored with the late Senator Ted Kennedy – and the Religious Land Use and Institutionalized Persons Act. These landmark pieces of legislation prohibit substantial government burdens on the free exercise of religion, allowing Americans of all faiths to live, work, and worship in accordance with their deeply held personal beliefs. Senator Hatch recently delivered a series of speeches on the Senate floor on the subject of religious liberty – its origins, its meaning, and its status in modern society – reproduced in his newly published book, *PROTECTING OUR RELIGIOUS LIBERTIES*. Senator Hatch has also long been on the front lines of legislative battles to protect our vulnerable Americans. Senator Hatch authored the recently passed Amy and Vicky Act, which created an effective, balanced restitution process for victims of child pornography.

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Anthony Michael Kreis is Visiting Assistant Professor of Law at the Illinois Institute of Technology's Chicago-Kent College of Law. He earned his PhD from the University of Georgia's School of Public and International Affairs in 2016. His dissertation, *The Capital of Trust*, examines the significance of

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Patrick N. Parkinson is Professor of Law at the University of Sydney. He was president of the International Society of Family Law from 2011 to 2014. He served from 2004 to 2007 as chairperson of the Family Law Council, an advisory body to the Australian attorney-general, and he also chaired a review of the Child Support Scheme in 2004–05, which led to the enactment of major changes to the child support system. He is a member of the Order of Australia. His books include *FAMILY LAW AND THE INDISSOLUBILITY OF PARENTHOOD* (Cambridge University Press, 2011); *AUSTRALIAN FAMILY LAW IN CONTEXT* (2015); *THE VOICE OF A CHILD IN FAMILY LAW DISPUTES* (2008) (with Judy Cashmore); and *CHILD SEXUAL ABUSE AND THE CHURCHES: UNDERSTANDING THE ISSUES* (2003).

Eric Rassbach has been Deputy General Counsel at the Becket Fund for Religious Liberty since 2004. He has represented Buddhists, Christians, Hindus, Jains, Jews, Muslims, Santeros, and Sikhs, among many others. He represented the winning parties in several pathbreaking religious liberty cases at the United States Supreme Court, including *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, *Burwell v. Hobby Lobby Stores*, and *Holt v. Hobbs*. He has also represented clients at the European Court of Human Rights in Strasbourg, France. He is a well-known commentator on church-state issues and has been quoted in the *New York Times*, *Washington Post*, *Times of India*, *Wall Street Journal*, and other publications. Before joining the Becket Fund, Rassbach served as a law clerk to United States District Judge Lee Rosenthal in Houston, Texas, and worked in private practice. Rassbach is a graduate of Harvard Law School.

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Shaakirrah R. Sanders is Associate Professor of Law at the University of Idaho College of Law, where she teaches constitutional law, criminal procedure, and the First Amendment. After earning a JD from Loyola University New Orleans College of Law, Professor Sanders clerked for Ivan L.R. Lemelle in the United States District Court for the Eastern District of Louisiana and Chief Judge Lavenski R. Smith of the United States Court of Appeals for the Eighth Circuit. She also practiced law in New Orleans at Locke Lorde and in Seattle at K&L Gates and the Public Defender Association. Her current scholarship encompasses jury trial rights, criminal sentencing, and the First Amendment. Her forthcoming scholarship explores how the US Constitution applies to family law. She has discussed this issue on national media outlets, including Al Jazeera America, Associated Press, the *New York Times*, and the *Washington Post*, as well as local and regional public television and radio stations and news affiliates for ABC, CBS, NBC, and Fox.

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Asma T. Uddin is a Fellow in the Initiative on Security and Religious Freedom at the UCLA Burkle Center for International Relations. She is also the Director of Strategy for the Center for Islam and Religious Freedom (CIRF), a Washington, DC-based nonprofit engaging in research, media, education, and advocacy at the intersection of Islam and religious freedom in both the West and Muslim-majority countries. She is also the founder and editor in chief of *altmuslimah.com* and a research fellow at Georgetown University’s Berkley Center. Prior to joining CIRF, Uddin served as counsel with Becket Law, a nonprofit law firm specializing in religious freedom cases in the United States and abroad. Her scholarly work has been published by numerous law reviews and prominent university presses. She also serves on the Organization for Security and Co-Operation in Europe’s Office for Democratic Institutions and Human Rights Panel of Experts on Freedom of Religion or Belief and the advisory council for the Institute for Global Engagement’s Center for Women, Faith & Leadership. Uddin is a graduate of the University of Chicago Law School, where she was a staff editor at the *University of Chicago Law Review*.

