Expressive Exclusion and Free Speech Sincerity: The Litigation Strategies of the Religious Right from *Piggie Park* to *303 Creative*

Caitlin Flanagan*

I. INTRODUCTION: BREAKING THE "UNBROKEN LINE" OF EXPRESSIVE EXCLUSION **2**

II. THE RELIGIOUS RIGHT AND ITS LITIGATION STRATEGIES **8**

III. CIVIL RIGHTS ERA RESISTANCE: THE EMBARRASSING ORIGINS OF A RIGHT TO EXPRESSIVE EXCLUSION **14**

A. DESEGREGATION AND EXPRESSIVE LIBERTIES 14
B. FAILED EFFORTS TO FORGE A JUDICIALLY-PROTECTED RIGHT TO EXPRESSIVE EXCLUSION 17

IV. THE RELIGIOUS RIGHT GOES ON DEFENSE **26**

A. BOB JONES V. UNITED STATES 26
B. FREE EXERCISE RETRENCHMENT AND A NEW SENSE OF URGENCY 33

V. THE CONSTITUTIONALIZATION OF THE RIGHT TO DISCRIMINATE **38**

VI. CONCLUSION: FIRST AMENDMENT PURPOSIVISM IN AN AGE OF PRIVATIZATION **54**

I. Introduction: Breaking the "Unbroken Line" of Expressive Exclusion[1]

The interpretation of the First Amendment, like much of the Supreme Court's current constitutional jurisprudence, is increasingly shaped by the litigants' ability to marshal "history and tradition" as "resources" for understanding the range of implications of a present-day decision.[2] Historical narratives regarding the substantive content of longstanding religious traditions and those practices' vulnerability to state regulations, for example, have been understood to imply constitutional protection for the display of the Ten Commandments on the Texas Capitol[3] and the validity of Philadelphia's Catholic foster agencies' refusal to work with same sex married couples.[4] Conservative activists opposed to the government's interest in curing cognizable racial disparities, on the other hand, craft arguments which pivot on the passage of time and intervening causal factors since Jim Crow's racial subordination laws.[5] Litigants' battles about the fraught history of the relationship between the free-flowing "marketplace of ideas" and legal efforts to guarantee equal access to the public marketplace have shaped contemporary First Amendment decisions regarding the proper goals of civil rights laws, too.

The power of strategically redacting and reframing the strained historical relationship between First Amendment freedoms and civil rights laws shaped every step of the Court's recent consideration of *303 Creative*, from briefing, to oral argument, to the majority's disdainful description of the dissent as "focus[ing] on the evolution of public accommodations laws."[6] During the recent

---

* University of Virginia School of Law, J.D. and Masters of Arts in Legal History Candidate, Class of 2024.

[1] This is a reference to Bob Jones University v. U.S., 461 U.S. 574, 593 (1983), where the Court referred to the "unbroken line of cases" that had, at that point, rejected attempts to forge a First Amendment carve out from civil rights laws due to the "most fundamental national public policy" against racial discrimination.

[2] *See* Reva B. Siegel, How "History and Tradition" Perpetuates Inequality: Dobbs on Abortion's Nineteenth-Century Criminalization, 60 HOUS. L. REV. 901 (2023), where Siegel uses the language of the "resources" of the past to argue that the Court's emphasis on history and tradition are "tradition entrenching."

[3] Van Orden v. Perry, 545 U.S. 677 (2005).

[4] Fulton v. City of Philadelphia, 593 U.S. 522 (2021).

[5] *See* Joy Milligan, "Animus and its Distortion of the Past," 74 ALA. L. REV. 725 (2023).

[6] 303 Creative LLC v. Elenis, 600 U.S. 570, 597 (2023). *See also* Kenji Yoshino, "Rights of First Refusal," 137 Harv. L. Rev. 244 (2023), discussing the significance of Sotomayor and Gorsuch's disagreement on the importance of the history of public accommodations law.

oral argument, tactical reformation of the history of religiously justified discrimination in the marketplace was pivotal to Kristen Waggoner's success.

Waggoner is the President of the Alliance Defending Freedom, the most active and successful of the many conservative legal groups opposing civil rights laws on a religious basis throughout the country. She appeared before the Court to protect the right of owners of places of public accommodation in Colorado to refuse service to members of the LGBTQ community. The Court pressed her repeatedly to respond to the implication of her argument that businesses, if motivated by a "sincerely held religious objection," could be constitutionally entitled to categorically exclude customers on the basis of other categories, like race.[7] She tellingly responded with an empirical, rather than a legal, distinction, that "[i]t's highly unlikely that anyone would be serving Black Americans in other capacities but only refusing to do so in an interracial marriage."[8]

Justice Kagan's response to Waggoner was pointed: "Well, it's not impossible." A defining, disturbingly recent case for the battleground between Christian religious liberty and antidiscrimination law pertained to a school claiming that exact perspective. In 1982, Bob Jones University attempted to argue before the Supreme Court that, while the school technically favored integration and rejected white supremacy, they were compelled to oppose racial intermarriage on strongly held theological grounds.[9]

When asked, again, what principle might distinguish a ruling in the website designer's favor from one permitting conscience-based objections to equal civil rights for Black Americans, Waggoner returned repeatedly dicta to from *Obergefell* that "decent and honorable people" oppose same-sex

---

[7] 303 Creative LLC v. Elenis, 600 U.S. 570 (2023).
[8] 303 Creative LLC v. Elenis: Oral Argument (No. 21-476) (Dec. 5, 2022) at 14, PROQUEST SUPREME COURT INSIGHT, https://supremecourt-proquest-com.proxy1.library.virginia.edu/supremecourt/docview/%7Capp-gis%7Csupreme-court%7C21-476_oa_0500/Oral Argument?accountid=14678.
[9] Goldsboro Christian Schools & Bob Jones v. United States: Oral Argument (Nos. 81-1 and 81-3) (Oct. 12, 1982), at 6, PROQUEST SUPREME COURT INSIGHT, https://supremecourt-proquest-com.proxy1.library.virginia.edu/supremecourt/docview/%7Capp-gis%7Csupreme-court%7C81-1ea_oa_0024/Oral Argument?accountid=14678.

marriage. She characterized this soft language towards discrimination as tacit endorsement of religious objections to homosexuality and a matter of binding law.[10] *Obergefell* was compared to the hearty condemnation of race-based distinctions in *Loving v. Virginia*, which identified anti-miscegenation laws as a system "designed to maintain White Supremacy."[11]

Justice Jackson identified the ahistoricism at the core of this distinction. If the repeated references to *Obergefell* were meant to suggest that authentic religious motivation was a basis for opposing same-sex marriage, but not for opposing interracial marriage, that was, she noted, just bad history. Jackson put on record that, "historically, opposition to interracial marriages and to integration in many instances was on religious grounds." Counsel for Colorado took the opportunity Jackson provided to point the Court towards the obvious, antecedent, Bob Jones.[12]

Ultimately Sotomayor's dissent, opposing the holding that the website designer had a constitutional, expressive right to exclude same-sex couples, took the time that it could afford to tell the silenced history of the fight for equal rights on behalf of the LGBTQ community. This was one small step towards counteracting the amnesiac spell which works to the advantage of the impact litigators of the Religious Right who have sought to erode longstanding civil rights efforts. Contemporary erasures like this call for a forceful re-telling of the work that has been done to use the First Amendment to limit marketplace equality.

