FUNDAMENTALISM IN AMERICAN RELIGION AND LAW

Why, from Ronald Reagan to George Bush, have fundamentalists in religion and in law (originalists) exercised such political power and influence in the United States? Why has the Republican Party forged an ideology of judicial appointments (originalism) hostile to abortion and gay rights? Why and how did Barack Obama distinguish himself among Democratic candidates not only by his opposition to the Iraq war but also by his opposition to originalism?

This book argues that fundamentalism in both religion and law threatens democratic values and draws its appeal from a patriarchal psychology still alive in our personal and political lives and at threat from constitutional developments since the 1960s. The argument analyzes this psychology (based on traumatic loss in intimate life) and resistance to it (based on the love of equals). Obama’s resistance to originalism arises from his developmental history as a democratic, as opposed to patriarchal, man who resists the patriarchal demands on men and women that originalism enforces – in particular, the patriarchal love laws that tell people who and how and how much they may love.

David A. J. Richards is Edwin D. Webb Professor of Law at New York University School of Law, where he teaches constitutional law, criminal law, and (with Carol Gilligan) a seminar on resisting injustice. He is the author of sixteen books, most recently Tragic Manhood and Democracy: Verdi’s Voice and the Powers of Musical Art (2004); Disarming Manhood: Roots of Ethical Resistance (2005); The Case for Gay Rights: From Bowers to Lawrence and Beyond (2005); Patriarchal Religion, Sexuality, and Gender: A Critique of New Natural Law (with Nicholas Bamforth, 2008); The Deepening Darkness: Patriarchy, Resistance, and Democracy’s Future (with Carol Gilligan, 2009); and The Sodomy Cases: Bowers v. Hardwick and Lawrence v. Texas (2009). He has served as vice president of the American Society for Political and Legal Philosophy and was the Shikes Lecturer in Civil Liberties at the Harvard Law School in 1998.
FUNDAMENTALISM IN
AMERICAN RELIGION
AND LAW

Obama’s Challenge to Patriarchy’s
Threat to Democracy

David A. J. Richards
New York University, School of Law
For Carol Gilligan and Nicholas Bamforth
“[F]undamentalist religious doctrines and autocratic and dictatorial rulers will reject the ideas of public reason and deliberative democracy.”

– John Rawls
CONTENTS

Acknowledgments

Introduction: Defining the Problem .............................................. 1

1 The Progressive Recognition of Human Rights under American Constitutional Law ................................................................. 14
   1. The Right to Intimate Life ................................................. 14
   2. Racism, Sexism, and Homophobia as Constitutional Evils: Moral Slavery ............................................................ 23
   3. Resistance to Patriarchal Voice as the Key to Resistance to Anti-Semitism, Racism, Sexism, and Homophobia in the Civil Rights Movements of the 1960s and Later .................................................. 31
   4. The Repressive Psychology of Patriarchy under Threat .................. 46

PART I: FUNDAMENTALISM IN LAW

2 The Fundamentalism of Constitutional Originalism .......................... 51
   1. Originalism as Fundamentalism ........................................ 52
   2. The Unreasonableness of ’Originalism’: A Critique .................... 54

3 The Motivations of Constitutional Fundamentalism .......................... 62

PART II: FUNDAMENTALISM IN RELIGION

4 Fundamentalism in Roman Catholicism ....................................... 83
   1. Vatican II and the Fundamentalism of New Natural Law ............... 85
   2. The Internal Incoherence of New Natural Law ......................... 90
      a. Historical Thomism .................................................. 90
      b. New Natural Law as Pseudo-Thomism ............................. 102
         (i) Basic Goods .................................................... 103
         (ii) Moral Absolutes .............................................. 112
3. The Substantive Unreasonableness of New Natural Law 113
4. Cultural and Psychological Roots 131

5 Fundamentalism among Protestants ........................ ........................................... 153
  1. Protestantism and Constitutional Democracy 153
  2. Contemporary Fundamentalist Protestantism 160
  3. A Critique of Protestant Fundamentalism 163
     a. The Historical Jesus 164
     b. Patriarchal Formation of Christian Tradition 173
     c. Dependence on Augustine 175
  4. Diagnosis: Patriarchal Culture and Psychology 184

6 Mormon Fundamentalism ................................................................. 193
  1. Mormon Fundamentalism 193
  2. The Unreasonableness of Mormon Fundamentalism 202
  3. Patriarchal Culture and Psychology: The Role of a Priesthood 206

PART III: FUNDAMENTALISM IN LAW AND RELIGION

7 Patriarchal Roots of Constitutional Fundamentalism ................. 213
  1. The Political Alliance of Religious Fundamentalists 214
  2. The Link between Religious and Constitutional Fundamentalism 218

8 Fundamentalism in Religion and Law: A Critical Overview ........ 231
  1. Crapanzano and Sunstein on Fundamentalism 231
  2. The Promise of Barack Obama for Democratic Constitutionalism 237
  3. Implications for Constitutional Law and Politics 246

Conclusion: Patriarchy as the American Dilemma: Facing the Problem of Fundamentalism at Home and Abroad ........... 256

Bibliography 279
Index 301
ACKNOWLEDGMENTS

This book arises from two previous coauthored books I have published, Nicholas Bamforth and David A. J. Richards, *Patriarchal Religion, Sexuality, and Gender: A Critique of New Natural Law* (Cambridge: Cambridge University Press, 2008), and Carol Gilligan and David A. J. Richards, *The Deepening Darkness: Patriarchy, Resistance, and Democracy’s Future* (Cambridge: Cambridge University Press, 2009). For this reason, I am very much in debt to both of my coauthors of these earlier books, Nicholas Bamforth and Carol Gilligan, for the collaborative inspiration that gave rise to both these earlier books and for their indispensable advice and support in writing this book.

