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## Introduction

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### Abstract

*This brief introduction introduces a symposium issue on the thought of four Woodruff University professors at Emory Law School. Professor Harold J. Berman focused his initial works on Soviet Russia and international trade, but moved on to study law and religion later in his career. His works challenge readers to look beyond current crises to contemplate a new common law and faith on a global scale. Professor Michael J. Perry also focuses on the study of law and religion as well as law and morality, judicial review, and human rights. His proposal of a universal theory of human rights rests on the proposition that every person has inherent dignity. Professor Martha L. Fineman has studied the issues of marriage, divorce and family law, viewed through the lenses of feminist jurisprudence and vulnerability theory. She argues that the responsibility for dependency and vulnerability should be distributed across societal institutions, particularly the state. Professor Martin E. Marty, leading American church historian, grapples here with the notion of the body, soul, and spirit of the law. He asserts that people of religious conviction must participate within the law.*

**Keywords:** Robert W. Woodruff Professor, Harold J. Berman, Michael J. Perry, Martha Albertson Fineman, Martin E. Marty, law and religion, legal theory, feminist jurisprudence, the spirit of the law

On March 25, 2004, a crowd of some 500 gathered at Emory University School of Law to celebrate the scholarship of its four Robert W. Woodruff Professors—Harold J. Berman, Michael J. Perry, Martha Albertson Fineman, and Martin E. Marty. Woodruff Professorships are Emory's most distinguished academic appointments. These chairs are reserved for world-class scholars who are not only proven leaders of their own fields of specialty but also ambitious

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bridge-builders across specialty disciplines.

The four distinguished scholars whose work we sample and celebrate in this Symposium exemplify the high ideals of the Woodruff Professorship. Taken together, Professors Berman, Perry, Fineman, and Marty have published more than 120 volumes and thousands of articles, and have built networks of scholars, scholarship, and advocacy on all five continents. They are prized leaders in the fields of legal history, church history, American religion, feminist jurisprudence, family law, constitutional law, comparative law, human rights, law and religion, legal theory, international trade, and law and morality. And they are prime movers in Emory Law School's commitment to produce new integrative, international, and interdisciplinary legal scholarship of the first rank.

Emory Law School's first Robert W. Woodruff Professor of Law is Harold J. Berman, one of the great polymaths of American legal education. For nearly 60 years, he has shaped an array of legal disciplines—legal history, Russian law, international trade, legal philosophy, and law and religion. His 30 plus books and 400 plus articles have set an enviable scholarly pace for the Emory faculty to follow. The 11 foreign languages in which his writings have appeared—Arabic, Chinese, French, German, Italian, Japanese, Polish, Portuguese, Russian, Spanish, and Vietnamese—reflect the kind of global influence to which Emory scholars aspire.

Professor Berman began his teaching career at Stanford Law School in 1947. From 1948 to 1985, he taught at Harvard Law School, much of the time as the James Barr Ames Professor of Law, and served as founder and director of the Law School's Liberal Arts Fellowship in Law. He was appointed Robert W. Woodruff Professor of Law at Emory Law School in 1985. He also serves as a Fellow in The Carter Center at Emory University, Founding Director of the American Law Center in Moscow, Founding Director and now Co-Director (with Johan D. van der Vyver) of the World Law Institute at Emory Law School, and principal architect (with Frank S. Alexander and John Witte, Jr.) of the Law and Religion Center at Emory University.

Professor Berman's initial scholarly energies were focused on the Soviet legal system and the law of international trade. He developed several new courses, testified frequently before courts, commissions, and Congressional committees, and traveled regularly to Europe and the Soviet Union. He spent the 1961-1962 academic year studying at the Moscow Institute of State and Law. In 1982, he served as Fulbright Professor at Moscow State University. He produced a massive body of new writing in this early period. Of these writings, his *Justice in the U.S.S.R.*<sup>3</sup> will long endure as a classic, as well as several of his lengthy law review articles on the *lex mercatoria*.