From *Piggie Park* through *303 Creative*, this paper will discuss the strategies that the Religious Right has used to create a hybrid between the Free Speech and the Free Exercise clause, a right I call

---

[10] 303 Creative LLC v. Elenis: Oral Argument, *supra* n.8 at 14. Although this line becomes a rallying cry for the proponents of expressive exclusion, they fail to mention that this statement in *Obergefell* was followed by, "But when that sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied."

[11] Loving v. Virginia, 388 U.S. 1, 11 (1967). Justice Alito then presented this argument regarding made by the team representing the wedding website designer to the Solicitor General of Colorado, who appropriately responded by suggesting that a constitutional way to evaluate the sincerity of theological objections to civil rights laws would be by way of a Free Exercise analysis, to ensure that neutral and generally applicable laws are not being applied in a way that singles out religion. 303 Creative LLC v. Elenis: Oral Argument, supra n.8 at 80-81.

[12] 303 Creative LLC v. Elenis: Oral Argument, supra n.8 at 104.

"expression exclusion" that has elevated the importance of free expression when it arises from what is thinly alleged to be "sincere" religious belief. This effort has not been surreptitious: it has appeared in the extensive amici briefing by religious organizations and in public statements about movement strategy. The success of this activist movement has depended upon the political organization by the Religious Right against antidiscrimination laws, theological innovations by the Religious Right, particularly around the distinction between discrimination on the basis of "status" versus "message," and the malleability of First Amendment doctrine.[13]

My first section provides some broader context for Christian legal organizations like the Alliance Defending Freedom, the conservative legal group that initiates and wins today's battles against civil rights laws like Colorado's antidiscrimination law. This paper then proceeds chronologically, to show the unbroken line of work to transform constitutional expressive rights into exclusive rights. My second section covers the era before the institutionalization of the Religious Right, from 1968 to 1982, beginning with the Supreme Court's unequivocal rejection of a Free Exercise justification for segregation in *Piggie Park*. I then discuss a line of failed efforts to forge secular First Amendment exclusion arguments; in *Norwood v. Harrison* and *Runyon v. McCrary*, litigants presented the same arguments which would come to characterize today's First Amendment private expressive right to exclude in public spaces[14] on the basis of invidious traits. These earliest antecedents preview the same arguments that continue to characterize the terms of today's claims for a First Amendment right to discriminate in public.

---

[13] *See* Robert Post, "Recuperating First Amendment Doctrine," 47 STANFORD L. REV. 1249 (1995), discussing the unfocused nature of the First Amendment's protection of "speech as such."

[14] The extent to which these cases pertain to public places varies, and often is a topic of debate through the process of litigation. The private school context has been understood as separate from the laws pertaining to public accommodations, but the question of the constitutionality of conditioning state aid on integration made these analyses relevant.

Next, I discuss the Religious Right's energized mobilization around the First Amendment from 1982 to 2000, in response to the Court's refusal to grant tax exemptions to a segregationist private school in *Bob Jones* and to the contraction of protections for Free Exercise in *Smith* in 1990. In this period, the Religious Right's rhetoric became more defensive—the Moral Majority had become a minority, and the constitutional rights to free expression and association were the only remaining possibility to "end government discrimination against religion."[15] But while their self-image became more defensive, the Religious Right's political lobbying grew more aggressive, culminating in a federal law that aimed to undo the damage to Free Exercise that *Smith* wrought, the Religious Freedom Restoration Act.

I conclude by telling the recent history: the constitutionalization of a right to expressive exclusion. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.* marked a major turning point, after which expressive exclusion arguments were deemed adequate to counter expanding public accommodations law. Although Christian legal groups like the Alliance Defense Fund did not yet initiate the lawsuits, religious institutions filed increasing numbers of amici briefs and evangelical leaders discussed their significance with their communities. These victories for private associational freedoms drew directly upon the clubs' alleged likeness to religious organization, and the Free Speech doctrines began to import the same concerns as the pre-*Smith* Free Exercise inquiry.

This section concludes with two cases which built on the foundation of *Hurley* and *Dale*, both won by Christian legal organizations against public accommodations laws: *Masterpiece Cakeshop* and *303 Creative*. These victories for "expression that offends prevailing standards of political correctness" met a more welcoming audience given the composition of the current Court but built

---

[15] Jennifer Ferranti, Religious Freedom Amendment Has Many Hurdles to Clear, CHRISTIANITY TODAY (Jan. 8, 1996), https://www.christianitytoday.com/ct/1996/january8/6t1062.html.

on the same successful strategies of analogizing to Free Exercise entanglement, sanitizing the human impacts of discrimination, and urging judicial deference to their interpretation of the factual record.[16]

There are other histories of this influential litigation strategy, the most relevant of which is Steven P. Brown's.[17] Brown tells the institutional history of what he describes as the "New Christian Right" coalition, built from 1980-2000, and compellingly argues that the move from the religion clause of the First Amendment to the Free Speech clause is characteristic of a "growing secularization accompanying other types of new Christian Right political activism."[18] My work focuses on a specific dynamic in this history, to argue that the retooling of the Free Speech clause is an explicit response to anti-discrimination laws as well as part of this broader story of re-establishment. Daniel K. Williams, who argues that the history of the Christian Right extends far before *Roe v. Wade* spurred American evangelicals into action, has also influenced my thought regarding the significant, long periodization of these cultural shifts.[19] Kevin Kruse's argument that corporate and evangelical interests forged a "conflation of faith, freedom, and free enterprise" in opposition to the New Deal in the 1940s and 1940s also gives useful context for the alliance between the Religious Right and libertarianism.[20] Relatedly, the evidence that Hannah Dick provides for the racialized and gendered politics of "neoliberal, white evangelicalism," as well as the contribution of authors like Melinda Cooper on the inextricable ties between social and economic

[16] Christian Legal Soc. Chapter of the Univ. of California, Hastings Coll. of the L. v. Martinez, 561 U.S. 661, 706 (2010) (Alito, J., dissenting).
[17] Steven P. Brown, TRUMPING RELIGION: THE NEW CHRISTIAN RIGHT, THE FREE SPEECH CLAUSE, AND THE COURTS (2002).
[18] Rachel Williams' work on the ADF's success in the past twenty years provides insight into its funding, storytelling in the media, and role in a "reestablishment" of religion. *See generally* Rachel Williams, "The United States after the Third Religious Disestablishment: A Case Study of the ADF's Strategies in Prolonging Culture Wars" (2023), Illinois Wesleyan University, https://digitalcommons.iwu.edu/polisci_honproj/54.
[19] Daniel K. Williams, GOD'S OWN PARTY (2010).
[20] Kevin M. Kruse, ONE NATION UNDER GOD (2015).

conservativism, provide explanation for the stakes of the Religious Right's recurrent call upon the state to enforce the proper order of the heterosexual, hierarchical family unit.[21]

