The Equal Right to Exclude: Religious Speech and the Road to *303 Creative LLC v. Elenis*

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This Article explains how speech became the constitutional vehicle for the right to discriminate on religious grounds in places of public accommodation. It argues that cause lawyers for the New Christian Right cobbled together a right to exclude from a surprising doctrinal source: the egalitarian tendencies within the First Amendment. Using extensive original archival research, case materials, and little-known accounts of key figures, I reconstruct the New Christian Right's legal strategy to obtain speech coverage for service denial. By strategically co-opting the progressive free speech legacy, innovative lawyers in the religious wing of the conservative legal movement convinced liberal jurists that they shared an approach to constitutional interpretation. The result was an argument that won the day in 303 Creative v. Elenis*—that the government discriminates on the basis of speech content when it enforces public accommodations law in the sale of expressive products.*

This research has important implications for our understanding of the conservative legal movement, the meaning of First Amendment equality, and the future of anti-discrimination law. First, by going to the origins of conservative Evangelical cause lawyering, this Article reveals compromises, tensions, and contingencies in the formation of today's conservative legal movement. Second, this novel history helps

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illuminate key moves in expressive conduct doctrine that resurfaced in 303 Creative*. Third, the story provides important resources for understanding the* 303 Creative *decision and where expressive association doctrine is likely to go next.*

INTRODUCTION

"Once loosed, the idea of Equality is not easily cabined."[1]

– Archibald Cox, November 1966.

"The Civil Rights Act of 1964 prohibits a large amount of speech in public and private institutions."[2]

– Christopher Rufo, August 2022.

1. Archibald Cox, *The Supreme Court, 1965 Term – Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 91 (1966).

2. Christopher F. Rufo (@realchrisrufo), TWITTER (Aug. 19, 2022, 12:56 PM), https://twitter.com/realchrisrufo/status/1560672046996000770 [https://perma.cc/4BJ2-KZSN].

Last year at the end of June, the Supreme Court dramatically changed the civil rights landscape. In a free speech case called *303 Creative LLC v. Elenis*, the Court ruled that a website designer could refuse to create wedding websites for same-sex couples because of her belief that gay marriage is "false."[3] Although the designer, Lori Smith, objected on religious grounds, the Court based its ruling on the constitutional law of free speech. Colorado state law prohibits discrimination on the basis of sexual orientation in places of public accommodation, but the Court held that the law cannot compel a business to sell bespoke products that express a message contrary to the proprietor's beliefs. Smith's supporters declared the opinion a victory for free speech;[4] others feared that it announced a new right to discriminate.[5] Court watchers had expected that the case would vindicate a longstanding goal of the conservative legal movement: to constitutionalize religious objections to complying with anti-discrimination law.

The main surprise was that it did not happen sooner. Observers expected this outcome to arrive two years ago through the free exercise clause. In 2021, it looked like the Court would use a case called *Fulton v. Philadelphia* to make it harder for government activities to burden religious practice. The case was predicted to overturn a 1990 precedent called *Employment Division v. Smith*,[6] a bugaboo of the religious right that impaired free exercise claims against neutral, generally applicable government regulations.

In a way, the outcome of *Fulton* seemed overdetermined. In the thirty years since *Smith*, the conservative legal movement had made a powerful mark on

3. *See* Transcript of Oral Argument at 9, 303 Creative v. Elenis, 600 U.S. 570 (2023) (No. 21-476).

4. *See, e.g.*, Kristen Waggoner & Nadine Strossen, *Web Designer's Free Speech Supreme Court Victory Is a Win for All*, BLOOMBERG LAW (July 10, 2023), https://news.bloomberglaw.com/us-law-week/web-designers-free-speech-supreme-court-victory-is-a-win-for-all [https://perma.cc/SYT7-6JGK] (describing the *303 Creative* decision as affirming the "bedrock principle" of "reject[ing] government efforts to compel speech or coerce ideological conformity").

5. Justice Sotomayor, joined by Justice Kagan and Justice Jackson, wrote in dissent, "[o]ur Constitution contains no right to refuse service to a disfavored group." 303 Creative v. Elenis, 600 U.S. 570, 604 (Sotomayor, J., dissenting); *see also* Elizabeth Sepper, *Opinion: With Its 303 Creative Decision, the Supreme Court Opens the Door to Discrimination*, L.A. TIMES (June 30, 2023), https://www.latimes.com/opinion/story/2023-06-30/supreme-court-303-creative-gay-rights-first-amendment-lorie-smith-neil-gorsuch-sonia-sotomayor [https://perma.cc/T24G-Q3VN] (describing the opinion as opening the door to increased discrimination in the consumer marketplace); Kenji Yoshino, *Rights of First Refusal*, 137 HARV. L. REV. 244 (2023) (remarking that the opinion makes civil rights laws newly vulnerable).

6. Emp. Div., Dep't. of Hum. Res. of Ore. v. Smith, 494 U.S. 872 (1990).

American political culture, judicial personnel, and doctrinal interpretation[7]—most notably, six conservative Christians sat on the 2020 Supreme Court.[8]

The First Amendment bore the influence of legal conservatism as well: the Court had expanded free speech protection for commercial speech, and it was increasingly skeptical that compliance with the Establishment Clause could be a compelling government interest.[9] It seemed obvious that the Supreme Court's conservative majority would vindicate the claims of conservative religious litigators with ties to the same movement institutions, theological formations, and intellectual tendencies.

The expected reversal did not come in *Fulton*, at least not explicitly.[10] Instead, the Court's conservative majority split. Justices Gorsuch, Thomas, and Alito would have overturned *Smith*,[11] and while Justices Barrett and Kavanaugh

7. Branches of the movement had developed strategies to change legal common sense in elite institutions, set up law schools and think tanks to support conservative legal ideas, and created public interest law firms to advance laissez-faire and religious social visions. *See generally* STEVEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW (2008); AMANDA HOLLIS-BRUSKY, IDEAS WITH CONSEQUENCES: THE FEDERALIST SOCIETY AND THE CONSERVATIVE COUNTERREVOLUTION (2015); AMANDA HOLLIS-BRUSKY & JOSHUA C. WILSON, SEPARATE BUT FAITHFUL: THE CHRISTIAN RIGHT'S RADICAL STRUGGLE TO TRANSFORM LAW & LEGAL CULTURE (2020); BRINGING JUSTICE TO THE PEOPLE : THE STORY OF THE FREEDOM-BASED PUBLIC INTEREST LAW MOVEMENT (Lee Edwards ed., 2004); Calvin Terbeek, *"Clocks Must Always Be Turned Back":* Brown v. Board of Education *and the Racial Origins of Constitutional Originalism*, 115 AM. POL. SCI. REV. 821 (2021); JEFFERSON DECKER, THE OTHER RIGHTS REVOLUTION: CONSERVATIVE LAWYERS AND THE REMAKING OF AMERICAN GOVERNMENT (2016); Ann Southworth, *Conservative Lawyers and the Contest over the Meaning of Public Interest Law*, 52 UCLA L. REV. 1223 (2005); MARY ZIEGLER, DOLLARS FOR LIFE: THE ANTI-ABORTION MOVEMENT AND THE FALL OF THE REPUBLICAN ESTABLISHMENT (2022); KENNETH IRA KERSCH, CONSERVATIVES AND THE CONSTITUTION: IMAGINING CONSTITUTIONAL RESTORATION IN THE HEYDAY OF AMERICAN LIBERALISM (2019); DANIEL BENNETT, DEFENDING FAITH: THE POLITICS OF THE CHRISTIAN CONSERVATIVE LEGAL MOVEMENT (2017); Kevin R. den Dulk, *Purpose-Driven Lawyers: Evangelical Cause Lawyering and the Culture War*, *in* THE CULTURAL LIVES OF CAUSE LAWYERS (Austin Sarat & Stuart Scheingold eds., 2008) [hereinafter *Purpose-Driven Lawyers*]; R. JONATHAN MOORE, SUING FOR AMERICA'S SOUL: JOHN WHITEHEAD, THE RUTHERFORD INSTITUTE, AND CONSERVATIVE CHRISTIANS IN THE COURTS (2007); Kevin R. den Dulk, Prophets in Caesar's Courts: The Role of Ideas in Catholic and Evangelical Rights Advocacy (2001) (Ph.D. dissertation, University of Wisconsin – Madison) (ProQuest) [hereinafter *Prophets in Caesar's Courts*].

8. Frank Newport, *The Religion of the Supreme Court Justices*, GALLUP NEWS (Apr. 8, 2022), https://news.gallup.com/opinion/polling-matters/391649/religion-supreme-court-justices.aspx [https://perma.cc/E4RW-E38D].

9. *See* Richard Schragger, Micah Shwartzman & Nelson Tebbe, *Reestablishing Religion*, 91 U. CHI. L. REV. (forthcoming 2024).

10. True, in a case on the so-called "shadow docket," the Court seemed to adopt an expansive vision of the Free Exercise Clause, while undermining the power of the Establishment Clause. *See, e.g.*, Tandon v. Newsom, 141 S. Ct. 1294 (2021) (adopting a broad Free Exercise theory); *see also* Jim Oleske, Tandon *Steals* Fulton*'s Thunder: The Most Important Free Exercise Decision Since 1990*, SCOTUSBLOG (Apr. 15, 2021), https://www.scotusblog.com/2021/04/tandon-steals-fultons-thunder-the-most-important-free-exercise-decision-since-1990/ [https://perma.cc/6DQB-R9MP] (explaining that the Court adopted a "most-favored nation" theory of free exercise for the first time in *Tandon*).

11. *See* Fulton v. City of Phila., Pa., 593 U.S. 522, 545 (2021) (Alito, J., concurring in judgment).

wrote that there were "compelling" reasons to agree, they declined to do so.[12] The free exercise path had unexpectedly stalled. Yet just two years later, in *303 Creative v. Elenis*, it became possible for the Court to accomplish a remarkably similar task using different constitutional resources. Lori Smith's attorneys presented the case on both free exercise and free speech terms, but the Court rested its ruling on free speech principles alone.

This Article explains how that was possible—how a free speech path was close at hand for a Supreme Court majority that was unwilling or unable to use the Free Exercise Clause for the same purpose. I argue that cause lawyers for the New Christian Right were key players in formulating a free speech strategy to undermine anti-discrimination law. Using extensive original archival research, case materials, and little-known accounts of key figures, I offer a novel historical genealogy of the speech right to exclude from places of public accommodation, explaining how a religiously motivated right to exclude migrated from a political objective into legal strategy and ultimately into constitutional law. Specifically, the Article explains the role of movement lawyers in making such claims constitutionally legible.

It's important to recall that since the mid-1960s, there has been a strong firewall between the First Amendment and anti-discrimination law. Shortly after Congress passed the Civil Rights Act of 1964, White opponents of racial integration used the First Amendment to argue that their religious beliefs prevented them from serving Black people.[13] The Supreme Court dismissed such claims as "patently frivolous."[14] After these infamous cases, it was understood that discrimination often included a communicative component—like a sign on a storefront that reads "Whites Only" or a sexually-harassing comment at work—but that such communication is not protected by the Constitution. The state's interest in equality far outweighed any incidental burdens on discriminatory communication. For thirty years, when litigators argued (and they did) that racial or gender discrimination was a protected form of speech, the Supreme Court said no. By going to the movement's origins, we can trace the trial-and-error that eventually changed this constitutional common sense.

The historical approach highlights two surprising and important turning points in the story: First, activists who happened to be lawyers began to constitute themselves cause lawyers for religious freedom. In the early 1970s, movement activists were furious that the Supreme Court appeared to have

12. *Id.* at 543 (Barrett, J., concurring in judgment).

13. Brief for Appellees at 33, Katzenbach v. McClung, 379 U.S. 294 (1964) (No. 543), 1964 WL 72714.

14. Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 402 n.5 (1968); *see also* Elizabeth Sepper, *Gays in the Moralized Marketplace*, 7 ALA. C.R. & C.L. L. REV. 129, 129–30 (2015) (summarizing *Newman* and the Court's response to the appellees' First Amendment claims); Christian Farias, *We've Already Litigated This*, SLATE (Dec. 4, 2017), https://slate.com/news-and-politics/2017/12/the-key-principle-in-the-masterpiece-cakeshop-case-was-litigated-in-1968.html [https://perma.cc/FAX6-FNW8] (describing *Newman* in the context of *303 Creative*).

equated Christianity with secular beliefs, removing Christian foundations from American life in favor of secularism and pluralism.[15] Bringing religious claims in a free speech register threatened to exacerbate the problem. It was not at all obvious, from the vantage point of the late 1970s, that movement lawyers would embrace that very conflation to promote constitutional equality for religious speech.

When they did, the strategy enabled them to navigate around obstacles in Religion Clause doctrine and to begin to portray conservative Christians as victims of government discrimination. Gone was the suggestion that America had a "Moral Majority" that would rise up against racial integration, gay rights, and feminism; now cause lawyers portrayed their constituency as facing invidious discrimination by the government. It was not a frontal challenge to progressive constitutional egalitarianism, but an attempt to claim its legacy.

In the second phase, lawyers for the New Christian Right translated this discrimination argument into the public accommodations law context. They argued that equal participation in the public sphere required acceptance of Christian religious practices, such as excluding certain comers. Lawyers in groups like the Alliance Defense Fund, now Alliance Defending Freedom (ADF), made the argument that service denial—or more provocatively, market discrimination itself—could be a form of expressive conduct.[16] The idea was that enforcing anti-discrimination law favored those who agreed with anti-discrimination law and disfavored those who did not. Civil rights law enforcement, on this acrobatic account of speech equality, was not content-neutral.

The standout case for this strategy was *Hurley v. Irish American Gay, Lesbian, and Bisexual Group of Boston.* After years of failure in Massachusetts state courts, ADF lawyers stumbled on the case and realized that it could significantly advance their cause. The case is usually taught as a limited expansion of expressive conduct doctrine, and it is not generally understood to be groundbreaking. But *Hurley* was an essential stepping stone for the New Christian Right because it cracked open the settlement between anti-discrimination law and free speech. For the first time, albeit under circumstances the Court called "peculiar,"[17] the free speech clause successfully challenged anti-discrimination law enforcement. Equality required a right to exclude.

To be really useful for the movement's long-term vision, however, the rule of *Hurley* would have to extend to for-profit businesses, not just expressive associations like a parade. That's what eventually happened in *303 Creative.*

15. FRANCIS A. SCHAEFFER, A CHRISTIAN MANIFESTO 55 (1981) (citing Torcaso v. Watkins, 367 U.S. 488 (1961)). Schaeffer's book was immensely popular, selling twice as many copies as the volume that topped *The New York Times* best seller list for 1982. *See* NEIL J. YOUNG, WE GATHER TOGETHER: THE RELIGIOUS RIGHT AND THE PROBLEM OF INTERFAITH POLITICS 179 (2015).

16. See *infra* Part III.

17. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 572 (1995).

Relying heavily on *Hurley*, the Court ruled that enforcing public accommodations law was unconstitutional because of the burden it would place on the business's expressive conduct. In short, Justice Gorsuch's majority opinion reflected the New Christian Right's theory that anti-discrimination law enforcement is itself discriminatory against conservative Christians. The Court had never held that the First Amendment is relevant to standard enforcement of public accommodations law, but it now protects a proprietor's right to deny some services to same-sex couples. *Hurley*'s crack in the longstanding settlement between free speech and anti-discrimination law became a chasm. After decades of insisting on the expressive nature of commercial life and suggesting that public accommodations law enforcement compels businesses to speak against their faith, ADF won the *equal right to exclude* a protected group from public accommodations.[18]

The Supreme Court filings in *303 Creative* reflected how far the movement had come since 1995. Alongside supportive amicus briefs from the first wave of conservative Christian groups like the National Organization of Evangelicals, Christian Legal Society, Concerned Women for America, and the Family Research Council, were briefs from organizations that joined the fold alongside ADF in the 1990s. These included Protestant groups like Liberty First and Liberty Counsel, as well as Catholic groups like the Becket Fund and Thomas More Society.

This Article makes three significant contributions. First, it intervenes in current debates about the meaning of *303 Creative*. Justice Gorsuch's majority opinion may have extended First Amendment coverage to commercial transactions only under the limited circumstances where the product contains the business's "original, customized" expression intended to "communicate ideas."[19] Or it may have authorized "acts of discrimination [the Court] considers 'pure speech.'"[20] The contours of the new rule remain murky, as Justice Gorsuch's clearest doctrinal statement took the form of a per se rule: "When a state public accommodations law and the Constitution collide, there can be no question which must prevail."[21] By placing the case in movement context, we

18. The conservative movement had long attempted to match progressive rights claims with its own rights counterclaims, but the strategy was relatively unsuccessful until the 1990s. *See generally* Kevin M. Kruse, *The Fight for "Freedom of Association": Segregationist Rights and Resistance in Atlanta*, *in* MASSIVE RESISTANCE: SOUTHERN OPPOSITION TO THE SECOND RECONSTRUCTION 99 (Clive Webb ed., 2005) (explaining how Southern segregationists understood themselves as defenders of their own rights and the rights of their children); Schmidt, *Defending the Right to Discriminate: The Libertarian Challenge to the Civil Rights Movement*, *in* SIGNPOSTS: NEW DIRECTIONS IN SOUTHERN LEGAL HISTORY 417 (Sally E. Hadden & Patricia Hagler Minter eds., 2013) (providing a history of libertarian critiques of antidiscrimination law in the 1960's South).

19. 303 Creative LLC v. Elenis, 600 U.S. 570, 587 (2023) (hereinafter *303 Creative* or *303 Creative v. Elenis*). This summary was adapted from Robert Post, *Public Accommodations and the First Amendment:* 303 Creative *and "Pure Speech*,*"* SSRN JOURNAL, 15–16 (2023).

20. Yoshino, *supra* note 5, at 245 (citing *303 Creative*, 600 U.S. at 583).

21. *303 Creative*, 600 U.S. at 592.

can better appreciate its place in movement strategy. Although the majority opinion describes itself as producing a narrow exception, the movement behind this genre of litigation has long opposed the extension of anti-discrimination protections to gay people. If past is prologue, strategists are likely to claim that broader applications of anti-discrimination law amount to compelled speech in a commercial setting.

Second, this Article's close reading of *Hurley* models a way to think about the role of doctrine in legal change. The outcome of *Hurley* was neither determined by prior doctrine nor a reflection of judicial politics. In the constitutional interregnum of the 1990s, conservative litigators strategically co-opted the tenets of free speech liberalism to make precedents defending minority religious groups, leftist radicals, dissidents, and pacifists work for them.

Indeed, in the mid-1990s, leading conservative Christian lawyers believed that progressive Justices were more sympathetic to their claims than those appointed by Presidents Nixon, Reagan, or H.W. Bush. The director of the Center for Law & Religious Freedom told a reporter, "I would much rather have — and this is almost blasphemous — a William Brennan hearing my case for religious liberty than an Antonin Scalia." [22] For Jay Sekulow, one of the most prominent equal access litigators, the "[b]ottom line is I would much rather be arguing my free-speech claim before Justice Brennan than Justice Rehnquist."[23] By historicizing the legal internalism of that moment, I show that cause lawyers succeeded in cases like *Widmar v. Vincent* and *Hurley v. GLIB* by convincing judges who did not agree with them politically that they nevertheless shared constitutional values.

Finally, this Article revises our understanding of speech in conservative political economy. Scholars have shown that corporate interests have pushed the courts to extend commercial speech coverage against regulation.[24] Christian conservative causes are often portrayed as mere adjuncts to the more important intellectual and organizational activities of libertarian legal theorists and their business allies, or limited to battles over abortion.[25] But Christian conservative

22. John Moore, *The Lord's Litigators*, 26 NAT. J. 1560 (1994), https://www-nationaljournal-com.libproxy.berkeley.edu/s/330588/legal-affairs-lords-litigators/ [https://perma.cc/3WNS-XZDX].

23. den Dulk, *Prophets in Caesar's Courts*, *supra* note 7, at 110 n.36 (quoting Mark Curriden, *Defenders of the Faith*, 80 A.B.A. J. 86 (1994)).

24. *See infra* Part I.

25. *See generally* ANGUS BURGIN, THE GREAT PERSUASION: REINVENTING FREE MARKETS SINCE THE DEPRESSION (2012) (focusing on economic conservatism); LAWRENCE B. GLICKMAN, FREE ENTERPRISE: AN AMERICAN HISTORY (2019) (focusing on libertarianism). *But see generally* KIM PHILLIPS-FEIN, INVISIBLE HANDS: THE MAKING OF THE CONSERVATIVE MOVEMENT FROM THE NEW DEAL TO REAGAN (2009) (covering links between economic and social conservatism); STEVEN BROWN, TRUMPING RELIGION: THE NEW CHRISTIAN RIGHT, THE FREE SPEECH CLAUSE, AND THE COURTS (2002); MOORE, *supra* note 7; ANN SOUTHWORTH, LAWYERS OF THE RIGHT: PROFESSIONALIZING THE CONSERVATIVE COALITION (2008); Douglas NeJaime, *Inclusion, Accommodation, and Recognition: Accounting for Differences Based on Religion and Sexual Orientation*, 32 HARV. J.L. & GENDER 303 (2009); BENNETT, *supra* note 7; HANS HACKER, THE CULTURE OF CONSERVATIVE CHRISTIAN LITIGATION (2005); KERSCH, *supra* note 7; HOLLIS-BRUSKY

cause lawyers were not dupes of their libertarian peers. Recovering the historical genealogy of *303 Creative* puts a different set of actors and legal arguments at the heart of the story. This study thus helps disentangle the contemporary conservative legal movement to better evaluate the interests and justifications that unite its constituent parts.[26]

The Article proceeds in four Sections. Section I canvasses the conventional account of how the First Amendment has become a weapon of deregulation. This literature describes how corporate interests have pushed the courts to extend commercial speech coverage, mobilizing free speech claims to invalidate commercial regulations they dislike.[27] I argue that the transformation of expressive conduct doctrine cannot be fully assimilated to this story, leading to an incomplete picture of how the First Amendment has changed over the last half-century.

Section II begins a genealogy for *303 Creative* by examining the turn to speech by conservative Christian lawyers. This turn was far from obvious, for it required these lawyers to adopt a vision of religion as equal to other secular ideas—and of religious groups as equal to other social groups, like gays and socialists—that was anathema to the Christian New Right they represented. However, these lawyers realized that they could rely on these analogies to mobilize a progressive constitutional egalitarianism in the public-school context to demand inclusion for religious student practices, which had been prohibited under the Establishment Clause.

Section III then explores how the Alliance Defense Fund and affiliated lawyers converted the public school cases into a strategy to challenge anti-discrimination law. In the 1990s, the ADF argued that equal participation in the marketplace required the inclusion of Christian religious practices, again cast as "religious speech." This time, the proprietor of a public accommodation was the disfavored minority speaker, and the speech act in question was denying service to certain customers. This Part explains their unexpected success in *Hurley*, which cracked open the free speech/anti-discrimination settlement by creating

& WILSON, *supra* note 7; DANIEL K. WILLIAMS, DEFENDERS OF THE UNBORN: THE PRO-LIFE MOVEMENT BEFORE ROE V. WADE (2016); ANDREW LEWIS, THE RIGHTS TURN IN CONSERVATIVE CHRISTIAN POLITICS (2017); ZIEGLER, *supra* note 7.