In the past three decades, Professor Berman has expanded his legal

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<sup>3</sup> HAROLD JOSEPH BERMAN, *JUSTICE IN THE U.S.S.R.* (rev. ed. 1963)(1950).

scholarship to include legal philosophy, legal history, and law and religion. He has produced a series of pathbreaking volumes, most notably *The Interaction of Law and Religion*,<sup>4</sup> *Faith and Order: The Reconciliation of Law and Religion*,<sup>5</sup> and his monumental series on *Law and Revolution*, published by Harvard University Press. The first, prize-winning volume, *Law and Revolution: The Formation of the Western Legal Tradition*,<sup>6</sup> was published in 1983. *Law and Revolution II: The Impact of the Protestant Reformations on the Western Legal Tradition*,<sup>7</sup> was published in 2003. The final volume on the American, French, and Russian revolutions is now on his writing desk. In these works, and in a long series of complementary articles and book chapters, Berman calls for the reintegration of the classic schools of legal positivism, natural law theory, and historical jurisprudence. He urges that law be given a prominent place among the humanities and social sciences, and that law enrich itself with the ideas and methods of theology, history, anthropology, hermeneutics, and other disciplines. He calls us to retrace the roots and routes of the Western legal tradition and so prepare our law and culture for the legal and political globalization of this new millennium.

Berman samples and summarizes some of these favorite themes in his contribution to this Symposium. But his real challenge is to beckon us to look beyond the current crises that now beset the world—those born of violent balkanization, radical fundamentalism, and belligerent nationalism—to contemplate the creation of a new *ius gentium* and *fides populorum*, a new common law and common faith on a world scale. We need global structures and symbols, global processes and principles, Berman urges. These cannot be found only in world-wide science and commerce, or in global literature and language. They must also be sought in a new “world law” and a new “world religion.” For law and religion are the only two universal solvents of human living that can ultimately bring true peace, order, and justice to the world.

“First it was Russian law, then it was Western law, now it is world law. What’s next, cosmic law?” This is how Harold Berman’s beloved wife Ruth once summarized (with a blend of exasperation and astonishment) the stages of Berman’s storied and storeyed legal career. There is keen insight in this statement. For Berman, every legal system—even the budding legal system of the world—must be founded upon cosmic commandments and contemplation, divine examples and exemplars. Berman has long prophesied that those legal systems that build on immanent and material foundations alone will ultimately fail. The spectacular failure of the Soviet legal system, a subject on which Berman has long been the world’s leading authority, is ample vindication of his

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<sup>4</sup> HAROLD JOSEPH BERMAN, *THE INTERACTION OF LAW AND RELIGION* (1974).

<sup>5</sup> HAROLD JOSEPH BERMAN, *FAITH AND ORDER: THE RECONCILIATION OF LAW AND RELIGION* (1993).

<sup>6</sup> HAROLD JOSEPH BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* (1983).

<sup>7</sup> HAROLD JOSEPH BERMAN, *LAW AND REVOLUTION II: THE IMPACT OF THE PROTESTANT REFORMATIONS ON THE WESTERN LEGAL TRADITION* (2003).

insight into the essential religious foundations of law.

The religious and moral foundations of law—and the challenges posed to them by the massive violence, evil, and hatred of the past century—have also been a central preoccupation of Michael J. Perry. Professor Perry is Emory Law School's second Robert W. Woodruff Professor of Law, appointed in 2003. He also serves as Senior Fellow in Emory's Center for the Study of Law and Religion and as Director of the Center's Roundtable Series on New Books in Law and Religion. He came to the Emory faculty from Wake Forest University, where he held the University Distinguished Chair in Law from 1997-2003. Before that he taught at Northwestern University School of Law, where he served as Howard J. Trienens Professor of Law from 1990-1997, and at Ohio State University College of Law where he started his teaching career in 1975. Professor Perry has also taught at Yale Law School, the University of Tokyo School of Law, and Trinity College (Dublin) School of Law and has lectured at law schools, universities, and colleges throughout North America and Europe.