II. The Religious Right and its Litigation Strategies

Kristen Waggoner, the attorney who made these arguments on behalf of 303 Creative, is the current CEO and President of the leading Christian impact litigation organization, the Alliance Defending Freedom (ADF). ADF was founded as the "Alliance Defense Fund" in 1993 by a collection of influential Christian conservative activists as a vehicle for financing religious-liberty suits and coordinating likeminded efforts by other groups.[22] The organization was founded to, in the words of prolific radio minister Marlin Maddoux, defeat the work of the ACLU so thoroughly that "they'll wonder why they ever went into this business."[23]

Recovering the First Amendment was a first priority for the ADF. As one early fundraiser wrote, "Challenges to religious freedom and the sanctity of life in America have escalated in recent years, while 'free expression' by those who oppose traditional and family values in America invades our schools, legislatures, and seemingly every aspect of public life."[24] It is apt that the ADF was initially introduced at a National Christian Broadcasters Convention—the Christian emphasis on the significance of Free Speech has long been influenced, in Maddoux's words, by a perception that there need to be "first Amendment stronghold[s]" against a radicalized "secular press" which has worked to drown out religious voices.[25] More than thirty Christian groups, with leaders from the

---

[21] See Melinda Cooper, FAMILY VALUES (2019). Hannah Dick's work on the "rhetoric of persecution" focuses on the ADF's strategic narratives relocating the harm of express exclusion by describing the "victimization of white, cisgender women." Hannah Dick, "Advocating for the Right: Alliance Defending Freedom and the Rhetoric of Christian Persecution," 29 FEM. LEG. STUD. 375 (2021).

[22] John W. Kennedy, "Religious Broadcasters: NRB Shuns Clinton" (Mar. 7, 1994), CHRISTIANITY TODAY, https://www.christianitytoday.com/ct/1994/march-7/religious-broadcasters-nrb-shuns-clinton.html. *See generally* Williams, "The United States after the Third Religious Disestablishment: A Case Study of the ADF's Strategies in Prolonging Culture Wars," *supra* n.18.

[23] Jeri Clausing, "Christian groups establish legal fund," AUSTIN AMERICAN-STATESMAN (Dec. 10, 1993).

[24] William Pew, "Alliance Defense Fund: Advertisement," NAPLES DAILY NEWS (May 16, 1996).

[25] John W. Kennedy, "Mixing Politics and Piety," (Aug. 15, 1994), CHRISTIANITY TODAY, https://www.christianitytoday.com/ct/1994/august15/christian-talk-radio-accountability-james-dobson.html

Southern Baptist Convention to Campus Crusade for Christ, became involved in this national effort to raise resources for the "civil war of values" that was being waged against "radical liberal activists."[26]

Activism by the Religious Right through ADF and other powerful institutions over the latter half of the twentieth century is part of the story of how the Free Speech guarantees of the First Amendment were successfully transformed from a tool in the hands of the sit-in protestors of the Civil Rights movement and a protection for political radicals to a sword of the courts, sharpened to cut down the impact of state public accommodation laws.[27] Paul Weyrich, longtime conservative activist and founder of the Heritage Foundation and the Moral Majority, observed that the successfully furthering the agenda of the Moral Majority would require a political philosophy "defined by us in moral terms, packaged in non-religious language, and propagated throughout the country by our new coalition."[28] This paper focuses on a major success in this effort towards translation: the movement's longstanding utilization of the interplay between the Free Exercise and Free Speech clauses to fight against antidiscrimination laws.

The Religious Right's turn to associational freedoms, rather than the Free Exercise, was catalyzed by the Court's decision to curtail religious exemptions for neutral, generally applicable laws in *Employment Division v. Smith*. Even before this limitation was imposed, however, expressive or associational arguments were deployed by religious groups who saw the flexibility inherent to the Free Speech clause. Specifically, the unfocused nature of the inquiry into the sincerity of an

---

[26] Jeri Clausing, *supra* n.23.

[27] Libertarianism and the Free Speech clause have deeply entwined roots. *See* Genevieve Lakier, "The First Amendment's Real Lochner Problem," 87 U. CHIC. L. R. 1241 (2023), arguing that current Free Speech jurisprudence "repeats the errors of the Lochner Court by relying upon an almost wholly negative notion of freedom and by assuming that the only relevant constitutional interest at stake . . . is the autonomy interest of the speaker." *See also* Laura Weinrib, THE TAMING OF FREE SPEECH (2016), arguing in the context of early twentieth century labor strikes that the radical roots of First Amendment agitation were neutralized by the ACLU's turn to judicial enforcement of civil liberties.

[28] Randall Balmer, The Historian's Pickaxe: Uncovering the Racist Origins of the Religious Right, https://amc.sas.upenn.edu/sites/default/files/Balmer%20-%20Historian%27s%20Pickaxe.pdf, citing "The Moral Majority," undated paper, Box 19, Paul M. Weyrich Papers, American Heritage Center, University of Wyoming.

individual belief and the range of options for expressive conduct leave litigants more latitude for claiming expressive liberty, whereas Free Exercise can motivate the Court to review objective indicia to determine whether a belief has theological roots and whether some conduct is properly understood as the exercise of some traditional religious belief.

The network of the Religious Right has become increasingly interwoven, as religious groups which previously "fought amongst [them]selves" successfully united around their common opposition to expanding civil rights equality.[29] The American Center for Law and Justice, like the Alliance Defending Freedom, is another powerful Christian legal organization that emerged in the 1990's and defined itself in opposition to the ACLU, particularly with regards to the founders' interpretation of the proper relationship between the church and the state.[30] Another longstanding participant in First Amendment litigation in support of marketplace discrimination is the National Association for Evangelicals. This group was founded in 1942 as the "fundamentalist movement's first lobbying group," with less than half a million members; by 1992, the NAE served more than 15 million people.[31] The Southern Baptist Convention, the largest Protestant denomination in the U.S., has also frequently become involved in church-state litigation before the Supreme Court.[32]

Much of the content of this history arises from the impactful briefing and arguments made before the Supreme Court by these, and similar, groups. For deeper context, I also turn to

---

[29] *See* Alan Sears' call to action in his book calling for setting aside denominational differences to instead work together with the "relative harmony" of the "homosexual advocacy groups. Alan Sears & Craig Osten, THE HOMOSEXUAL AGENDA: EXPOSING THE PRINCIPAL THREAT TO RELIGIOUS FREEDOM TODAY at 181, https://ia600504.us.archive.org/10/items/TheHomosexualAgenda-ExposingThePrincipalThreatToReligiousFreedomToday/The-Homosexual-Agenda-Exposing-the-Principle-Threat-Alan-Sears.pdf.

[30] The Christian Science Monitor, "ACLJ v. ACLU: Battling Acronyms" (Feb. 7, 1994) https://www.csmonitor.com/1994/0207/07142.html.

[31] Michael Hirsley, "Bush reaches out to Religious Right, vows to veto abortion bill," CHICAGO TRIBUNE (Mar. 4, 1992).