Merle H. Weiner is Philip H. Knight Professor of Law at the University of Oregon School of Law, where she is the faculty director and co-founder of the Domestic Violence Clinic, now in its eighteenth year. Professor Weiner is a member of the American Law Institute, the International Society of Family Law, and the Executive Committee of the Section on Family Law of the American Association of Law Schools. She also sits on the National Executive Committee for the Order of the Coif. Professor Weiner coauthored the first US casebook on comparative and international family law, now in its third edition, and has written extensively on the topic of international child abduction. Professor Weiner’s book, *A PARENT-PARTNER STATUS FOR AMERICAN FAMILY LAW*, was published by Cambridge University Press in 2015.

Robin Fretwell Wilson is Roger and Stephany Joslin Professor of Law and Director of the Family Law and Policy Program at the University of Illinois College of Law, where she also directs the Epstein Health Law and Policy Program. She is the author of eleven books, including *RECONCEIVING THE FAMILY: CRITICAL REFLECTIONS ON THE AMERICAN LAW INSTITUTE'S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION* (Cambridge University Press, 2006, ed.); *THE HANDBOOK OF CHILDREN, CULTURE & VIOLENCE* (2006, with Nancy Dowd and Dorothy Singer, eds.); *SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY* (2008, with Douglas Laycock and Anthony Picarello, eds.); *RELIGIOUS FREEDOM, LGBT RIGHTS AND THE PROSPECTS FOR COMMON GROUND* (2018, with William N. Eskridge, Jr. eds., Cambridge University Press) (in press); and *DOMESTIC RELATIONS: CASES AND MATERIALS*, 8th ed. (2017, with Walter Wadlington and Raymond C. O'Brien). Professor Wilson has been consistently ranked as one of the top ten scholars in family law in the United States in terms of scholarly impact. Her work has been featured in the *New York Times*, *Washington Post*, *Los Angeles Times*, *Wall Street Journal*, *Good Morning America*, and *Essence* magazine, among others. A member of the American Law Institute and the Executive Council of the International Society of Family Law, Professor Wilson is presently the chair of the Section on Law and Religion of the Association of American Law Schools and past chair of the AALS Section on Family and Juvenile Law. In 2018, Professor Wilson received the Thomas L. Kane Religious Freedom Award, presented annually to an individual who has contributed in significant ways to the defense of religious freedom in the public square.

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TRADITION (2012); NO ESTABLISHMENT OF RELIGION: AMERICA'S ORIGINAL CONTRIBUTION TO RELIGIOUS LIBERTY (2012); THE WESTERN CASE FOR MONOGAMY OVER POLYGAMY (Cambridge University Press, 2015); and RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT (4th ed., 2016). Professor Witte received the 2016 Harry Krause Lifetime Achievement Award in Family Law and the National Religious Freedom Award. Professor Witte's writings have appeared in fifteen languages. With major funding from the Pew, Ford, Lilly, Luce, and McDonald foundations, he has directed twelve major international projects on democracy, human rights, and religious liberty, and on marriage, family, and children. He edits EMORY UNIVERSITY STUDIES IN LAW AND RELIGION and CAMBRIDGE LAW AND CHRISTIANITY SERIES (Cambridge University Press).

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Foreword

We live in a critical time for religious liberty. This fundamental freedom – so esteemed by our forebears that they enumerated it in the First Amendment – is now in danger both at home and abroad. Threats to free exercise are proliferating across America as courts narrow religious liberty protections and new laws restrict the ability of believers to express views or practice their faith when out of step with prevailing orthodoxy.