26. I intend to pursue this relationship in future work. Recent socio-legal scholarship has begun to account for overlaps, tensions, and connections between parts of the movement in different legal domains. *See generally* Briana Shiri Last & Joanna Wuest, *Church Against State: How Industry Groups Lead the Religious Liberty Assault on Civil Rights, Healthcare Policy, and the Administrative State*, 51 J. L. MED. ETHICS (forthcoming) (discussing civil rights, health services); Elizabeth Sepper & James D. Nelson, *Government's Religious Hospitals*, 109 VA. L. REV. 61 (2023) (discussing healthcare); Joanna Wuest, *A Conservative Right to Privacy: Legal, Ideological, and Coalitional Transformations in US Social Conservatism*, 46 L. & SOC. INQUIRY 964 (2021) (discussing the right to privacy); MELINDA COOPER, FAMILY VALUES: BETWEEN NEOLIBERALISM AND THE NEW SOCIAL CONSERVATISM (2017) (discussing social services).

27. *See infra* Section I.

an exception for expressive associations. It concludes by tracing ADF's efforts to expand *Hurley*, culminating in *303 Creative.*

Finally, Section IV articulates the doctrinal, theoretical, and historical insights we gain from understanding the work of conservative Christian lawyers to change the First Amendment.

I.
THE TRANSFORMATION OF THE FIRST AMENDMENT

First Amendment doctrine has evolved considerably over the past fifty years. In 1974, commercial speech received no constitutional protection. The Supreme Court did not extend coverage to commercial speech—paradigmatically advertising—because economic regulation did not implicate First Amendment values.[28] For most of the twentieth century, American constitutional law distinguished between economic activity and civil liberties like the freedoms of speech and religion. Federal courts were expected to protect non-economic rights while deferring to legislative regulation of commercial activity.[29] The arrangement enshrined the legitimacy of a growing administrative

28. The leading precedent was *Valentine v. Chrestensen,* 316 U.S. 52 (1942). There, the Court ruled that a New York anti-litter ordinance could be enforced against a pamphlet with an advertisement on one side and a political message on the other because "the Constitution imposes no such restraint on government as respects purely commercial advertising." *Id*. at 54. Over the years, the Court did find that advertising that served the public interest and went beyond proposing a commercial transaction could be covered. *See* Jamison v. Texas, 318 U.S. 413, 417 (1943) (holding that coverage for religious handbills that included advertisement for religious book could be covered); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 264 (1964) (holding the same regarding coverage for advertisement to raise funds for Martin Luther King, Jr.); Bigelow v. Virginia, 421 U.S. 809, 829 (1975) (holding the same regarding coverage for advertisement for healthcare organization offering abortion). *But see* Breard v. City of Alexandria, 341 U.S. 622, 644–45 (1951) (holding that the First Amendment's protections for commercial speech provided no coverage for door-to-door salesman's speech).

29. This arrangement is sometimes called "legal liberalism," or the "liberal compromise." *See* LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM 2 (1996) (describing "legal liberalism" as "the potential of the courts, particularly the Supreme Court, to bring about . . . 'specific reforms that affect large groups of people . . . in other words, policy change with nationwide impact'" (cleaned up); Emma Kaufman, *The New Legal Liberalism*, 86 U. CHI. L. REV. 187, 195 (2019) (same). Footnote four of *United States v. Carolene Products* has become a synecdoche for this bifurcation in judicial deference. 304 U.S. 144, 152 n.4 (1938); *see also* Jeremy K. Kessler & David E. Pozen, *The Search for an Egalitarian First Amendment*, 118 COLUM. L. REV. 1953, 1967 (2018) (describing *Carolene Product*s as a "gnomic testament" to the "liberal compromise" that was "gradually displacing progressive civil libertarianism"). A generation of revisionist scholars suggests that the liberal compromise retreated from a more "statist, collectivist, and labor-oriented project" they call progressive civil libertarianism. *Id.* at 1965; *see also* Henry P. Monaghan, *First Amendment Due Process*, 83 HARV. L. REV. 518, 528, 534 (1970) (describing Justice Brennan's First Amendment imagination); Bruce A. Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713, 715 (1985) (describing the *Carolene Products* arrangement); LAURA M. WEINRIB, THE TAMING OF FREE SPEECH: AMERICA'S CIVIL LIBERTIES COMPROMISE [passim] (2016) (touching on the retreat from progressive civil libertarianism); Laura Weinrib, *Untangling the Radical Roots of America's Civil Liberties Settlement: Causation, Compromise, and* The Taming of Free Speech, 18 JRSLM. REV. LEGAL STUD. 135, 153 (2018) (characterizing the New Deal settlement); Jeremy K. Kessler, *The Early Years of First Amendment Lochnerism*, 116 COLUM. L. REV. 1915, 1919 (2016) (describing the *Carolene Products* set up). Kessler

state to structure the economy while envisioning the courts as a backstop against government actions that trod on fundamental rights. Given that economic regulation was generally constitutional and the Court's attitude toward commercial speech, it was outside the legal mainstream of the 1970s to think that businesses could argue that speech rights protected them from regulation.

Lorie Smith, the owner of 303 Creative, based her legal claim on the idea that serving customers can be a form of expressive conduct. Despite a robust literature documenting how part of the conservative legal movement pushed to expand commercial speech coverage, the changes in expressive conduct doctrine that undergirded *303 Creative* have received comparatively less attention. This Section summarizes this literature to highlight the importance of adding a history of conservative Christian lawyering to our picture of the conservative legal movement's development since the late 1970s. The remainder of the Article then shows how these conservative Christian lawyers brought about the free speech right to exclude from places of public accommodation.

Today, free speech jurisprudence looks very different from 1974. The Supreme Court has expanded coverage to some commercial speech, and extended protection against some compelled professional speech. The Court has used the free speech clause to strike down rules governing campaign finance,[30] data privacy,[31] union dues,[32] and the provision of healthcare services.[33] By finding that commercial speech has similarities to political opinion, the Court has overridden mandatory disclosure rules designed to help consumers make informed decisions in the marketplace by asserting that such corporate reporting impermissibly compels firms' speech.[34] In short, a range of commercial communications are now considered speech for First Amendment purposes.

Scholars criticize these developments for sending the country back to the Gilded Age.[35] They argue that the new jurisprudence recalls the *Lochner* Era, when the Supreme Court deployed the Due Process Clause to invalidate

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and Pozen argue that key elements of the liberal compromise—general preference for courts over administrative agencies, and in the First Amendment, content and viewpoint neutrality doctrines—made the more recent *Lochner*ization of the First Amendment possible. Kessler & Pozen, *supra* note 29, at 1965.

30. Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010); Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721 (2011).

31. Sorrell v. IMS Health, Inc., 564 U.S. 552 (2011).

32. Janus v. Am. Fed. of State, Cnty., and Mun. Emps., Council 31, 585 U.S. 878 (2018).

33. Nat'l Inst. of Fam. and Life Advocs. v. Becerra, 585 U.S. 755 (2018).

34. *IMS Health*, 564 U.S. at 557, held that content-based restrictions on commercial speech are subject to heightened scrutiny. *See generally* Jedediah Purdy, *Neoliberal Constitutionalism: Lochnerism for a New Economy*, 77 L. & CONTEMP. PROBS. 195 (2014) (discussing the expansion of commercial speech coverage in IMS Health and other cases).

35. Early observers of this trend include CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH (1993); Frederick Schauer, *The Political Incidence of the Free Speech Principle*, 64 U. COLO. L. REV. 935 (1993); David M. Rabban, *Free Speech in Progressive Social Thought*, 74 TEX. L. REV. 951 (1996); *see also* Genevieve Lakier, *Imagining an Antisubordinating First Amendment*, 118 COLUM. L. REV. 2117 (2018) (noting this tendency and collecting sources).

economic regulation for infringing on the liberty of private business.[36] Then as now, they suggest, the Supreme Court casts government as the enemy of industry, choosing to "conscript[] the First Amendment to shield the undisturbed operation of the laissez faire market."[37] The basic transactions of market life—spending money, advertising—once understood as subject to public control, are wrenched away from the political process in the name of business freedom.[38]

First Amendment *Lochner*ization scholarship attributes these doctrinal developments to business conservatives who believe that regulation impedes market freedom.[39] Indeed, the dominant account of the conservative legal movement invokes a collection of "wealthy interests"[40] who formed a "business-led social movement"[41] and built a "well-funded network of advocacy groups."[42] The story often begins with Lewis Powell, then a prominent Virginia attorney, who in 1971 wrote a memorandum to the Chamber of Commerce laying out a legal strategy for American business to push back against the regulatory state and regain a political stronghold for free enterprise.[43] The resulting document, "Attack on the American Free Enterprise System," outlined a plan for business elites to influence legislatures and the media, and to "exploit[] judicial action" in

36. Historical scholarship has drawn this characterization of the era, if not the case itself, into question by documenting significant economic regulation during the teens. *See generally* William J. Novak, *The Public Utility Idea and the Origins of Modern Business Regulation, in* CORPORATIONS AND AMERICAN DEMOCRACY 139 (Naomi R. Lamoreaux & William J. Novak eds., 2017) (describing public utility regulations); JOHN FABIAN WITT, THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW (2004) (discussing workingmen's compensation); KATHRYN KISH SKLAR, FLORENCE KELLEY AND THE NATION'S WORK: THE RISE OF WOMEN'S POLITICAL CULTURE, 1830–1900 (1995) (describing gender-based labor regulations); MARTIN J. SKLAR, THE CORPORATE RECONSTRUCTION OF AMERICAN CAPITALISM, 1890–1916: THE MARKET, THE LAW, AND POLITICS (1988) (describing trade regulation). However, *Lochner* remains a dirty word in constitutional law, invoked by opposing interests as a definitive part of the constitutional anti-canon. *See* Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 417 (2011).

37. Robert Post & Amanda Shanor, *Adam Smith's First Amendment*, 128 HARV. L. REV. F. 165, 171 (2015).

38. *See* Amanda Shanor, *The New Lochner*, 2016 WIS. L. REV. 133, 182 (arguing that both *Lochner* and the new commercial speech doctrine "pit business freedom against the government's ability to structure or facilitate citizen choice").

39. *See, e.g.*, Kessler & Pozen, *supra* note 29, at 1975–76; Jedediah Purdy, *Beyond the Bosses' Constitution: The First Amendment and Class Entrenchment,* 118 COLUM. L. REV. 2161, 2164 (2018); Amy Kapczynski, *The Lochnerized First Amendment and the FDA: Toward a More Democratic Political Economy*, 118 COLUM. L. REV. ONLINE 179, 199 (2018); Charlotte Garden, *The Deregulatory First Amendment at Work*, 51 HARV. C.R.-C.L. L. REV. 323, 327 (2016); Shanor, *supra* note 38, at 182.

40. Purdy, *supra* note 34, at 203.

41. Shanor, *supra* note 38, at 135.

42. Kessler & Pozen, *supra* note 29, at 1975 (includes religious with business-lobby groups).

43. These targets were not new for economic conservatives; business interests had been trying to reverse the New Deal regulatory state since its inception. *See, e.g.*, SOPHIA Z. LEE, THE WORKPLACE CONSTITUTION FROM THE NEW DEAL TO THE NEW RIGHT 5 (2014) (charting conservative efforts to challenge New Deal constitutionalism); PHILLIPS-FEIN, *supra* note 25, at xi (arguing that business leaders fought the New Deal state as it was being erected).

the courts. Months later, Powell replaced Hugo Black as an associate Justice on the Supreme Court.[44]

Over the fifteen years that Justice Powell sat, his former colleagues organized a formidable conservative network of attorneys, law professors, and policymakers. Before the ink on Powell's memo was dry, business elites began funding the kind of organizations he prescribed—litigation non-profits to rival the NAACP Legal Defense Fund, the American Civil Liberties Union (ACLU), and the Sierra Club through conservative impact litigation. Although groups like the Pacific Legal Foundation and Mountain States Legal Foundation were not particularly successful in altering doctrine at first, they successfully developed positions on the Takings Clause and the Fourteenth Amendment's guarantees of due process and equal protection to benefit property owners.[45]

Their efforts finally bore fruit in the 1980s, when lawyers who had cut their teeth representing property owners in California and the Mountain West converged on Washington to serve in the Reagan administration. From positions of power within agencies, and later as appointed judges, this generation of business conservative lawyers expanded resource extraction at the Department of Interior[46] and won a major victory for private property against public coastal access in *Nollan v. California Coastal Commission.*[47] In the early 1990s, a new generation of business conservative legal non-profits like the Institute for Justice and Center for Individual Rights succeeded in shifting major doctrines of eminent domain, school funding, and affirmative action.[48] According to the leading chronicle, these groups had "clearer, more forthrightly libertarian principles" than their predecessors.[49] Lawyers from these firms went on to staff the organizations that continue to push the deregulatory First Amendment today.[50] These are the known origins of the contemporary commercial speech movement.

The *Lochner*ization literature and leading accounts of the conservative legal movement thus work together to explain commercial speech doctrine historically: The First Amendment once, at least briefly,[51] embodied egalitarian concern for the little guy, but newly coordinated "economic libertarians and

44. *See* TELES, *supra* note 7, at 62.

45. *See* DECKER, *supra* note 7, at 3.

46. *Id.* at 126–38.

47. *Id.* at 178. They also tried to "defund the left" by attacking the Legal Services Corporation and plaintiff-friendly policies like fee-shifting and "private attorney general" provisions. *Id.* at 138.

48. TELES, *supra* note 7, at 220–21.

49. *Id.* at 221. Within the conservative movement, the first generation of non-profit firms came under attack for being too closely aligned with the major industries that financially supported them. Michael Horowitz, later a major figure in the Reagan administration, penned an influential memo arguing that the non-profit right would not gain popular support until it addressed itself toward matters of public interest with more apparent independence. *See* DECKER, *supra* note 7, at 120–21.

50. Shanor, *supra* note 38, at 163; TELES, *supra* note 7, at 232.

51. Genevieve Lakier, *Imagining an Anti-Subordinating First Amendment*, 118 COLUM. L. REV. 2117, 2119 (characterizing prior doctrine as sympathetic to egalitarian concerns).

corporate lawyers"[52] on the bench and bar wrangled it into a mechanism to check the administrative state. They expanded speech coverage to more kinds of commercial communications, culminating in major victories. The paradigmatic case is *Citizens United v. FEC,* in which the Roberts Court ruled that limitations on business campaign spending violate the free speech rights of corporations.[53]

Recent developments in religious liberty doctrine are often assimilated into this story. For example, scholars often subsume *Hobby Lobby* and *Masterpiece* to the *Lochner*ization thesis as another example of a liberty claim successfully challenging a market regulation.[54] In *Burwell v. Hobby Lobby*, the Court announced for the first time that closely held corporations could have sincerely held religious beliefs, and that such beliefs could entitle them to religious exemptions from generally applicable law—in this case, employee access to health insurance that covers contraception.[55] Although the Supreme Court did not decide the core question in *Masterpiece Cakeshop v. Colorado Civil Rights Commission,* that case also falls under this umbrella because the Court at least showed solicitude for the idea that anti-discrimination law in public accommodations might burden the free exercise rights of certain Christian proprietors.[56]

But these cases were not the product of the same legal strategies or organizations. The emphasis on the business bar and its libertarian vision obscures the distinctive history of the legal movement of religious lawyers, especially conservative Protestants, who laid the doctrinal groundwork for the religious right to exclude mooted in *Masterpiece* and now, *303 Creative*. These lawyers developed a free speech theory for the right to deny service in places of public accommodation out of expressive conduct doctrine. By elaborating the religious wing of the "First Amendment industrial complex,"[57] we can better understand the compromises and tensions embodied in the contemporary

52. Tim Wu, *The Right to Evade Regulation*, THE NEW REPUBLIC (June 2, 2013), https://newrepublic.com/article/113294/how-corporations-hijacked-first-amendment-evade-regulation [https://perma.cc/AV4N-H8MP].

53. 558 U.S. 310, 366 (2010).

54. *See* Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453, 1453 (2015) (arguing that federal courts' interpretations of the First Amendment and Religious Freedom Restoration Act (RFRA) are "resurrecting *Lochner*"); Samuel R. Bagenstos, *The Unrelenting Libertarian Challenge to Public Accommodations Law*, 66 STAN. L. REV. 1205, 1205 (2014) (locating attacks on public accommodations law enforcement within libertarianism); *see also* Kessler & Pozen, *supra* note 29, at 1959; Kessler, *supra* note 29, at 1917; Shanor, *supra* note 38, at 182; Leslie Kendrick & Micah Schwartzman, *The Etiquette of Animus: The Supreme Court 2017 Term: Comments*, 132 HARV. L. REV. 133, 154 (2018).

55. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014). Although *Hobby Lobby* concerned the rights of corporations under the Religious Freedom Restoration Act (RFRA) and not the Constitution, the Court's interpretation of RFRA is widely considered coextensive with its understanding of the Free Exercise Clause. *See* Kessler & Pozen, *supra* note 29, at 1959–60 (citing Cynthia Estlund, *Are Unions a Constitutional Anomaly?*, 114 MICH. L. REV. 169, 172 n.11 (2015)).

56. Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 584 U.S. 617, 623 (2018) (describing the balance between anti-discrimination law and proprietors' rights as posing "difficult questions").

57. Kessler & Pozen, *supra* note 29, at 1976.

conservative legal movement, and appreciate the religious right to exclude as part of a comprehensive worldview that has evolved with, and in reaction to, existing doctrine.[58]

II.
FREE SPEECH AND THE RIGHT TO BE INCLUDED AT SCHOOL

Conservative Christians are now paradigmatic free speech litigants, but in the 1970s, leading thinkers on the New Christian Right did not want to equate religious activity with speech in the first place. This Section explains how cause lawyers in the Christian Legal Society learned to love the speech-religion analogy in litigation on behalf of Christian student groups. They believed that evangelizing was both a moral imperative and a constitutional right under the Free Exercise Clause of the First Amendment.[59] But a generation of Establishment Clause jurisprudence prevented religious practice in public schools.[60] Consequently, many public universities prevented Christian student groups from using school space for worship or evangelizing. Free exercise claims on behalf of these students hit an Establishment Clause wall.

In their search for an alternative frame, these cause lawyers considered whether recent free speech and association doctrines might work. Could they argue that on-campus worship and evangelizing were forms of speech like any other? Doing so was not obvious, as it would violate their belief that Christianity stood above other belief systems.[61] But without a viable free exercise path, they decided to give free speech a try.

Conservative Christian lawyers strategically co-opted free speech egalitarianism by analogizing Christian religious practices to the minority

58. My account also differs from the separate conversation about *Hobby Lobby* and *Masterpiece Cakeshop* among scholars of anti-discrimination law and religious liberty doctrine. Their work begins from the understanding that conservative Christians would raise free speech arguments to advance their moral vision and portray conservative Christians as a disfavored minority. Within anti-discrimination scholarship, *see generally* Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516 (2015); Melissa Murray, *Consequential Sex: #MeToo,* Masterpiece Cakeshop*, and Private Sexual Regulation*, 113 NW. U. L. REV. 825 (2018); Melissa Murray, *Inverting Animus:* Masterpiece Cakeshop *and the New Minorities*, 2018 SUP. CT. REV. 257 (2018); Leah Litman, *Disparate Discrimination*, 121 MICH. L. REV. 1 (2022). Within law & religion scholarship, *see generally* Richard Schragger & Micah Schwartzman, *Religious Antiliberalism and the First Amendment*, 104 MINN. L. REV. 1341 (2020); Richard Schragger & Micah Schwartzman, *Against Religious Institutionalism*, 99 VA. L. REV. 917 (2013); Nomi Maya Stolzenberg, *It's About Money: The Fundamental Contradiction of* Hobby Lobby, 88 S. CAL. L. REV. 727 (2015); Micah Schwartzman & Jocelyn Wilson, *The Unreasonableness of Catholic Integralism*, 56 SAN DIEGO L. REV. 1039 (2019); Jason Blakely, *The Integralism of Adrian Vermeule*, COMMONWEAL MAG. (Oct. 5, 2020), https://www.commonwealmagazine.org/not-catholic-enough [https://perma.cc/GKH3-SWVF]. This Article locates one source of minoritizing rhetoric in the New Christian Right's legal strategy, and identifies key internal moves for developing an expressive conduct right to exclude which occurred long before the Roberts Court.

59. *See* YOUNG, *supra* note 15, at 179.

60. *See infra* Section II.A.1.

61. *Id.*

religious groups previously under the doctrine's aegis. They equated Christian practices with secular speech and likened conservative Christians to disfavored minority speakers. The result was a viable legal argument that equality at school required inclusion for Christian religious practices, including evangelizing to other students, which were cast as "religious speech." What was initially conceived of as an Establishment Clause violation became an activity protected by the Free Speech and Assembly Clauses.

A. Religious Activity as Speech

From within the New Christian Right of the late 1970s, there was little support for the idea that Christian conduct could be analogized to speech. New Christian Right activists held the Supreme Court partially responsible for America's moral decline, particularly for denigrating Christianity when it equated religious faiths with secular beliefs. Bringing free speech and association claims required the movement to rely on the analogy that it so despised. It also separated the movement's political rhetoric from its legal strategy. In the public arena, the movement claimed to represent the moral position of most Americans, while inside the courtroom cause lawyers began to describe conservative Christians as a disfavored minority.

This strategic innovation worked because it resonated with the progressive free speech tradition. Other groups, from gay student organizations to Students for a Democratic Society, had indeed successfully raised equal access claims earlier in the 1970s. Some of the earliest judicial victories for the religious speech strategy were delivered by progressive federal judges, who understood these student groups as similarly disfavored and meriting judicial solicitude for their unequal treatment under university policies.