Carol Gilligan and I have been teaching a seminar for the past decade at the New York University School of Law, and the manuscript profited from close criticism of a draft manuscript not only from Carol but also from the students in our seminar during the 2008–9 academic year, namely, Kathiana Aurelien, India Autry, Travis Coleman, Courtney Cross, Timothy Dixon, Deborah Fashakin, Danijela Gazibara, Morgan Janssen, September Lau, Marie Mark, Colleen McCormack-Maitland, Kira Mineroff, Lemar Moore, Leah Morfin, Lauren Nichols, Monique Robinson, Sarah Samuels, and Janine Tien.

I am also very much in the debt of the two editors at university presses who showed immediate interest in publishing this book, namely, John Berger at Cambridge University Press and Deborah Gershenowitz at New York University Press, and secured reviews that very much helped me in revising the manuscript. I must, in this connection, especially thank one of these external readers, Andrew Koppelman, for his invaluable comments and criticisms.

This book was researched and written during sabbatical leaves and during summers, supported in part by generous research grants from the New York University School of Law Filomen D’Agostino and Max E. Greenberg Faculty Research Fund. I am grateful as well for the financial support of the School of Law for the professional indexing of this work, and for the help and support of my assistant, Lavinia Barbu, in preparing the bibliography.
Finally, as always, my work on this book was illuminated by conversations with the person closest to me, my life partner, Donald Levy, whose love makes everything possible.

David A. J. Richards
New York, N.Y.
June 2009
FUNDAMENTALISM IN AMERICAN RELIGION AND LAW
DEFINING THE PROBLEM

It is an important development in recent American politics that religious fundamentalists from diverse denominations and theologies (e.g., Protestants, Catholics, Mormons) have found common ground and not only have aggressively moved into American politics but also have been increasingly influential, notably on the two administrations of President George W. Bush.\(^1\) One of the ways in which this development has been expressed is in the role such fundamentalists have increasingly played in influencing judicial appointments, including those to the Supreme Court. Their preferred approach to constitutional interpretation is originalism, a view advocated by Justices Scalia and Thomas, appointed, respectively, by Presidents Reagan and George H. W. Bush to the Supreme Court. More recently, two justices were successfully appointed by President George W. Bush to our highest court, Chief Justice Roberts and Justice Alito, at least one of whom (Alito) may be an originalist and the other (Roberts) often allied with them.\(^2\) During the presidential election campaign of 2008, the Republican candidate, John McCain, though critical of many of the policies of George Bush, followed Bush and Republican Party orthodoxy in advocating strict constructionism as the appropriate criterion for appointments to the federal judiciary, including the Supreme Court (citing, as models, Roberts and Alito, and the late chief justice Rehnquist).\(^3\) His Democratic opponent, Barack Obama, clearly rejected this approach to constitutional interpretation; indeed, as a senator, he opposed and voted against the appointments of both Roberts and Alito.\(^4\) It is already quite clear, in terms of the pending nomination by President Obama of Sonia Sotomayor to the Supreme

---


Fundamentalism in American Religion and Law

Court (replacing the retiring Justice Souter) and probable later appointments, that arguments over judicial appointments by President Obama, including opposition to his proposed appointees, will continue to be framed in terms of what has become Republican Party orthodoxy on constitutional interpretation.\(^5\)

If there were ever a time for a closer normative and explanatory study of these developments, it is now. The stakes could not be higher, and it is crucial that we understand what those stakes are. This book undertakes an original critical and psychological study of both these developments, one that is both timely and important. It both supports President Obama’s rejection of originalism and illuminates why his approach deserves the support of Americans in general concerned with preserving the integrity of our democratic constitutionalism. Properly understood, the issue should transcend party affiliation, as all Americans have an overriding interest in what distinctively unites us as a free people under law, our constitutionalism. On examination, originalism, which claims to honor our founders, dishonors and betrays them.

Obama distinguishes himself from all other American political leaders in the way he has opposed originalism. Why? It is not just because compelling normative arguments are available that support his position. Such arguments have been available for some time,\(^6\) but no politician of Obama’s stature has felt moved to embrace them as part of a larger program for reclaiming and extending American democracy itself. There is both a cultural and a psychological question here. Culturally, why do these arguments come to have an appeal for Obama and others at a certain point in American cultural and political history? And psychologically, what in Obama’s background explains why he is so moved to resist originalism? The interest of this book for many may be the ways its critical perspectives on the merits and psychology of fundamentalism as well as the resistance to fundamentalism yield, at the end of my argument, illuminating answers to both questions. To anticipate, let me sketch these answers now, as a way of persuading you that my argument may help you understand both how and why Obama has had the appeal he has, and what he may mean for the future of our democracy and for democracy everywhere.

