

## About This Issue

This is the second volume of Constitutional Issues in Family Law where we continue with excellent and thought-provoking articles on the intersection of family law and the Constitution. This issue features essays on the constitutional implications of the *Dobbs* decision as well as how it may affect families. Parentage issues are discussed in both multi-state cases and those involving unwed parents. Empirical research forms the basis on an article regarding functional parenthood and home schooling in a pandemic is also discussed. Interesting issues are raised in the context of family support obligations and the thirteenth amendment and practical methods of considering constitutional issues in the legal practice related to ART are also presented. Part II of an excellent bibliography on articles touching on the Constitution and Family Law concludes the issue.

Our Issue Editors are Anne Berger and Laura Morgan. Anne L. Berger has been practicing law in Massachusetts for over 50 years. She is a fellow of the American Academy of Matrimonial Lawyers and a fellow of the International Academy of Family Lawyers and has served in multiple positions on the governing boards of both organizations. Ms. Berger is also a former Chair and a current Trustee of the International Commission on Couples and Family Relations and has served on the JAAML Editorial Board for many years. Her practice concentrates on complex matrimonial matters with international components. Ms. Morgan is the owner/operator of Family Law Consulting in Amherst, Massachusetts, where she provides research and writing services to family law attorneys nationwide. Laura is the author of *CHILD SUPPORT GUIDELINES: INTERPRETATION AND APPLICATION* (2nd ed. 2021-2022) and the co-author of *ATTACKING AND DEFENDING MARITAL AGREEMENTS* (2nd ed. 2010), as well as dozens of law review articles. She has also presented at over 100 CLEs and serves on the Board of Editors of the *Journal of the American Academy of Matrimonial Lawyers* and *The Family Law Journal*, and previously served on the Board of *The Family Advocate*.

Our first article is entitled, *Unwed Parents: The Limits of the Constitution* authored by Albertina Antognini. Her article which focuses on the Supreme Court's jurisprudence concerning unwed parents begins with an analysis of the Court's most recent opinion on the issue, *Sessions v. Morales-Santana*. In that case the Court held that differential residency requirements for unwed mothers and unwed fathers prior to transmitting citizenship to their children born abroad violates equal protection. Professor Antognini argues that the opinion imperils previous rulings that justify sex-based distinctions between unwed parents that remain good law, but that it does not remedy the discrimination it

identifies. She suggests that it ignores same-sex-parents, fails to consider the burdens that accrue to the caretaking parent, and that it fails to acknowledge the racialized history of the citizenship rules. Professor Antognini is the James E. Rogers Professor of Law at the University of Arizona James E. Rogers College of Law. Her research considers how legal rules regulate intimate relationships, especially intimate relationships that exist outside of formal legal categories, to identify how the law maintains and perpetuates assumptions about family roles and relationships. Professor Antognini co-founded and currently co-chairs the Roundtable on Nonmarriage and the Law, which brings together scholars across disciplines studying nonmarriage. Most recently, her writings have appeared in the Washington University Law Review, the Stanford Law Review, and the Boston University Law Review.

Susan Frelich Appleton is the author of our next article entitled, *Out of Bounds?: Abortion, Choice of Law and a Modest Role for Congress*. Her piece focuses on the aftermath of *Dobbs v. Jackson Women's Health Organization* where the law grapples with the emerging problems of jurisdictional competition and choice of law as abortion-hostile states seek to impose restrictions beyond their borders and welcoming states seek to become havens for abortion patients, regardless of their domicile. She identifies the chaos generated by *Dobbs* and suggests that it poses a threat to our federal system because of Congress's failure to codify a national right to abortion in the Women's Health Protection Act or other proposals. She evaluates the prospects of using relevant provisions of the U.S. Constitution as potential solutions to the problems and finds them lacking. She concludes by advancing a model found in the existing Parental Kidnapping Prevention Act (PKPA). Susan Frelich Appleton is the Lemma Barkeloo & Phoebe Couzins Professor at Washington University School of Law. She focuses her scholarship and reasearching on issues of family, sex, gender, reproduction, and feminist legal theory, with publications that include casebooks as well as many articles and book chapters. She received the inaugural award for outstanding contributions and achievements in the field from the AALS Section on Family & Juvenile Law (2021), a Dukeminier Award from UCLA's Williams Institute for scholarship on sexual orientation and gender identity law (2018), and Distinguished Faculty and Teaching Awards from her University (1993 & 2004). An active member of the American Law Institute, she held the position of Secretary of the Institute (2004-13), has served on its Council (since 1994), and participated as an Adviser on the revision of the Model Penal Code's provisions on sexual assault and the Restatement of Children and the Law. She sits on the boards of the Futtmacher Institute and Planned Parenthood of the St. Louis Region.