Over the past two decades, Professor Perry has produced nine major monographs—published by Oxford, Cambridge, and Yale university presses—and scores of articles. He has written brilliantly and courageously on a broad range of the most contentious issues of American law and politics. He first came to national attention in American legal circles with his 1982 book, *The Constitution, the Courts and Human Rights: An Inquiry into the Legitimacy of Constitutional Policymaking by the Judiciary*,<sup>8</sup> which offered a strong theory of constitutional interpretation and a robust defense of judicial activism by the courts. Perry's exploration of judicial activism led him to turn his attention to moral philosophy and its relation to law. He explored this theme at great length in his *Morality, Politics, and Law*<sup>9</sup> as well as in his *Love and Power*,<sup>10</sup> a volume that also addressed the relationship between religion, law, and public discourse. These latter themes became the centerpiece of his *Religion in Politics: Constitutional and Moral Perspectives*.<sup>11</sup> In *We the People: The Fourteenth Amendment and the Supreme Court*,<sup>12</sup> Perry examined critically whether the federal courts have usurped the political process on issues ranging from affirmative action to homosexuality and abortion. In *The Idea of Human Rights*,<sup>13</sup> he asked whether there are fundamental human rights that are universal, and concluded, contrary to several versions of moral relativism, that the idea of human rights is "ineliminably religious." His latest book, *Under God?: Religious*

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<sup>8</sup> MICHAEL J. PERRY, *THE CONSTITUTION, THE COURTS AND HUMAN RIGHTS: AN INQUIRY INTO THE LEGITIMACY OF CONSTITUTIONAL POLICYMAKING BY THE JUDICIARY* (1982).

<sup>9</sup> MICHAEL J. PERRY, *MORALITY, POLITICS, AND LAW: A BICENTENNIAL ESSAY* (1988).

<sup>10</sup> MICHAEL J. PERRY, *LOVE AND POWER: THE ROLE OF RELIGION AND MORALITY IN AMERICAN POLITICS* (1991).

<sup>11</sup> MICHAEL J. PERRY, *RELIGION IN POLITICS: CONSTITUTIONAL AND MORAL PERSPECTIVES* (1997).

<sup>12</sup> MICHAEL J. PERRY, *WE THE PEOPLE: THE FOURTEENTH AMENDMENT AND THE SUPREME COURT* (1999).

<sup>13</sup> MICHAEL J. PERRY, *THE IDEA OF HUMAN RIGHTS: FOUR INQUIRIES* (1998).

*Faith and Liberal Democracy*,<sup>14</sup> argued that political reliance on religious faith violates neither the First Amendment prohibition on religious establishment nor the morality of liberal democracy. The book also addressed three issues at the center of America's culture wars: school vouchers, same-sex marriage, and abortion.

Professor Perry is currently at work on a volume tentatively entitled "Human Rights as Morality, Human Rights as Law: Toward a Theory of Human Rights," a volume that builds especially on his *Idea of Human Rights*. In this next book, Perry seeks to understand the inner morality of human rights, which in his view consists most centrally of the claim that every human being has "inherent dignity," that is, is essentially "inviolable." He also seeks to explain the relationship between the morality of human rights and the law—national, transnational, and international—of human rights.

These latter themes are at the heart of Professor Perry's contribution to this Symposium. The main contention of his lengthy article herein is that a universal theory of human rights must rest on the proposition that every person has inherent dignity, a quality that makes personhood inherently inviolable and certain rights inherently inalienable. Only a rigorous theological anthropology can provide an adequate account of human dignity, Professor Perry contends, and he spends a good bit of his article demonstrating what he considers to be the fallacies and limitations of the arguments of various modern philosophers who have sought to build human rights and human dignity on nonreligious foundations.

Human rights, particularly "second generation" social, cultural, and economic rights, are among several of the fundamental legal ideas that have long occupied Martha Albertson Fineman. Professor Fineman is Emory Law School's third Robert W. Woodruff Professor of Law, appointed in 2004. She also serves as Director of the Feminism and Legal Theory Project, now in its twenty-first year, and as Senior Fellow in the Center for the Study of Law and Religion. An internationally decorated law and society scholar and expert on family law and feminist jurisprudence, Professor Fineman came to Emory from Cornell Law School, where she served as the Dorothea S. Clarke Professor of Feminist Jurisprudence, the first professorship in feminist jurisprudence in the country, from 1999-2003. Prior to joining the faculty at Cornell, Fineman was the Maurice T. Moore Professor of Law at Columbia University School of Law. She began her career as a Professor of Law at the University of Wisconsin, where she also served as Director of the Family Law and Policy Program, and Founder and Director of the Feminism and Legal Theory Program.