1. School Prayer and the Wall of Separation

The New Christian Right burst onto the political scene in the late 1970s. Over the course of the following decade, a potent new White conservative Protestant ecumenicalism bridged theological differences through shared diagnosis of America's moral collapse.[62] The fundamentalist Baptist preacher

62. No single issue galvanized evangelical political engagement in the late 1970s. School desegregation, abortion, tax policy toward religious broadcasters, financial benefits for religious schools, and the Equal Rights Amendment (ERA) were among the movement's major concerns. *See* BROWN, *supra* note 25, at 22; Paul Boyer, *The Evangelical Resurgence in 1970s American Protestantism*, *in* RIGHTWARD BOUND: MAKING AMERICA CONSERVATIVE IN THE 1970S 29, 36 (Bruce J. Schulman & Julian E. Zelizer eds., 2008); Joseph Crespino, *Civil Rights and the Religious Right*, *in* RIGHTWARD BOUND: MAKING AMERICA CONSERVATIVE IN THE 1970S 90, 91 (2008); Rogers M. Smith, *An Almost-Christian Nation? Constitutional Consequences of the Rise of the Religious Right*, *in* EVANGELICALS AND DEMOCRACY IN AMERICA 329, 335 (Steven Brint & Jean Reith Schroedel eds., 2009); DANIEL SCHLOZMAN, WHEN MOVEMENTS ANCHOR PARTIES: ELECTORAL ALIGNMENTS IN AMERICAN HISTORY 92 (2015); YOUNG, *supra* note 15, at 3; RANDALL BALMER, BAD FAITH: RACE AND THE RISE OF THE RELIGIOUS RIGHT 38 (2021). Anti-communist organizations on the right also expanded their activism in response to the women's movement. For example, the John Birch Society and the Christian

Jerry Falwell was among the most visible leaders of the movement and was the chief exponent of its defining vision. He preached that cultural change and legal victories for racial equality, feminism, and gay rights posed an existential threat to America's moral foundation, which he characterized as Christian.[63] According to Falwell, permissive culture combined with government overreach imperiled religious freedom; only if ordinary churchgoing people challenged these forces of "secular humanism" could the country avert further moral decay and preserve its place on the world stage.[64] The very name of his organization, the Moral Majority, invoked this mix of fundamentalist eschatology, historical narrative, and political agenda.[65]

In Falwell's declension narrative, some of the blame lay with the Supreme Court because it had prohibited prayer in public schools. For decades, the Supreme Court ruled that the Establishment Clause required government neutrality toward religion in public institutions to maintain a "wall of separation between Church and State."[66] Many cases arose from religious activity in public schools, or from state support for religious schools. One of the earliest cases involving schools and religion explicitly forbade using "the tax-established and

Crusade (a precursor to the Moral Majority) both launched campaigns against sex education in public schools in this period. DANIEL K. WILLIAMS, GOD'S OWN PARTY: THE MAKING OF THE CHRISTIAN RIGHT 81, 83 (2010). What differentiated the late 1970s was a concerted effort to unite grassroots conservative Protestantism into a powerful bloc within the Republican Party. *Id.* at 159.

63. *See* JERRY FALWELL, HOW YOU CAN HELP CLEAN UP AMERICA 23 (1978); *see also* SUSAN FRIEND HARDING, THE BOOK OF JERRY FALWELL: FUNDAMENTALIST LANGUAGE AND POLITICS 164 (2000) (detailing Falwell's "jeremiad"); FRANCES FITZGERALD, THE EVANGELICALS: THE STRUGGLE TO SHAPE AMERICA 308 (2017) (describing the Moral Majority's use of Falwell's jeremiad).

64. WILLIAMS, *supra* note 62, at 133. The concept of secular humanism originated with Francis Schaeffer, a fundamentalist theologian whose ministry in the Swiss Alps called L'Abri ("The Shelter") opened its doors to a wide range of hippies, college students, and religious seekers. *Id.* at 138. "Secular humanism" was his way of capturing a perceived slip into moral relativism across western democracies, exemplified by widespread acceptance and support for abortion. *See* Seth Dowland, *"Family Values" and the Formation of a Christian Right Agenda*, 78 CHURCH HIST. 606, 612 (2009) (describing Schaeffer's work to bring conservative evangelicals into the anti-abortion movement); WILLIAMS, *supra* note 62, at 140 (discussing ways Schaeffer popularized his argument); YOUNG, *supra* note 15, at 151 (summarizing Schaeffer's definition of secular humanism). Through a series of popular books and films, Schaeffer urged evangelicals to engage directly in politics to fend off secular humanism. And by directing their attention toward abortion—mostly off the radar because it was considered a Catholic concern—Schaeffer advocated for co-belligerence with Christians of other denominations. *See* SCHAEFFER, *supra* note 15, at 73, 77; Dowland, *supra* note 64, at 613. Falwell made frequent use of the concept in his books, sermons, and public appearances. *See* HARDING, *supra* note 63, at 164.

65. The name suggested a mass of supporters who could be activated to avert the looming disaster and redeem America's true character through activism.

66. Reynolds v. United States, 98 U.S. 145, 164 (1879) (citing Thomas Jefferson for the idea that the purpose of the Establishment Clause is to build "a wall of separation between church and State"); *see also* Everson v. Bd. of Educ. of Ewing Twp., 330 U.S. 1, 16 (1947) (finding that the Establishment Clause was intended to "erect a wall of separation between Church and State"); Epperson v. Arkansas, 393 U.S. 97, 106 (1968) (using public property for religious purposes breaches the wall of separation).

tax-supported public school system to aid religious groups to spread their faith."[67] This case affirmed the religion-neutrality principles of the Constitution.

The Court reinforced this neutrality principle in two key rulings of the early 1960s. Both *Engel v. Vitale* and *Abington v. Schempp* prohibited mandatory non-denominational prayer or devotional Bible reading in public schools.[68] They reasoned that school prayer elevated one religious belief over others in violation of the government's duty to remain neutral. A few years later, the Court relied on similar reasoning to strike down an Arkansas law that banned teaching evolution in public schools and universities.[69]

During the early 1970s, these lines of reasoning consolidated into a requirement that the government avoid entanglements with religion by ensuring that its activities had a secular purpose and did not promote or constrain religion.[70] State funding of religious activity was particularly suspect, for example the sponsoring or funding of "a specifically religious activity in an otherwise substantially secular setting."[71] Religious worship, theological education, and evangelism were prohibited in public schools.

Although *Engel* and *Schempp* received mixed reviews from conservative evangelicals at the time, the New Christian Right turned them into a potent symbol of government hostility toward religion and creeping secularization of American society by the late 1970s and early 1980s.[72] Coupled with the Court's decision legalizing abortion in *Roe v. Wade* and the Carter administration's crackdown on racially discriminatory religious schools, the New Christian Right held the federal government responsible for a national loss of moral righteousness.[73] But unlike the progressive legal movement, the New Christian Right did not have a legal strategy to take on the Supreme Court.

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67. People of State of Illinois ex rel. McCollum v. Bd. of Educ. of Sch. Dist. No. 71, Champaign Cnty., Ill., 333 U.S. 203, 210 (1948).

68. Engel v. Vitale, 370 U.S. 421, 425 (1962) ("[T]he constitutional prohibition against laws respecting an establishment of religion must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government."); Sch. Dist. of Abington Twp., Pa. v. Schempp, 374 U.S. 203, 225 (1963) (explaining that the mandatory prayer in question was "religious exercise[], required by the States in violation of the command of the First Amendment that the Government maintain strict neutrality").

69. *Epperson*, 393 U.S. at 107.

70. The paradigm case is Lemon v. Kurtzman, 403 U.S. 602 (1971).

71. Hunt v. McNair, 413 U.S. 734, 743 (1973); *see also* Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 772 (1973) (holding that expenditures for maintenance and repair, renovation, and for the cost of heating and lighting classrooms of sectarian schools had a primary effect of advancing religion).

72. YOUNG, *supra* note 15, at 65–78.

73. Daniel K. Williams, *Jerry Falwell's Sunbelt Politics: The Regional Origins of the Moral Majority*, 22 J. POL'Y HIST. 125, 139–40 (2010). For example, in 1978, Falwell claimed that "[t]he decision by the Supreme Court legalizing 'abortion-on-demand' did more to destroy our nation than any other decision it has made."). *Id.* at 140. He made similar claims regarding gay rights. *Id.* For discussions of the IRS crackdown on religious schools, *see* BALMER, *supra* note 62, at 42; ANDREW HARTMAN, A WAR FOR THE SOUL OF AMERICA: A HISTORY OF THE CULTURE WARS 3 (2015); SCHLOZMAN, *supra*

John Wayne Whitehead tried to close the gap. A fundamentalist attorney who counted major movement leaders among his spiritual mentors, Whitehead believed that Christianity should organize American public life.[74] He shared the movement's enthusiasm for a robust public witness that burst out of the churches and Sunday schools and brought conservative evangelical values to all areas of life. He wrote that "the idea of Christians taking dominion over God's earth made perfect sense. I truly believed that Christians were one day going to control society, establish right and wrong, and define goodness."[75] The first step was to re-establish a connection between Christianity and government: "Wherever a Christian finds himself he must, as God's viceregent, control that particular area for God."[76]

Whitehead linked the New Christian Right's declension narrative to First Amendment jurisprudence in a series of books and articles directed to a movement audience.[77] He believed that the original purpose of the First Amendment was to "prevent one Christian denomination from dominating the others."[78] According to this understanding of history, "the First Amendment (as well as the entire Constitution) was written to promote a Christian order."[79] But now "the religion of secularism . . . is the established religion of this country."[80] He viewed cases like *Engel* and *Schempp* as "a spiritual race war" between Christians and non-Christians, which would only be resolved in the end times.[81] For Whitehead, the "humanistic infiltration (and dominance) in public education"[82] was evidence that the Court's supposed neutrality principle in fact "equals hostility" toward Christianity.[83]

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note 62, at 90; Crespino, *supra* note 62, at 91. For explanations of different politics of abortion amongst conservative Christian denominations, see YOUNG, *supra* note 15, at 4.

74. The two biggest intellectual and spiritual influences on Whitehead in this period were Schaeffer and Rousas John Rushdoony. Whitehead helped draft and is cited throughout Schaeffer's most famous book, *A Christian Manifesto*. JOHN W. WHITEHEAD, SLAYING DRAGONS: THE TRUTH BEHIND THE MAN WHO DEFENDED PAULA JONES 186 (1999); SCHAEFFER, *supra* note 15, at 10, 11, 36, 56, 140, 146. Rushdoony was a conservative Calvinist Presbyterian and the founder of a well-connected extremist theological group called Christian Reconstructionism, who mentored Whitehead closely in the early 1970s. WHITEHEAD at 147.

75. WHITEHEAD, *supra* note 74, at 145.

76. JOHN W. WHITEHEAD, THE SEPARATION ILLUSION: A LAWYER EXAMINES THE FIRST AMENDMENT 173 (1977). He continued, "[T]his means applying the Scriptures to every area of life. . . . Of course, the non-Christian will resist since the Scriptures to him are foolish." *Id.* at 174.

77. WHITEHEAD, SLAYING DRAGONS, *supra* note 74, at 64; JOHN W. WHITEHEAD, THE SECOND AMERICAN REVOLUTION (1982); JOHN W. WHITEHEAD, THE NEW TYRANNY: THE OMINOUS THREAT OF STATE AUTHORITY OVER THE CHURCH (1982).

78. John W. Whitehead & John Conlan, *The Establishment of the Religion of Secular Humanism and its First Amendment Implications*, 10 TEX. TECH. L. REV. 1, 3 (1978) (quoting Edward S. Corwin, *The Supreme Court as National School Board*, 14 LAW & CONTEMP. PROBS. 3, 11–12 (1949).

79. WHITEHEAD, *supra* note 76, at 115.

80. *Id.* at 123.

81. WHITEHEAD, *supra* note 76, at 97–98.

82. WHITEHEAD, THE SECOND AMERICAN REVOLUTION, *supra* note 77, at 58.

83. WHITEHEAD, *supra* note 76, at 116.

The heart of Whitehead's critique was dismay that the Court had equated Christianity with other belief systems.[84] According to his historical narrative, the Religion Clauses were meant to protect Christianity. When the Court referred to other practices as religious, including "secular humanism," the effect was nothing less than a redefinition of religion for constitutional purposes.[85] For Whitehead, it was wrong "to level all religions to a position of equality" because "Christianity offers the only path to the one true God,"[86] and so "[t]he Christian faith is not reducible to the level of every other religion."[87] As the source of truth, Christianity could not be compared to other belief systems: it was inherently superior.

For Whitehead, it followed that Christianity was not egalitarian.[88] "The true Christian faith teaches that all men are not equally loved by God," he explained, because "if they [were], Christianity would no longer make any sense because the sinner would be equal with the saint and to be evil would be the same as to be good."[89] The idea that "all men are equal in the eyes of God" was simply "an example of how democratic thought has polluted the doctrines of many theologians."[90]

According to Whitehead, the Court only made things worse by applying this equality principle so unevenly. "If moral teaching is eliminated in the public schools, then the ideology of the religion of Secular Humanism would be the only ideology in public education offering answers to moral questions," he complained.[91] If public schools could not promote Christian values, then the schools should also be prevented from inculcating secular values.[92] In fact, "[t]o

84. MOORE, *supra* note 7, at 60 (discussing Whitehead and Conlan's analysis of religion-as-speech).

85. Whitehead & Conlan, *supra* note 78, at 15. Other movement lawyers picked up on this point. Like Whitehead, they pointed to Torcaso v. Watkins, 367 U.S. 488 (1961), in which the Court had included "secular humanism" in a list of religions. *See, e.g.*, William B. Ball, *What Is Religion?*, 8 CHRISTIAN LAW (C.L.S.) 5–7 (1979). For more on William Ball's influence on conscience exemptions, *see* Jeremy Kessler, *The Legal Origins of Catholic Conscientious Objection*, 31 WM. & MARY BILL RTS. J. 361, 373–75 (2022).

86. WHITEHEAD, *supra* note 76, at 115.

87. *Id.*

88. *Id.* at 52.

89. *Id.* at 53.

90. *Id.*

91. Whitehead & Conlan, *supra* note 78, at 20.

92. Other movement lawyers echoed this concern. Reflecting on the effects of the decisions in 1981, for example, William Ball wrote that the Supreme Court had prescribed "religion-free sterility" in public institutions, depriving religious expression to millions of Americans. When students learned about "fetishism, transvestites, sadism, masochism, sodomy, pre-marital sex, and the 'meaning of marriage'" in a health class, for example, was not the state teaching children "the religion of secular humanism"? William B. Ball, *Religious Liberty: New Issues and Past Decisions, in* A BLUEPRINT FOR JUDICIAL REFORM 327, 343, 345 (Patrick B. McGuigan & Randall R. Rader eds., 1980); Paul Weyrich Papers, University of Wyoming, Box 41, Folder 12.

hold otherwise would smack of discrimination."[93] The Court could not pick sides without violating its own commitment to neutrality.

2. The Turn to Free Speech

In the late 1970s, Whitehead converted this sense of hypocrisy into a legal argument. Like many movement lawyers, he first found professional fellowship as a member of the Christian Legal Society (CLS), a national network for conservative Christian lawyers.[94] Founded by conservative Evangelicals, CLS was a big tent with room for Catholic intellectuals, fundamentalist preachers, and evangelical activists.[95] The group launched the Center for Law and Religious Freedom (CLRF) in 1975, the nation's first conservative Evangelical public-interest firm, to defend the rights of Christian student groups in public schools.[96] CLRF's task was to go on the offensive, challenging school rules that prohibited religious exercise on campus. Whitehead was one of the first lawyers to sign on.[97]

As the landscape of the First Amendment shifted, Whitehead and his colleagues groped toward possible legal strategies in law reviews and the CLS quarterly journal. The most obvious option was the Court's recent extension of free speech rights to public school students in *Tinker v. Des Moines Independent Community School District*.[98] Perhaps, Whitehead argued, *Tinker* could be used to defend the rights of students to hear religious speakers.[99] Or, insofar as

93. Robert L. Toms & John W. Whitehead, *The Religious Student in Public Education: Resolving a Constitutional Dilemma*, 27 EMORY L. J. 3, 14 (1978). Robert Toms was president of the Christian Legal Society in 1974–75 and member of the board from 1973–88. *See* Robert L. Toms, *The President's Message*, 4 CHRISTIAN L. (C.L.S.) 2 (1971).

94. WHITEHEAD, *supra* note 74 at 147; den Dulk, *Prophets in Caesar's Courts*, *supra* note 7, at 180–81.

95. Some of the prominent people associated with CLS in the early 1980s included William B. Ball, the Catholic lawyer; John Neuhaus, a Lutheran intellectual; and Herb Titus, an evangelical law professor with ties to Christian Reconstructionism. Francis Schaeffer and Charles Colson, two bold-faced names in the evangelical movement, both spoke at CLS's 1981 conference. Ball, *supra* note; Richard John Neuhaus, *Law and the Rightness of Things*, 1 CHRISTIAN LEGAL SOC'Y Q. 7 (1980); Herbert W. Titus, *Moses, Blackstone, and the Law of the Land*, 1 CHRISTIAN LEGAL SOC'Y Q. 5 (1980); Glen Eyrie, *Impact of Law on Religious Expression in the '80s*, 2 CHRISTIAN LEGAL SOC'Y Q. 16 (1981).

96. BROWN, *supra* note 25, at 31.

97. WHITEHEAD, *supra* note 74, at 148. Indeed, Whitehead wrote the first brief for CLS. BROWN, *supra* note 25, at 33. Conservative Catholic cause lawyers, and the broader anti-abortion movement, turned toward individual rights claims in the same period. This "conscience talk," to use Jeremy Kessler's phrase, was evident in Catholic reception of *Roe* as an affront to Catholic social citizenship, and fueled a separate strand of religious objections that converged with evangelical efforts in the 2010s. Kessler, *supra* note 85 at 363, 369.

98. 393 U.S. 503 (1969) (holding that public school students have a right to wear black armbands as a sign of protest under the Free Speech Clause).

99. John W. Whitehead, *Religious Expression on the Public Education Campus*, 8 CHRISTIAN L. (C.L.S.) 49, 52–54 (1979).

religious practices could be considered expressive, perhaps these restrictive school policies amounted to prior restraints on free speech.[100]

The lawyers also took note of a new line of free speech cases linking expressive freedom with access to public spaces. Starting with *Police Department of Chicago v. Mosley* in 1972, the Supreme Court articulated a right of equal access to government property it called a "public forum."[101] *Mosley* concerned a Chicago ordinance that forbade protests on public property within 150 feet of a public school during school hours but allowed labor picketing. The Court found that the ordinance violated the Free Speech Clause because it differentiated between labor messages and other speech.[102] This was content discrimination, and it could not condition access to public space. "Selective exclusions from a public forum," the Court wrote, "may not be based on content alone, and may not be justified by reference to content alone."[103]

The Court also invoked the Equal Protection Clause, which had long protected the principle that similarly situated groups must be treated alike. The Justices noticed that the city ordinance treated labor protesters differently than other picketers. Infusing free speech and association considerations with equal protection analysis, the Court explained that content discrimination was especially suspect on government property, where the state had an obligation to promote "'equality of status in the field of ideas.'"[104] The opinion linked liberty of speech to constitutional equality, requiring the government to provide equal access to spaces where free speech occurs.[105] Subsequent public forum cases refined the concept, but maintained the idea that access cannot be granted in a discriminatory way.[106]

Whitehead and his collaborators noticed that "the constitutional right to freedom of a public forum has equal protection overtones."[107] Here was Whitehead's crucial act of translation between New Christian Right movement values and legal reasoning. When writing for a movement audience, Whitehead had harshly criticized recent jurisprudence; but as a lawyer, he had to take the Court as he found it. Whitehead and his co-authors turned the Court's apparent hypocrisy to their advantage. They reasoned that since the Court had already

100. Toms & Whitehead, *supra* note 93, at 30.

101. 408 U.S. 92, 96 (1972). The concept of a "public forum" is generally traced to Harry Kalven, Jr., *The Concept of the Public Forum:* Cox v. Louisiana, 1965 SUP. CT. REV. 1 (1965). *See* Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1718 (1987).

102. *Mosley*, 408 U.S. at 96 (noting the "government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views").

103. *Id.*

104. *Id.*

105. *Id.*

106. Post, *supra* note 101, at 1745–46, 1746 n.135 (discussing Erznoznik v. City of Jacksonville, 422 U.S. 205, 209 (1975); Greer v. Spock, 424 U.S. 828 (1976)).

107. Whitehead, *supra* note 99, at 58.

equated Christian beliefs with secular ones but had shown favoritism toward secular values, Christianity was being treated unfairly. Whitehead's critique of the Court's equivalence between religion and other beliefs became an argument that the government discriminated against conservative Christians. If the Religion Clauses would not help Christian student groups, then they could pitch their defense as a free speech claim to redress the same underlying harm.[108]

The New Christian Right's lawyers knew that this particular kind of speech equality claim had been used already to defend the rights of other student groups shut out of campus.[109] For example, several CLS attorneys noted the success of a very different group of speakers before the Court of Appeals for the First Circuit.[110] In that case, the Gay Students Organization at the University of New Hampshire filed suit when it was denied the right to hold social events on campus.[111] Using evidence that the school's policy was driven by distaste for the content and viewpoint expressed by the group and citing *Mosley*, the First Circuit found that the event ban was content-based and denied the group its free speech rights in a public forum.[112] Attorneys also noted similar precedents on behalf of Jehovah's Witnesses, Black civil rights protesters, and the leftist student organization Students for a Democratic Society (SDS).[113]

It might seem strange that Whitehead and CLRF would rely on a gay rights case for support, since the movement blamed gay rights for national decline. Indeed, in other legal work, CLS strongly opposed gay rights. Whitehead's first case as a solo practitioner created a religious exemption from San Francisco's ordinance preventing employment discrimination on the basis of sexual orientation. With support from CLS, he argued that the First Orthodox Presbyterian Church should be able to fire its openly gay organ player.[114] Other CLS affiliates defended a Catholic school's right to rescind an employment offer to a gay teacher and supported a Christian theological seminary's decision to prevent a gay student from graduating.[115] When the Chicago City Council was

108. den Dulk, *Prophets in Caesar's Courts*, *supra* note 7, at 190; BROWN, *supra* note 25, at 69.

109. *See* Toms & Whitehead, *supra* note 93, at 33; Lawrence W. Stunkel, *Religious Freedom in the Public Schools: Is the Wall Being Misplaced?*, 8 CHRISTIAN L. (C.L.S.) 61, 65 (1979).

110. Toms & Whitehead, *supra* note 93, at 33–34; Stunkel, *supra* note 109, at 65.

111. PATRICIA A. CAIN, RAINBOW RIGHTS: THE ROLE OF LAWYERS AND COURTS IN THE LESBIAN AND GAY CIVIL RIGHTS MOVEMENT 96 (2000).

112. Gay Students Org. of Univ. of N.H. v. Bonner, 509 F.2d 652, 662 (1974).

113. Fowler v. Rhode Island, 345 U.S. 67 (1953) (holding that enforcement of city ordinance prevented Jehovah's Witnesses from equal access to public park compared to other religious groups); Healy v. James, 408 U.S. 169 (1972) (SDS); Carey v. Brown, 447 U.S. 455 (1980) (government cannot limit access of Committee Against Racism to open public forum).

114. *Church Autonomy Reaffirmed*, The Advocate: CLRF, July 1980, A1; *see* Walker v. First Orthodox Presbyterian Church of S.F., No. 760-028, 1980 WL 4657 (Cal. Super. Ct. Apr. 3, 1980).