Our next authors, Naomi Cahn and June Carbone have written extensively on what they describe as the "blue" and "red" family models. As the authors describe it, "the blue model, rewards investment in both girls' and boys' earning capacity and manages relationships based on

reciprocity and trust rather than gendered and hierarchical family roles. It contrasts with the red family model, rooted in religious teachings and longstanding cultural mores, which continues to celebrate the unity of sex, marriage, and procreation.” In this article entitled, *The Blue Family Constitution*, they compare the decisions of the early sixties and seventies with more recent Supreme Court decisions in terms of their practical impact on family life. They focus on decisions by which the Court advanced from protecting the right of privacy and reproductive liberty to a fuller embrace of the new family order’s moral claims in their own right. They argue however, that even as the Court expanded such rights it refused to protect the pathways into the system and reified a dual system of family formation based on class. The effect of many of the Court’s decisions, including a steady undermining of abortion rights, left some constitutional protections in place for those with the means to access them, but undercut access to a large part of the population and prevented the systemization and expansion of such basic benefits as health care and contraception for all, permitting only those with resources to reap the benefits. In the final section, the authors discuss how the *Dobbs* decision entrenches red political opposition and class-based family lives. Naomi Cahn is the Justice Anthony M. Kennedy Distinguished Professor of Law, Nancy L. Buc ’69 Research Professor in Democracy and Equity, and Co-Director of the Family Law Center at the University of Virginia School of Law. Cahn is a co-author of casebooks in both family law and trusts and estates, and she has written numerous articles exploring the intersections among family law, trusts and estates, aging and the law, and feminist theory. She is the author or editor of books written for both academic and trade publishers, including *RED FAMILIES v. BLUE FAMILIES* (OUP 2010, with June Carbone); *HOMEWARD BOUND* (OUP 2017, with Amy Zierlow); and *FAIR SHAKE* (Simon and Schuster, forthcoming 2023, with June Carbone & Nancy Levit). In 2017, Cahn received the Harry Krause Lifetime Achievement in Family Law Award from the University of Illinois College Law. She has worked with the Uniform Law Commission as a reporter for two drafting committees. Cahn is a member of the American Law Institute, an elected fellow of the American College of Trust and Estate Counsel, editor of the *AXTEC Law Journal*, and a member of the American Bar Foundation, among other commitments. June Carbone is the Robina Chair of Law, Science and Technology at the University of Minnesota Law School. Previously she has served as the Edward A. Smith/Missouri Chair of Law, the Constitution and Society at the University of Missouri - Kansas City School of Law and Associate Dean for Professional Development and Presidential Professor of Ethics and the Common Good at Santa Clara University School of Law. She received her J.D. from the Yale Law School, and her A.B. from the Woodrow Wilson School of Public and International Affairs at Princeton University. She teaches Property, Family Law, and Assisted Reproduction and the Family. She has written *FROM PARTNERS TO PAR-*

ENTS: THE SECOND REVOLUTION IN FAMILY LAW (Columbia University Press, 2000); the third, fourth and fifth editions of FAMILY LAW with Leslie Harris and the late Lee Teitelbaum (ASPEN, 2005, 2009, 2014); RED FAMILIES v. BLUE FAMILIES (Oxford University Press, 2010); MARRIAGE MARKETS : HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY (Oxford University Press, 2014), both with Naomi Cahn and FAIR SHAKE (Simon and Schuster, forthcoming 2023, with Naomi Cahn & Nancy Levit).