[32] Today's amicus briefing in support of expressive exclusion is a coordinated and ecumenical effort from diverse conservative religious groups, ranging from the originally Catholic conservative Becket Fund, to religious groups formed around their anti-gay activism like the Public Advocate of the United States, to include conservative Jewish groups, like Agudath Israel. The ADF and the ACLJ effectively organize these diverse groups' contributions to their impact litigation.

conversations that were happening amongst Christians regarding the evolving relationship between the theological and the political. Indeed, before the prolific growth of these Christian institutions in the 1980's, much of the development of a theology of discriminatory association occurred internally. This earlier generation was more interested in holding rallies and electing presidents who might be a "political savior," and had not yet learned the necessity of "long-term involvement in the political process" to ensure that Christian voices would be heard.[33]

Popular publications offer a window into the bottom-up production of the Religious Right's understanding of the guarantees of the First Amendment. I thus turn to "evangelicalism's flagship magazine," Christianity Today, as a source for public, popular dialogue about the meaning of the First Amendment.[34] Christianity Today was founded by Billy Graham in 1956 and continues to, in its own words, strive to find a balance between "progressive mainline congregations" and "reactionary fundamentalist settings."[35] Christianity Today was never intended to be a segregationist publication, but in its attempt to identify a middle ground, is particularly representative of the broader camp of Christians who endorse a more submerged type of discrimination, ostensibly justified by First Amendment "negative liberties," or "family values," rather than express language about white, heterosexual supremacy.

This archive's central sources are the abundant content presented to the Supreme Court by the litigants in favor of First Amendment freedom and by the Religious Right, arguments which have shaped the current state of First Amendment law. The work of the Religious Right to expand legal protections for free expression in order to counter antidiscrimination laws is, at core, a story of

---

[33] Paul Weyrich, "Empowering the Right," NPR (2008) https://www.npr.org/transcripts/98505916. *See also* Williams, *supra* n.19, chronicling the Religious Right's evolving relationship with electoral politics and disappointing presidents.
[34] *See* Daniel Silliman, "An Evangelical is Anyone who Likes Billy Graham: Defining Evangelicalism with Carl Henry and Networks of Trust," 90 CHURCH HISTORY 621 and Kristin Kobes du Mez, JESUS AND JOHN WAYNE 29 (2020), both describing the origin of the magazine and emphasizing the importance of print culture for evangelicals' self-definition.
[35] CHRISTIANITY TODAY, "Our History," https://www.christianitytoday.org/who-we-are/our-history/#:~:text=Graham%20launched%20CT%20in%201956,or%20in%20reactionary%20fundamentalist%20settings.

strategic and ideological continuity, even as the Court's solicitude to these claims has changed over time. This paper will continually return to three recognizable patterns in legal strategy over the past fifty or so years.

Above all, the amicus briefs do case-defining work to corroborate, or question, the sincerity of the construal of the religious beliefs used to justify opposition to antidiscrimination laws.[36] Doctrinally, the turn to the Free Speech clause by the litigators of the Religious Right should have nullified the requirement imposed in Free Exercise cases to show that the parties' religious beliefs are sincerely held, "not merely a matter of personal preference, but one of deep religious conviction."[37] The role that amici in these cases of expressive exclusion take up, though, is one of legitimization: religious institutions corroborate the sincere theological roots for exclusionary activity.[38]

A second frequent tactic in these cases is to submerge the real consequences of discrimination by either initiating suit before a specific marginalized party has experienced true harm from unequal treatment in the marketplace or by rhetorically obfuscating the human impacts of business' discriminatory policies. In oral argument and briefing, the party's attorneys distance themselves from the objections to expanding civil rights and make overt efforts to undermine the effect that this has had, or could have, on the relevant communities. This strategy leads to intractable factual confusion, as the Court attempts to evaluate the relevant legal conclusions in the midst of continued debates

---

[36] The Supreme Court has, admittedly, not settled on a usable, static definition of religion for the sake of the First Amendment. *See* discussion in Ben Clements, "Defining Religion in the First Amendment: A Functional Approach, 74 CORNELL L. REV. 532 (1989), chronicling various Supreme Court approaches to the definition of religion, from an a "given belief that is sincere and meaningful" and "parallel to that filled by the orthodox belief in God," to contrasting it from "philosophical and personal" claims, like Thoreau's isolation at Walden Pond.

[37] Frazee v. Ill. Dep't of Emp. Sec., 489 U.S. 829, 833 (1989). *See also* Wisconsin v. Yoder, 406 U.S. 205, 215 (1972), where the religiosity of the traditional way of life of the Amish is contrasted to a "subjective evaluation and rejection of [] contemporary secular values."

[38] Carlos A. Ball argues that the debates that occur about the "sincerity and reasonableness" of business owner's beliefs in 303 Creative is "grounded in precisely the type of governmental distinction on the basis of speakers' viewpoints that the Free Speech Clause prohibits." Carlos A. Ball, "First Amendment Exemptions for Some," 137 HARV. L. REV. FORUM 46 (2023).

about the on-the-ground impact of any ruling they might make. Litigants fight for the right to discriminate in one breath, while denying the existence of any actual discrimination in the next.

Finally, the Court is urged to be particularly deferential to the parties' construal of the record in these cases of expressive discrimination, even where that record is disputed. The thinly veiled language of Free Exercise in these arguments for Free Speech rights is made even clearer when litigants invoke the risk of inappropriate government entanglement with the private association, which directly echoes one of the three prongs of the previous test for free exercise.[39] As Petitioner argued in *Dale*, as their sole point of rebuttal during oral argument when the Court inquired into the centrality of the exclusion of homosexual troop leaders from the Boy Scouts, "if you have to dissect each butterfly in order to classify it, there are not going to be many butterflies left."[40] The justices are urged to defer to an association's own assertions regarding the nature of its own expression and the association's view of what might impair that expression, no matter how thin the evidence they and amici have offered may be.[41]

All of these time-tested strategies of the Religious Right attest to the unusual role that amicus briefs by religious institutions can play in these cases. While the many amicus briefs filed before the Court are never technically dispositive, the Court has appointed amici in order to brief arguments

---

[39] This refers to the *Lemon* test for Establishment Clause violations, which once held that the state could only aid religion if the primary purpose of the assistance was secular, the assistance neither promoted nor inhibited religion and, as is echoed in these cases, there is no "excessive entanglement" between the church and the state. Lemon v. Kurtzman, 403 U.S. 602, 612 (1971). This has been overturned by the Supreme Court recently, in favor of a less clear "history and tradition" standard. *See* Kennedy v. Bremerton Sch. Dist., 597 U.S. 507 (2022).

[40] Boy Scouts of America v. Dale: Oral Argument (No. 99-699) (April 26, 2000) at 53, https://supremecourt-proquest-com.proxy1.library.virginia.edu/supremecourt/docview/%7Capp-gis%7Csupreme-court%7C99-699_oa_0057/Oral Argument?accountid=14678.

[41] Justice Stevens directly addresses this strategy in his dissent in *Dale*, where the Court held that the Boy Scouts of America have an expressive right to expel a gay troop leader despite a state civil rights law. Boy Scouts of Am. v. Dale, 530 U.S. 640, 686 (2000) (Stevens, J., dissenting). He describes this requested deference as an "astounding view of the law," where the "scope of a constitutional right [is] determined by looking at what a litigant asserts in his or her brief and inquiring no further." Where the Court engages in this "odd form of independent review that consists of deferring entirely to whatever a litigant claims," litigants' strategic citations to amici who reconfirm the inextricability of discrimination to a group's mission become all the more crucial.

that they wish to consider and which are not currently on the table.[42] In these cases, which ultimately pivot on the parties' construal of disputed facts, or even hypothetical harms, the amicus briefs do important work to reconfirm or undermine a party's construal of the underlying threats.

