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Introduction: Perspectives on Religious Fundamentalism and Families in the U.S.

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PERSPECTIVES ON RELIGIOUS FUNDAMENTALISM AND FAMILIES IN THE U.S.

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The Institute of Bill of Rights Law sponsored this symposium as a forum (1) for exploring the nature and exercise of fundamentalist religion in the U.S., (2) for better understanding fundamentalist families, and (3) for examining the role of the state when religious exercise, family autonomy, and individual rights collide. The group of academics that gathered at the William and Mary School of Law in November 2009 comprised some of the nation's foremost scholars of the First Amendment's religion clauses, family law, and American religious history and culture. Their contributions, first at the symposium and again in this issue, help us to think more deeply about absolutist beliefs in a pluralist society, to better evaluate current conflicts and anticipate others that might loom, and to participate in devising better paths forward.

The essays here pursue three broad themes. The first one is the meaning and import of "fundamentalism" itself—or at least the American version of it. Randall Balmer, Andrew Koppelman, and Frederick Gedicks turn their attention to this question.

Randall Balmer, a professor of American religious history at Barnard College, Columbia University, provides essential historical and cultural context in *Fundamentalism, the First Amendment, and the Rise of the Religious Right*.[1] Balmer describes early nineteenth-century evangelical Baptists' enthusiastic support of Thomas Jefferson and of the separation of church and state embodied in the First Amendment. Balmer then explains how American fundamentalism emerged in the early twentieth century as a conservative response to the rise of theological liberalism in mainline Protestant denominations. And he notes the irony of contemporary efforts by the Religious Right (whose own success was, of course, made possible by the "free market of religion" guaranteed by the First Amendment) to collapse the distinction between church and state through efforts including advocacy of prayer in public schools, taxpayer vouchers for religious schools, faith-based initiatives, and religious symbols and monuments in public spaces.

Frederick Gedicks takes a philosophical approach to understanding American fundamentalism in *God of Our Fathers, Gods for Ourselves: Fundamentalism and*

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[1] 18 WM. & MARY BILL RTS. J. 889 (2010).

Postmodern Belief.[2] He begins his analysis with the postmodern condition. The (our) postmodern condition is defined by the absence of "metanarrative"; in other words, the failure of philosophical, scientific, or religious approaches to provide a comprehensive and universally acceptable explanation of life or the world. Gedicks views American religious fundamentalists as having rejected postmodernism and the pluralism it implies. Instead, they believe that they possess the only truth. While religious fundamentalists are not unique in making this sort of claim, Gedicks argues that what distinguishes them is that "they know this truth and the God that guarantees it with such reliability and confidence that they are impelled to structure society around it." American fundamentalism thus embraces the alignment of government with "true religion"—not as a nation that goes so far as to suppresses dissent, but as a Christian nation that tolerates dissenters. Gedicks himself embraces the postmodern condition and implicitly chides fundamentalists not only for their certitude, but also for the hubris inherent in their attempts to imbue American secular society with public religion.

In his essay *The Nonproblem of Fundamentalism*,[3] Andrew Koppelman shows greater faith than do Balmer and Gedicks in American fundamentalists' commitment to the separation of church and state. Koppelman describes fundamentalism as essentially "a strategy of biblical interpretation." To the extent that there is a connection between fundamentalists and a particular political commitment (i.e., the policies of the conservative right), such a connection is contingent—not inevitable. Koppelman argues against using fundamentalism as a meaningful category when examining issues of public concern. Instead, the focus should remain exclusively on the issues themselves. For example, policymakers concerned with the inadequate education provided some homeschooled children ought not focus on fundamentalist homeschoolers (perhaps because they have become an increasingly large proportion of homeschoolers), but instead on inadequate homeschooling itself. Indeed, Koppelman warns that using fundamentalism as a proxy for what he terms "a retrograde politics" risks alienating potential fundamentalist allies.

The second theme that emerges from the essays in this issue is that too much religious deference can pose significant social risk—especially to women and children. The essays contributed by Robin Fretwell Wilson, Marci Hamilton, and Catherine Ross all demonstrate how the liberal commitment to respecting religious belief and exercise can result in the state's unwittingly abdicating its basic responsibilities towards all of its citizens.