Fineman's original and thought-provoking work in the field of divorce and family law has had a profound effect on the debates surrounding the legal regulation of intimacy. Her first monograph, *The Illusion of Equality: The*

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<sup>14</sup> MICHAEL J. PERRY, *UNDER GOD?: RELIGIOUS FAITH AND LIBERAL DEMOCRACY* (2003).

*Rhetoric and Reality of Divorce Reform*,<sup>15</sup> challenged the country's no-fault divorce reforms of the 1970s and 1980s and the implications of the gender-equity revolution. Fineman argued that gender equality imposed in one arena—divorce—actually resulted in heightened inequality for women, especially when other social arrangements such as work and childcare remained unchanged and unequal. A whole literature documenting the “feminization of poverty” has emerged in vindication of this thesis that initially won Fineman ample disdain from colleagues on all sides of the political spectrum, including fellow feminists.

Professor Fineman’s second major monograph, *The Neutered Mother, the Sexual Family, and Other Twentieth Century Tragedies*,<sup>16</sup> broke new ground in the exploration of single motherhood, welfare reform, and marriage as social policy. In this volume, Fineman explored society's undervaluation of motherhood and the laws that reflect that undervaluation. She also called for a re-visioning of family law and explored the implications of abolishing marriage as a legal category. Her most recent monograph, *The Autonomy Myth: A Theory of Dependency*,<sup>17</sup> articulated a radical new conception of the family and its relationship to other institutions within society. Rather than placing primary responsibility on the family for addressing the dependency needs of children and many of the elderly, ill, and disabled, as has been traditional in the United States, Professor Fineman argued that responsibility for dependency should be distributed across the societal institutions that benefit from the care work that occurs in the family. In particular, the state and market should provide both economic and structural support for caretaking, rather than continue to assume workers are unencumbered and have no dependency demands that conflict with paid work. Self-sufficiency and independence, Professor Fineman argued, are myths. In fact, we all live subsidized lives and one of those subsidies takes the form of the caretaking that others have provided for us as individuals and for the larger society from which we all benefit.

In addition to her own monographs, Professor Fineman has edited a number of influential anthologies, all prepared under the auspices of her Feminism and Legal Theory project. These include *At the Boundaries of Law: Feminism and Legal Theory*,<sup>18</sup> *The Public Nature of Private Violence*,<sup>19</sup> *Mothers in Law*,<sup>20</sup> *Feminism, Media, and the Law*,<sup>21</sup> and *Feminism Confronts Homo*

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<sup>15</sup> MARTHA FINEMAN, *THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM* (1991).

<sup>16</sup> MARTHA FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* (1995)

<sup>17</sup> MARTHA FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* (2004)

<sup>18</sup> *AT THE BOUNDARIES OF LAW: FEMINISM AND LEGAL THEORY* (Martha Fineman & Nancy Sweet Thomadsen eds., 1991)

<sup>19</sup> *THE PUBLIC NATURE OF PRIVATE VIOLENCE: THE DISCOVERY OF DOMESTIC ABUSE* (Martha Fineman & Roxanne Mykitiuk eds., 1994).

<sup>20</sup> *MOTHERS IN LAW: FEMINIST THEORY AND THE LEGAL REGULATION OF MOTHERHOOD* (Martha Fineman & Isabel Karpin eds., 1995)

<sup>21</sup> *FEMINISM, MEDIA, AND THE LAW* (Martha Fineman & Martha T. McCluskey eds., 1997)

*Economicus*.<sup>22</sup>

One of the hallmarks of Professor Fineman's scholarship is her insistence that we engage in rigorous comparative legal study to test and contest the value and validity of our own legal and political constructions. That methodological accent is on full display in her contribution to this Symposium. Drawing on the teachings of both international human rights norms and the laws of other nations, Professor Fineman exposes some of the social fallacies and disparities that inform America's most cherished constitutional icons: liberty, equality, and autonomy. She also exorcises some of the founding "myths" and "illusions" of classical liberalism and modern-day libertarianism, many of whose teachings, in her view, remain hostage to outmoded religious and cultural presuppositions. Professor Fineman calls for a new norm and narrative of "substantive equality" predicated on a genuine concern for distributive justice and a real commitment to protecting not only first generation civil and political rights, but also second generation social, cultural, and economic rights and third generation rights to peace, justice, environmental protection, and orderly development.