III. Civil Rights Era Resistance: The Embarrassing Origins of a Right to Expressive Exclusion

A. Desegregation and Expressive Liberties

Title II of the Civil Rights Act of 1964 guarantees equal access to places of public accommodation engaged in interstate access, without discrimination based on race, color, religion, or national origin. Although it took decades for a valid First Amendment objection to civil rights laws to catch hold of the imagination of the Supreme Court, constitutional arguments pitting individual expressive freedoms against antidiscrimination laws have roots as deep as activists' efforts to acquire meaningful equality in public places. Secular libertarian arguments pressed by Robert Bork and Barry Goldwater criticized the highly controversial Title II, the provision of the Civil Rights Act of 1964 which prohibited discrimination in places of public accommodation, as an incursion on the constitutional right to free expression, "the freedom to choose in a way most of us may consider wrong."[43]

Title II was broadly understood as the "most explosive title"[44] in the Civil Rights Act—indeed, Congress had attempted to make the same law in the Civil Rights Act of 1875, but the Supreme

[42] In *Bob Jones*, the Court appointed an advocate to argue in favor the ability to tax the segregated institution, after the Reagan administration dropped the case. The Court also exercised this power to control the range of reasoning available to it in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), where they ordered parties to address whether they should reconsider *Runyon v. McCrary*, 427 U.S. 160 (1976).
[43] Calvin Terbeek, "'Clocks Must Always Be Turned Back': *Brown v. Board of Education* and the Racial Origins of Constitutional Originalism," 115 AMERICAN POLITICAL SCIENCE REVIEW 821 (2021).
[44] Harry Quick, "Public Accommodations: A Justification of Title II of the Civil Rights Act of 1964," 16 W. RSV. L. REV. 660 (1965), https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=4313&context=caselrev; Samuel R. Bagenstos, "The Unrelenting Libertarian Challenge to Public Accommodations Law," 66 STAN. L. REV. 6, 1206 (2014) (citing Joseph William Singer's 1996 article "asserting there is a 'settled social consensus' that businesses open to the public should have no right to exclude customers based on race or sex").

Court quickly deemed the effort unconstitutional, on the grounds that the government may not "adjust what may be called the social rights of men and races in the community."[45] The Civil Rights cases of 1883 relied upon a thin distinction between discrimination by private parties, "social rights," and discrimination that is the result of state action, "civil rights."[46] The Court framed the boundaries between inviolable social rights and the proper realm for regulation by the government in terms of a bundled individual right to property, contract, or freedom of association.[47]

Theological arguments reinforced this legal understanding of the segregated social order as beyond the reach of the law. Conservative Protestants throughout the 1940's to 1960's identified the Republican Party as "the party of anticommunism and a Protestant-based moral order."[48] The Christian defense of racial segregation tied all of these strands together, by presenting the question of integration as "essentially a choice between the Anglo-Saxon ideal of racial purity maintained by a consistent application of the principle of segregation, and the Communist goal of amalgamation, implemented by the wiping out of all distinctions and the fostering of the most intimate contact between the races in all the relations of life."[49] Theological arguments elevated the segregated order to a sacred societal arrangement, like the divinely determined hierarchies within the domestic family or the church, and thus construed secular governmental regulations as unnatural interventions in the divine order.

Southern religious leaders were among the preeminent critics of Title II as a potential risk to freedom of association when the law was passed. Along with admonitions based in biblical exegesis of the natural, godly "order," preachers tied preservation of the segregated world to resistance to

---

[45] The Civil Rights Cases, 109 U.S. 3 (1883).
[46] *Id.*
[47] Bagenstos, *supra* n.44 at 1207.
[48] Williams, *supra* n.19, "Introduction," arguing that the lineage of the Religious right needs to be tied back long before *Roe v. Wade*, where previous studies located the origins of the Christian Right.
[49] G.T Gillespie, "A Christian View on Segregation" (1954). Pamphlets and Broadsides, at 3. https://egrove.olemiss.edu/citizens_pamph/1.

secularization by way of communism. The Cold War became a sort of "holy war" for Southern Christians, and desegregation was thus attacked from the pulpit as a "communist conspiracy to undermine law and order," an order imbued with innate racialized inequalities.[50] Public figures in and outside of the church reframed their language of resistance to the Civil Rights Act from a blatant discourse of racial superiority to the coded language of anticommunism and states' rights.[51] The Christian embrace of anticommunism during the 1950's went far broader than just providing new valence for southern segregationists' beliefs; Billy Graham and the National Association of Evangelicals emphasized the importance of the "home," the "citadel of American life" that was most vulnerable to a communist attack.[52]

Exegetical innovations opposing interracial sex worked in tandem with the Religious Right's affinities with libertarian property rights and anti-communism to defend the segregated order. Historian Jane Dailey has argued that awarding the "palm of orthodoxy to the colorblind, universalist theology" espoused by leaders like Martin Luther King Jr. tends to "miss the titanic struggle waged by participants on both sides of the conflict to harness the immense power of the divine to their cause."[53] Dailey presents diverse, convincing evidence that the central Christian framing of the problem with integration was opposition to interracial marriage.[54] Even when *Brown* was announced and schools were constitutionally obliged to integrate, interracial marriage remained illegal in twenty-seven states.[55] The entire Old Testament, from Eve's encounter with the serpent in the garden, to Noah's Ark, to the Tower of Babel, was reinterpreted by religious leaders during the

---

[50] *See* Matthew J. Hall, "Cold Warriors in the Sunbelt: Southern Baptists and the Cold War, 1947-1989" (2014). University of Kentucky Theses and Dissertations—History, https://uknowledge.uky.edu/history_etds/17.
[51] *See* Nicole Hemmer, MESSENGERS OF THE RIGHT: CONSERVATIVE MEDIA AND THE TRANSFORMATION OF AMERICAN POLITICS (2016).
[52] *See* Williams, *supra* n.19, Chapter One; Kristin Kobes du Mez, JESUS & JOHN WAYNE (2020), Chapter Two.
[53] Jane Dailey, "The Theology of Massive Resistance: Sex, Segregation, and the Sacred after Brown," MASSIVE RESISTANCE: SOUTHERN OPPOSITION TO THE SECOND RECONSTRUCTION (2005), at 168.
[54] *Id.* at 151-180.
[55] *Id.* at 158.

Civil Rights era as parables which mandated the "immutable social reality" of racial segregation.[56] The conservative order, in the form of the single-race family, was thus imbued with normative value and theological endorsement.