On the cultural point, this book views the appeal of originalism to be rooted in a patriarchal psychology very much threatened by the advances in the understanding and protection of human rights made possible by the human rights

---


movements of the 1960s and later. These advances were themselves made possible, I argue, by a personal and political psychology of resistance to injustices that Americans had come to regard as in the nature of things. Originalism has had the appeal it has had not on its normative merits, but as the expression of a reactionary psychology that sought to limit and even reverse the advances made in the 1960s and later. American politics had been dominated since Ronald Reagan’s presidency by a conservative movement that drew its appeal from this psychology. Obama’s appeal arose at a time when Americans began to confront how bad the consequences of the power this movement had uncritically enjoyed for much too long had been for American democracy. Obama spoke very much in a voice made possible by the human rights movements of the 1960s, in particular, the voice of Martin Luther King, who appealed to Americans across the chasm of race that had unjustly divided them for so long. Obama, a man of color, found a voice with a similar appeal, resisting the ways in which conservative politicians had divided Americans from one another, appealing to a deeper basis of common values rooted in our common constitutional values. At a moment when national crisis brought into doubt the long domination of our politics by reactionary conservatism, Americans were ready to respond to this moral voice. So much for the cultural question.

On the psychological point, my argument offers a personal and political psychology that explains both how resistance to injustice arises and how such resistance is quashed. Because the argument appeals at both points to a psychology rooted in both resistance to and enforcement of patriarchal values and practices, it makes possible a fresh rethinking of psychological questions not previously addressed. In particular, it offers a plausible explanation of what it is in Obama’s psychological development that explains why he sees what he has seen about originalism as a threat to democracy. I take what Obama sees – patriarchy as a threat to democracy – as the subtitle of this book because it explains, as I hope to show, what a certain kind of antipatriarchal developmental psychology makes possible in the emotional intelligence, including the ethical and political intelligence, of humans. What I show this psychology enables is hearing, listening to, and giving appropriate ethical and political weight to the resisting voices of precisely those groups whom patriarchy ignores, indeed represses. What Obama accordingly demands from constitutional interpretation is an interpretive attitude democratically responsive to those voices, grounded, as they often are, in the more just protection of the basic human rights owed to all Americans under our constitutionalism.

There have been a number of important studies of fundamentalism both in American religion and in American politics and constitutional law. But, aside

from one important book by Vincent Crapanzano, there has been little interest in what they share in common. Even Crapanzano, while placing the anthropological study of religion and law side by side, confesses having “not . . . much faith in most sociological or psychological answers” to the appeal of fundamentalism in law, and acknowledges as well his “inability to view the two literalist discourses [in religion and constitutional law] from the same vantage point.” My aim in this book is, building on Crapanzano’s insights (in particular, into fundamentalist American religion), to study fundamentalism both in American religion and in constitutional law not as separate, though related, topics but as aspects of one problem.

The problem is the continuing power of patriarchy over our conceptions of authority both in religion and in law. By patriarchy, I understand “a hierarchy – a rule of priests – in which the priest, the hieros, is a father. It describes an order of living that elevates fathers, separating fathers from sons (the men from the boys) and men from women, and placing both children and women under a father’s authority.” It is important to be clear that patriarchy, thus understood, identifies, as its central case, a hierarchy in a priesthood (operative in religion and in personal life), and that, in placing fathers in this role, it divides not just men from women, but men from men and boys and women from women and girls. Patriarchy, properly understood, is an unjust burden on men as well as on women. It divides both from their common humanity and proscribes a structure of authority that expresses their common humanity – an ethics of equal respect and a democracy of equal human rights, including rights to voice.

Carol Gilligan and I argued in The Deepening Darkness, on the basis of Roman history and Latin literature, that patriarchy, thus defined, took a particularly extreme and influential form in the religion and politics of ancient Rome, linking the power of the patriarchal family in Roman private and public life to Rome’s extraordinary psychological capacity to bear the burdens of relentless imperialistic violence in war. We trace its later influence in the religion, art, psychology, and politics of Western culture, including its distortion of democratic constitutionalism. Patriarchy, as we study it, is a hierarchical conception requiring that only the father has authority in religion, politics, or law – resting on the


9 Id., 296.
repression of the free, resisting voice of those unjustly subject to his authority, both women and men. We offer a developmental psychology that explains how such patriarchal authority arises and is sustained, namely by traumatic breaks in personal relationships (including of sons from mothers), leaving a devastating sense of loss and a disjunction between relationship and identification. The patriarchal voice becomes internalized, along with its gender stereotypes, accepted as in the nature of things or as the price of civilization. Such identification expresses itself through a rigidly binary conception of manhood and womanhood that not only accepts loss in intimate life as in the nature of things (e.g., loveless arranged marriages that serve patriarchal ends) but also is prone to forms of unjust repressive violence, including scapegoating, against any imagined threat to its authority, including resistance to its unjust demands. I call this personal and political psychology the Gilligan-Richards thesis.

