Fundamentalism in American Religion and Law

Obama's Challenge to Patriarchy's Threat to Democracy

David A. J. Richards

www.cambridge.org/9780521191227
This page intentionally left blank
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.................................................................................................................. ix

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
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. 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. 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). 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. It is already quite clear, in terms of the pending nomination by President Obama of Sonia Sotomayor to the Supreme Court, that his preference for a judge who would interpret the Constitution as the framers intended will be a significant departure from the two appointed by President Bush.

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., 326.


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 disjuncture 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

---