B. Failed Efforts to Forge a Judicially-Protected Right to Expressive Exclusion

Before *Bob Jones* was issued in 1982, an ecumenical and litigation-oriented religious movement around the First Amendment as a defense to expanding civil rights laws had not yet coalesced. Christianity Today, launched by Billy Graham in 1956, published prolifically on social and political issues through throughout the 1960s and 70's, but showed some skepticism of religious entanglement with the state. The only explicit and sustained interpretation of the First Amendment offered by evangelicals centered around uneasiness with state-aid to Catholic parochial schools, as well as discomfort with Catholics' "penchant" for politics.[57] Some conservative Protestants at the time actually organized around "separation of church and state," out of concern for a "church hierarchy" which "would tend to violate the Constitution."[58] Indeed, the first (and only) effort to seek the recognition of a constitutional right to violate Title II of the Civil Rights Act was *Piggie Park*, a case most remarkable for its brevity.

Maurice Bessinger, who opened the *Piggie Park* drive-in barbecue restaurants in South Carolina in the 1950's, also engaged in segregationist political activism before his appeal to the Supreme Court, including picketing integrated restaurants, leading a local white supremacist group, and heading a state-wide organization supporting Alabama Governor George C. Wallace's presidency. The same year his restaurants were sued for noncompliance with Title II of the Civil Rights Act, he initiated

---

[56] *See* Fay Botham, ALMIGHTY GOD CREATED THE RACES: CHRISTIANITY, INTERRACIAL MARRIAGE, AND AMERICAN LAW (2009), detailing the biblical interpretation which was invented to bolster anti-miscegenation laws.
[57] C. Stanley Lowe, "Protestants, Catholics and Politics," CHRISTIANITY TODAY (July 20, 1959), https://www.christianitytoday.com/ct/1959/july-20/protestants-catholics-and-politics.html.
[58] CHRISTIANITY TODAY, "Anxiety Over Catholic Advance," (Jan 20, 1958), https://www.christianitytoday.com/ct/1958/january-20/anxiety-over-catholic-advance.html.

his campaign for Congress as a "Jeffersonian Democrat, dedicated to the principle of Christianity and to the preservation of liberty."[59] Bessinger made the national news for his response to Title II of the Civil Rights Act: "I'm not trying to prevent anyone from getting their Civil Rights. I am simply trying to maintain my own Civil Rights."[60]

The NAACP represented three African American customers who were refused service by Bessinger in the summer of 1964 and who sued under the Civil Rights Act of 1964.[61] From the very beginning of his response to the lawsuit, Maurice Bessinger articulated his objection to the enforcement of Title II in his chain of barbecue restaurants using the language of religious freedom, that he "believes as a matter of faith that racial intermixing or any contribution thereto contravenes the will of God," and that this constitutes State interference with the free practice of his religion.[62] The District Court in Columbia did not question the sincerity of Bessinger's views. Their holding merely distinguished between the constitutional right to "espouse the beliefs of his own choosing," and "the absolute right to exercise and practice such beliefs in utter disregard of the clear constitutional rights of other citizens."[63] The Supreme Court, in 1968, affirmed the Fourth Circuit's dismissal of this claim as "patently frivolous."[64]

The same year that the Supreme Court dismissed the argument for expressive exclusion in *Piggie Park*, *Jones v. Alfred H. Mayer Co.* suggested that the Civil Rights Acts could be applied to racial discrimination by private clubs and schools.[65] Five years later, the Court unanimously reconfirmed in

---

[59] Maurice Bessinger, "Bessinger Will Run for House," THE STATE (March 18, 1964).
[60] Kent Krell, "'Rights' Suit Filed Against Columbia Firm," COLUMBIA RECORD (Dec. 18, 1964).
[61] *Id.*
[62] Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968). Appendix (1967). THE MAKING OF MODERN LAW: U.S. SUPREME COURT RECORDS AND BRIEFS, 1832–1978, link.gale.com/apps/doc/DW0100609843/SCRB?u=virginia_law&sid=bookmark-SCRB&xid=ca5887f4&pg=15.
[63] Newman v. Piggie Park Enterprises, Inc., 256 F. Supp. 941, 945 (D.S.C. 1966), citing to line of cases that stand for the idea that religious beliefs are "subject to regulation when religious acts require accommodation to society."
[64] Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 n.5 (1968).
[65] In *Jones v. Alfred H. Mayer Co.*, the Supreme Court held that the Thirteenth Amendment permitted Congress to eliminate racial discrimination in private transactions. This reversed precedent that held that the Civil Rights Acts only prohibited state-backed discrimination. *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

Norwood v. Harrison that there was no "affirmative constitutional protection[]" for "invidious private discrimination," even where it "may be characterized as a form of exercising freedom of association protected by the First Amendment."[66] Mississippi would not be permitted to provide tangible aid, in the form of textbooks, to private schools that continued to practice racial discrimination.[67] Where government aid "has a significant tendency to facilitate, reinforce, and support private discrimination," that state action was found to violate the Equal Protection clause.[68]

Factual contests regarding the extent of the injury to Black children in Mississippi pervaded the briefing, and the decision, in *Norwood*. The state of Mississippi objected to the scope of the actual harms alleged: first, Black public school students' argument that there was a "sub rosa transmutation of public to private schools" were challenged by "the lower court's finding that 90% of the educable children remain in public schools," and second, the schools were not "ideologically" segregationist, but rather simply achieve de facto segregation by charging their rates of tuition.[69] Appellants, in response, took time to clarify the factual record, rather than to argue the relevant law.[70] Further, the affected Black families' reply brief cited numerous other courts who found these argument about technically open, non-ideological enrollment policies to be a "disingenuous quibble," one which would come as "a surprise and a shock to the parents who have children attending these schools."[71]

The Court's conclusions in *Norwood* were not a response to a well-reasoned First Amendment argument. Mississippi just attempted to thinly argue an analogy to the state-aid to religion cases, without fleshing out the religious justifications for segregationist academies. Still, the discriminating

---

[66] Norwood v. Harrison, 413 U.S. 455, 470 (1973).
[67] *See* Monica Blair, "From Segregation Academies to School Choice: The Post-Brown History of School Privatization," ONLINE ARCHIVE OF UNIVERSITY OF VIRGINIA SCHOLARSHIP (2021) and "Segregation Academies and State Action," 82 YALE L. J. 1436 (1973), telling the history of segregationists' turn to private schools after *Brown*.
[68] Norwood v. Harrison, 413 U.S. at 466.
[69] Norwood v. Harrison, No. 72-77, "Brief of Appellees," 1972 WL 135758 (U.S., 1972), at *2.
[70] Norwood v. Harrison, No. 72-77, "Appellants' Reply Brief," 1973 WL 171682 (U.S., 2004), informing the Court that the 56 majority Black school districts of the state reported a loss of 40% of their White enrollment between 1968-79 and 1970-71.
[71] *Id.*

entity took up the strategy of factually obfuscating the very discrimination for which they seek judicial sanction, a tactic which crops up repeatedly throughout this line of cases.

Additionally, the state of Mississippi tried to suggest that the Court, in crafting a remedy, would run into the type of "entanglement" problem that characterizes state aid to religion cases, as the District Court would have to "decide which of 107 private schools can receive books," including "the state's Catholic schools," "which [had] scant numbers of black students."[72] This impressionistic briefing was meant to suggest that the state ought not find itself in the practice of scrutinizing any private institutions' policies, even where they are not protected as *religious* institutions. The Supreme Court addressed this concern, though, by condoning the "cumbersome" "school-by-school determination" as "no more" challenging "than the State's process of ascertaining compliance with educational standards."[73] This is an early example of the common strategy of urging deference to the factual record as stated, without drawing common sense conclusions or mandating further inquiry, to avoid "dissecting the butterfly."