Patriarchy expresses its demands in two related ways. First, it rigidly imposes a gender binary (e.g., reason as masculine, emotion as feminine), which tracks not reality but the gender stereotypes that support patriarchy. And second, it always places one pole of the binary in hierarchical order over the other. Our psychology of patriarchy offers an explanation of how these two features of patriarchy come to be culturally entrenched, quashing a moral voice that challenges both the gender binary and its hierarchical ordering. The opposite of patriarchy is, we argue, democracy, in which authority accords everyone a free and equal voice, a voice that both breaks out of the gender binary and contests hierarchy. What patriarchy precludes is love between equals, and thus it also precludes democracy, founded on such love and the freedom of voice it encourages. Because patriarchy is inconsistent with the normative demands of democratic constitutionalism, its persistence is a continuing threat to democracy.

My project in this book is to deepen and extend this analysis by showing how it offers a compelling normative critique as well as an explanatory account of the appeal of fundamentalisms for Americans both historically and, in particular, in contemporary circumstances. How is it possible that in an advanced, well-educated nation like the United States, in which there is such a deep consensus about the enduring values of our democratic constitutionalism, fundamentalisms should flourish both in religion and in law? If such fundamentalisms are in contradiction to our democratic traditions, how is it that this is so little understood and seen? That such views should have gotten so far in American politics shows something troubling about American culture and psychology in a constitutional democracy as developed and enlightened as that of the United States. That so many Americans cannot even see the problem defines, I believe, the problem.

At the heart of the problem is the degree to which patriarchal conceptions and institutions have been uncritically assumed by many American religions in general and fundamentalist religions in particular. Americans live under one of the most robust constitutional traditions protecting religious liberty. Such protections include not only a guarantee of free exercise but also, more radically,
a prohibition on the state’s establishment of religion. The consequence has been what leading advocates of these protections anticipated: because religious teachers must draw support directly from the people (not from the state), America would develop and sustain one of the most diverse and pluralistic ranges of religious and philosophical convictions in the world. Americans, for example, are much more religious than Europeans, where established churches still exist. Precisely because the state in America may not establish religion, religion in America is democratically closely tied to the people and has flourished in independence from state power. Sometimes, its independence has empowered American religions to criticize on the ground of ethics such state-supported evils as slavery as well as racism and sexism, and it has supported movements that questioned and resisted these evils (e.g., the abolitionist movement). But, in other cases, such independence has led American religions and the people who supported them to defend, as God’s word, such evils (at one time, only the Quakers among American religions questioned slavery; the others were proslavery). My interest in this book is in these latter religions. Precisely because of the separation of church and state in the United States, my argument is directed not at the state, though it has implications for the interpretation of the religion clauses, as I argue in Chapter 8. I accept, as normatively sound, the general constitutional structure for the protection of religious liberty in the United States. But it is the very democratic freedom of religion in the United States that has rendered it so powerful, and my argument is thus an internal one with my fellow Americans, namely, that they ask themselves whether the interpretation of patriarchal religion in their lives is not, in fact, inconsistent with the democratic values that have supported religious freedom in the United States, values in which, as with Americans generally, they take just pride.

What I am at pains to show (in Part II) is that these religions assume and carry forward patriarchal ideas and practices, which they have uncritically absorbed from the role Roman patriarchy played in the formation of Christianity under the Roman Empire, in particular, after Christianity became the established church of the Roman Empire. Such religions have not only flourished here but have also become important institutions in sustaining and defending patriarchy, a practice that the historical Jesus conspicuously questioned (see Chapter 5). In particular, in the face of any religious or other movement that deeply questions patriarchy, these religions have gravitated to forms of fundamentalism that structure authority in a patriarchal male priesthood, expressing a personal and political psychology of

---


Defining the Problem

traumatic loss in intimate life that Christianity absorbed from Roman patriarchal and related practices. It is this structure of authority and its underlying psychology that do not just make the religion insensitive to resisting voices but also silence and demonize the voices and experience of the women and men who would reasonably resist its demands. The consequence is a sense of ethics and politics that fails to take seriously the voices and experiences of more than half the human race and that flouts the central principle of a democratic ethics and politics, equal respect for all. Patriarchy feeds on an echo chamber of its own narcissistic voice, endlessly speaking and hearing only itself. A religious culture, in which patriarchy becomes deeply entrenched, loses the capacity for reasonable doubt about its views, which is shown by the way the polemic of gender scapegoating against dissenters flourishes instead of reasoning with democratic equals. Its views even of its founder, Jesus of Nazareth, ignore what is most distinctive and moving in his antipatriarchal teaching (Chapter 5). Patriarchy thus undermines religion and the role of religion in supporting a democratic ethics and politics.