In *Constitutional Issues in Assisted Reproduction*, authors Gary A. Debele and Sydnie M. Peterson identify the myriad and complex constitutional issues involved in ART. They suggest that the process of moving from initiation of an ART process to the culmination of obtaining a court order establishing legal parentage provides many opportunities for constitutional issues to arise. These include the determination of who can be a legal parent, and who should have access to ART services. Through their article they hope to highlight for practitioners in this area of practice these potential constitutional issues that should be considered when drafting the contracts and pursuing legal parentage. These considerations likely will not dramatically change the dynamic of the proceedings but might inform the negotiations of the contracts and be addressed in the establishment of parentage so that contracts and parentage determinations are as legally sound as possible. Attorney Gary A. Debele is shareholder and chair of the Family Law Practice Group of the Minneapolis-based law firm of Messerli & Kramer, P.A. He is also an adjunct professor at the University of Minnesota Law School where he teaches the Family Law Capstone course to second- and third-year law students interested in practicing family law. Gary's practice includes all types of family law matters, with particular expertise in the areas of assisted reproduction, adoption, and third-party custody and visitation. Sydnie Peterson is a third-year law student at the University of Minnesota Law School. At the law school, Sydnie has participated in the Family Law Clinic for two years, gaining experience in divorce and custody matters. Additionally, Sydnie has been a member of, and Note and Comment Editor for, the Journal of Law and Inequality. Sydnie is currently a law clerk at the law firm of Messerli Kramer where she will become an associate attorney in the fall of 2023 and practice in the areas of Family Law and Business Litigation.

Our next article is entitled *Family, Religion and the Constitution: Penumbra of Sovereignty* by Nan D. Hunter. Professor Hunter describes her essay as utilizing "the metaphor of family sovereignty to analyze three stages in the history of family law and the Constitution. Over time, family law has moved from rejection of constitutional principles to incorporation of liberal equality norms to exporting the concept of private non-state sovereignty to the religious sector and free exercise law. In each stage, the hybrid public-private nature of how the legal system has constructed the family has been essential to the law's capacity to switch between shielding or disrupting internal hierarchies of

power within the family without apparent inconsistency in legal doctrine. Gender and race continue to skew application of ‘constitutionalized’ family law. But the policing function that emanated from traditional family law which was directed toward unconventional sexual and gender practices has substantially shifted. It now is more likely to reside in the growing role of religious institutions as employers, health care providers, and managers of social welfare programs.” Nan D. Hunter is the Scott K. Ginsburg Professor of Law Emerita at Georgetown University Law Center. Professor Hunter’s primary scholarship has spanned three areas: state regulation of sexuality and gender, law and social movements, and health law. Her publications include co-authorship of a field-defining casebook on sexuality gender, and the law, now in its fifth edition as well as numerous articles and book chapters. She recently received the Edie Windsor Lifetime Achievement Award from Equality Florida. Other awards include the inaugural Dan Bradley Award from the LGBT Bar Association and the “Civil Rights Pioneer” award from the American Foundation for AIDS Research.

Empirical research informs our next article by Courtney G. Joslin & Douglas NeJaime entitled, *How Functional Parent Doctrines Function: Findings from an Empirical Study*. After first describing the variety of functional parent doctrines that exist in the U.S. today, the authors attempt to test assumptions usually framed as concerns about the application of the doctrines. Their study reveals that common empirical assumptions about when, how, and to whom these doctrines are applied are not significantly supported by the data. For instance, while commentators cite concerns about meritless and abusive claims, the data reveals that in the overwhelming majority of cases, the functional parent has been the child’s primary caregiver. Further while many believe that LGBTQ parents are the most common claimants, in fact, the authors found that relatives constitute the largest share of functional parents in the data set. Further, while commentators often assume that post-dissolution custody disputes are the dominant setting in which functional parent claims are asserted, the study found functional parent claims arising in a range of scenarios, including cases involving parental death and child welfare intervention. Perhaps, most importantly while some commentators fear that recognition of functional parents will introduce instability in children’s lives, the authors found that courts commonly apply the doctrines in ways that make children’s lives more stable and secure by protecting their relationships with their primary caregivers, preserving their home placements, and shielding their families from further state intervention. The authors conclude that these functional parent doctrines “serve many families not envisioned in contemporary debates—families facing poverty, families subject to state intervention through the child welfare system, families in which the biological or legal parents are struggling with substance use disorders, housing insecurity, or incarceration, and families in which the biological or legal parent has died.” Their hope is that their empirical based re-