115. *The Docket*, THE ADVOCATE: CLRF (Christian Legal Soc'y, Springfield, Va.), Jan. 1980, at 5 (discussing gay teacher case); *Right of Seminary Trustees to Deny Graduation to Avowed Homosexual Goes to Kentucky Supreme Court – Lexington Theological Seminary v. Vance,* THE ADVOCATE: CLRF (Christian Legal Soc'y, Springfield, Va.), Jan. 1980, at 2 (discussing gay seminarian case).

considering a gay rights ordinance, CLS's Executive Director issued a press release opposing the law based on his concern that it would require churches, religious schools, landlords, and social agencies to hire and serve gay people.[116]

But Whitehead and CLRF were not approaching the problem as movement activists, they were thinking like movement lawyers. They had to stop "beating our heads against the wall by arguing most of these cases as 'establishment clause' and 'free exercise.'"[117] If a gay student group could get protection to "flaunt its credo,"[118] why shouldn't Christian students be afforded the same rights? Whitehead's critique may have informed his legal thinking[119]: If the Court had already equated religion with secular beliefs, then the movement should deploy those precedents towards its goals. Perhaps the movement could embrace the speech analogy, forcing the Court to acknowledge religious exclusion on campus.

The New Christian Right movement's embrace of free speech claims signaled a divergence between political rhetoric and legal strategy. Lawyers like Whitehead developed a legal theory that universities violated the Free Speech Clause by engaging in viewpoint discrimination in a limited public forum. In doing so, they portrayed religious speech as just one species of speech among many, even though religious movement lawyers had previously maintained that religious activity was different and deserved special treatment under the Establishment Clause. They moved the question from a doctrinal setting where courts were nervous about government "entanglements" with religion[120] to one where courts regularly reinforced equality between entrants in the marketplace of ideas. They did not set out to *change* a particular doctrine so much as to *shift* the doctrinal location for redressing essentially the same harm.

The free speech strategy also shifted the way the movement described itself by analogizing conservative Christian students with disfavored or marginal secular groups that historically received solicitude under the Free Speech and Assembly clauses.[121] Not only was religious activity like speech, but conservative Christian student groups were like gay student organizations. While their co-belligerents invoked a majority in the political sphere, CLS lawyers

116. *See CLS Makes Statement at Press Conference Regarding Homosexual Rights*, THE ADVOCATE: CLRF (Christian Legal Soc'y, Springfield, Va.), Jan. 1980, at 4.

117. Mark Curriden, *Defenders of the Faith*, 80 A.B.A. J. 86, 88 (1994).

118. *Gay Students Org. of Univ. of N.H.*, 509 F.2d at 658.

119. MOORE, *supra* note 7, at 147 (making a related point).

120. Lemon v. Kurtzman, 403 U.S. 602, 616 (1971).

121. The idea that religious practices may have expressive elements which are protected by the free speech clause is nothing new to our constitutional law. The mid-century Supreme Court repeatedly protected the rights of adherents to small and disfavored religious groups to evangelize their faiths. The difference was that the group claiming this protection was a part of the Christian majority. *See generally* SHAWN FRANCIS PETERS, JUDGING JEHOVAH'S WITNESSES: RELIGIOUS PERSECUTION AND THE DAWN OF THE RIGHTS REVOLUTION (2000) (providing a history of religious freedom litigation on behalf of Jehovah's Witnesses).

portrayed Christians as a disfavored minority group in court.[122] The claim sounded in equality—a right to be included on the same terms as everyone else.

B. "Religious Speech" in Widmar v. Vincent

The Supreme Court validated this "religious speech" argument in a case filed by a CLS affiliate.[123] In 1977, eleven students in an evangelical group called Cornerstone sued the University of Missouri-Kansas City.[124] The school granted the group official recognition and use of school spaces on par with other student groups, but attempted to draw the line at using school spaces for "regular religious services."[125] Cornerstone wanted regular use of a school meeting space to conduct "worship," including "the offering of prayer," and "singing of hymns." Consistent with the teachings of their faith, the students also intended to evangelize to the "undecided and… uncommitted" in attendance.[126] To the university, approving religious worship on campus sounded like a violation of the Establishment Clause prohibition on government advancing or endorsing a particular religion. The CLS attorney objected that the prohibition violated the students' rights to free exercise of their religion. Echoing Whitehead's views, the lawyer also argued that the policy embodied a prior restraint of religious speech, as well as an Equal Protection Clause violation.[127]

The case hinged on whether the judge believed religious practice received the same protections as secular speech under the Free Speech Clause. The district court's answer was no. It ruled for the school on Establishment Clause grounds, but its discussion of CLS's other two constitutional claims is instructive. On a basic level, the court did not think that secular and religious groups were similarly situated. It was certain that "speech with religious content cannot be treated the same as any other form of speech. To do so would make a nullity of

122. Historians of the New Christian Right generally argue that the movement switched from a majoritarian to a minoritarian framing in the 1990s out of frustration that the Reagan administration was not wholly receptive to their project. *See, e.g.*, David John Marley, *Riding in the Back of the Bus: The Christian Right's Adoption of Civil Rights Rhetoric*, *in* THE CIVIL RIGHTS MOVEMENT IN AMERICAN MEMORY 346, 348 (Renee C. Romano & Leigh Raiford eds., 2006) (describing Ralph Reed's influence on the shift); *see also* NeJaime, *supra* note 25, at 324 (describing the waning force of majoritarian politics on the Christian Right in this period). However, minoritizing legal claims arose simultaneously with the Moral Majority in the late 1970s.

123. The attorney was James M. Smart, Jr. *See Religious Freedom and the First Amendment Feature*, 7 CHRISTIAN LEGAL SOC'Y Q. 17, 18 (1986). His co-counsel was Michael Whitehead, a Kansas City attorney who went on to litigate with ADF and serve as chairman of the ADF foundation and as a member of the Board of Directors. *See Michael Whitehead*, ADF LEGAL, https://adflegal.org/profile/michael-whitehead [https://perma.cc/Z2ES-VFCY] (last visited Aug. 9, 2023).

124. Chess v. Widmar, 480 F. Supp. 907, 908 (W.D. Mo. 1979); *see also* Brief of Respondents at 4, Widmar v. Vincent, 454 U.S. 263 (1981) (No. 80-689), 1981 WL 390013 (describing students as evangelicals of different denominations who share major tenets of evangelical faith, including Biblical inerrancy, scriptural command to bear witness, and teach the Bible.)

125. *Chess*, 480 F. Supp. at 908.

126. *Id.* at 910.

127. *Id.* at 918.

both the establishment clause and the free exercise clause of the first amendment."[128] CLS appealed, stating that the decision gave "fewer rights to students of religious persuasion than to other student groups."[129] The Eighth Circuit agreed, using a free speech analysis.

The author of the majority opinion, Judge Gerald Heaney, was not a conservative jurist. He was appointed to his seat by President Johnson after years of leadership in Minnesota's Democratic-Farmer-Labor Party, and was best known for his support of racial integration in St. Louis schools.[130] His opinion in *Widmar* reflected his progressive constitutionalism, including citations to landmark cases defending free association and public forum rights for the NAACP and the labor movement, to find that such protection also extended to free association to advance religious beliefs.[131] He began the majority opinion "with the proposition that religious speech, like other speech, is protected by the First Amendment."[132] Without using the word, the civil libertarian found that the university's policy discriminated against Cornerstone.[133] CLS's framing of the case had worked.

Before the Supreme Court, CLS reiterated its free speech arguments, and the University of Missouri insisted that the case turned on the Establishment Clause.[134] The CLS brief argued that the University of Missouri had adopted and enforced a regulation which "directly, and firmly, discriminate[d] against religious speech and exercise."[135] Seven Justices agreed that "[t]he question is not whether the creation of a religious forum would violate the Establishment Clause. The University has opened its facilities for use by student groups, and the question is whether it can now exclude groups because of the content of their speech."[136] They believed that the University had "discriminated against student groups and speakers based on their desire to use a generally open forum to engage in religious worship and discussion."[137] The Court then applied strict scrutiny to the school policy, and found that none of the University's interests were sufficiently compelling to justify it.[138] In dissent, Justice White wrote that

128. *Id.*

129. *Late Breaking News – December 20, 1979*, THE ADVOCATE: CLRF (Christian Legal Soc'y, Springfield, Va.), Jan. 1980, at 1.

130. *Retired Federal Judge, Longtime DFL Activist Gerald Heaney Dies at 92*, PIONEER PRESS (June 22, 2010), https://www.twincities.com/2010/06/22/retired-federal-judge-longtime-dfl-activist-gerald-heaney-dies-at-92/ [https://perma.cc/4XCF-5JEQ].

131. *See* Chess v. Widmar, 635 F.2d 1310, 1315 (8th Cir. 1980).

132. *Id.*

133. *Id.* at 1317 ("The University's policy singles out and stigmatizes certain religious activity and, in consequence, discredits religious groups").

134. Brief of Petitioners at 47, Widmar v. Vincent, 454 U.S. 263 (1981) (No. 80-689), 1981 WL 390010 (distinguishing *Widmar* from cases "actually concerned with the rights of free speech").

135. Brief of Respondents at 13, Widmar v. Vincent, 454 U.S. 263 (1981) (No. 80-689), 1981 WL 390013.

136. Widmar v. Vincent, 454 U.S. 263, 273 (1981).

137. *Id.* at 269.

138. *See id.* at 270.

collapsing religious practice into speech was "plainly wrong."[139] "Were it right, the Religion Clauses would be emptied of any independent meaning in circumstances in which religious practice took the form of speech."[140] Over these objections, the Court had converted an Establishment Clause violation into a protected activity under the Free Speech Clause.

After *Widmar*, CLS focused on free speech litigation for equal access to public schools, which became a cottage industry in the growing movement.[141] Over the next twenty years, cause lawyers of the New Christian Right argued equal access cases thirty-six times and won on twenty-four occasions.[142] They argued that the central reasoning in *Widmar* should extend to high schools, funding for student groups, as well as questions of school curricula.[143] The equal access strategy sat uneasily with some supporters, and movement leaders understood that it could be used by other groups, like gay student organizations.[144] However, CLRF director Sam Ericsson told one researcher that the Center did not oppose this expansion because "it presents Christians as sincere, consistent with principle, and fair."[145] Litigators would later describe these claims as seeking a "seat at the table," or an equality of access for all comers.[146]

III.
ANTI-DISCRIMINATION LAW AND THE RIGHT TO EXCLUDE

> "We have people who cannot agree on how to get to heaven, but we are together on this one issue – all our religious freedoms are

139. *Id.* at 284 (White, J., dissenting).

140. *Id.*

141. Religious Freedom and the First Amendment Feature, *supra* note 123, at 17 ("The Center has gained a reputation for advocacy of protecting religious speech by the same constitutional standard as political speech."). In 1984, the group also led efforts to codify *Widmar* by urging Congress to pass the Equal Access Act. *See* den Dulk, *Prophets in Caesar's Courts*, *supra* note 7, at 63; ALLEN D. HERTZKE, REPRESENTING GOD IN WASHINGTON: THE ROLE OF RELIGIOUS LOBBIES IN THE AMERICAN POLITY 161–199 (1988).

142. *See* den Dulk, *Prophets in Caesar's Courts*, *supra* note 7, at 207. Jay Sekulow claimed the mantle of equal access cases in 1990, when he founded the American Center for Law and Justice, the legal arm of Pentecostal televangelist Pat Robertson's Christian Coalition. *See* BROWN, *supra* note 25 at 13; *see also* Linda Greenhouse, *High Court Rules Religious Clubs Can Meet in Public High Schools*, N.Y. TIMES. (June 5, 1990), https://www.nytimes.com/1990/06/05/us/high-court-rules-religious-clubs-can-meet-in-public-high-schools.html [https://perma.cc/DJH6-4QJN] (reporting on contemporary rulings post-*Widmar*).

143. *See* Bd. of Educ. of Westside Cmty. Schs. v. Mergens ex rel. Mergens, 496 U.S. 226, 247–53 (1990); Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 842–46 (1995).

144. SOUTHWORTH, *supra* note 25, at 165.

145. den Dulk, *Prophets in Caesar's Courts*, *supra* note 7, at 192. In her pioneering study of the conservative legal movement, Ann Southworth's interview subjects similarly recounted how they "came to the conclusion that there was no principled way to say, the student-led Bible studies are in and the gay-straight alliances are out." SOUTHWORTH, *supra* note 25, at 165.

146. HACKER, *supra* note 25, at 36 (attributing "place at the table" to Jay Sekulow.).

> decaying."[147]
>
> – Alan Sears, December 1994.

The movement's legal education from the equal access cases served it well going forward. In the 1990s, free speech lawyers for the New Christian Right exported the religious speech strategy out of public forums and into public accommodations. Much as they felt victimized by school policies constraining evangelism, movement leaders also objected to public accommodations laws that they believed violated the religious freedom of proprietors. They argued that equal participation for religious businesses in the marketplace required that courts recognize their right to deny service to some customers.

Like in the educational context, the Religion Clauses were more of a hindrance than a help.[148] In 1990, the Supreme Court lowered the scrutiny it extends to government activities that infringe on the Free Exercise Clause in *Employment Division v. Smith.*[149]

Seeking an alternative path to strict scrutiny, movement litigators stumbled on an opportunity to test a different theory. In *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, a solo practitioner named Chester Darling had been arguing that a parade could exclude some members of a protected group because the organizers objected to their message.[150] The Alliance Defense Fund, a leader in the growing Christian right legal ecosystem, supported his appeal to the Supreme Court.[151] There, conservative Christian litigators tried to replicate the egalitarian register of the school cases by arguing that government discriminated against conservative Christian public accommodations when it enforced civil rights law against them.

The case was not considered a bombshell when it was decided in 1995. A unanimous Court held that a parade warranted free speech coverage, even noting that an unusual application of public accommodations law had transformed the purpose of anti-discrimination law from protecting minorities to changing the content of private speech.[152] But among conservative Christian movement litigators, the case held greater significance. For the first time, the Supreme Court had unsettled the balance between anti-discrimination law and free speech.

This Section details how the New Christian Right widened this crack in the doctrine, culminating in *303 Creative*. Part A offers a history of public accommodations and the New Christian Right. Informed by this history, Part B explains how cause lawyers for the New Christian Right translated the equal

147. Curriden, *supra* note 117, at 87.

148. In the education cases, CLS attorneys used speech to circumvent Establishment Clause bars to religious practice at public schools. In the public accommodations context, the obstacle was a recent interpretation of the Free Exercise Clause. Under prior precedent, government activities which infringed on free exercise were subject to heightened scrutiny. See Sherbert v. Verner, 374 U.S. 398, 403. (1963).

149. 494 U.S. 872, 877 (1990).

150. 418 Mass. 238 (1995).

151. *See infra* Part III.B.2.

152. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557 (1995).

access theory of discrimination into a broader right to exclude. Finally in Part C, I discuss how in *303 Creative*, the *Hurley* exception became the rule, imputing unconstitutional purpose to commonplace anti-discrimination laws.

A. Public Accommodations and the New Christian Right

By the winter of 1993, the New Christian Right was accustomed to disappointment. Reagan's election had given the movement high hopes, but the president did not push the Family Protection Act, the movement's omnibus social policy legislation, and had offered only nominal support for proposed school prayer and anti-abortion amendments to the Constitution.[153] Contrary to his campaign promises, Reagan introduced legislation empowering the IRS to deny tax exemption from racially discriminatory schools.[154] Fundamentalist preacher Pat Robertson's presidential campaign in 1988 had failed, and flagship organizations like the Moral Majority disappeared from the national stage.[155] The movement's public image was in free fall after corruption and sexual scandals brought down leading ministries.[156]

Yes, Reagan had filled the federal bench, but from the perspective of the movement, the judiciary remained intransigent.[157] The Supreme Court applied Title IX of the Civil Rights Act to a conservative Christian college that rejected federal funding, prevented New York from sending state financial support to parochial schools, and struck down voluntary school prayer.[158] The Court had

153. WILLIAM C. MARTIN, WITH GOD ON OUR SIDE: THE RISE OF THE RELIGIOUS RIGHT IN AMERICA 233 (1996); WILLIAMS, *supra* note 62, at 203. For the movement's disappointment with the Reagan administration, see YOUNG, *supra* note 15, at 211; ZIEGLER, *supra* note 7, at 58–72.

154. *See* Crespino, *supra* note 62, at 104; MICHAEL J. MCVICAR, CHRISTIAN RECONSTRUCTION: R.J. RUSHDOONY AND AMERICAN RELIGIOUS CONSERVATISM 145–47 (2015).

155. *See* SCHLOZMAN, *supra* note 62, at 202; NICOLE HEMMER, PARTISANS: THE CONSERVATIVE REVOLUTIONARIES WHO REMADE AMERICAN POLITICS IN THE 1990S 53 (2022).

156. Both Jimmy Swaggart and Jim Bakker were embroiled in sex scandals in the late 1980s. *See* SARAH BARRINGER GORDON, THE SPIRIT OF THE LAW: RELIGIOUS VOICES AND THE CONSTITUTION IN MODERN AMERICA 147 (2010).

157. A 1987 retrospective in *Policy Review*, a magazine of the Heritage Foundation, is instructive. Michael McConnell, later appointed to the Court of Appeals for the Tenth Circuit by President George W. Bush, wrote that "[a]lthough Republican presidents have filled the last seven vacancies on the Supreme Court, conservatives have yet to see their ideas prevail, more than occasionally, in the courts." Michael W. McConnell, *The Counter-Revolution in Legal Thought*, 41 POL'Y REV. 18, 18 (1987). Paul M. Weyrich, one of the architects of the New Christian Right, complained that "there has been no Reagan Revolution." Paul Weyrich, *The Reagan Revolution That Wasn't*, 41 POL'Y REV. 50, 50 (1987). President Reagan elevated William Rehnquist to Chief Justice and named Sandra Day O'Connor, Antonin Scalia, and Anthony Kennedy to the Supreme Court.

158. Grove City Coll. v. Bell, 465 U.S. 555, 572 n.21 (1984) (finding that Title IX applied to schools that accepted federal money in the form of student financial aid); Aguilar v. Felton, 473 U.S. 402, 414 (1985) (finding that New York state program to send public school teachers to parochial schools violated Establishment Clause); Wallace v. Jaffree, 472 U.S. 38, 61 (1985) (finding that Establishment Clause prevented mandatory moment of silence or voluntary prayer in public school).

rejected Bob Jones University's free exercise defense for violating racial anti-discrimination law, and *Roe v. Wade* was still on the books.[159]

These frustrations reverberated into the Bush years, epitomized by the Supreme Court's decision in *Employment Division v. Smith.*[160] For thirty years, the Court had applied strict scrutiny to government intrusions on free exercise of religion.[161] The cases reflected the Court's concern for minority religions like Jehovah's Witnesses, Seventh-Day Adventists, and the Old Order Amish.[162] After William Rehnquist became Chief Justice in 1986, the Court began to uphold regulations despite the substantial burden they placed on Jews, Muslims, and Native Americans.[163] This retreat from strict scrutiny culminated in *Smith*.[164] There, the Court lowered the state's burden by ruling that neutral, generally applicable laws that do not target religious practices do not violate the Free Exercise Clause. Reagan nominee Antonin Scalia wrote the majority opinion,[165] while the remaining progressive stalwarts of the Warren Court, Justices Brennan and Marshall, both dissented.[166]

Lawyers for the New Christian Right felt betrayed.[167] The Reagan revolution on the Supreme Court had delivered a major blow to their vision of religious freedom. One movement lawyer told the Washington Post that the "most shocking thing" was that "the conservatives that all the Christians were shouting 'hurray' about when Reagan picked them to the Supreme Court . . . were all the people who stabbed us in the back on this thing. Scalia wrote the opinion, and Rehnquist and Kennedy joined it."[168] The attorney later described

159. Bob Jones Univ. v. United States, 461 U.S. 574 (1983); Roe v. Wade, 410 U.S. 113 (1973). Even with three new Justices and Justice Rehnquist at the helm, the Court declined to overturn *Roe* in 1992. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

160. 494 U.S. 872 (1990).

161. Sherbert v. Verner, 374 U.S. 398 (1963).

162. *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (Jehovah's Witnesses); Sherbert, 374 U.S. at 400 (Seventh-Day Adventists); Wisconsin v. Yoder, 406 U.S. 205 (1972) (Old Order Amish); *see also* Nejaime & Siegel, *supra* note 58, at 2525 (describing the claimants in these cases as "minority religious practitioners who asserted unfamiliar religious convictions"); Thomas Scott-Railton, *A Legal Sanctuary: How the Religious Freedom Restoration Act Could Protect Sanctuary Churches*, 128 YALE L.J. 408, 424 (2018) (attesting to the progressive provenance of this doctrine).

163. Goldman v. Weinberger, 475 U.S. 503 (1986); O'Lone v. Est. of Shabazz, 482 U.S. 342 (1987); Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988).

164. Or at least apparent retreat. In truth, only two religious claimants prevailed at the Supreme Court under Sherbert, which was ostensibly more protective of religious liberty. Nelson Tebbe, *The Principle and Politics of Liberty of Conscience*, 135 HARV. L. REV. 267, 281 n.75 (2021).

165. 494 U.S. 872, 874 (1990).

166. *Id.* at 907 (Blackmun, J., dissenting).

167. Some conservatives, including religious conservatives, greeted the decision with approval. In 1998, Robert George, a leading Catholic legal intellectual, wrote that "there is no free exercise 'right' to conduct exemptions." James M. Jr. Oleske, *The Born-Again Champion of Conscience*, 128 HARV. L. REV. F. 75, 79 (2014-2015) (quoting Robert P. George, *Protecting Religious Liberty in the Next Millennium: Should We Amend the Religion Clauses of the Constitution?*, 32 LOY. L.A. L. REV. 27, 32 (1998)).

168. *See High Court Urged to Reconsider; Varied Groups Unite to Protest Ruling on Ceremonial Use of Drugs*, WASH. POST, May 12, 1990, at C11.

Smith as having "relegated our national commitment to the free exercise of religion to the sub-basement of constitutional values."[169] They had spent a decade casting conservative Christians as a beleaguered minority in the equal access cases, and *Smith* felt like a slap in the face. It also posed a major challenge to their hopes of carving out religious exemptions from anti-discrimination law.

These disappointments, coupled with the end of the Cold War, pushed the broader conservative movement to recalibrate.[170] The legal wing of the movement was beset by infighting over tactics and competition for funding in an increasingly crowded field.[171] John Whitehead was particularly prickly when it came to overtures for coalition building, telling a reporter that his group did not "like holding hands. It gets all sweaty."[172]

Others were more eager to collaborate. In 1993, nine prominent men in conservative Evangelical circles established the Alliance Defense Fund (ADF) to promote "religious freedom, the preservation of the family, and the sanctity of life."[173] The Board of Directors, which would consolidate and rationalize the process of choosing and funding cases, included Sam Ericsson, the longtime Executive Director of the Christian Legal Society.[174] The founders recruited leading movement attorneys to join ADF's Legal Advisory Group and help the

169. *See* Michael P. Farris & Jordan W. Lorence, Employment Division v. Smith *and the Need for the Religious Freedom Restoration Act*, 6 REGENT U. L. REV. 65, 66 (1995). Internal documents from Coalitions for America, a lobbying think tank headed by Paul Weyrich, sound a similar note. For example, a 1991 memo agreed that *Smith* had "the unsavory effect of relegating the first liberty protected in the Bill of Rights to a decidedly second-class status." Memorandum from Thomas L. Jipping, legal affairs analyst, to Coalition for America interested parties (March 4, 1991) (internal quotations omitted) (Paul Weyrich Collection, University of Wyoming, Box 2, Folder 38).