It is for this reason that it is so important to show, as I try to do in this book, how unreasonable these religions are in terms of their own internal traditions (notably, the antipatriarchal teachings of the Jesus of the Gospels), let alone unreasonable in light of larger developments in American politics and law. It is because of the role of patriarchy in these religions and the culture they shape that they have uncritically and aggressively moved into American politics and have had the appeal and impact they have had on constitutional law. My argument explains precisely what is so puzzling to many abroad: the failure of so many Americans not only not to see the problem but indeed to aggravate the problem by accepting a fundamentalism in law (originalism) that is as unreasonable as fundamentalism in religion, and much more pernicious because, in the name of the founders, it betrays the secular constitutionalism that is perhaps the founders’ greatest legacy to us. The contradiction between patriarchy and democracy is not seen – indeed, is so easily dismissed – because our religion has so uncritically structured its authority in terms of a patriarchal priesthood and a supporting patriarchal psychology that we have come to regard patriarchy as nature, indeed as God’s law. Both these patriarchal structures and the supporting psychology darken our ethical intelligence in religion and in law. We need, as Americans, to question the psychology of patriarchal manhood and womanhood – its force in our religion and in our politics– that has held us captive for much too long. We cannot deal with the problem until we can see the problem.

Fundamentalism is, in its nature, reactionary and repressive. It arises in reaction to progressive, antipatriarchal developments in religion or in law, which it represses. These contemporary developments have been of two sorts: first, a normative conception of basic human rights, including rights to conscience and voice, owed to all persons – irrespective of religion, race (ethnicity), gender, or sexual orientation; and second, questioning, as illegitimate forms of what I call moral slavery, traditional grounds on which entire groups of persons have been
excluded from the scope of protection of basic human rights. I argue that patriarchy is an important explanatory element of these traditional grounds and, for this reason, questionable as a ground for authority in religion or law in a constitutional democracy. The civil rights movements of the 1960s and later had the impact they had on American constitutional law because they brought an antipatriarchal voice to bear on understanding and criticizing Americans’ extreme religious intolerance, racism, sexism, and homophobia (Chapter 1).

Nicholas Bamforth and I elaborated a form of this argument in our critical study of new natural law, which attempts to defend the current views of the papacy on gender and sexuality on ostensibly secular grounds.¹⁵ We argue, both on internal grounds of consistency and on external grounds of moral plausibility, that new natural law is certainly not the secular view it claims to be but, in fact, a highly sectarian religious view. In the course of that critique, we develop a definition of fundamentalism, a view relying on an appeal to the certainty of a specific understanding of authority, rooted in the past, a certainty that is to guide thought and conduct today irrespective of reasonable contemporary argument and experience to the contrary.¹⁶ At the heart of fundamentalism is a form of irrationalism, a sectarian conception of certainty – itself demonstrably unreasonable – that refuses to be open to contemporary argument and experience. It is that refusal to be open to reason or to reasonable arguments that places fundamentalisms, as I shall argue, in such tension with the role of deliberative reason in constitutional democracies.

What I am undertaking in this book, drawing on these earlier works, is an integrated study of fundamentalism in American religion and constitutional law. Patriarchy has been as stable and persistent as it has been in human societies because a developmental psychology of traumatic breaks in intimate life sustained its demands on both men and women. Why and how does this psychology continue to enjoy appeal today even among contemporary Americans? My diagnostic aim in this book is to use the appeal of fundamentalism in America as an illuminating case study of the continuing force of this psychology. What may make my diagnosis of interest is that it offers a not obvious and illuminating explanation of a range of otherwise puzzling symptoms of fundamentalism both in American religion and in law – the need for certainty as opposed to reasonable grounds for belief, its ahistorical appeal to history, the anger and even violence directed at dissent, and of course, its demonization of certain contemporary claims for justice in matters both of sexuality and gender.

My interest in fundamentalism is not only diagnostic but also critical. Indeed, my sense that diagnosis is the appropriate term for my project arises from my sense that the appeal of fundamentalism should concern us, both religiously and

¹⁶ See id., 256.
Defining the Problem

politically, because its doctrines are so critically problematic for two reasons. First, fundamentalist views arise as interpretive claims within a tradition, whether a religious tradition like Christianity or a constitutional tradition like American constitutionalism, and their interpretive claims introduce incoherence and even inconsistency into how the tradition is understood or to be understood. And second, such interpretive claims not only are internally flawed but also so interpret the tradition that it fails any longer to offer an attractive and reasonable view of the world and human life that can or would appeal to someone not already committed to the fundamentalist view. In a secular constitutional democracy, like the United States, such fundamentalist views must, as a basis for political action, let alone constitutional interpretation, be constitutionally problematic. If such fundamentalist views, on critical examination, carry with them such a high price of internal inconsistency and external unreasonableness, we must naturally ask why they enjoy the appeal that they have.

I come to this question, the question of diagnosis, in the same way any student of an irrationalist view, like anti-Semitism or racism, inquires into its continuing appeal. What makes my inquiry into fundamentalism, both in religion and in law, interesting is that it is not obvious that fundamentalism is as flawed by irrationalism, both internally and externally, as the now more widely acknowledged and understood irrationalist evils of anti-Semitism and racism. It is a matter of argument, the argument of this book, that fundamentalism in religion and law is irrational in terms of both internal and external criteria, and thus the further question of diagnosis arises – what psychology sustains such a problematic (because it is irrationalist) interpretive attitude? It is at this point that I turn, by way of deeper explanation, to the psychology that I argue sustains patriarchy, a psychology that clarifies as well the appeal of irrationalist prejudices like anti-Semitism and racism.