The argument for a constitutional shield for expressive exclusion which was dismissed as frivolous in *Piggie Park*, and inchoate in *Norwood*, was polished by the secular schools that litigated *Runyon v. McCrary* just three years later. The parents of Michael McCrary and Colin Gonzales filed a class action suit against two Virginia suits who had discriminated against their children on the basis of race. The Southern Independent School Association, which intervened in the case on behalf of the schools accused of racial discrimination, began their brief by minimizing the harm: emphasizing that a child did receive admission at another school, underscoring the generally exclusive nature of the specific school to which his family sought admission, and stating that there were ample public and private schools open to "any pupil, of any race, creed, or religion, for any parent subscribing to

[72] Norwood v. Harrison, No. 72-77, "Brief in Support of Motion to Dismiss,"1972 WL 135759, at *8 (U.S., 2004).
[73] Norwood v. Harrison, 413 U.S. 455, 471 (1973).

any philosophy."[74] Indeed, the very first point made by the schools during oral argument was to question whether the Black families really "made out a case" that they had been discriminated against "on the basis of a phone call," before launching back into their argument for a constitutional right to "freely choose" one's associates.[75]

The attorney defending the segregated schools before the Court at oral argument mentioned that there *were* now two or three Black students in the previously segregated institution, "so that is not the question."[76] "The question" that he wished to focus the Court upon is "the individual right of a private citizen, just like a private school."[77] The Court quickly interrupts this sleight of hand with a tone of confusion: if there are Black students in the school, they ask, why they have been brought together to consider whether a school can practice a policy of complete racial exclusion? The attorney then sheepishly admitted that those students were only admitted after the Fourth Circuit's decision was issued—the decision that deemed segregationist private academies unconstitutional, and which was under appeal that day.[78]

The discriminatory schools' repeated suggestions that they did not have a policy of total exclusion seemed a waste of precious time during oral argument. Perhaps, though, the attorneys for the Southern Independent Schools took this rhetorical approach because they knew that a successful ruling would require successfully training the judges' gaze away from the actual harms suffered by Black families, and towards the hypothetical injuries posed to the "individual rights of a private citizen."[79]

---

[74] Runyon v. McCrary: Petitioner's Brief (No. 75-62) (Dec. 23, 1975) at 13, https://supremecourt-proquest-com.proxy1.library.virginia.edu/supremecourt/docview/%7Capp-gis%7Csupreme-court%7C75-62ea_peb_0005/Brief?accountid=14678.

[75] Runyon v. McCrary: Oral Argument (No. 75-62) (April 26, 1976) at 5, https://supremecourt-proquest-com.proxy1.library.virginia.edu/supremecourt/docview/%7Capp-gis%7Csupreme-court%7C75-62_oa_7000/Oral Argument?accountid=14678.

[76] *Id.* at 17.

[77] *Id.*

[78] *Id.* at 18.

[79] *Id.* at 18.

The Respondents' brief stated the facts quite differently. When the Black parents asked why their son's application to the school was rejected, they were told bluntly on a phone call, "we are not integrated."[80] The attorneys representing the Black families who experienced the schools' discriminatory policies expressed exasperation with his opponents' deception, and urged the Court to just remand the case if the schools continue to dispute the stipulated record.[81] He also directed the Court's attention to footnote 5 of *Piggie Park*, as evidence that there has been particular sensitivity to bad-faith arguments like these in matters of racial discrimination.[82]

The freedom of association argument presented by petitioners in *Runyon* depended upon describing the school as a private, rather than a commercial place. *Pierce* and *Yoder*, First Amendment cases about parents' rights to educate their children in religious contexts, were presented to support a general right of parents to rear and to educate their children in the atmosphere that they see fit—in this case, a secular segregated academy.[83] As is typical in these cases, even where a freedom of religion argument was not being made, the litigants ask the Court to draw connections between the importance of extending constitutional protection for a sincerely held cultural belief in racial segregation and other sincerely held, religious beliefs.

This attempt to forge a secular freedom of association analogous to religious freedom was particularly obvious in Dade Christian School's amicus briefing.[84] Even if the Court might not rule on the question of segregated religious schools that day, Dade wanted to present their perspective because it would offer more compelling "associational imperatives" and enable the Court to better

---

[80] Runyon v. McCrary: Brief for the Respondents (No. 75-62) (Feb. 5, 1976) at 5, https://supremecourt-proquest-com.proxy1.library.virginia.edu/supremecourt/docview/%7Capp-gis%7Csupreme-court%7C75-62ea_resb_0008/Brief?accountid=14678.
[81] Runyon v. McCrary: Oral Argument, *supra* n.75 at 77.
[82] *Id.* at 78.
[83] Runyon v. McCrary: Petitioner's Brief, *supra* n.74, at 12-13.
[84] Runyon v. McCrary: Motion of Dade Christian Schools, Inc., for Leave to File Brief Amicus Curiae (No. 75-62), https://supremecourt-proquest-com.proxy1.library.virginia.edu/supremecourt/docview/%7Capp-gis%7Csupreme-court%7C75-62ea_mot_0004/Amicus Curiae Brief?accountid=14678.

resolve "this sensitive constitutional problem."[85] Their school, they alleged, was originally founded in response to the Court's decisions banning prayer from public schools, but then "several years after" it was founded, concluded that an integrated school "would constitute a tacit endorsement of racial intermarriage, a practice clearly contrary to the Divine scheme of things."[86]

Dade Christian School's brief construed white flight from the South's integrated public schools as a religious phenomenon, writing that there has been a "spectacular" growth of religiously-sponsored educational institutions in recent years, "especially those espousing Fundamentalist views."[87] White, middle-class families were "forced" to make "difficult financial sacrifices in order to maintain their children in non-public schools," but do so "in an effort to insure that their children are developed in 'moral' surroundings in which they will associate with the 'right' other children."[88]

To support the idea of a First Amendment right to discriminate, Dade Christian School cited to a 1975 law review article that discussed a possible "low value" right to discriminate, which could be stronger when coupled with the free exercise of religion.[89] The article warned, however, that the Court need to inquire into whether the conduct has a "substantial relationship to fundamental tenets of the religion," by inquiring into the institution's practices and literature. These concerns came to define *Dade*'s own battle for a right of expressive exclusion. The trial Court, in Dade's own, later case, found that the refusal to integrate was not actually based on a religious belief, but rather on a policy or philosophy.[90]

---

[85] *Id.* at 5.
[86] Runyon v. McCrary, et al.: Brief of Dade Christian Schools, Inc., as Amicus Curiae at 3 (No. 75-62), https://supremecourt-proquest-com.proxy1.library.virginia.edu/supremecourt/docview/%7Capp-gis%7Csupreme-court%7C75-62ea_acb_0006/Amicus Curiae Brief?accountid=14678.
[87] Runyon v. McCrary: Motion of Dade Christian Schools, Inc., for Leave to File Brief Amicus Curiae, *supra* n.84 at 5.
[88] *Id.* at 5.
[89] Section 1981 and Private Groups: The Right to Discriminate Versus Freedom from Discrimination, 84 YALE L.J. 1441 (1975).
[90] Section 1981 after Runyon v. McCrary, 6 DUKE L. J. (1977).