170. For historical overviews of political realignment in the 1990s, *see generally* KEVIN M. KRUSE & JULIAN E. ZELIZER, FAULT LINES: A HISTORY OF THE UNITED STATES SINCE 1974 (2019); SHAPED BY THE STATE: TOWARD A NEW POLITICAL HISTORY OF THE TWENTIETH CENTURY (Brent Cebul, Lily Geismer & Mason B. Williams eds., 2019); JULIAN E. ZELIZER, BURNING DOWN THE HOUSE: NEWT GINGRICH, THE FALL OF A SPEAKER, AND THE RISE OF THE NEW REPUBLICAN PARTY (2020); HEMMER, *supra* note 155; LILY GEISMER, LEFT BEHIND: THE DEMOCRATS' FAILED ATTEMPT TO SOLVE INEQUALITY (2022); TIMOTHY SHENK, REALIGNERS: PARTISAN HACKS, POLITICAL VISIONARIES, AND THE STRUGGLE TO RULE AMERICAN DEMOCRACY (2022); BRENT CEBUL, ILLUSIONS OF PROGRESS: BUSINESS, POVERTY, AND LIBERALISM IN THE AMERICAN CENTURY (2023).

171. SOUTHWORTH, *supra* note 25, at 34.

172. BROWN, *supra* note 25, at 36 (quoting John Moore, *The Lord's Litigators*, 26 NAT. J. 1560 (1994)).

173. *Alliance Defense Fund Network*, ALL. DEF. FUND, INC. (All. Def. Fund, Inc., Phx., A.Z.), 1994, at 4. University of California, Berkeley Bancroft Library, Diamond Collection on the U.S. Right, Box 5, Folder 17 [hereinafter SD 5-17]; Alan Sears, *This is No Game* . . . ADF BRIEFING (All. Def. Fund, Inc., Phx., A.Z.), Vol. 1, No. 5, Nov. 1995, at 4. SD 5-17. James Dobson of the Family Research Council, Bill Bright of Campus Crusade for Christ, D. James Kennedy of Coral Ridge Ministries, Robert Dugan of the National Association of Evangelicals, and Don Wildmon of the American Family Association were among the bold face names in the founder's circle. *Id.* at 1.

174. *A Proven Board of Directors,* ALL. DEF. FUND, INC. (All. Def. Fund, Inc., Phx., A.Z.), 1994, at 10. SD 5-17; *see also* SOUTHWORTH, *supra* note 25, at 31 (discussing ADF's role in coordinating conservative Christian cause lawyering).

Board make funding decisions.[175] Nearly all of the major organizations in conservative Protestant cause lawyering were connected to ADF.[176]

ADF was picky about which cases it would fund. Early on, it rejected three-quarters of the applications it received.[177] The Board of Directors evaluated requests for funding according to four criteria: "Would the matter establish a good legal precedent? Is its outcome critical to the Fund's vision? What is the realistic opportunity for success? . . . Will the law firm agree to share its research and pleadings with others involved in similar cases?"[178] In the first year, thirty-five lawsuits made the cut.[179]

Selectivity immediately paid dividends. In its very first year of existence, ADF supported an equal access case that built on *Widmar* and its progeny to ensure that Christian students could obtain school funding on equal terms with secular student groups. In the case, ADF provided crucial funding to Ronald Rosenberger, a college student at the University of Virginia.[180] In 1990, Rosenberger and some fellow evangelical Christian students at UVA created a Christian group called Wide Awake Productions. The University gave the group official status, but it refused to fund its evangelical publication on Establishment Clause grounds. Backed by powerhouse attorney Michael McConnell, and financial support from ADF, Rosenberger won the case.[181]

Unlike the lower federal courts, which had evaluated the case through the Religion Clauses, the Supreme Court ruled that UVA's policy violated the Free Speech Clause because it constituted viewpoint discrimination against Rosenberger's "religious speech."[182] One ADF affiliate made the equality stakes of the decision even starker when it told supporters that the decision ended

175. They included Jay Sekulow from Pat Robertson's American Center for Law & Justice and Mat Staver of Liberty Counsel. Alan Sears, *From an Idea to a Thriving Reality*, ADF BRIEFING (All. Def. Fund, Inc., Phx., A.Z.), Vol. 2, No. 2, March 1996, at 4. SD 5-17; *ADF Proves the Power of the Principle of Precedent*, ADF BRIEFING (All. Def. Fund, Inc., Phx., A.Z.), Vol. 3, No. 1, January 1997, at 2. SD 5-17.

176. The major exception was John Whitehead and his firm, the Rutherford Institute.

177. BROWN, *supra* note 25, at 49.

178. *Alliance Defense Fund: Operation and Potential,* ALL. DEF. FUND, INC. (All. Def. Fund, Inc., Phx., A.Z.), 1994, at 8. SD 5-17. *See also* Diane Hesselberg, *Fighting the Legal Left,* FOCUS ON THE FAMILY CITIZEN, October 17, 1994. University of California, Berkeley Bancroft Library, Diamond Collection on the U.S. Right, Box 4, Folder 3 [hereinafter SD 4-3].

179. *See Fundraising Materials,* ALL. DEF. FUND, INC. (All. Def. Fund, Inc., Phx., A.Z.), 1994, SD 5-17.

180. *See Case Briefs,* ALL. DEF. FUND, INC. (All. Def. Fund, Inc., Phx., A.Z.), 1994; *Case Briefs,* ALL. DEF. FUND, INC. (All. Def. Fund, Inc., Phx., A.Z.), 1995 (describing ADF financial support for Rosenberger's appeal); SD 5-17.

181. Jeff Hooten, Slam Dunk! FOCUS ON THE FAMILY CITIZEN (Focus on the Family, Colorado Springs, Colo.) Dec. 18, 1995, at 3, SD 4-4. Michael McDonald of the Center for Individual Rights served as McConnell's co-counsel. TELES, *supra* note 7, at 220–21.

182. Widmar v. Vincent, 454 U.S. 263, 277 (1981).

"government discrimination against Christian religious expression."[183] The victory was both a vindication of Whitehead's religious speech equality strategy and a sign that ADF was supplanting his place at the head of the table.[184]

The new group also inherited its founders' belief that tolerance of gay people posed an existential threat to America's moral order.[185] By the early 1970s, some thirty American cities had passed local ordinances that protected gay people against discrimination in housing, employment, and public accommodations.[186] Opposition to gay rights became a central and recurring theme for the New Christian Right.[187] Evangelicals and fundamentalists believed that homosexuality was a sinful activity, not a personal identity, and that extending civil rights to gay people would undermine traditional social roles. One reverend told *The Philadelphia Inquirer* that a gay rights ordinance would bring "hordes of homosexuals" to the city, where they would "flaunt themselves in public, in the classrooms" and molest schoolchildren.[188] Grassroots opposition boiled over into national politics in 1977, when singer Anita Bryant launched a campaign to reverse one such anti-discrimination ordinance in Miami.[189] Her success yielded press attention across the country, and helped her "Save Our Children" movement spread to Minneapolis and other cities.[190]

Like its predecessors, ADF anticipated an "escalating confrontation with the homosexual agenda as attempts are made to expand its influence in our society."[191] Many of ADF's funds in its "family preservation" stream went to challenge non-discrimination and domestic partnership ordinances in Minneapolis, Cincinnati, Denver, and Atlanta, and to represent cisgender, heterosexual parents in parentage disputes with their gay or transgender former

183. *Case Briefs,* ALL. DEF. FUND, INC. (All. Def. Fund, Inc., Phx., A.Z.), 1994. SD 5-17; *Paying Freedom's Price*, MONEY MATTERS (Christian Fin. Concepts, Gainesville, G.A.), Oct. 1994 at 3. SD 5-17.

184. Indeed, the case had arisen in John Whitehead's front yard, and subsequent filings revealed that Rosenberger asked Rutherford for assistance and was refused. Rosenberger v. Rector & Visitors of Univ. of Va., Civ. A. No. 91-0036-C, 1996 WL 537859, at *4 (W.D. Va. Sept. 17, 1996); BROWN, *supra* note 25, at 51.

185. *See, e.g.*, ROUSAS JOHN RUSHDOONY, THE INSTITUTES OF BIBLICAL LAW: A CHALCEDON STUDY (1972) (advocating physical punishment for homosexuality); GREG L. BAHNSEN, HOMOSEXUALITY, A BIBLICAL VIEW (1978) (arguing that gay civil rights advance sin); TIM F. LAHAYE, WHAT EVERYONE SHOULD KNOW ABOUT HOMOSEXUALITY (1978).

186. *See* FRED FEJES, GAY RIGHTS AND MORAL PANIC: THE ORIGINS OF AMERICA'S DEBATE ON HOMOSEXUALITY 109 (2008); AMY L. STONE, GAY RIGHTS AT THE BALLOT BOX 41–62 (2012).

187. Earlier in the decade, conservative Protestants had diagnosed homosexuality as a psychological disorder brought on by poor parenting. In the late 1970s, they began to portray it as "an external threat to the traditional family." Matthew D. Lassiter, *Inventing Family Values*, *in* RIGHTWARD BOUND: MAKING AMERICA CONSERVATIVE IN THE 1970S 13, 23 (Bruce J. Schulman & Julian E. Zelizer eds., 2008).

188. *Rights Laws Haven't Hurt Cities – Or Helped Many Gays*, PHILA. INQUIRER, June 16, 1974, at 3F.

189. FEJES, *supra* note 187, at 2.

190. *Id.* at 4.

191. Alan Sears, *How Would You Answer These Questions?* ADF BRIEFING (All. Def. Fund, Inc., Scottsdale, A.Z.), Jan. 1997, at 4, SD 5-17.

spouses.[192] The organization also explained its activities outside the courtroom in terms of opposition to gay rights. For example, in 1997 ADF launched an education program for sympathetic attorneys to learn about "defining the American Family and its Legal Future."[193] ADF's founding director Alan Sears explained that the initiative would be the "beginning of an army to confront the homosexual agenda, which I believe will be the number one issue we face as we enter the third millennium."[194]

Fighting public accommodations protections with free exercise claims would be an uphill battle, however. In the 1960s, civil rights demonstrators pushed Congress to include federal protections against racial discrimination in public accommodations, which it did in Title II of the Civil Rights Act of 1964.[195] The Supreme Court ruled that Congress had the power to enforce Title II against private businesses, like hotels and restaurants, that had ties to interstate commerce.

In two of the key cases, *Heart of Atlanta Motel v. U.S.* and *Katzenbach v. McClung*, civil rights opponents raised myriad objections, arguing that Title II violated due process, that it took property without compensation, and even that it amounted to involuntary servitude.[196] In *McClung*, a restaurant owner argued, among other things, that providing equal service to Black people unconstitutionally compelled his speech.[197] The Court did not bother to address the claim. Four years later in *Newman v. Piggie Park*, opponents tried again, this time arguing that Title II violated a White restaurant owner's religious objection

192. *See, e.g.*, Lilly v. City of Minneapolis, 527 N.W. 2d 107 (Minn. Ct. App. 1995) (relating to a challenge to Minneapolis ordinance); Equality Found. of Greater Cincinnati v. City of Cincinnati, 54 F.3d 261 (6th Cir. 1995) (relating to a challenge to Cincinnati ordinance) (this is the also-ran case with Evans v. Romer, 854 P.2d 1270 (Colo. App. 1993)); City of Atlanta v. McKinney, 454 S.E.2d 517 (Ga. 1995) (relating to a challenge to Atlanta ordinance); Schaefer v. City & County of Denver, 973 P.2d 717 (Colo. App. 1998) (relating to a challenge to Denver ordinance).

193. *First ADF Litigation Academy Will Train Attorneys to Win*, ADF BRIEFING (All. Def. Fund, Inc., Scottsdale, A.Z.), Jan. 1997, at 2, SD 5-17.

194. *Id.* Sears had worked closely with President Reagan's Attorney General Edwin Meese as the Executive Director of his Commission on Pornography. Connaught Marshner, *Inside Look at Pornography and the Commission*, CONSERVATIVE DIGEST, Aug.1986, at 27. University of Wyoming, American Heritage Center, Paul Weyrich Collection, Box 40.

195. Title II was perhaps the most contentious provision of the Civil Rights Act. Many conservative legal intellectuals, including overt segregationists, argued that it violated rights of private property, association, and liberty. *See, e.g.*, Alfred Avins, *Freedom of Choice in Personal Service Occupations: Thirteenth Amendment Limitations on Antidiscrimination Legislation*, 49 CORNELL L. REV. 228 (1964) (arguing that antidiscrimination legislation violates the Thirteenth Amendment); Alfred Avins, *The Civil Rights Act of 1866, the Civil Rights Bill of 1966, and the Right to Buy Property*, 40 S. CAL. L. REV. 274 (1967) (arguing that the Fourteenth Amendment does not override property rights of business owners); Robert Bork, *Civil Rights—A Challenge*, NEW REPUBLIC, Aug. 31, 1963, at 21. For historical analysis of these arguments, *see* Terbeek, *supra* note 7, at 830; Schmidt, *supra* note 18, at 417.

196. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 260–61 (1964); Katzenbach v. McClung, 379 U.S. 294, 295 (1964).

197. Brief for Appellees at 33, *McClung*, 379 U.S. 294 (1964) (No. 543), 1964 WL 72714.

to serving African-Americans. The Court found the argument "patently frivolous," remarking that it was "not even a borderline case."[198]

In the decades that followed, private organizations—including many religious non-profits—tried and failed to obtain religious exemptions from anti-discrimination law.[199] The Supreme Court rejected, for example, a state's religion-based defense of prohibitions on interracial marriage in *Loving v. Virginia.*[200] In *Bob Jones University v. United States,* it rejected a religious objection to complying with racial anti-discrimination tax regulations.[201]

At the same time, successive social movements fought to expand public accommodations protections for a broader range of politically subordinated groups. State and local regulations expanded to include protection from discrimination on the basis of sex and other characteristics in public accommodations.[202]

Opponents began to float the idea that following these laws violated their rights of expressive association. The Court's reaction to one challenge in 1984 is telling. The United States Junior Chamber of Commerce, or Jaycees, claimed that a public accommodations anti-discrimination ordinance violated its First Amendment right to free expression by requiring it to admit girls. Once women were members, the group argued, its political message would be tainted by unwanted messages—essentially a compelled speech claim. The majority rejected the argument on the ground that inclusion of women as members would not change the group's message, explaining that "acts of invidious discrimination in the distribution of publicly available goods, services, and other advantages cause unique evils that government has a compelling interest to prevent—wholly apart from the point of view such conduct may transmit."[203]

Justice Sandra Day O'Connor concurred in the decision, but for a different reason. She argued instead that the important question was whether the group was fundamentally expressive and therefore protected by the First Amendment, or commercial and therefore subject to business regulation. In her memorable phrase, "[a]n association must choose its market."[204] Jaycees could not both be

198. Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 n.5 (1968); *see also* Sepper, *supra* note 14, at 129–30; Farias, *supra* note 14.

199. Sepper, *supra* note 14, at 132 n.17 (collecting cases).

200. 388 U.S. 1 (1967).

201. Bob Jones Univ. v. United States, 461 U.S. 574 (1983); *see also* Olatunde C.A. Johnson, *The Story of* Bob Jones University v. United States*: Race, Religion, and Congress' Extraordinary Acquiescence*, *in* STATUTORY INTERPRETATION STORIES (William Eskridge, Philip P. Frickey & Elizabeth Garrett eds., 2010); Robert M. Cover, *The Supreme Court, 1982 Term – Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

202. *See* Elizabeth Sepper & Deborah Dinner, *Sex in Public*, 129 YALE L.J. 78 (2019) (outlining the history of public accommodations protections on the basis of sex).

203. Roberts v. U.S. Jaycees, 468 U.S. 609, 628 (1984).

204. *Id.* at 636 (O'Connor, J., concurring).

a public accommodation and claim free speech rights to exclude.[205] In 1994, the landscape remained clear: discriminatory exclusion does not merit free speech coverage. It remained to be seen how the rule would fare in the new, and contested, cultural conflict over gay rights.

B. The Equal Right to Exclude

While movement allies, including the Christian Coalition, Concerned Women for America, and Focus on the Family, attacked gay rights at the ballot box,[206] ADF litigators turned to courts for a right of business owners to deny gay people equal service. One lawyer put it bluntly: if businesses and apartment buildings "lose their ability to discriminate against individuals whose behavior is considered immoral" through gay civil rights legislation, "the very existence of such institutions will be threatened."[207]

The legal strategy developed in dynamic relationship between movement goals, free exercise, and free speech jurisprudence. The lawyers believed that *Smith* made it more difficult to argue that public accommodations laws violated the religious freedom of discriminatory proprietors, but the opinion left open the possibility that they could get strict scrutiny by linking religious freedom to free speech. So, they reached into their toolkit and decided to try the free speech strategy again. This time, rather than argue that free speech required equal access, they would suggest that it required the right to exclude.

1. Free Exercise and Housing Discrimination

ADF's earliest attacks on sexual orientation anti-discrimination protections in public accommodations did not directly address sexual orientation at all.[208] Instead, ADF threw its support behind several religious objections to local ordinances barring housing discrimination on the basis of marital status. The cases arose from very similar fact patterns: An unmarried heterosexual couple applied to rent a room from a mom-and-pop landlord. The landlords denied them, citing their Christian beliefs that fornication is a sin. The couples instigated administrative actions against the landlords for violating local law.

Movement lawyers claimed that the anti-discrimination laws violated their free exercise rights. In fundraising materials, ADF cast the cases as principally about "religious persecution" by government, not public discrimination by

205. *Id.* at 640 ("The members of the Jaycees may not claim constitutional immunity from Minnesota's antidiscrimination law by seeking to exercise their First Amendment rights through this commercial organization.")

206. STONE, *supra* note 187, at 20–22.

207. Case Hoogendoorn, *Homosexuality, Civil Rights and Justice*, 4 CHRISTIAN L. SOC'Y Q. 17, 18 (1983). Hoogendoorn served as Chairman of the CLS Jurisprudence Committee in 1983. *See* Lynn Buzzard, *A Call to Jurisprudence*, 4 CHRISTIAN L. SOC'Y Q. 51, 53 (1983).

208. Direct challenges did occur. In 1986 the Court of Appeals of Minnesota rejected a Minneapolis gym's argument that it had a free exercise right to exclude a gay member. Blanding v. Sports & Health Club, Inc., 373 N.W.2d 784 (Minn. Ct. App. 1985).

landlords.[209] An ADF-backed lawyer explained to the *Chicago Tribune* that the tenants misunderstood the power dynamics at play. The landlords were not "pushing [their] morality down people's throats," instead "it's the other way around. These landlords are being prosecuted with the full weight of government against them for exercising their religious beliefs."[210] As early as 1980, CLS attorneys had identified these claims as a potential source for a "conscience-based exemption from public policy."[211] A few state courts had signaled that they might be receptive to such claims in early 1990s.[212]

The primary target was public accommodations protections on the basis of sexual orientation.[213] In public statements, supporters of ADF's position often cast the cases as competing rights claims, raising arguments courts had rejected in the 1960s and 1970s.[214] A *Wall Street Journal* reader described the cases pitting "the property owners claim to a right to act with freedom" against the prospective tenants' "right to aggress against others and the property of others."[215] One defendant landlord reminded a reporter, "I have religious rights."[216] For Alan Sears, the question was instead, "Do we have the right to freely maintain our religious beliefs outside our homes, or not?"[217] A movement lawyer put it plainly that he aimed to carve out a right to refuse service to gay people: "We are trying to establish that a person with sincere religious beliefs

209. Letter from Alan Sears, President, to ADF Mailing List, June 1996, at 1. SD 5-17.

210. Jody Temkin, *Unmarried Tenants Bring Clash of Values into Court*, CHI. TRIB. (Aug. 27, 1989), https://www.chicagotribune.com/news/ct-xpm-1989-08-27-8901080232-story.html [https://perma.cc/WMY5-9A6M].

211. *Conscience-Based Exemption from Public Policy*, 1 CHRISTIAN L. SOC'Y Q. A3 (1980) (discussing two cases in Minnesota district courts).

212. *See generally* State by Cooper v. French, 460 N.W.2d 2 (Minn. 1990); Mister v. A.R.K. P'ship, 553 N.E.2d 1152 (Ill. App. Ct. 1990); Cnty. of Dane v. Norman, 497 N.W.2d 714 (Wis. 1993). These cases all found that a landlord could discriminate against cohabitators because cohabitation was not covered by laws limiting discrimination on the basis of "marital status" in housing. Although the defendant in *Mister* raised a religious objection, all three of the courts in Minnesota, Wisconsin, and Illinois reached their holdings by determining that the statutes did not intend to include protections for cohabitation.

213. Letter from Alan Sears to ADF Mailing List, June 1996, at 3. SD 5-17 (describing possible consequence for "a Christian business owner [who] won't obey a law requiring him to give health insurance benefits to the homosexual or unmarried sex partners of his employees."); *id.* at 4 (describing ADF support for a couple who ran a motel and did not want to serve unmarried couples as "nearly identical" to Evelyn Smith's case).

214. Jerry Falwell had helped popularize this approach twenty years earlier. For example, he wrote that employment anti-discrimination protections for gay people were a "smoke screen" for the "curtailment of the civil rights of an employer to the free use of his property and business." FALWELL, *supra* note 63, at 14. *See generally* Andrew Fegelman, *Ruling Places Limits on Landlord's Rights*, CHI. TRIBUNE, Dec. 23, 1994, at W3 (summarizing differences in state courts either ruling that landlords' freedom of religion allows them to discriminate against prospective tenants or stating that landlords' discrimination based on sexual orientation is unlawful).

215. *Letters to the Editor: They Have a Right to Be Religious*, WALL ST. J. E. EDITION, Sept. 18, 1992, at A15.