I begin in Part 1 with the examination of fundamentalism in American constitutional law, showing its critical defects and then turning to its appeal. The argument examines critically, in terms of both internal and external criteria of reasonableness, the form such fundamentalism takes in the school of constitutional interpretation called originalism (Chapter 2). Originalism, I argue, is a form of source-based fundamentalism, one not only marred by internal incoherence and even contradiction but also deeply unreasonable in the way it walls constitutional interpretation off from the growth in both our moral and our scientific experience over time and in contemporary circumstances. In particular, originalism draws its appeal from the way it forbids constitutional interpretation to take account of reasonable contemporary views of sexuality and gender, in effect, attacking often rather intemperately a range of constitutional decisions that give effect to such views, as I show in Chapter 3 by examining both the tone and the substance of Justice Scalia’s dissents in such cases. Why does such an unreasonable view enjoy the psychological support it does? Why the angry, dismissive, even contemptuous tone of such dissents? It is, as a way of answering this question,
that I turn to the diagnosis and critique of fundamentalism in religion. It is the persistence of American fundamentalism in religion that explains, so I argue, not only the psychology that leads originalists in law to take the position they do but also, more generally, why many Americans find originalism the attractive position they suppose, wrongly, it to be.

My argument in Part II examines three forms of fundamentalism in religion: the new natural lawyers as defenders of the normative views on sexuality and gender of the papal hierarchy of the Catholic Church (Chapter 4); Evangelical fundamentalists in Protestant denominations (Chapter 5), and Mormonism (Chapter 6). Catholics and Protestants, as orthodox forms of Christianity, disagree on matters of both theology and religious conviction; and both regard Mormonism as, at best, a highly unorthodox form of Christian belief. Nonetheless, all these divergent religious views, as interpretations of the Christian tradition, adopt fundamentalist views on matters of sexuality and gender, views that condemn and repudiate central claims of the progressive developments discussed in Chapter 1.

Although fundamentalists in religion often define themselves in terms of the certainty of a set of religious beliefs (the inerrancy of the Bible, or the Virgin Birth), the form of fundamentalism that is of contemporary interest – both in religion and in law – is one that ascribes an unquestionable certainty to beliefs about gender (the subordination of women in matters of religious and moral authority) and about sexuality (the intrinsic wrongness, for example, of contraception, abortion, and gay and lesbian sex). These views are fundamentalist because they ascribe a foundational certainty to such beliefs, as beliefs that must be held and acted on irrespective of reasonable argument to the contrary.

I distinguish two grounds for such fundamentalism: norm based and source based. Source-based fundamentalisms rest on an interpretation of the authority of sacred scriptures – for Evangelical Protestants, the Bible; for Mormons, the Bible as well as the Book of Mormon, Doctrine and Covenants, and Pearl of Great Price. Fundamentalists read such texts as the exclusive historical source (sola scriptura) of ultimate religious authority and further suppose that they require belief in and action on the certainties of gender and sexuality just mentioned.

Roman Catholicism, in contrast, ascribes ultimate religious authority to interpretive traditions that include but are not limited to the Bible, and that regard Bible interpretation as not limited to the more literal interpretations favored by many Protestants. Such a tradition – historically open to the interpretive relevance of secular philosophical traditions like Aristotelianism and even lessons learned from historical experience – may come to question and repudiate, as Catholicism did in Vatican II, many of the positions once regarded as fundamental to Catholicism, for example, its rejection of religious toleration in particular and political liberalism in general.17 When Catholic apologists, like the new natural

Defining the Problem

lawyers, defend traditional Catholic teaching on matters of sexuality and gender, a teaching affirmed by the papal hierarchy, they do so on grounds of an ostensibly secular argument for certain norms that, they argue, establish as certainties views of gender and sexuality that repudiate the progressive tradition on these matters.

I argue, examining each of these variant grounds for fundamentalism, that they are both internally inconsistent and externally unreasonable. An important argument for internal inconsistency is how they ignore or fail reasonably to interpret the life and teachings of the founder of Christianity, Jesus of Nazareth, an argument that has force against both source-based and norm-based fundamentalisms, as interpretations of the Christian tradition. Other arguments will have more force against one ground for such fundamentalism as opposed to another, for example, questioning the allegedly secular arguments of the new natural lawyers.

What organizes and explains these otherwise diverse religious views – in particular, their fundamentalism on matters of sexuality and gender – is the role that patriarchy plays in supporting their common fundamentalist views. This is shown not only by the limitation of the priesthood or ministry in Catholicism or Evangelical fundamentalists or Mormonism to men, clearly excluding women and the authority of women’s voices and experience, but also by the requirements placed on the authority of such a male priesthood, namely that of patriarchal fathers. Catholicism, for example, imposes on its exclusively male priesthood the requirement of celibacy with consequences that I explore. And both the forms of more orthodox fundamentalist Christianity I examine (i.e., Catholicism and Evangelical Protestantism) crucially accord the kind of interpretive authority they do to a male priesthood or ministry because of a conception of original sin based on, as I shall argue, a highly controversial interpretation of the Adam and Eve narrative in Genesis that has appeal because of patriarchal assumptions never questioned. The role of patriarchy in Mormonism is, I shall argue, rather more stark, as it both arose from and appealed to an anachronistic revival of ancient Jewish patriarchy, embodied in the prophet Joseph Smith, as a solution to what Smith and his followers found to be the intolerable openness of American Christian freedom to new experiments in living, including the religious authority of women.