Robin Fretwell Wilson makes this point using examples from abroad. She explains in *Privatizing Family Law in the Name of Religion* how Great Britain and Western Thrace (a semi-independent region in Greece) both permit Muslim Sharía courts applying Islamic law to adjudicate family disputes.[4] Wilson then chronicles the

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[2] 18 WM. & MARY BILL RTS. J. 901 (2010).
[3] 18 WM. & MARY BILL RTS. J. 915 (2010).
[4] 18 WM. & MARY BILL RTS. J. 925 (2010).

myriad ways in which Islamic rules governing divorce, child custody, and inheritance leave women significantly worse off than they would be under the countries' civil laws. Wilson notes that the religious law's harsh treatment of women at divorce—upon which they face near-certain impoverishment and loss of custody of their children—can effectively trap them in violent, nonfunctioning marriages. And many religious leaders to whom women turn for guidance admit that they uniformly discourage women—including those who are victims of family violence—from exiting marriage. Wilson concludes by cautioning that "[b]inding women who want to exit a marriage to a religious community's norms . . . will erect a barrier to exit for many women and prevent them from privately regulating conduct toward themselves and their children."

Marci Hamilton turns our attention to children in the U.S. who have been sexually abused by religious clergy or by way of their membership in religious organizations. Her essay, *The 'Licentiousness' in Religious Organizations and Why It Is Not Protected Under Religious Liberty Constitutional Provisions*, highlights both the sexual abuse committed by Roman Catholic priests and the sexual abuse endemic to polygamous Mormon communities.[5] Hamilton first explores some of the reasons the state has failed to protect children from this abuse. Among them is the intentional secrecy of some religious organizations, including the Catholic and Mormon Churches, especially with respect to wrongdoing by their members. A result is that misconduct is not reported to state authorities but instead handled (or mishandled, or buried) internally. Another factor hindering the state's ability to protect children is the invocation by religious organizations of religious liberty guarantees to defend their actions—a strategy Hamilton rightly criticizes as "perverse." At least as perverse is the conclusion by courts in a minority of states that religious liberty guarantees indeed apply as defenses to abuse claims. These courts believed that the claims required them to assess the characteristics of a "reasonable member of the clergy," and their resolution would thus result in the "excessive entanglement between courts and religious doctrine." Hamilton then suggests that the religious liberty claims of polygamous groups raise a "slightly more interesting issue," since their sexual practices—which routinely involve statutory rape, forced marriage, and bigamous marriage—are dictated by their religious beliefs, unlike the sexual abuse perpetrated by Catholic clergy. She then refutes those claims with dispatch by surveying the history of state and federal religious liberty doctrine, including the explicit exclusion of "licentiousness," or illicit sex, from religious liberty protections. Because "illicit sexual conduct . . . is unprotected religious conduct, whether the conduct is religiously motivated or not," the state's obligation to protect children from entrenched sexual abuse, whatever its motivation or justification, remains undiminished.

In *Fundamentalist Challenges to Core Democratic Values: Exit and Homeschooling*, Catherine Ross argues against state deference to parents who, for religious reasons, homeschool their children to inculcate in them unquestioning acceptance

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[5] 18 WM. & MARY BILL RTS. J. 953 (2010).

of their parents' absolutist belief system.[6] Ross begins by chronicling the history of homeschooling in the U.S. She notes that homeschooling is a relatively recent trend, led in the 1980s and 1990s by conservative and religious families who objected to what they viewed as a secular bias in public schools that undermined their fundamentalist belief systems. Today, homeschooling is dominated by conservative Christians. Ross acknowledges that conservative Christians who homeschool are not a monolithic group and that some may expose their children to other beliefs, but she also notes studies demonstrating that many parents choose homeschooling precisely because they do not want their children exposed to diverse viewpoints. And, Ross argues, by withdrawing their children from the public sphere and shielding them from other viewpoints, such parents deny their children the civics education that lies at the core of liberal democracy. She reasons that the state's interest in the education of homeschooled children should thus extend beyond the three R's to also include "the civics education goals of the state, including lessons on mutual respect for diverse populations and viewpoints." Because democracy relies for its effective functioning on citizens who share certain civic norms, such as tolerance for diversity, Ross concludes that "the states' interest in educating children for life in a pluralist democracy trumps any asserted parental liberty interest in controlling children's education."