216. Fegelman, *supra* note 215.

217. *Christian Landlords Sued*, ADF BRIEFING (All. Def. Fund, Inc., Scottsdale, A.Z.), Sept. 1995, Vol. 1, No. 4, at 1.

against fornication or sodomy cannot be forced to rent to those who would engage in those immoral activities on their property."[218]

An attorney named Jordan Lorence helped massage that position into an egalitarian register.[219] With support from ADF in the early 1990s, he teamed up with other movement lawyers to advocate for landlords who discriminate, bringing with him one of the first landlord-defendants as a client.[220] An early useful precedent came from a California appellate court in *Donahue v. Fair Employment and Housing Commission.*[221] In *Donahue,* the court found that Catholic landlords had violated an anti-discrimination law, but held that they were entitled to a religious exemption under the California Constitution because they believed that pre-marital sex is sinful, and that it is also sinful to "aid another person in the commission of a sin."[222] On appeal, lawyers on both sides explained the case's broader implications. The tenants' attorney warned that the decision would spawn litigation on the "freedom of religion versus civil rights in the entire spectrum of business relationships, allowing "the exception to swallow[] up the

218. *Final Briefs Filed in Smith Case,* CONCERNED WOMEN FOR AM. NEWSLETTER (Concerned Women for America, D.C.), Sept. 1988, Vol 10. No. 9 at 18 (on file with author) ("Jordan Lorence, the CWA attorney who is handling the case, said the decision will affect whether Christians can refuse to rent to homosexuals"). Journalists covering the cases also recognized that they were proxy battles over gay rights. Temkin, *supra* note 211 ("The concern is that if unmarried heterosexuals can be discriminated against on religious grounds, then so can homosexual couples"); *see also* Philip Hager, *Court to Rule on Refusal to Rent to Unwed Couple: Bias: Landlords Said Their Beliefs Did Not Allow Them to Give a Lease. Case Will Be a Pivotal Test of Religious Rights versus Fair-Housing Laws*, L.A. TIMES (Feb. 28, 1992), https://www.latimes.com/archives/la-xpm-1992-02-28-me-3011-story.html [https://perma.cc/2LZW-DWCY] (stating the Supreme Court's ruling on the legality of landlords citing religious reasons to refusal rental to unmarried couples has broader implications on queer couples); Liane Hansen, transcript of *Catholic Couple Won't Rent to Unwedded*, WEEKEND ALL THINGS CONSIDERED 1 (1991) ("I imagine that this sort of ruling is going to have a big effect on gay couples"). One gay rights lawyer told the *Chicago Tribune* that ADF was "trying to bring under the 1st Amendment something that is really about the freedom to discriminate against gay people." Fegelman, *supra* note 215.

219. After graduating from Stanford and the University of Minnesota Law School, Lorence went to work for the small legal operation within Beverly LaHaye's evangelical anti-feminist organization Concerned Women for America (CWA) in the mid-1980s. He represented a straight woman in a custody battle with her gay ex-husband, parents in Tennessee who wanted their children exempted from science lessons about evolution in their public school, and aided CWA members in Howard County in opposing a proposed gay civil rights law. Mary T. Schmich, *A Spokeslady of the Right*, CHI. TRIBUNE (Mar. 23, 1986), https://www.chicagotribune.com/1986/03/23/a-spokeslady-of-the-right/ [https://perma.cc/ASL4-X9KS]; Thomas Owen, *Freedom of Speech*, THE CHRISTIAN SCIENCE MONITOR, Nov. 24, 1987, at 16 (quoting Lorence during his time at CWA stating that his goal is to allow "students to 'opt out' of being subjected to material that offends their parents' religious beliefs"). *See generally* Jordan Lorence, *The Textbook Case: The Real Complaint*, WASH. POST, Nov. 15, 1986, at A19 (featuring Lorence himself describing the case involving teaching evolution in Tennessee public schools).

220. Smith v. Fair Emp. & Hous. Comm'n, 913 P.2d 909 (Cal. 1996); HACKER, *supra* note 25, at 31. Lorence worked frequently with Jay Sekulow of the American Center for Law and Justice on these cases.

221. Donahue v. Fair Emp. & Hous. Comm'n, 2 Cal.Rptr.2d 32 (Ct. App. 1991).

222. *Id.* at 33 n.1.

rule."[223] Lorence believed the state was "basically wiping out religious liberties for everyone else," akin to "swatting a gnat with an atomic bomb."[224] *Donahue* vindicated neither fear, as the California Supreme Court vacated the Appellate Court's decision, dismissed review, and remanded.[225]

For conservative Christian lawyers, the case suggested an opportunity.[226] Learning from movement experience, Lorence and his colleagues fought anti-discrimination enforcement with its egalitarian logic. Rather than emphasize the landlord's liberty to use their property according to their religion, however, the attorneys cast the landlords as victims of discriminatory treatment by the government. For example, in *Attorney General v. Desilets*, a member of ADF's Legal Advisory Group wrote that Massachusetts' anti-discrimination statute itself "discriminate[s] between religious and secular behavior." He argued that the landlords were not "forcing their religious beliefs on others; rather, it is [] the Attorney General seeking to force the values of the sexual revolution on" the landlords.[227] The argument converted landlords into the victims of discrimination by the government, occluding the effects of their preferences on unmarried couples.

Another ADF-backed attorney made the argument just as clearly in *Swanner v. Anchorage Equal Rights Commission*.[228] Tom Swanner's attorney explained that "[t]his case involves a conflict between a right that is fundamental and constitutionally protected—the free exercise of one's religion—and the right of a statutorily mandated protected class." He argued that the effect of the statute was to coerce him to violate his religious beliefs. For him, that would "be to condone and in effect to participate in the sin by facilitating the sin. . . . [I]t would also force him to make a Hobson's choice—to give up his economic livelihood or to act in contradiction to his religious principles."[229] The source of discrimination, properly understood, was not Swanner, but the government, whose "legislative act . . . forc[ed] him to engage in conduct which is prohibited from by the Law of God."[230] Again, the anti-discrimination law was itself

223. Hager, *supra* note 219; *Catholic Couple Won't Rent to Unwedded*, *supra* note 219.

224. Jayne Levin, *A Case of Rent Bias and Religious Views: In California, Landlords Deny Apartment to Unmarried Couple*, WASH. POST, Sept. 12, 1992, at F1 [https://perma.cc/UCD6-WX5C].

225. *Donahue*, 2 Cal. Rptr. 2d at 38, *review granted and opinion superseded*, 825 P.2d 766 (Cal. 1992).

226. Lorence filed an amicus brief in *Donahue.* He also joined a coalition of 21 groups on both sides of the substantive issue that urged the California Supreme Court to apply strict scrutiny to the state's free exercise clause. *Housing Discrimination Rules Clash with Religious Beliefs*, TAMPA BAY TIMES, May 30, 1992, at 2E [https://perma.cc/J2J7-LXB8]; Levin, *supra* note 225, at F5.

227. Brief for the Defendants-Appellees at *3, 14–15, Att'y Gen. v. Desilets*, 636 N.E.2d 233 (Mass. 1994) (No. SJC-06284), 1993 WL 13156914.

228. 874 P.2d 274 (Alaska 1994).

229. Brief for the Appellant at *13–14, Swanner v. Anchorage Equal Rts. Comm'n, 874 P.2d 274 (Alaska 1993) (No. S-05362), 1993 WL 13625851.

230. *Id.* at *26. Swanner believed that cohabitation before marriage was a sin. And anticipating complicity-based conscience claims in *Hobby Lobby* by twenty years, that "the *Bible* also avers it to be a sin to facilitate or cooperate in the sin of another. . . . [I]t would be as great a sin . . . for someone to

discriminatory in that its enforcement differentially affected landlords with particular religious beliefs.

Most courts did not see anti-discrimination law as a free exercise violation in the early 1990s.[231] ADF lost the cases regardless of which standard of review the courts applied. This remained true even after Congress passed the Religious Freedom Restoration Act (RFRA) in 1993, which raised the burden on laws that implicated religious practice.[232] Judges also had a hard time equating religious exercise with for-profit activities. They did not question the defendants' sincerely held religious beliefs, but found that voluntary entry into market activity required adherence to commercial regulation.[233]

Several courts reasoned that the burden on religious exercise was justified on balance with the harm to third parties of enabling discrimination against unmarried tenants.[234] Despite the attorneys' attempts to cast landlords as victims, courts believed the real targets of discrimination were prospective renters. Judges

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facilitate the sin of cohabitation by renting to such a couple as it would be for oneself to cohabitate outside the bonds of marriage." *Id.* at *10.

231. In two cases unrelated to the New Christian Right, landlords won on other legal theories. In *Mister v. A.R.K. Partnership*, the Illinois Court of Appeals ruled that the landlord could discriminate because the state law covering "marital status" did not encompass cohabitation. 553 N.E.2d 1152 (Ill. App. Ct. 1990). In *State by Cooper v. French*, the Minnesota Supreme Court also found for the landlord for the same reason. 460 N.W.2d 2 (Minn. 1990). In *Att'y Gen. v. Desilets*, the Massachusetts Supreme Judicial Court remanded for the trial court to develop the record on whether there was a sufficiently compelling state interest to justify a burden on religious exercise. 636 N.E.2d 233 (Mass. 1994). A final case, *McCready v. Hoffius*, was remanded by the Supreme Court of Michigan for development of the record on whether the state civil rights act violated the state or federal free exercise clauses, 586 N.W.2d 723 (Mich. 1998), likely because *Boerne*, the case that invalidated the RFRA, came out after the initial decision ruling for renters. On remand, the parties stipulated to dismiss the case without prejudice. City of Boerne v. Flores, 521 U.S. 507 (1997); *see also* Helen M. Alvaré, *Is This Any Way to Make Civil Rights Law? Judicial Extension of "Marital Status" Nondiscrimination to Protect Cohabitants*, 17 GEO. J. L. & PUB. POL'Y 247, 252–57 (2019) (discussing discrimination theory in collected cases).

232. Ira C. Lupu & Robert W. Tuttle, *Religious Exemptions and the Limited Relevance of Corporate Identity*, *in* THE RISE OF CORPORATE RELIGIOUS LIBERTY 373, 375 (Micah Schwartzman, Chad Flanders & Zoë Robinson eds., 2016); William P. Marshall, *The Religious Freedom Restoration Act: Establishment, Equal Protection and Free Speech Concerns*, 56 MONT. L. REV. 227, 228–29 (1995).

233. Swanner v. Anchorage Equal Rts. Comm'n, 874 P.2d 274, 283 (Alaska 1994). With ADF's support, Swanner's lawyer filed a certiorari petition to the Supreme Court. The same Court that would decide *Rosenberger* and *Hurley* declined to hear Swanner's appeal. Justice Thomas, however, took the unusual step of writing a dissent from the denial of cert, where he signaled his interest in determining whether the state's interest in preventing marital status discrimination was compelling enough to overcome a substantial burden on free exercise under RFRA. Swanner v. Anchorage Equal Rts. Comm'n, 874 P.2d 274 (Alaska 1994), *cert. denied,* 513 U.S. 979 (1994) (Thomas, J., dissenting).

234. *See generally* Swanner v. Anchorage Equal Rts. Comm'n, 874 P.2d 274 (Alaska 1994) (ruling that a landlord's refusal to rent to unmarried couples in Alaska due to their religious beliefs was unlawfully discriminatory); Smith v. Fair Emp. & Hous, Comm'n, 913 P.2d 909 (Cal. 1996) (finding that the California Fair and Employment Housing Commission's finding that a landlord's refusal to rent an apartment to an unmarried couple was correct); Jasniowski v. Rushing, 678 N.E.2d 743 (Ill. App. Ct. 1997) (finding that a prospective tenant in Chicago was unlawfully discriminated against by a landlord who refused to rent on the basis of marital status).

were unwilling to adopt an argument that amounted to religious exceptionalism, even in a legal milieu where the Establishment Clause's importance was waning.

2. Compelled Speech in Hurley v. GLIB

It was not long, however, before the Alliance Defense Fund stumbled on a case to test a different legal theory. In fact, *Rosenberger* was not ADF's only victory at the Supreme Court in 1995. ADF also supported the appellant in *Hurley v. Irish-American Gay Lesbian and Bisexual Group of Boston*, a crucial, if misunderstood, precedent for the movement. *Hurley* is a well-known and frequently taught case on the B-side of the gay rights canon and law of speech. Asked whether a private event could exclude a group whose message contradicted its own, all nine Justices of the Supreme Court answered in the affirmative. Posed this way, however, the question occluded the stakes of the case for anti-discrimination law. By locating a sympathetic free speech protagonist—a parade—in conflict with anti-discrimination law, the case challenged the settled position that public accommodations enforcement was constitutional even when it burdened discriminatory communication.

The case originated in a controversy over the 1992 St. Patrick's Day–Evacuation Day Parade in Boston. The parade was historically organized by the City to commemorate both St. Patrick's Day and a state holiday marking the British retreat from Boston Harbor in 1776.[235] Every year, it followed the same route along public streets in South Boston.[236] Starting in 1947, the city outsourced parade organization to the South Boston Allied Veterans Council, an "unincorporated association of individuals" elected by local veterans groups.[237] Into the early 1990s, the city was still closely involved in making the parade happen. It provided roughly a quarter of the necessary funds, promoted the event to participants and spectators, offered printing services, and provided the use of the official seal.[238] The event was, by all accounts, a massive undertaking, with more than 10,000 participants and as many as one million spectators.[239]

The Veterans Council evaluated applications according to "no written procedures, criteria, or standards."[240] The Council automatically approved many previous participants and voted on new submissions in "batches."[241] The Council did not usually ask applicants what message they intended to promote by their participation.[242] On several occasions, groups were permitted to march without

235. Larry W. Yackle, *Parading Ourselves: Freedom of Speech at the Feast of St. Patrick*, 73 B.U. L. REV. 791, 834 (1993).

236. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos. v. City of Bos., 636 N.E.2d 1293, 1296 (Mass. 1994).

237. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 557 (1995).

238. *Id.* at 561.

239. *Id*. at 560–61.

240. *Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 636 N.E.2d at 1296.

241. *Id*.

242. *Id.*

submitting applications by making a contribution, or simply by showing up at the start of the parade route.[243]

In 1992, three people formed the Irish-American Gay, Lesbian, and Bisexual Group of Boston (GLIB) with the express purpose of marching in the parade.[244] They hoped that their participation would express pride in their Irish, lesbian, gay, and bisexual identities, demonstrate internal diversity to both communities, and show support for a similar group fighting to participate in New York's St. Patrick's Day Parade.[245] Initially, the Council denied their request, citing "safety" and "insufficient information regarding the social club."[246] GLIB obtained a court order requiring their inclusion, and they joined the march wearing green shamrocks and pink triangles. Their banner simply named the group: "Irish-American Gay, Lesbian and Bisexual group of Boston."[247] The Council denied GLIB's application again in 1993, this time explaining that its "decision to exclude groups with sexual themes merely formalized that the Parade expresses traditional religious and social values."[248] John "Wacko" Hurley, a leader on the Council, also suggested that he would never allow GLIB to march because he believed that its members were part of ACT-UP and Queer Nation.[249]

GLIB responded by filing an anti-discrimination lawsuit against the Council in state court.[250] It alleged that the parade was a place of public accommodation under Massachusetts law, and that excluding GLIB was discrimination against gay people.[251] The trial court and the Supreme Judicial Court of Massachusetts saw the case through GLIB's frame. After a four-day bench trial, the trial court determined that the Parade qualified as a public

243. *Id.*

244. Yackle, *supra* note 236, at 839.

245. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 557 (1995).

246. *Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 636 N.E.2d at 1295.

247. S. Bos. Allied War Veterans Council v. City of Bos., 875 F. Supp. 891, 902 (D. Mass. 1995). Despite threats that they were "going to get whupped," the worst abuse came from a few spectators lobbing smoke bombs and beer cans at the contingent. *Boston Journal: Gay Group in a Parade Stirs Anger In "Southie,"* N.Y. TIMES, LATE ED. (E. COAST), Mar. 14, 1992, at 16; *see also Gays are Pelted During Boston's St. Patrick's March*, CHI. TRIBUNE, Mar. 16, 1992, at 3 [https://perma.cc/B8XU-HYG9]. One participant was stoned in the head, requiring medical attention. *100% Irish:* Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, GLADLAW, at 10:10 (Mar. 11, 2013), https://soundcloud.com/gladlaw/100-irish-hurley-v-irish [https://perma.cc/7AGL-YKRY].

248. *Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 636 N.E.2d at 1295.

249. *Id.* at n.8. GLIB formed to show support for a similar group being denied access to the New York St. Patrick's Day Parade. Conflict between the Catholic Church and the gay community in New York was explosive during the AIDS crisis. ACT-UP had staged an action at St. Patrick's Cathedral to protest the Catholic Church's position on AIDs education and condom distribution in 1989. *See* Yackle, supra note 236, at 819.

250. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos. v. City of Bos., No. 921518, 1993 WL 818674, at *1 (Mass. Super. Ct. Dec. 15, 1993).

251. *Id.* at *2.

accommodation, and that the Council had discriminated against GLIB on the basis of sexual orientation.[252]

In expressive association cases, the Court first examines whether the communication in question is covered by the First Amendment at all, and if so, the Court evaluates what kind of constitutional protection is required.[253] The coverage question is notoriously difficult. The Supreme Court has long conceptualized activity along a speech/conduct continuum, ruling that the First Amendment covers "pure speech" like the written word, but is generally agnostic as to regulation of conduct. The gray area in the middle can be thorny—what to do about conduct that expresses a message?

By 1995, the Court had established a two-part test to define when activity is "expressive conduct" warranting First Amendment coverage: first, does the actor have the subjective intent to convey a particularized message; and second, is it reasonably likely that an objective observer would understand the message in social context?[254]

When the court turned to the Council's free speech defense, it struggled to see how the parade would be covered. The Council had "always opted for heterogeneousness" and was not selective in choosing participants, making it "impossible to discern any specific expressive purpose" that the First Amendment could reach. In the back of the judge's mind was also Hurley's changing explanations for why the Council had been selective in this instance, which the judge considered mere pretext.[255] The analysis turned on comparing how the Council had treated GLIB compared to other applicants. As the court concluded, "GLIB is not entitled to special benefits, but neither should it be subject to special burdens."[256]

It could have all ended there. The Council's attorney, Chester Darling, had been waging this battle on his own, at considerable cost to his practice, and he had lost at every level of the Massachusetts court system.[257] His decision to pursue the case further proved consequential. Darling cast around for support in the Boston legal community, and eventually assembled a team of four volunteer

252. *Id.* at *15.

253. *See* Boy Scouts of Am. v. Dale, 530 U.S. 640, 648 (2000) ("To determine whether a group is protected by the First Amendment's expressive associational right, we must determine whether the group engages in 'expressive association.'"); *see generally* Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765 (2004) (explaining the coverage/protection distinction in First Amendment law).

254. *See* Spence v. Washington, 418 U.S. 405, 415 (1974) (holding that adding peace sign to American flag constitutes expressive conduct) *and* Texas v. Johnson, 491 U.S. 397, 406 (1989) (holding that burning American flag in political protest is expressive conduct).

255. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos. v. City of Bos., 636 N.E.2d 1293, 1295 (Mass. 1994).

256. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos. v. City of Bos., No. 921518, 1993 WL 818674, at *14 (Mass. Super. Ct. Dec. 15, 1993).

257. John Ellement, *Supreme Court Victory Sweet for Veterans' Lawyer*, BOS. GLOBE, June 24, 1995, at 18.

attorneys who recruited students from Harvard and UMass law schools to assist with a cert petition and briefing.[258] One of the attorneys, Dwight Duncan, recently recalled that at the time, "I felt it was an uphill battle," but he joined the legal team in support of the "legal principle that [the] First Amendment should trump (so to speak) public accommodation law."[259] During preparations for oral argument, Jordan Lorence introduced Darling to Alan Sears at ADF, who provided grant funding to help prepare for the Supreme Court.[260]

Chester Darling continued to insist that the state courts had it all wrong. The parade should be understood as private speech, not a public accommodation.[261] Parades and protest marches are, after all, paradigmatic activities protected by the rights of free speech and association.[262] The argument was not an obvious fit for existing doctrine: even if a court agreed that the parade was the Council's speech, it was not obvious that the Council intended to convey anything specific, given its lax attitude toward reviewing and approving potential participants. Nor was it clear that a parade observer would infer a particularized message from such a diverse array of participants. If the gambit paid off, however, it might clear a path to undermine the longstanding settlement between anti-discrimination law and the First Amendment by invoking strict scrutiny of public accommodations enforcement.

Once First Amendment coverage is established, the inquiry turns to the government's activity to determine how much protection the Constitution provides. Where the regulation is considered content-neutral, the Court applies an intermediate scrutiny test balancing the government's interest against the burden on speech.[263] If instead the government discriminated on the basis of speech content, strict scrutiny is warranted. If the parade was simply the

258. E-mail from Dwight G. Duncan, Professor, UMass Law School, to author (July 25, 2023, 4:51 EST) (on file with author).

259. *Id.*

260. Jeff Hooten, *Slam Dunk!* Focus on the Family Citizen, Dec. 18, 1995, at 4. SD 4-4; PAUL J. WALKOWSKI & WILLIAM M. CONNOLLY, FROM TRIAL COURT TO THE UNITED STATES SUPREME COURT: ANATOMY OF A FREE SPEECH CASE vi, 237 (1996).

261. Brief for Petitioners at *9, Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557 (1995) (No. 94-749), 1995 WL 89280 (arguing that the parade is "a form of speech per se").

262. Protecting the right to march and protest was a hallmark of mid-century civil libertarianism. A series of Warren Court decisions ruled that civil rights protests warranted coverage. *See* Gregory v. City of Chicago, 394 U.S. 111, 112 (1969) (holding that the First Amendment protects peaceful civil rights march); Cox v. Louisiana, 379 U.S. 536, 552 (1965) (holding that the First Amendment protects protest of civil rights arrests), Edwards v. South Carolina, 372 U.S. 229, 235 (1963) (holding that the First Amendment protects desegregation protest). In 1978, the ACLU famously defended the right of a Nazi group to march in Skokie, Illinois, home to many Holocaust survivors. *See generally* DONALD ALEXANDER DOWNS, NAZIS IN SKOKIE: FREEDOM, COMMUNITY, AND THE FIRST AMENDMENT (1985) (describing a Nazi demonstration that obtained the legal assistance of the ACLU to argue for First Amendment free speech rights to march).

263. United States v. O'Brien, 391 U.S. 367, 376–77 (1968) (articulating test). For a canonical critique of doctrine in this area, *see generally* John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975) (criticizing the expression-action distinction in *O'Brien* and later cases).

Council's speech, and the government was attempting to interfere with its expression, then the application of public accommodations law in this context might not be content-neutral. Instead, Darling argued, it amounted to compelled speech.[264]

The argument invoked the bedrock principle of free speech law, that inherent in the right to speak is the right not to speak. In *West Virginia State Board of Education v. Barnette*, a landmark case of 1943, the Court struck down a West Virginia law requiring public school children—the litigants were Jehovah's Witnesses—to salute the American flag and recite the Pledge of Allegiance. Justice Jackson's majority opinion produced one of the most famous articulations of First Amendment values: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox."[265] Relying on *Barnette* deployed speech egalitarianism on the Council's behalf by suggesting that the government had discriminated against it by enforcing a law that compelled it to speak contrary to its intended message.