I turned to the study of fundamentalism in religion as a way of answering the question, Why does fundamentalism in constitutional law enjoy the appeal it does? In Part III, I show how and why originalists like Justices Scalia and Thomas are psychologically drawn to their position on the basis of an uncritical religious fundamentalism (Chapter 7).

In light of the critique and diagnosis of fundamentalism in both American religion and law, I then turn to the implications of this study for advancing and deepening political democracy in the United States and elsewhere (Chapter 8). First, I explore how my view offers a deeper explanation and criticism of developments in religion and law, which are almost always discussed in isolation from each other, a failure of intelligence that bespeaks the spell of the underlying
Second, and perhaps more important, I show something that surprised me and may surprise you, namely how the psychological and cultural perspectives of this book cast a flood of light on both how and why Barack Obama has seen more deeply into and resisted originalism than any other American politician, and why, as this point in our history, his moral voice has found such a resonance in the American people. And third I ask, If patriarchy, as I argue, is the root of a range of political evils, some of them now constitutionally recognized as such, should we reframe our understanding of religious liberty and/or antiestablishment to take account of such compelling secular state purposes? My answer calls, if anything, for a more muscular defense of the antiestablishment values of religious liberty that our founders took so seriously and, paradoxically under the influence of the corrupt form of originalism I criticize in this book, we, to our cost, do not. Nothing in our constitutional traditions of free exercise and antiestablishment justifies the degree of political support patriarchal religion enjoys today in the United States. It was, rather, precisely such entanglement of the ostensibly democratic power of the state with undemocratic religion that, for Madison and Jefferson, corrupted both democratic politics and religion as, in their view, it had historically corrupted Christianity (once Constantine established Christianity as the church of the Roman Empire) into its support of illegitimate regimes, for example, imperialistic monarchies. It is a symptom of the constitutional pathology that originalism is that, in the name of the founders, it so nesciently betrays them and us.

Finally, the conclusion draws together the threads of my analysis in terms of the theory of faction that the deepest thinker among our founders, James Madison, took so seriously. Madison regarded religious faction as among the deepest threats to democratic constitutionalism, and I show that the unholy alliance of religious and legal fundamentalism today has unleashed on us this threat. I then offer reasons for thinking that my account of fundamentalism in the United States can be reasonably generalized to illuminate fundamentalism abroad as well, for example, constitutional debates in India, the world’s largest democracy, as well as the aggressive resurgence of violent forms of fundamentalism abroad. If patriarchy is in these ways such a threat to democracy everywhere, it is perhaps time for us responsibly to understand and face the American dilemma as the contradiction between patriarchy and democracy that all peoples now face. It is for this reason that I argue that the continuing power of patriarchy today, in an age of democracy, poses the twenty first-century democratic dilemma.

Carol Gilligan, on reading an earlier draft of this book, observed that its appeal to reason expresses deep emotion as well, in particular, moral indignation. She pressed me better to understand both the content and tone of my argument. It is perhaps a feature of my own recent work, which has come self-consciously to question gender binaries (reason as masculine, emotion as feminine), that I should have written this book in the way I have. Carol Gilligan, all of whose
work in psychology arises out of close observation of voice resisting patriarchy, classically has put the point as speaking in a different voice, and what she observed about this book, in contrast to the many others I have written on constitutional law, was its different voice. What Carol and I traced in The Deepening Darkness was a psychological argument about evidence of resistance to patriarchy (reoccurring through time and across culture). This book is itself an act of resistance – hence the tone of moral outrage, the impassioned voice, the contempt for those who perpetuate injustice and prejudice, using their power to silence dissent and abrogate the rights of others. The best of American constitutional law rests, I have come to believe, on the role it accords resisting voice, and the worst on the repression of such voice. Since I have come to see, as I argue here and elsewhere, patriarchy as the root of the problem, I have responded to the patriarchal rage that underlies originalism with a defense of democracy, a sense of what Carol calls righteous fury versus patriarchal rage. I have come to see my own wedding of reason and emotion in this book as the way I have found my voice and, through breaking the gender binary, to see what I believe in this book I came to see, and as a citizen of a great and beloved democracy, to share what I see with you.
Contemporary American fundamentalism draws its reactionary force from the successes of movements for civil rights in the 1960s and thereafter, including judicial acceptance of many of the arguments of these movements about the proper interpretation of American constitutional principles. It is these constitutional developments that fundamentalism repudiates.