search will influence debates among scholars, judges, and lawmakers. Courtney G. Joslin is a Martin Luther King Jr. Professor of Law at UC Davis School of Law and is a leading expert in the areas of family and relationship recognition, with particular focus on same-sex and unmarried couples. Professor Joslin's publications have appeared or are forthcoming in *Boston University Law Review*, *California Law Review*, *Columbia Law Review*, *Harvard Civil-Rights-Civil Liberties Law Review*, *Harvard Law Review Forum*, *Iowa Law Review*, *Southern California Law Review*, *UCLA Law Review*, and *Yale Law Journal Forum*, among other sources. Professor Joslin served as the Reporter for the Uniform Parentage Act (2017) and is an elected member of the American Law Institute. Professor Joslin received her undergraduate degree from Brown University and her law degree from Harvard Law School. Douglas NeJaime is the Anne Urowsky Professor of Law at Yale Law School, where he teaches and writes in the areas of family law, constitutional law, and legal ethics. NeJaime is the co-author of a leading casebook, *FAMILY LAW IN A CHANGING AMERICA*, and his articles on the legal recognition of parent-child relationships have appeared in the *Columbia Law Review*, *Harvard Law Review*, *Stanford Law Review*, and *Yale Law Journal*. Professor NeJaime has been a leader on national efforts to reform parentage laws to accommodate families that feature nonbiological parent-child relationships, including those formed by same-sex couples and through assisted reproduction. He led the effort to pass comprehensive parentage reform in Connecticut, serving as the principal drafter of the Connecticut Parentage Act, Public Act 21-15, which took effect in 2022.

Next, we have another thought-provoking essay on the implications of the Supreme Court's recent abortion decision by Linda C. McClain & James E. Fleming entitled *Ordered Liberty After Dobbs*. Linda C. McClain is the Robert Kent Professor of Law at Boston University School of Law, where she is a co-director of the new BU Program in Reproductive Justice. She writes and teaches about family law, gender and law, feminist legal theory, and civil rights. Among her books are *WHO'S THE BIGOT? LEARNING FROM CONFLICTS OVER MARRIAGE AND CIVIL RIGHTS LAW* (Oxford University Press, 2020), *ORDERED LIBERTY: RIGHTS, RESPONSIBILITIES, AND VIRTUES* (Harvard University Press, 2013) (with James E. Fleming, her co-author on this article), and *THE PLACE OF FAMILIES: FOSTERING CAPACITY, EQUALITY AND RESPONSIBILITY* (HARVARD, 2006). Professor McClain is also a co-author of the popular casebook, *CONTEMPORARY FAMILY LAW* (West Academic, 6th ed. Forthcoming 2023) and co-editor of the forthcoming *ROUTLEDGE COMPANION TO GENDER AND COVID-19* (with her colleague Aziza Ahmed). A former faculty fellow at Harvard University's Edmond J. Safra Center for Ethics and at Princeton University's University Center for Human Values, she is a member of the American Law Institute and fellow in the American Bar Foundation. James E. Fleming is The Honorable Paul J. Liacos Professor of Law at Boston

University School of Law. His many books include *CONSTRUCTING BASIC LIBERTIES: A DEFENSE OF SUBSTANTIVE DUE PROCESS* (University of Chicago Press, 2022); *FIDELITY TO OUR IMPERFECT CONSTITUTION: FOR MORAL READINGS AND AGAINST ORIGINALISM* (Oxford University Press, 2015); *ORDERED LIBERTY: RIGHTS, RESPONSIBILITIES AND VIRTUES*, (HARVARD UNIVERSITY PRESS, 2013) (with Linda McClain his co-author on this article); *CONSTITUTIONAL INTERPRETATION: THE BASIC QUESTIONS* (Oxford University Press, 2007) (with Sotirios A. Barber); and *SECURING CONSTITUTIONAL DEMOCRACY: THE CASE OF AUTONOMY* (University of Chicago Press, 2006). He received a PH.D. in Politics from Princeton University and a J.D. from Harvard Law School after earning his A.A at University of Missouri. He has held faculty research fellowships at Princeton University's Program in Law and Public Affairs and Harvard University's Emond & Lily Safra Center for Ethics. He is a former Editor of *NOMOS*, the annual book of the American Society for Political and Legal Philosophy, and the past President of the Society. Their essay explores the implications of *Dobbs* on the future of substantive due process questioning whether the decision represents the second death of the doctrine. They discuss the Court's opinion in the "context of prior battles on the Court over whether 'liberty' under the due process clause includes substantive rights at all and, if it does, what is the proper interpretive approach to deciding the contours of such 'liberty.'" "