The third theme is perhaps the murkiest. It involves the constitutionality, propriety, and desirability of facially secular policies whose motivations are clearly religious—questions addressed here by June Carbone and Naomi Cahn, and John Taylor. In their essay *Embryo Fundamentalism*, Carbone and Cahn consider what they view to be the distinct (undesirable) possibility that religiously derived views on the status of human embryos will shape future legislation regulating assisted reproduction technologies (ART).[7] In *Family Values, Courts, and Culture War: The Case of Abstinence-Only Sex Education*, Taylor considers abstinence-only sex education, which, he argues, promotes a normative family vision that is "recognizably part of a religiously conservative worldview."[8]

Embryo Fundamentalism addresses an issue that Carbone and Cahn caution may extend the abortion fight into the sphere of assisted reproduction: the disposition of the hundreds of thousands of excess embryos created through in vitro fertilization (IVF) and currently stored in the freezers of fertility clinics around the country. Carbone and Cahn observe that imposing pragmatic legal infrastructure on the virtually unregulated fertility industry could be beneficial, and might improve the safety and effectiveness of ART. But they also note legislation's potential to give effect to a comprehensive theological/moral approach that treats embryos as human beings from the moment of conception—an approach Carbone and Cahn call "embryo fundamentalism." Embryo fundamentalism shares the religious origins of the anti-abortion movement, whose

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[6] 18 WM. & MARY BILL RTS. J. 991 (2010).
[7] 18 WM. & MARY BILL RTS. J. 1015 (2010).
[8] 18 WM. & MARY BILL RTS. J. 1053 (2010).

historical growth Carbone and Cahn recount. While abortion was originally viewed as a Roman Catholic issue, with the Catholic Church leading "the development of a comprehensive theological approach to the treatment of embryos as human beings," the anti-abortion movement spread and gained support from other conservative Christian denominations. The anti-abortion movement's absolute commitment to the belief that human life begins at conception, Carbone and Cahn argue, will surely shape the debates involving assisted reproduction. They describe and compare legislation adopted in several states, with Louisiana and California anchoring either end of the ideological spectrum. Legislation passed in Louisiana, for example, declares embryos to be "juridical persons" until implantation, prohibits their intentional destruction, and provides for embryo donation and "adoption." California, on the other hand, has passed legislation that requires fertility clinics to provide their patients with a comprehensive list of embryo disposition options. Carbone and Cahn thus express concern that, influenced by the absolutism of embryo fundamentalists, future regulatory schemes could "create a fundamentalist infrastructure for the oversight of assisted reproduction to the exclusion of other views." If legislation gave effect to such views, the result could be "[t]he potential redefinition of constitutionally protected reproductive rights and family integrity." Carbone and Cahn derive some reassurance, however, from the fact that those who reliably oppose abortion are less united in their opposition to various aspects of ART; they thus remain hopeful that fundamentalists will continue to prefer "rhetoric over action."

John Taylor addresses abstinence-only sex education in public schools, which is objectionable to many, he notes, for two primary reasons: First, it is religiously motivated. And second, it is demonstrably less effective than comprehensive sex education at reducing pregnancy and sexually transmitted diseases and is thus bad policy. Taylor explores the claims that those on the "sexual left" view sex education as a public health issue (and presumably avoid reliance on their personal, subjective values), while those on the "sexual right" see it as a values issue (and presumably allow their subjective, religious values to dictate their policy preference). Taylor rejects the dichotomy, however, and concludes that their approaches to sex education express the "values" of both the left and right. He then turns briefly to the question of whether facially secular sex education runs afoul of the Establishment Clause. While he views the question as a close one, he nonetheless finds it "quite difficult to show that a policy neither declaring religious truth nor requiring a religious observance violates the Establishment Clause." Taylor ultimately expresses more strongly his discomfort with the position that abstinence-only education is unconstitutional, cautioning that "judicial invalidation of facially secular abstinence education would come perilously close to invalidating policies simply because they are religiously motivated." In an area traditionally controlled by state and local governments, he instead urges that the federal government's approach should be one of detachment, with its involvement limited perhaps to funding programs that demonstrate effectiveness. To be clear, however, Taylor does not embrace abstinence-only sex education

as good policy. To his mind, "the problem with (at least most forms of) abstinence education is not that they are 'too religious' to satisfy the Establishment Clause, but that they conscript the public schools as strategic tools in culture war."

In urging restraint before bringing the power of the federal government down on the side of the "sexual left" and against religious fundamentalists or the "sexual right," Taylor implicitly warns his (predominantly secular?) readers against making the same absolutist mistake with which religious fundamentalists are charged. His warning recalls Frederick Gedicks's prescient counsel—"the best safeguard of liberty in a pluralist democracy, [is] a constant and present and humble sense of being not quite sure that one is right."