Martin E. Marty serves as the Robert W. Woodruff Visiting Professor in Emory's Center for the Study of Law and Religion, and codirector of the Center's three-year project on "The Child in Law, Religion, and Society." He has been a frequent visitor at Emory Law School over the past fifteen years, and a regular contributor to the Law and Religion Center's conferences and publications. Professor Marty taught for 35 years at the University of Chicago, where he is now Fairfax M. Cone Distinguished Service Professor, *Emeritus*. On his retirement, the University of Chicago Divinity School established the Martin Marty Center to promote the "public religion" scholarship that he has long cultivated. *Time Magazine* called Marty the "most influential interpreter of religion" in the nation.

Marty is past president of the American Academy of Religion, of the American Society of Church History, and of the American Catholic Historical Association. He has served on two United States Presidential Commissions and was director of both the Fundamentalism Project of the American Academy of Arts and Sciences and the Public Religion Project at the University of Chicago. Marty's honors include the National Humanities Medal, the National Book Award, the Medal of the American Academy of Arts and Sciences, the University of Chicago Alumni Medal, and the Distinguished Service Medal of the Association of Theological Schools. He is an elected member of the American Antiquarian Society and of the Society of American Historians and an elected fellow of the American Philosophical Society and the American Academy of Political and Social Sciences. Marty has received 72 honorary doctorates

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<sup>22</sup> FEMINISM CONFRONTS HOMO ECONOMICUS: GENDER, LAW, AND SOCIETY (Martha Fineman & Terence Dougherty eds., 2005).

Professor Marty is the author of more than 50 books, the editor of some 20 more. His most recent books include *Martin Luther*,<sup>23</sup> *Modern American Religion: The Irony of It All*,<sup>24</sup> *Modern American Religion: Under God, Indivisible*,<sup>25</sup> *Modern American Religion: The Noise of Conflict*,<sup>26</sup> *The One and the Many: America's Search for the Common Good*,<sup>27</sup> *Education, Religion, and the Common Good*,<sup>28</sup> and *Politics, Religion, and the Common Good*.<sup>29</sup> In many of these writings, he has brilliantly illuminated issues at the intersection of law, religion, and politics—particularly issues of religious freedom and church-state relations in American and European history. No scholar has done more to map the immense diversity and complexity of world-wide fundamentalism, and no scholar has served better to prepare America to deal with the complexities of religious and cultural pluralism.

Mapping the pluralist religious foundations of law is the central aim of Marty's contribution to this Symposium. Emperor Justinian in the sixth century spoke famously of the *body* of the law (*Corpus Iuris Civilis*). Baron Montesquieu in the eighteenth century spoke famously of the *spirit* of the law (*l'esprit des lois*). Martin Marty speaks herein of the *soul* of the law. The soul of the law includes the diverse "virtues, values, and moralities" embraced by the persons and peoples who live under the rule of law. The soul of the law is reflected in the religious dimensions of authentic legal systems—the rituals, traditions, customs, and symbols that animate the body of the law and keep it vital and growing. In the theocracies and monarchies of the past in the West—and of the present in some parts of the world today—the soul of the law is often identified with the religion of the rulers, whether Christian, Muslim, Hindu, Confucian, or other. But in the more complex pluralistic societies of the West—and of many parts of the world beyond the West—the great legal challenge is to find ways to mediate and appropriate the diversity of understandings of absolute virtues, values, and moralities that are proffered, whether grounded in scripture or nature, tradition or custom. Healthy democracies have found ways to meet this challenge—by balancing majoritarian rule and minority protection, legislative consensus and judicial exemptions, federal absolutes and federalist experiments, among other ways. What is essential for the soul of the law to live in these modern democracies, however, is that all persons and peoples of religious conviction participate in the legal and political process, and that the state make room for religion to be both public and private, both professional and confessional. To

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<sup>23</sup> MARTIN E. MARTY, *MARTIN LUTHER* (2004).

<sup>24</sup> MARTIN E. MARTY, *MODERN AMERICAN RELIGION: THE IRONY OF IT ALL* (1986).