Darling argued that *Barnette* and its progeny should guide the Court's protection analysis. He wrote that enforcing the public accommodation law in this setting went beyond the state's "concern for an end to discrimination" because it "directly alters the message which the Veterans send down the streets in their Parade"[266] by mandating "dissemination of an ideological message supported by those it seeks to protect."[267] To rule otherwise, he wrote, would endorse "the creation of a state orthodoxy."[268] He urged the Court to apply strict scrutiny to this application of public accommodations law, something ADF lawyers had tried and failed to accomplish using free exercise claims.[269]

As the *New York Times* reported at the time, this framing "pose[d] a conundrum for judges who are both sympathetic to the interests of the gay marchers and, for First Amendment purposes, committed to maintaining a broad

264. The idea that compelled speech is presumptively content-based has gained traction on the Supreme Court in recent years. *See* Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015) (Content-based laws are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests."); Natl. Inst. of Fam. and Life Advocs. v. Becerra, 585 U.S. 755, 767 (2018) (noting that the Court has been reluctant to "exemp[t] a category of speech from the normal prohibition on content-based restrictions.").

265. W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943). The sentiment became the lodestar of compelled speech doctrine.

266. Brief for Petitioners at *31, Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557 (1995) (No. 94-749), 1995 WL 89280.

267. *Id*. at *23. At oral argument, he indicated that the Council's message was in part about "celebrating their religious values." Transcript of Oral Argument at 8, Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557 (1995) (No. 94-749).

268. Brief for Petitioners at *17, Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557 (1995) (No. 94-749), 1995 WL 89280.

269. *Id.*

definition of what constitutes 'expression.'"[270] Indeed, the ACLU filed an amicus brief in favor of neither party, and when a unanimous Court ruled for *Hurley,* [271] one prominent ACLU attorney greeted the decision as a victory for "the lifeblood of the civil rights movement" that meant that "nobody can rain on anybody else's parade."[272] Strategic co-optation had worked.

Both the Court's coverage and protection reasoning stretched existing doctrine. First, the Court ruled that the parade merited free speech coverage by casting the act of exclusion as rejecting an unwanted message. The Court likened the Veterans Council to a composer whose score does not "produce a particularized message," but still chooses which "expressive units" will convey "what merits celebration on that day."[273] As for the objective prong of expressive conduct analysis, the Court determined that allowing GLIB to march would "likely be perceived" as having come from the Council's judgment that "its message was worthy of presentation and quite possibly of support as well."[274] Despite having no particularized message, the parade was a speaker with "the autonomy to choose the content of [its] own message," not merely a conduit for the speech of others as GLIB had suggested.[275]

Second, the Court found that enforcing public accommodations law against an expressive association changed the law's purpose. This application went beyond merely addressing invidious discrimination to compel an ideological orthodoxy, which merits strict scrutiny. The protection analysis drew directly from the Council's brief. It acknowledged that the Massachusetts law, like the long history of common law protections, was intended to redress public discrimination, not to restrict or compel speech.[276] This application of the law, however, was "peculiar."[277] By applying the law to an expressive activity, the

270. Linda Greenhouse, *Supreme Court Roundup; Gay Group and Parade Backers Battle*, N.Y. TIMES, Apr. 26, 1995, at A15.

271. The liberal wing of the Court, which included Justices Stevens, Breyer, and Ginsburg, signed on to Justice Souter's opinion. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 559 (1995).

272. *Justices Allow Ban on Gays in Parade: Supreme Court Rules in Boston Controversy*, HARTFORD COURANT, June 20, 1995, at A1F.

273. *Hurley*, 515 U.S. at 574.

274. *Id.* at 575.

275. *Id.* at 558. This conclusion required the Court to distinguish the case from *Pruneyard Shopping Center v. Robins,* 447 U.S. 74 (1980). In that case, the Court had ruled that California could force a private shopping mall to allow protesters to distribute leaflets on its premises without violating the mall's right against compelled speech. The Court argued that *Hurley* was different because 1) the parade was not open to the public, 2) GLIB's speech was likely to be confused for that of the Veteran's Council, and 3) the Council could not disavow GLIB's message. *Hurley*, 515 U.S. at 580. None of these reasons stands up to scrutiny. The parade was indeed quite open to public participation. Observers had no reason to conflate GLIB's sign with that of the Council or other participants. The Council could have disavowed GLIB's message by calling the parade "The Traditional Family Values Saint Patrick's Day Parade," thus distinguishing the organizers' message from that of the participants.

276. *Id.* at 571–72.

277. *Id.* at 572. For a discussion of the Court's ongoing confusion between conduct, status, and expression in this line of cases, see generally William N. Eskridge Jr., *Noah's Curse: How Religion*

lower courts had extended the law to require the Council "to alter the expressive content of their parade."[278] Justice Souter mused that using anti-discrimination law "to produce speakers free of [] biases" was a "decidedly fatal" purpose.[279]

Mirroring Chester Darling's brief and citing *Barnette*, the Court concluded that "[t]he very idea that a noncommercial speech restriction be used to produce thoughts and statements acceptable to some groups . . . amounts to nothing less than a proposal to limit speech in the service of orthodox expression."[280] In other words, the government had harmed the Council by "essentially forc[ing]"—you could say compelling—it to include a particular message.[281] Although the ruling was confined to this "peculiar" application of anti-discrimination law, it opened a wedge in the longstanding settlement between free speech and anti-discrimination law.

ADF recognized that the case could have broader implications for its anti-civil rights agenda. In movement publications celebrating the victory, ADF did not distinguish between excluding a gay person and excluding a pro-gay message. ADF's newsletter described the case as "a group of veterans defending themselves from forced inclusion of gay rights activists in their annual parade"[282] and stated that "the government has no right to coerce pro-family and religious groups into accepting dissident or opposing viewpoints or participants in their activities."[283] Alan Sears boasted that "The *Hurley* decision crushes the radical homosexual speech and inclusion tactics."[284] Jordan Lorence called it "a massive victory for religious freedom and free speech."[285] The Supreme Court had implicitly adopted the framing that ADF-backed lawyers had attempted in *Swanner* under the free exercise clause. By portraying the parade as Council's speech, the Court concluded that the Veterans Council was the victim of government overreach. In a prescient interview, Lorence and Jay Sekulow suggested that "the Boy Scouts may be able to use the *Hurley* ruling to keep them

Often Conflates Status, Belief, and Conduct to Resist Antidiscrimination Norms, 45 GA. L. REV. 657 (2011).

278. *Hurley*, 515 U.S. at 572–73.

279. *Id.* at 579.

280. *Id.*

281. *Id.* at 558.

282. *ADF Helps Bring Hurley Case to Supreme Court*, ADF BRIEFING (All. Def. Fund, Inc., Phx., A.Z.), Vol. 1, No. 2, July 1995, at 1. SD 5-17.

283. *Victory! ADF-Funded Cases Set Historic Precedents for America*, ADF BRIEFING (All. Def. Fund, Inc., Phx., A.Z.), Vol. 1, No. 3, Aug. 1995, at 2. SD 5-17.

284. Alan Sears, *Thanks to You, A Thunderous Alleluia!,* ADF BRIEFING (All. Def. Fund, Inc., Phx., A.Z.), Aug. 1995, at 4.

285. Alan Sears, *From an Idea to a Thriving Reality,* ADF BRIEFING (All. Def. Fund, Inc., Phx., A.Z.), Vol. 2, No. 2, Mar. 1996, at 4.

from being forced to accept homosexuals as scoutmasters."[286] That moment would arrive just five years later.[287]

Things also changed in the immediate aftermath of *Hurley*. ADF and its antecedents understood these suits as involving "discrimination against people of faith who want to live their lives according to God's laws and commandments."[288] They recognized that *Hurley* set a powerful precedent for making such claims legible within compelled speech doctrine.[289] Lorence immediately began to integrate free speech claims into lawsuits defending landlords who excluded unmarried couples. In 1999, a Ninth Circuit panel led by conservative Judge O'Scannlain ruled in his favor, writing that "the expression forbidden by the [] anti-discrimination laws is, at its essence, religious speech."[290] Although the *en banc* court overruled the panel in that decision, it signaled that a new door had opened.

C. From Hurley *to* 303 Creative

Hurley was a crucial precedent for the right to exclude from places of public accommodation under the Free Speech Clause. After decades of caselaw admitting no constitutional problems with public accommodations regulation, the Court suggested that enforcement of some public accommodations law amounted to a content-based imposition on private speech. ADF and other movement organizations spent nearly thirty years trying to extend this analysis from the "peculiar" situation in *Hurley* to public accommodations enforcement in general. In *303 Creative*, ADF finally succeeded, at least as concerns public accommodations with arguably expressive products.

Much has changed in the intervening years. The Roberts Court is markedly more conservative than the Rehnquist Court and since 2020 includes six solidly conservative Christian justices, many of whom have personal and professional ties to the conservative legal movement. As I discuss in the subsequent subparts, decisions of the Roberts Court have extended free speech coverage to a broader

286. Hooten, *supra* note 261.

287. *See* Boy Scouts of Am. v. Dale, 530 U.S. 640, 641 (2000) (holding that the presence of a homosexual assistant scoutmaster "would interfere with the Scouts' choice not to propound a point of view contrary to its beliefs").

288. *Christian Landlords Sued*, ADF BRIEFING (All. Def. Fund, Inc., Phx., A.Z.), Vol. 1, No. 4, Sept. 1995, at 1.

289. *Id.* at 2.

290. Thomas v. Anchorage Equal Rts. Comm'n, 165 F.3d 692, 711 (9th Cir. 1999), *rev'd en banc*, 220 F.3d 1134 (9th Cir. 2000). After the Supreme Court struck down RFRA as applied to the states in 1997, Congress debated reinstating the RFRA standard on a different basis. According to Doug NeJaime and Reva Siegel, the decision in *Thomas* dissuaded some members of Congress from supporting the new bill because such claims could be used to undermine state and local anti-discrimination law. NeJaime & Siegel, *supra* note 58, at 2527–28; *see* Richard W. Garnett, *Religious Accommodations and—and Among—Civil Rights: Separation, Toleration, and Accommodation*, 88 S. CAL. L. REV. 493, 499 (2014); Douglas Laycock, *Sex, Atheism, and the Free Exercise of Religion*, 88 U. DET. MERCY L. REV. 407, 412–13 (2011).

variety of commercial speech than ever before, and the Establishment Clause is much weakened in the face of a supercharged Free Exercise Clause. These changes are important to understand why, after decades of strategically coopting the progressive free speech tradition, conservative Christian cause lawyers now make straightforward claims for the right to exclude under both free speech and free exercise theories.

1. Compelled Expressive Conduct after Hurley

Five years after *Hurley*, the Supreme Court solidified the expressive association exception to public accommodations law in *Boy Scouts of America v. Dale*. Represented by a movement lawyer, the Boy Scouts argued that New Jersey's public accommodation law could not force it to include gay scout leaders.[291] The Court acknowledged that the Boy Scouts qualified as a public accommodation under state law. Under *Hurley*[292] however, an expressive association could not be forced to "send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior."[293] As several commentators noted in the aftermath, the Court indicated that such protections would not extend from expressive associations to for-profit businesses, although there was no conceptual justification in its reasoning that would prevent it.[294]

Within a few years, ADF was testing the expressive/commercial distinction in court. Around 2001, the organization began to litigate directly, hiring staff attorneys to work alongside affiliates receiving grant support. Jordan Lorence was an early hire, and he represented the plaintiffs in one of the first test cases, *Elane Photography v. Willock.*[295] The ADF brought many similar test cases in state and federal courts,[296] but the group's best chance before the Supreme Court arrived in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*.

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291. Boy Scouts of Am. v. Dale, 530 U.S. 640, 640 (2000).

292. *Id.* at 659 (2000) ("Although we did not explicitly deem the parade in *Hurley* an expressive association, the analysis we applied there is similar to the analysis we apply here.").

293. *Id.* at 653. Commentators at the time observed that message and identity are difficult to separate in this way, creating the possibility that *Dale* would license excluding gay people. *See, e.g.*, Nan D. Hunter, *Accommodating the Public Sphere: Beyond the Market Model*, 85 MINN. L. REV. 1591, 1592 (2001).

294. *See* Bagenstos, *supra* note 54, at 1208. The Court declined to extend expressive association in *Rumsfeld v. Forum for Academic and Institutional Rights (FAIR)* when it ruled that requiring universities to host military recruiters on campus did not amount to compelling the schools to speak a message supporting Don't Ask, Don't Tell. 547 U.S. 47, 61–62 (2006). In 2010, a split court ruled that the University of California College of the Law, San Francisco (formerly UC Hastings) had not violated the First Amendment when it applied an all-comers policy to a CLS chapter of law students. Christian Legal Soc'y v. Martinez, 561 U.S. 661 (2010). Justice Alito's dissent, joined by Justices Roberts, Thomas, and Scalia, argued that the school's nondiscrimination policy constituted viewpoint discrimination against religious groups like CLS. *Id*. at 724 (Alito, J., dissenting).

295. 309 P.3d 53 (N.M. 2013).

296. *See* Emilee Carpenter v. James, 575 F. Supp. 3d 353 (W.D.N.Y. 2021), *appeal filed,* No. 6:21-cv-06303 (2d. Cir. May 23, 2023) (resolving a pre-enforcement challenge by photographer and

ADF represented Jack Phillips, a baker who claimed that the First Amendment protected his right to refuse to sell a wedding cake to a same-sex couple. The Supreme Court granted certiorari on both free exercise and free speech questions, but it did not ultimately grant a broad right to exclude. Instead, writing for a 7-2 majority, Justice Kennedy wrote that the case presented "difficult questions."[297] He disposed of the case on free exercise grounds largely confined to the facts, leaving the main conflict and the free speech question for another day.[298]

In two concurrences, Justices Gorsuch and Thomas indicated that they would do more. Justice Thomas, joined by Justice Gorsuch, wrote separately to say that the Court should have reached the free speech question.[299] He argued that Phillips' cakes should qualify as covered expressive conduct, and that the public accommodations law enforcement against him amounted to compelled speech requiring strict scrutiny.[300] For his part, Justice Gorsuch also wrote a concurrence, which Justice Alito joined, to reiterate his belief that Colorado engaged in "discrimination" against Phillips because the state "wished to condemn" Phillips' religious beliefs.[301] Still, *Hurley* and *Dale* remained outliers in the speech/anti-discrimination settlement through 2018 because there was no majority for this position.

While ADF aggressively litigated the public accommodations cases, it also joined with peer firms in the broader conservative legal movement to expand coverage for commercial speech and extend religious freedom to corporations. In cases from both the religious conservative and libertarian wings of the movement, the Roberts Court has obliged. Since 2005, the Court has expanded the definition of covered speech and raised judicial scrutiny on laws and

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blogger who objects to providing services to same-sex weddings); Chelsey Nelson Photography, LLC v. Louisville-Jefferson Cnty. Metro Gov't, 556 F. Supp. 3d 657 (W.D. Ky. 2021), *appeal filed*, Nos. 22-5884, 22-5912 (6th Cir. Apr. 14, 2023) (resolving a pre-enforcement challenge by photographer and blogger who objects to providing services to same-sex weddings); Telescope Media Grp. v. Lucero, 936 F.3d 740 (8th Cir. 2019) (resolving a pre-enforcement challenge by videographers); Lexington-Fayette Urb. Cnty. Hum. Rts. Comm'n v. Hands On Originals, 592 S.W.3d 291 (Ky. 2019) (challenging a graphic design printshop that refused to print t-shirts for Pride celebration); Brush & Nib Studio, LLC v. City of Phoenix, 448 P.3d 890 (Ariz. 2019) (challenging a custom wedding invitation company that refused to create invitations for same-sex weddings); State v. Arlene's Flowers, Inc., 441 P.3d 1203 (Wash. 2019), *vacated,* 138 S. Ct. 2671 (2018) (challenging a florist that denied service to same-sex couple); Cervelli v. Aloha Bed & Breakfast, 415 P.3d 919 (Haw. Ct. App. 2018) (challenging a bed & breakfast that denied service to lesbian couple); Klein v. Ore. Bureau of Lab. & Indus., 410 P.3d 1051 (Ore. Ct. App. 2017), *vacated*, 139 S. Ct. 2713 (2019), *aff'd,* 506 P.3d 1108 (Ore. Ct. App. 2022), *vacated,* 143 S. Ct. 2686 (U.S. 2023) (ruling on a cake baker pre-enforcement challenge to Oregon anti-discrimination law); Amy Lynn Photography Studio v. City of Madison, No. 17-cv-555 (Wis. Cir. Ct. Aug. 23, 2017) (order granting declaratory judgment) (resolving a photographer pre-enforcement challenge to Wisconsin anti-discrimination law).

297. Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 584 U.S. 617, 623 (2018).

298. *Id.* at 639.

299. *Id.* at 654 (Thomas, J., concurring).

300. *Id.* at 662–65 (Thomas, J., concurring).

301. *Id.* at 649 (Gorsuch, J., concurring).

government action that implicates it. Constitutional speech now includes, for example, union dues and independent spending on political campaigns.[302] Meanwhile, the Court found that government could not compel professional disclosures,[303] and announced for the first time that for-profit corporations could have sincerely held religious beliefs.[304] Although these parallel developments did not bear directly on *303 Creative*'s doctrinal analysis, they enabled the Court to move swiftly past threshold questions about whether Smith's commercial communication benefits from protections against compelled speech, and whether 303 Creative LLC could have sincerely held religious beliefs.

2. 303 Creative v. Elenis*: Compelled Speech in Commerce*

303 Creative v. Elenis was the result of decades of strategic litigation by ADF attorneys to extend *Hurley* and *Dale* to commercial transactions in places of public accommodation. The firm described a standard public accommodations anti-discrimination law as unconstitutionally compelling a proprietor to speak by forcing her in the hypothetical future to endorse gay marriage by selling an expressive product celebrating the wedding of a same-sex couple. The facts are simple: Lorie Smith runs a website design company called 303 Creative LLC in Colorado. She "believes that God is calling her to promote and celebrate His design for marriage by designing and creating custom wedding websites for weddings between one man and one woman only."[305] But Smith claimed that 303 Creative had not made wedding websites for anyone out of concern that when she turns away a gay couple, Colorado will find that the company violated its civil rights law.[306] With ADF's help, Smith brought a pre-enforcement lawsuit alleging that future enforcement of the civil rights law would violate her company's rights of free speech and religious exercise.[307] The Supreme Court granted certiorari on speech grounds alone.

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302. *See infra* Part I; Janus v. Am. Fed. Of State, Cnty., and Mun. Emps., Council 31, 55 U.S. 878 (2018); Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

303. Natl. Inst. of Fam. And Life Advocs. v. Becerra, 585 U.S. 755 (2018).

304. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014).

305. Complaint at 2, 303 Creative v. Elenis, 600 U.S. 570 (2023) (No. 21–476).

306. Petition for a Writ of Certiorari at 190a, 303 Creative v. Elenis, 600 U.S. 570 (2023) (No. 21–476), ("If not for [the Colorado Anti-Discrimination Act, "CADA"], Plaintiffs would have already . . . begun offering their creative services for the design, creation, and publication of wedding websites that celebrate and promote marriages between one man and one woman."). It is not clear that Smith's speech was, in fact, so chilled. *See* Melissa Gira Grant, *A Real Wedding Website in a Fake Gay Wedding Website Case*, NEW REPUBLIC (July 25, 2023), https://newrepublic.com/article/174440/real-wedding-website-fake-gay-wedding-website-case [https://perma.cc/8LKF-LTRF] (reporting that Smith had created and advertised a wedding website in 2014 with no adverse consequences). CADA protects against public accommodations discrimination on the basis of "disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry." COLO. REV. STAT. § 24–34–601(2)(a). Smith stipulated that her business qualified as a public accommodation under the law. Complaint at 23, 303 Creative v. Elenis, 600 U.S. 570 (2023) (No. 21–476).

307. *This Colorado Web Designer Doesn't Want to Make Wedding Sites for Same-Sex Couples. The U.S. Supreme Court Will Decide Whether That's Legal*, COLO. PUB. RADIO (2022), https://www.cpr.org/2022/12/01/this-colorado-web-designer-doesnt-want-to-make-wedding-sites-for-

ADF skillfully framed the lawsuit to exploit doctrinal ambiguities and portray Lorie Smith as the victim. The litigators leaned on the idea that Smith's business conduct was expressive of her religious beliefs, converting her desire to deny service into a manifestation of her speech. They portrayed Smith as an "artist" whose websites are "expressive" of her "original, customized messages."[308] As for protection, ADF recommended that the Court reason from *Hurley.* Because the Colorado Anti-Discrimination Act (CADA) could require Smith to express that same-sex marriages are not "false,"[309] the law "compels and restricts speech based on content and viewpoint" and triggers strict scrutiny.[310] The apparent purpose of CADA, according to ADF, was not to address discrimination in the marketplace, but to "eliminate certain ideas in favor of others," the purpose the *Hurley* Court had considered "decidedly fatal."[311]

When the Supreme Court issued its opinion, it vindicated both aspects of ADF's free speech theory, finding that future enforcement of CADA against Smith would violate her First Amendment rights by compelling her to speak contrary to her religious beliefs. Justice Gorsuch's majority opinion moved swiftly past the threshold coverage question based on the parties' stipulations that the hypothetical websites would be expressive.[312] Indeed, the Court interpreted the stipulations to concede that the websites, if they existed, would be a form of "pure speech" or "expressive activity" warranting First Amendment coverage.[313] The reasoning built from ambiguities in *Hurley* and *Dale* as to what conduct was being regulated in the first place: the inclusion of particular messages in commercial products or the inclusion of particular people in market transactions.[314] Although Justice Gorsuch rejected the dissent's implication that the opinion authorized outright discrimination against same-sex couples, the opinion's equivalence between speech and conduct, combined with its blurring of *Hurley* and *Dale*, suggest an ambiguity as to whether the protected expression

same-sex-couples-the-u-s-supreme-court-will-decide-whether-thats-legal/ [https://perma.cc/FG4B-9YNM] (last visited May 10, 2024) (""I spoke to my pastor, and my pastor recommended Alliance Defending Freedom . . . So I reached out to ADF and they told me, yes, you do need to be concerned.'").

308. Brief for Petitioners at 4–5, 303 Creative v. Elenis, 600 U.S. 570 (2023) (No. 21-476), 2022 WL 1786990.

309. Transcript of Oral Argument at 9, 303 Creative v. Elenis, 600 U.S. 570 (2023) (No. 21-476).

310. Brief for Petitioners at 10, 303 Creative v. Elenis, 600 U.S. 570 (2023) (No. 21-476), 2022 WL 1786990.

311. *Id.* at 13 (quoting 303 Creative LLC v. Elenis, 6 F.4th 1160, 1178 (10th Cir. 2021) (internal quotations omitted), *cert. granted in part*, 142 S. Ct. 1106 (2022), and *rev'd,* 143 S. Ct. 2298 (2023)).