In *The Thirteenth Amendment in Family Law: The "Involuntary Servitude" of Support Obligations*, Laura W. Morgan & Jennifer Koiles Pratt, focus on child support and spousal support as they explore the limits, if any, of the court's general and coercive powers under the Thirteenth Amendment in family law cases. The article begins with an overview of the history of Thirteenth Amendment jurisprudence. It then examines the arguments under the amendment to avoid child support and spousal support obligations or seek-work orders. Some litigants have used similar arguments to avoid incarceration as a punishment for failure to pay, or to avoid garnishment of wages. The article concludes that such arguments have only been successful where the challenges have been to seek-work orders that demand a party seek and find a particular job in a particular field, or that a party employ the other party. Laura Morgan, a co-issue editor of this volume is the owner/operator of Family Law Consulting in Amherst, Massachusetts, where she provides research and writing services to family law attorneys nationwide. Jennifer Koiles Pratt is the managing partner of Koiles Pratt Family Law Group in Salem Massachusetts. Her practice focuses on complex divorces, complicated compensation structures, business valuations, support, and custody matters. She has been active in the American Academy of Matrimonial Lawyers and has served as a Vice President of the Massachusetts Chapter from 2015 to 2018.

Jeffrey A. Parness explores the application of parentage laws in cases involving parentage for childcare purpose and for such non child-

care purposes as tort, probate, and child support in *Choosing Parentage Laws in Multistate Conduct Cases*. He points out the choice of the laws of the forum may apply or the results may be compelled by Full Faith and Credit. These complexities arise because these rules can vary in a single state between contexts, as with parenthood in childcare and in probate settings. These rules can also vary between states in a single context, as with parentage in tort settings. His article seeks to provide guidance to those who face challenging choice of parentage law issues in multistate conduct cases. Professor Emeritus Jeffrey A. Parness, of Northern Illinois University College of Law, has been teaching in law schools since 1976. He graduated (B.A.) from Colby College and received his J.D. from the University of Chicago. He clerked for a federal district judge in the Northern District of Illinois. He started teaching at the University of Akron School of Law. He has been a visiting professor at several law schools, including Washington and Lee, Kansas, Marquette, Case Western and Loyola, Chicago.

Our final article, *The Legal Basis for Homeschooling in a Pandemic and Beyond*, by Margaret Ryznar examines the place of homeschooling in constitutional law, particularly in the context of the parental right. It introduces the concept of homeschooling and its legal basis and considers potential constitutional protections. It then analyzes the standard of review of state laws restricting homeschooling, if it were indeed a parental right and examines the limitations of such a right. Professor Ryznar has been a professor at Indiana University McKinney School of Law for over a decade where she received the Trustees' Teaching Award in 2017. She is a graduate of Notre Dame Law School and holds a master's degree in European Studies from Jagiellonian University and a bachelor's degree from the University of Chicago with a quadruple major in Economics; English Language & Literature; Political Science; and Law, Letters, & Society. Prior to joining the faculty at Indiana, she served as a law clerk to the Honorable Myron H. Bright of the United States Court of Appeals for the Eighth Circuit and practiced law with Cadwalader, Wickersham & Taft LLP in Washington, D.C. Professor Ryznar is the author of over 100 academic publications on law. She edits the Family Law Prof Blog and has been a contributor to the Huffington Post. Professor Ryznar has been a visiting professor at Brooklyn Law School, UIC Law School, and the University of Oxford.

This issue also features two student Comments. Leigh Hunnicutt contributed *Home is a Body Where You Get to be You: The Intersection of Minor Guardianship and Transgender Youth* and Ashley Rogers wrote *Swimming Free of Regulation: The Need for a National Regulatory System for Sperm Donation*.

The volume concludes with Part II of Allen Rostron's excellent bibliography on Constitutional Issues in Family Law. Professor Rostron is the William R. Jacques Constitutional Law Scholar and Professor of Law at the University of Missouri-Kansas City School of Law.



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