<sup>25</sup> MARTIN E. MARTY, *MODERN AMERICAN RELIGION: UNDER GOD, INDIVISIBLE* (1986).

<sup>26</sup> MARTIN E. MARTY, *MODERN AMERICAN RELIGION: THE NOISE OF CONFLICT* (1991).

<sup>27</sup> MARTIN E. MARTY, *THE ONE AND THE MANY: AMERICA'S SEARCH FOR THE COMMON GOOD* (1997).

<sup>28</sup> MARTIN E. MARTY & JONATHAN MOORE, *EDUCATION, RELIGION, AND THE COMMON GOOD: ADVANCING A DISTINCTLY AMERICAN CONVERSATION ABOUT RELIGION'S ROLE IN OUR SHARED LIFE* (2000).

<sup>29</sup> MARTIN E. MARTY & JONATHAN MOORE, *POLITICS, RELIGION, AND THE COMMON GOOD: ADVANCING A DISTINCTLY AMERICAN CONVERSATION ABOUT RELIGION'S ROLE IN OUR SHARED LIFE* (2000).



stifle any peaceable public religious voice is destructive not only for religion but also for law. Without a soul, the body of the law will die.

These four Woodruff scholars are big thinkers, with hearty appetites and capacities to think above, beyond, and against their legal times. All four of their articles herein offer courageous, counterintuitive, and controversial reflections on the foundations of law. They are intended to begin discussion, not to end it.

To that end, twelve other leading faculty members from Emory Law School offer their critical reflections on these articles by our four Woodruffs. These twelve are sterling scholars in their own right; a few of them seem on the path to earning their own university professorships in due course. Michael Broyde, Abdullahi An-Na'im, and David Bederman test Harold Berman's grand visions of integrative jurisprudence and world law from the perspectives of Jewish law, Islamic law, and (ancient and modern) international law, respectively. Robert Schapiro, Morgan Cloud, and Johan van der Vyver take on Michael Perry's foundational theory of human rights with the tools of public law, political theory, and comparative law. Anita Bernstein, Bill Carney, and Marc Miller take up Martha Fineman's challenges using the logics of law and society, law and economics, and criminal justice. Frank Alexander, Timothy Terrell, and Paul Zwier weigh Martin Marty's presentation of the soul of the law from the perspectives of Christian theology, contemporary jurisprudence, and legal ethics.

Our four Woodruff Professors themselves fare marvelously in these discussions; their colleagues uniformly praise them for their inspiring vision and ambition. But none of their papers comes out unscathed; indeed some of their formulations take such a pummeling that it would only seem right to organize a sequel symposium or two that would bring these and other scholars back together for further earnest conversation.

That is precisely what we intend. This "Foundations of Law" symposium will become a regular offering of the Emory Law School. In subsequent installments of this series, we aim to showcase the talents of a number of other Emory Law School faculty alongside the sixteen Emory faculty featured herein. We aim to celebrate the prodigious work of the Emory Law School faculty on the international, comparative, economic, political, and literary foundations of law, and on such specialty topics as law and religion, law and economics, feminist jurisprudence, child advocacy, environmental protection, human rights, criminal justice, federalism, legal professionalism, global governance, world citizenship, and other topics, several of which are already subjects of major interdisciplinary programs and centers at Emory Law School.

This installment of the "Foundations of Law" conference series was cosponsored by Emory Law School, The Center for the Study of Law and Religion, and the *Emory Law Journal*. We would like to express our warm appreciation to several colleagues, besides our sixteen speakers, who helped to

convene the conference and to prepare these proceedings for publication—April Bogle, Eliza Ellison, Anita Mann, Amy Wheeler, and Janice Wiggins in the Center for the Study of Law and Religion, Scott Andrews, Corky Gallo, Keith Miller, Melanie Still, and Carolyn Wright of the Emory Law School, and Jason Medinger and his *Emory Law Journal* colleagues in the Class of 2004 and Eli Kay-Oliphant and his *Emory Law Journal* colleagues in the Class of 2005. We also wish to thank our colleagues, Professors Frank Alexander, David Bederman, Morgan Cloud, and Marc Miller, for their wise counsel in crafting this Foundations of Law series.