At the core of these attacks is a fundamental misunderstanding of the nature and substance of religious liberty. Religious liberty is not an ancillary freedom in service to our other rights and privileges; it is the foundation of freedom itself. Indeed, the ability to think, speak, and act in accordance with one's conscience is preliminary to the exercise of all other liberties – including freedom of speech and the rights of assembly and petition. In this regard, religious liberty is indispensable to the future of our Republic.

Perhaps this is why, of all the rights delineated in the Constitution, the Framers chose to list religious freedom first. This priority of place suggests that religious exercise has particular significance and merits special protection. Indeed, freedom of conscience deserves preeminence because it goes to the very heart of who we are as human beings and how we make sense of our world. It implicates duties that transcend mere personal choice and become obligatory in the life of the believer.

No decision is more fundamental to human existence than the decision we make regarding our relationship to the divine. It follows, then, that no act of government can be more intrusive or more invasive of individual autonomy and free will than the act of compelling a person to violate his or her sincerely chosen religious beliefs.

When government denies religious freedom, it forces believers to choose between duty to God and duty to man – duty to man backed by threat of force.

No government that values its citizens' agency, and certainly no limited government that exists at the suffrage of the people, should put its citizens to such an impossible choice.

Yet today, with respect for religious liberty eroding in the wake of rising secularism, the role of faith in public life faces unprecedented scrutiny. Even in the private sphere, religion is under attack. The sacred rights of conscience, once held to be inviolable, are increasingly subordinated to the demands of a progressive political agenda. Nowhere is the assault on religious belief more apparent than in our courts.

Landmark Supreme Court cases, such as *Obergefell v. Hodges*, have called into question the special solicitude traditionally given to religion in family law. In the aftermath of these momentous decisions, the boundaries between church and state are being tested anew. Much as *Burwell v. Hobby Lobby Stores, Inc.* disturbed what some saw as a settled understanding of the relationship between the state and its citizens, *Obergefell* reimagined the nature of what many Americans believe to be a fundamentally religious institution: marriage. Such decisions tear at the seams of a delicate social fabric.

In the ongoing debate over the government's authority to effect change across religious institutions, protecting the family is of paramount importance. The family plays an indispensable role in preserving religious freedom by serving as the primary buffer between the state and the individual. While historically the courts have treated the family as "an entity which has a claim against legal intrusion,"¹ that claim has been weakened in the aftermath of recent court decisions. As a consequence, the status of religion in the legal landscape of the family is more contested today than perhaps ever before.

Protecting the rights of religious individuals from further intrusion requires a keen understanding of the current legal environment. In answering the myriad questions raised by *Obergefell*, *Hobby Lobby*, and *Zubik v. Burwell*, *THE CONTESTED PLACE OF RELIGION IN FAMILY LAW* offers the most comprehensive analysis to date. Contributors to this volume include leading scholars in both family law and religious liberty law – two areas of legal scholarship that significantly overlap, yet all too infrequently interact.

Perhaps the most remarkable aspect of this volume is the diversity of perspectives contained within it. The authors include journalists, academics, ordained ministers, feminists, child advocates, physicians, social conservatives, liberals, and moderates. In conducting their research, contributors have utilized a wide range of analytical tools, including economic theory, constitutional law, social science analysis, empirical methods, historical

¹ Lee E. Teitelbaum, *Family History and Family Law*, 197 UTAH LAW REVIEW 237 (2006).

examination of the law's development, and comparative perspectives from outside the United States.

THE CONTESTED PLACE OF RELIGION IN FAMILY LAW is distinct from other publications because it includes voices missing in many academic works, such as federal and state legislators – the groups that principally decide how much protection governments accord religion in the sphere of the family – as well as litigators at the forefront of legal battles to preserve religious autonomy in family life.

Safeguarding the right to worship amid growing hostility requires steadfast vigilance and determination. I am confident that the superlative scholarship of this volume will guide individuals of faith, and all Americans, as we chart a new path forward to restore religious liberty to its rightful place in the American legal system.

Senator Orrin G. Hatch
President Pro Tempore
United States Senate

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