312. 303 Creative v. Elenis, 600 U.S. 570, 586 (2023).

313. *Id.* at 586, 599. For a detailed analysis of Justice Gorsuch's treatment of the stipulations, *see* Post, *supra* note 19.

314. The majority and dissent also disagreed on this score. *See, e.g.*, Katie Eyer, *Anti-Transgender Constitutional Law,* 77 VANDERBILT L. REV. 1113, 1184 (2024) (suggesting that the cases turn on the expressive content of the products); David D. Cole, *"We Do No Such Thing":* 303 Creative v. Elenis *and the Future of First Amendment Challenges to Public Accommodations Laws*, 133 YALE L. J. F. 499,500 (2024) (describing the conflict between regulating message and regulating customers by identity).

is the production of custom websites including Smith's speech or the sale of the websites to members of a protected class.

Justice Gorsuch lingered longer on the issue of First Amendment protection. Echoing ADF's brief and parts of the Tenth Circuit opinion, he wrote that "Colorado seeks to compel speech Ms. Smith does not wish to provide" because the "coercive elimination of dissenting ideas about marriage constitutes Colorado's very purpose."[315] Gorsuch reiterated his gloss on the relevant facts as the state's attempt to "co-opt,"[316] "conscript[]"[317] and "coerc[e]"[318] Smith into "conform[ing] her views to the State's."[319] The state's general and "unexceptional" interest in anti-discrimination thus transformed into a targeted attack on Smith because of her religious objection to same-sex marriage.[320] It follows from *Hurley* and *Dale*, he reasoned, that this is "more than enough" to violate the First Amendment.[321] With a sleight of hand suggested by ADF, Gorsuch thus converted the unusual effect of public accommodations law enforcement on an expressive association in *Hurley* into the general purpose of enforcing such laws in their paradigmatic setting.

It is not clear what level of scrutiny Justice Gorsuch applied to the law, but it is clear that CADA would not survive in this hypothetical future situation. Justice Gorsuch appeared to rule that *any* effect on expressive conduct is enough to overcome even a compelling state interest: "When a state public accommodations law and the Constitution collide, there can be no question which must prevail."[322] That categorical statement suggests a very high level of judicial scrutiny even when the First Amendment is "implicate[d]," perhaps even in the slightest.[323] Whatever tier of scrutiny it applied, the opinion constitutionalized the right to discriminate—at least for businesses with arguably expressive products—as a rule against compelled expressive conduct.[324]

Of course, clever arguments alone do not convert "difficult questions" into dispositions so obvious that "there can be no question" about the outcome.[325] As Justice Sotomayor hinted in her dissent, five years has made a world of difference, as the additions of Justice Kavanaugh and Justice Barrett jolted the

315. *303 Creative,* 600 U.S. at 588–89.
316. *Id.* at 593.
317. *Id.*
318. *Id.*
319. *Id.* at 598.
320. *Id.* at 591.
321. *Id.* at 589.
322. *Id.* at 592.
323. *Id.*
324. Other scholars disagree with this assessment by suggesting that the rule only applies to a limited set of expressive products, not gay customers as a class. But Justice Gorsuch blurs this proposed distinction between message expressed by the product and identity held by the customer in two ways. First, he seems to draw an equivalence between "pure speech" and "expressive activity." Second, the opinion draws directly from *Dale*, in which this distinction was not present.
325. Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1723 (2018).

Court's median vote to the right. *303 Creative* does not follow automatically from *Hurley*; it takes the interplay of litigation strategy and judicial politics to make it look that way. That said, ADF's influence is easily discernible in the final result. The opinion delivered very stringent scrutiny on laws that implicate religious beliefs expressed through economic conduct, and it adopted the narrative framing that ADF pursued since the marital status cases of the early 1990s. Whether framed as lack of neutrality under the Free Exercise Clause or content discrimination under the Free Speech Clause, the movement finally obtained a constitutional right to exclude, and the Supreme Court's imprimatur on its conviction that businesses like 303 Creative LLC are victims of censorious discrimination by government enforcers.

IV.
COMPELLED EXPRESSIVE CONDUCT AND THE CONSERVATIVE LEGAL MOVEMENT

This Article shows the value of seeing like a social movement.[326] It allows us to see across the silos of speech and religion within the First Amendment, to appreciate how litigators pursued the right to exclude in dynamic relationship to changes in multiple areas of constitutional law. The Article makes doctrinal, theoretical, and historical contributions to our understanding of the First Amendment.

First, it intervenes in the emerging debate about *303 Creative*. The history recounted here helps situate the decision in the conservative Christian legal movement's long-term strategy, allowing us to distinguish between the opinion's place in constitutional law and the case's role in movement litigation strategy. While it is important to parse the lines drawn in *303 Creative*, the movement's long term litigation strategy, understanding of the current Court majority, and analysis of the cultural landscape for LGBT rights all suggest that it will push compelled expressive commercial conduct doctrine beyond its current confines.

Second, this story promotes a new model for theorizing the role of doctrine in legal change. Doctrine neither determined, nor constrained the success of lawyers for the New Christian Right, but neither was it irrelevant to the history recounted here. Doctrine did some work—not as pure argument, but as a framing device to convince jurists steeped in the progressive free speech tradition to rule in their favor. In other words, the Article historicizes the legal internalism of speech claims in the 1980s and 1990s.

Third, the Article restores a crucial constituency to the history of the conservative legal movement's deregulatory project. While the libertarian legal movement expanded compelled speech rights for corporations, conservative Christian lawyers convinced the Supreme Court to carve out an expressive association exception from public accommodations law. Without their work,

326. With apologies to James Scott. JAMES SCOTT, SEEING LIKE A STATE (1998).

Lorie Smith's claim in *303 Creative* would not make sense. And without understanding their history, we cannot appreciate the coalition of conservative interests and institutions that has transformed the First Amendment.

A. The Past and Future of Compelled Expressive Commercial Conduct

The text of the *303 Creative* decision leaves open major questions of doctrine. It offers little guidance for future disputes over what kinds of commercial conduct merit speech protection, and it is not clear what level of scrutiny is required to evaluate laws that regulate it. Does the case create only a narrow exception to public accommodations law for businesses which are "truly and undeniably expressive"?[327] Is it a carve out for custom, expressive products when a customer requests a message that the seller objects to on any grounds?[328] Or have same-sex couples "lost the protections of civil rights law"[329] because businesses have been handed a "right to discriminate against anyone for any reason they like"?[330] Does the case reach protections on the basis of "race, disability, sex, and religion"?[331]

This Article's historical approach to doctrinal change can help point toward answers about what *303 Creative* is likely to mean for civil rights law. By placing the case in the longer history of lawyering for the New Christian Right, we can better appreciate where it fits in the movement's broader social vision, and perhaps gain some insight about what will come next. For example, history shows that the conservative Christian legal movement has long viewed public accommodations law as a barrier to business owners who live their faith through the market. Lawyers for the New Christian Right did not turn to the Free Speech Clause because they were particularly concerned with the rights of expressive businesses, but because the judiciary was unmoved by free exercise claims against commercial regulation. This context suggests that ADF will push the

327. Michael A. Helfand, *Religion Won at the Supreme Court, but Not as Big as People Think*, FORWARD (July 5, 2023), https://forward.com/opinion/553078/religion-won-at-the-supreme-court-but-not-as-big-as-people-think [https://perma.cc/SJZ7-JC3M].

328. Dale Carpenter, *How to Read* 303 Creative v. Elenis, REASON.COM (July 3, 2023), https://reason.com/volokh/2023/07/03/how-to-read-303-creative-v-elenis [https://perma.cc/J4GP-AC8Y].

329. Mark Joseph Stern, *The Supreme Court's Blessing of Anti-LGBTQ+ Discrimination Will Haunt Gay Couples*, SLATE (June 30, 2023), https://slate.com/news-and-politics/2023/06/supreme-court-lgbtq-gay-wedding-website-discrimination.html [https://perma.cc/5FNG-CYTR].

330. Andrew Koppelman, *The New, Mysterious Constitutional Right to Discriminate*, THE HILL (July 3, 2023), https://thehill.com/opinion/judiciary/4077760-the-new-mysterious-constitutional-right-to-discriminate/ [https://perma.cc/D2Y6-4NWX].

331. Sepper, *supra* note 5; *see also* Kate Shaw, *The Supreme Court's Disorienting Elevation of Religion*, N.Y. TIMES (July 8, 2023), https://www.nytimes.com/2023/07/08/opinion/supreme-court-religion.html [https://perma.cc/QUS5-DPGW] ("Nothing in the opinion limits its application to same-sex couples and their families."); Carpenter, *supra* note 329 ("Nor, in principle, are the speech protections the Court outlined limited to the creation of messages about same-sex marriage, marriage in general, or homosexuality.").

commercial conduct doctrine announced in *303 Creative* to public accommodations whose products are not as arguably expressive.

The longer view on this movement also suggests that litigators may seek to extend *303 Creative* into other domains of anti-discrimination law. Consider two recent decisions of the Second Circuit. The first concerned a New York state law that prohibits employment discrimination based on reproductive health decisions. In *Slattery v. Hochul,* a network of crisis pregnancy centers brought a pre-enforcement challenge to the law. With legal support from the Thomas More Society, one of the earliest conservative Catholic legal non-profits, the centers argued that the law violated its right of expressive association by "preventing it from disassociating itself from employees who, among other things, seek abortions."[332] A three-judge panel ruled that the business had plausibly stated a claim to discriminate against employees on a protected basis. Cases pushing this kind of attenuated reasoning—equating health services with speech and attributing an employee's personal healthcare activities to the employer's speech—are likely to multiply after *303 Creative.*

So too are free speech challenges to anti-discrimination provisions in social service regulation. New York state, for example, prohibits adoption agencies from discriminating against gay or unmarried applicants, among other groups.[333] New Hope Family Services, an evangelical adoption agency in Syracuse, refused to place children with gay or unmarried couples, prompting administrative action.[334] ADF sued the state, arguing that the state was compelling New Hope to speak a message it disagreed with: to wit, that it can be in the best interests of a child to be placed with gay or unmarried couples.[335] The Second Circuit ruled for New Hope, and on remand the district court issued a permanent injunction against enforcing the anti-discrimination law against it.[336] New Hope was entitled, according to this reading of compelled speech doctrine, to discriminate against gay and unmarried couples. *303 Creative* will give tailwind to this kind of litigation as well.

In *Employment Division v. Smith*, Justice Scalia approvingly quoted precedent to ask, "Can a man excuse his practices to the contrary [of neutral, generally-applicable law] because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself."[337] If *303 Creative* extends to other services, areas of civil rights law, and genres of

332. 61 F.4th 278, 283 (2d Cir. 2023).

333. *See* 18 N.Y. Comp. Codes R. & Regs. § 421.3.

334. Roger G. Brooks, New Hope Family Services v. Poole*,* ALL. DEF. FREEDOM (Mar. 7, 2023), https://adfmedia.org/case/new-hope-family-services-v-poole [https://perma.cc/8HCN-NYKD].

335. New Hope Fam. Servs., Inc. v. Poole, 966 F.3d 145, 171 (2d Cir. 2020). ADF also raised free exercise and equal protection claims.

336. New Hope Fam. Servs., Inc. v. Poole, 626 F. Supp. 3d 575 (N.D.N.Y. 2022).

337. Emp. Div., Dep't of Hum. Res. of Ore. v. Smith, 494 U.S. 872, 879 (1990) (quoting Reynolds v. United States, 98 U.S. 145, 166–67 (1878)).

government regulation, the First Amendment will render every corporation a conscientious objector. To follow Justice Scalia's quote to the source: "Government could exist only in name under such circumstances."[338]

B. Strategic Cooptation and Constitutional Argument

At the center of this Article is a puzzle about *Hurley*: why did the Supreme Court break the firewall between anti-discrimination law and the First Amendment in 1995 without so much as a dissent? The question offers an opportunity to evaluate the operative theory of doctrine in legal history, and begin to gesture at an alternative.

Robert Gordon's theory of doctrine in legal history has led the field for decades. In his canonical article, *Critical Legal Histories*, he suggested that law is (1) radically indeterminate, and (2) constitutive of society.[339] As John Witt more recently noted, there is a tension between the precepts.[340] How is it possible for something to be both radically indeterminate, and yet hefty enough to call social relations into being? It may be true that at the moment of announcement or enactment, a law has no inherent meaning, and that in the long *durée*, it can come to mean any number of contradictory things. But in the medium-term there must be some more fixed, even determinate, content to a given doctrine in order for the litigators deploying it and the judges interpreting it to have a sense that they are engaged in a shared project. One need not impute any necessary content to law to see it this way, as a social practice in which professionals are socialized to believe—or act as if they believe—that they are bound by stable rules. And if this is so, then one project of legal history is to historicize that very legal internalism, deconstructing the set of expectations that gave meaning to a legal doctrine at a particular moment.[341]

Doctrine is generally considered a constraint on legal innovation, and it was expected to limit the success of the conservative legal movement's turn to free speech. Twenty years ago, when scholars began to describe the phenomenon, they argued that free speech would help the movement gain inclusion in public settings, but that it would be much harder to use for religious exemptions. They suggested that free speech arguments in the public university cases helped movement litigators win cases like *Widmar* and *Rosenberger* because they invoked mainstream values like religious pluralism and equality of access to public spaces.[342] One scholar explained that movement litigators "are feeling compelled to accord with modern secular norms of pluralistic society" rather

338. *Reynolds*, 98 U.S. at 167.

339. Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 102, 109 (1984).

340. John Fabian Witt, *For Bob Gordon: Final Remarks*, 70 STAN. L. REV. 1681, 1684 (2018).

341. For a broader analysis, *see generally* Shyamkrishna Balganesh & Taisu Zhang, *Legal Internalism in Modern Histories of Copyright: Book Review*, 134 HARV. L. REV. 1066 (2020).

342. *See* Matthew C. Moen, *From Revolution to Evolution: The Changing Nature of the Christian Right*, 55 SOCIO. RELIGION 345, 352 (1994).

than "argue openly . . . for a privileged status for religion in American life."[343] Another similarly suggested that the Christian Right's free speech strategy was "partly responsible for further cementing the inclusion model of pluralism that forecloses" their success in other domains.[344] Observers expected that the movement would be limited by the language and reasoning of secular liberal legal culture when it sought preferential treatment for conservative Christians in the public square. They warned that the free speech strategy would be particularly ineffective in the confrontation with gay rights.[345] The upshot was that "the Free Speech Clause can never be an effective long-term ally of the New Christian Right."[346]

With the benefit of hindsight, these conclusions require revision. Doctrine did not impede lawyers for the New Christian Right. Instead, they strategically co-opted the progressive free speech tradition because they thought it would enable them to advance their version of Christian exceptionalism. Doctrine is often considered to be the authoritative pronouncement of courts, but it is also the language through which social movements translate their political visions into a legal register. As Doug NeJaime has argued, "doctrine provides a set of arguments and justifications for positions and decisions that shape the surrounding legal, political, and cultural context in which the Court intervenes."[347] The way legal actors understand which doctrinal moves are available to them, and under what conditions, thus shapes how litigators build legal and political narratives.

That said, it is tempting to attribute a case like *Hurley* to forces entirely divorced from doctrine. Support for gay rights was not a consensus position in the 1990s, rendering sexual orientation-based anti-discrimination law particularly vulnerable. And despite the additions of Justices Ginsberg and Breyer, the Rehnquist Supreme Court was perceptibly more conservative than its predecessors under Chief Justices Warren and Berger. Indeed, in the glow of recent revelations about the conservative movement's focus on shifting judicial personnel, one might think that judicial ideology did most of the heavy lifting in *Hurley*.

It is important to remember, however, that the transition from enduring progressive to conservative majorities on the Supreme Court took several decades. In the late 1970s, much of the progressive Warren Court's jurisprudence was still intact. Even in the 1980s and 1990s, movement leaders were not convinced that President Reagan's appointees shared their view that religious

343. Smith, *supra* note 69, at 330, 350.

344. NeJaime, *supra* note 25, at 311.

345. HACKER, *supra* note 25, at 76 ("[T]he gay rights issue threatens years of work within the New Christian Right developing a position in court on religious freedom that resonates with judges").

346. BROWN, *supra* note 25, at 142.

347. Douglas NeJaime, *Doctrine in Context*, 127 HARV. L. REV. F. 10, 11 (2013).

freedom required the right to discriminate. We must be careful not to project contemporary judicial politics on the past.

To understand *Hurley*, then, we turn our attention to the way the mainstream legal elite understood speech doctrine in the 1990s and how the conservative Christian legal movement adapted its strategy in response. For lawyers trained in mid-century civil libertarianism, doctrinal moves redounded to the benefit of paradigmatic beneficiaries, and they advanced particular constitutional values. Speech expansionism was not radically indeterminate, but laden with the expectation that it would benefit the politically powerless and advance democratic self-government. By strategically coopting doctrine in this thicker sense, the movement lawyers at the center of my story presented courts with an opportunity to rule in their favor while holding true to their constitutional values. The success of *Hurley* thus owes itself to a delicate pressure on the law/politics divide, not the vulgar formalist's straightforward application of past precedents or the vulgar realist's crude ideological takeover of the judiciary.

We saw this dynamic at play in the early years of the conservative Christian legal movement. When John Whitehead identified an egalitarian register in First Amendment doctrine of the late 1970s, it helped him see through the doctrinal thicket to arguments that might be plausible to federal judges. If the movement was willing to equate evangelizing with secular speech and Christians with secular groups, it could take advantage of speech equality in public forums. Cause lawyers like Whitehead believed that arguments sounding in equality could be an advantage when facing judges steeped in mid-century civil libertarianism.

Strategic cooptation made sense in the constitutional interregnum of the 1990s. It is important to remember that the transition from enduring progressive to conservative majorities on the Supreme Court took several decades. In the late 1970s, much of the progressive Warren Court's jurisprudence was still intact. Even in the 1980s and 1990s, movement leaders were not convinced that President Reagan's appointees shared their view that religious freedom required the right to discriminate. Their decision to pursue free speech claims reflected an understanding of the interplay between doctrinal standards and judicial politics. The strategy paid off in *Hurley v. GLIB*, not because free speech claims have an inherent quality, but because the litigators co-opted the political valence and cultural context of such claims, and convinced the liberal wing of the Court that theirs was the side of principle.

C. Lawyers for Religious Deregulation

The history of cause lawyers for the New Christian Right is also essential to understand the political coalition that has transformed the First Amendment. In both motivation and legal strategy, groups like the Christian Legal Society and Alliance Defense Fund were quite different from the libertarian organizations that populate the extant First Amendment scholarship. As

discussed in Part I, those lawyers in groups like the Chamber of Commerce were primarily motivated by their opposition to the New Deal and regulatory state. They pushed constitutional strategies to deregulate private property and industry in the name of market freedom. The operative analogy in the literature is between their successes and the *Lochner* period, when constitutional rights talk invalidated labor legislation. According to this view, the First Amendment is a natural home for neo-*Lochner*ian constitutionalism because information and data are so central to the modern economy. This work has taught us that where virtually any transaction has an expressive component, economic activity can be re-conceptualized as speech, and thereby obtain the same constitutional protection afforded public discourse.[348]

This Article adds the deregulatory—and regulatory—power of religious speech to the picture. Lawyers for the New Christian Right were more concerned about secularization and social acceptance of immorality than about the growth of the administrative state. The liberation movements of mid-century, and especially the sexual revolution, suggested that America was in decline and needed a robust religious revival. As a theological and legal concept, religious liberty required that the faithful be able to bring their religious values to all aspects of their lives, including market transactions. Their target was not environmental protection or workplace hazards, but the waning influence of Christianity on society. The growing body of civil rights laws protecting gays and lesbians from discrimination appeared to accelerate this pattern. They fought civil rights laws to limit the reach of public morality, so that private morality might more easily govern.

The synthesis of this view was that religious freedom authorized excluding gays and lesbians from places of public accommodation. When lawyers for the New Christian Right turned to free speech, it was to vindicate this religious right to exclude. ADF's claim in *303 Creative* was made possible by this process of trial and error, arriving at a narrative strategy that cast exclusionary proprietors as victims themselves of regulatory discrimination. Where successful, this story accomplishes the same goal as free exercise and property rights objections to civil rights laws in the 1960s, that is, to authorize discrimination.

Retracing these steps contributes to our understanding of the alliances and tensions that brought together the contemporary conservative legal movement.[349] From the late 1970s through the early 2000s, movement organizations worked separately but in parallel to challenge market regulation of various kinds. Libertarian cause lawyers fought against campaign finance reform, pharmaceutical regulation, and mandatory corporate disclosures. The predominantly Catholic anti-abortion movement blocked government spending

348. Shanor, *supra* note 38, at 163; Purdy, *supra* note 34, at 202.

349. Opposition to the Supreme Court helped unite anti-communists, social conservatives, and libertarians in the late 1960s. ZIEGLER, *supra* note 7, at 10. Less scholarship has examined the resulting constellation of conservative cause lawyering.

on family planning initiatives.[350] And the New Christian Right, a coalition of conservative Protestants including evangelicals, fundamentalists, and charismatics, set its sights on anti-discrimination law in places of public accommodation.

All of these strategies—advanced by different institutions on behalf of different constituencies—converged on the First Amendment. Over time, the lines between these groups became harder to discern, as the anti-abortion movement entered campaign finance litigation, and Catholic and Evangelical litigators put aside theological differences to promote claims of religious conscience by corporations.[351] This Article returns us to an earlier period, when it was not at all obvious that business elites and conservative Christians would find so much common ground. It helps map the terrain of the conservative legal movement by situating the New Christian Right's long campaign to enshrine a right to discriminate in the Constitution within our existing accounts of the movement's deregulatory agenda. In doing so, the Article contributes to the construction of a much-needed bridge between legal histories of economic deregulation and the culture wars.

CONCLUSION

This Article brings lawyers for the New Christian Right into our First Amendment history. Over forty years, this part of the conservative legal movement navigated peaks and valleys in its political fortunes, parallel developments across the First Amendment, and the rightward shift of the federal judiciary to forge a plausible argument for the right to deny service in places of public accommodation out of expressive conduct doctrine. But just as importantly, it reveals that they did not view doctrinal arguments as empty vessels into which new meaning could be effortlessly poured. Instead, they believed that doctrinal arguments were embedded narratives about the social world. Retracing their steps toward *303 Creative v. Elenis* is a reminder of the work it took to change constitutional common sense.

350. Cary Franklin, *The New Class Blindness*, 128 YALE L.J. 2 (2018); ZIEGLER, *supra* note 7, at 70; Kessler, *supra* note 29, at 365.

351. *See* ZIEGLER, *supra* note 7; *see, e.g.*, Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dept. of Health & Hum. Servs., 724 F.3d 377 (3d Cir. 2013) (litigation brought by contemporary coalition); Burwell v. Hobby Lobby, 573 U.S. 682 (2014) (Protestant litigants represented by Catholic public interest law firm).