To set the stage for the study of American fundamentalisms (in law and in religion), we must understand these judicial developments, including their normative justification in the judicial elaboration of basic constitutional principles. These judicial developments are of two related sorts: first, the recognition of a basic human right of intimate life owed all persons; and second, the recognition that certain grounds like religion, ethnicity, gender, and sexual orientation cannot be a just basis for the abridgment of such a basic right. I begin with the basic right and then examine the suspect grounds as resting on a rights-denying tradition of what I call moral slavery. Finally, I argue that both developments can be plausibly understood as giving expression to moral voices in the civil rights movements critical of the role patriarchy played in distorting the interpretation of American constitutional values.

1. THE RIGHT TO INTIMATE LIFE

In 1965, the Supreme Court, in *Griswold v. Connecticut*, constitutionalized the argument for a basic human right to contraception that had been persistently and eloquently defended and advocated by Margaret Sanger for more than forty years, a decision that Sanger lived to see. The Court extended the right to abortion services in 1973 in *Roe v. Wade* (reaffirming its central principle in 1992),

---

and – after denying its application in 1986 to consensual homosexual sex acts in *Bowers v. Hardwick*⁵ – reversed itself in 2003 in *Lawrence v. Texas*, holding that gay and lesbian sex was fully protected by the right and that laws criminalizing such acts were unconstitutional.⁶ A related form of analysis was used, albeit inconclusively, in cases involving the right to die.⁷ Three of these cases (contraception, abortion, homosexuality) can be understood on the grounds of a basic right to intimate personal life, one of them (death) involving another basic right (an aspect of the right to life or meaningful life).⁸ I focus here on the first three cases.

Margaret Sanger’s and Emma Goldman’s arguments for the right to contraception were rooted in rights-based feminism, a feminism that challenged the traditional grounds on which women had been denied respect for the basic human rights that long had been accorded to men. Sanger’s and Goldman’s arguments had two prongs, both of which were implicit in the Supreme Court’s decisions in *Griswold* and later cases: first, a basic human right to intimate life and the right to contraception as an instance of that right; and second, the assessment of whether laws abridging such a fundamental right met the heavy burden of secular justification that was required.

The foundation of the fundamental human right to intimate life was as basic an inalienable right of moral personality as the right to conscience. Like the right to conscience, it protects intimately personal moral resources (thoughts and beliefs, intellect, emotions, self-image, and self-identity) and the way of life that expresses and sustains them in facing and meeting rationally and reasonably the challenge of a life worth living – one touched by enduring personal and ethical value.

The human right of intimate life was interpretively implicit in the historical traditions of American rights-based constitutionalism. In both of the two great revolutionary moments that framed the trajectory of American constitutionalism (the American Revolution and the Civil War), the right to intimate life was one of the central human rights, the abridgment of which rendered political power illegitimate and gave rise to the Lockean right to revolution.⁹

---

⁷ See *Cruzan v. Missouri Department of Health*, 496 U.S. 261 (1990). Justice Rehnquist, writing for a 5–4 majority, accepts that a right to die exists and applies to a case involving passive euthanasia but denies that the state has imposed an unreasonable restriction on that right on the facts of the case. But see also *Washington v. Glucksberg*, 521 U.S. 702 (1997) (where the Court unanimously refused to extend right of constitutional privacy to state prohibition of physician-assisted suicide, or active euthanasia, though five justices allowed for as-applied challenges to such statutes).
⁹ On American revolutionary constitutionalism as framed by these events, see David A. J. Richards, *Foundations of American Constitutionalism* (New York: Oxford University Press, 1989); Richards,
At the time of the American Revolution, the background literature on human rights, known to and assumed by the American revolutionaries and founding constitutionalists, included what the influential Scottish philosopher Francis Hutcheson called “the natural right [of] each one to enter into the matrimonial relation with any one who consents.”10 Indeed, John Witherspoon, whose lectures Madison heard at Princeton, followed Hutcheson in listing even more abstractly as a basic human and natural right a “right to associate, if he so incline, with any person or persons, whom he can persuade (not force) – under this is contained the right to marriage.”11 Accordingly, leading statesmen at the state conventions ratifying the Constitution, both those for and those against adoption, assumed that the Constitution could not interfere in the domestic sphere. Alexander Hamilton, of New York, denied that the federal Constitution did or could “penetrate the recesses of domestic life, and control, in all respects, the private conduct of individuals.”12 And Patrick Henry, of Virginia, spoke of the core of our rights to liberty as the sphere in which a person “enjoys the fruits of his labor, under his own fig-tree, with his wife and children around him, in peace and security.”13 The arguments of reserved rights both of leading proponents (Hamilton) and of leading opponents (Henry) of adoption of the Constitution thus converged on the private sphere of domestic married life.

At the time of the Civil War, the understanding of marriage as a basic human right took on a new depth and urgency because of the antebellum abolitionist rights-based attack on the peculiar nature of American slavery; such slavery failed to recognize the marriage or family rights of slaves,14 and indeed inflicted on the black family the moral horror of breaking them up by selling family members separately.15 One in six slave marriages thus were ended by force or sale.16 No aspect of American slavery more dramatized its radical evil for abolitionists and Americans more generally than its brutal deprivation of intimate personal life, including undermining the moral authority of parents over children. Slaves, Weld argued, had “as little control over them [children], as have domestic animals over

---

13 See id., vol. 3, p. 54.