The parents of the children who had been excluded from these Virginia private schools in *Runyon* responded to the arguments for expressive exclusion by, to use Post's language, *contextualizing* the First Amendment rights that petitioner has drawn upon.[91] Cases regarding parents' religious freedom to educate their children outside of the public school system did not sanction an "unfettered right to educate their children as they see fit," these families argued.[92] The First Amendment's implicit right to association must be linked to freedoms of speech and assembly, which are commonly exercised to promote political or social ideas. Schools, on the other hand, "are apolitical and the purpose they serve is to provide education, not to advance political or social interests."[93] A right to association should be closely linked to freedom of speech and assembly, and is therefore not an exclusionary concept, as exclusion is usually "antithetical to the strength that is gained from numbers when associations are formed to promote social or political ideals."[94]

The ACLU, who had long stood in favor of robust Free Speech rights and now sought to buttress the strength of the civil rights laws, developed this argument regarding the purpose of the First Amendment in their amicus briefing by distinguishing between private schools and "purely political groups and parties," insofar as the private school is not an essential medium for propagating political ideology.[95] Antidiscrimination laws do not inhibit the teaching of substantive doctrines like anti-miscegenation within these schools; state intrusions upon the content of teachings, and not regulations upon membership, are the proper sphere for the protection of the Free Speech clause.[96] The United States' amicus brief, too, usefully worked to re-focus the meaning of the First

[91] *See* Post, *supra* n.13.
[92] Runyon v. McCrary: Brief for the Respondents, *supra* n.80 at 11.
[93] *Id.* at 11.
[94] *Id.* at 40.
[95] Runyon v. McCrary: Motion for Leave to File Brief and Brief of Anti-Defamation League of B'nai Brith, American Jewish Committee, American Jewish Congress, National Association for the Advancement of Colored People and American Civil Liberties Union as Amici Curie (No. 75-62) (Feb. 5, 1976) at 16, https://supremecourt-proquest-com.proxy1.library.virginia.edu/supremecourt/docview/%7Capp-gis%7Csupreme-court%7C75-62_acb_0010/Amicus Curiae Brief?accountid=14678.
[96] *Id.*

Amendment, as a protection for "individuals and groups from unwanted or overbroad government intrusions jeopardizing the existence of the group by unjustifiably compelling disclosure of the identity of group members or supporters, penalizing individuals for joining groups engaged in legitimate activities or frustrating the achievement of lawful group objectives."[97] Defining the proper purpose of the First Amendment was key to countering arguments that it must be used to justify discrimination in commercial places.

In the same vein, the Respondents argued that the line of privacy cases upon which the schools also relied to carve out a right to expressive exclusion, like *Griswold*, which prohibited the states from making contraception illegal, only pertained to the sphere of "intimate or familial relationships," not the public space of education.[98] During oral argument, the Court rebuked the attorney speaking on behalf of the segregated schools twice for drawing faulty analogies between the educational and domestic spheres. When they argued what separates democracy from other Communistic nations is "the right to choose your associates, whom you want to bring into your home," the Court interrupts to correct twice: "The school is not a home."[99] Likewise, the Court curtailed the attempt to import the constitutional guarantees for religious free exercise into the case, by directly asking the advocate for the segregated schools whether they rely on either provision concerning religion.[100] The school is neither a home nor a church.

For Respondents, the school operated akin to a commercial business, with open advertisements and an entry in the Yellow pages, and not a private club.[101] To define an association as private, and therefore outside of the scope of state regulation, the club would have to show a "plan or purpose"

---

[97] Runyon v. McCrary, et al.: Brief for the United States as Amicus Curiae at 30-31 (No. 75-62), https://supremecourt-proquest-com.proxy1.library.virginia.edu/supremecourt/docview/%7Capp-gis%7Csupreme-court%7C75-62ea_acb_0012/Amicus Curiae Brief?accountid=14678.
[98] Runyon v. McCrary: Brief for the Respondents, *supra* n.80 at 11.
[99] Runyon v. McCrary: Oral Argument, *supra* n.75 at 16.
[100] *Id.* at 44.
[101] *Id.* at 23.

of selection that does not simply boil down to a purpose to exclude on the basis of race.[102] This dilemma for the secular segregationist schools was one reason it was appealing to pivot to explicit Free Exercise reasoning and analogies. In the context of a religious freedom claim, proving a longstanding "plan or purpose of exclusiveness," even on the basis of invidious characteristics, *can* actually go to show the sincerity of the belief and its centrality to the free exercise of the religion.

The Supreme Court's decision in *Runyon* concluded that the Constitution placed "no value on discrimination," and dealt with the First Amendment question by distinguishing between the freedom to promote the belief that segregation is desirable and the freedom to practice such segregation.[103] The freedom to associate is protected "because it promotes and may well be essential to the effective advocacy of both public and private points of view, particularly controversial ones."[104] The ability to "inculcate whatever values and standards they seem desirable," and not to practice discriminatory admissions policies, is what the First Amendment was "designed to foster."[105] Thus, the Court endorses the contextualization of the First Amendment presented by Respondents.

IV. The Religious Right Goes on Defense

A. Bob Jones v. United States

Despite the clear precedent in favor of integration in educational institutions and against a constitutional right to exclusive expression, Bob Jones University and Goldsboro Christian School gained some political traction for their 1982 appeal of the IRS' decision to revoke tax-exempt status on account of their racially discriminatory policies. The Reagan administration decided against

[102] *See* Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969).
[103] Runyon v. McCrary, 427 U.S. 160, 176 (1976).
[104] *Id.* at 175.
[105] *Id.* at 177.

enforcing the IRS' policy after the case was filed, and thus urged the Supreme Court to end consideration of the case on the grounds that "nothing in the 'plain language' of the IRS code or the history of the legislation [] justified the denial of the tax exemptions."[106] The Administration's announcement that it would return tax-exempt status to more than 100 segregationist schools which caused immediate and national backlash.[107] So, a political compromise, the Court chose to appoint an outside attorney, William T. Coleman Jr. of the NAACP, to defend the validity of the IRS policy, as the Justice Department had taken up defense of the constitutionality of the agency's rules.

As mentioned, the prior case on this issue, *Brown v. Dade Christian*, did not reach the clash between religious liberties and anti-discrimination law because the Fifth Circuit found that their segregationist philosophy was not genuinely religious.[108] In *Bob Jones*, numerous religious institutions, including the United Presbyterian Church, American Baptist Church, National Association of Evangelicals, Mormons, and Amish organizations submitted amici briefs in support of the validity of religious convictions opposing interracial dating and marriage and the importance of state deference to religious institutions on policies like these.[109] The NAE, for example, wrote that they would not submit a brief on behalf of the university if they had any reason to believe that these professed religious beliefs were a mask for invidious racial discrimination, and explains the university's exclusionary policies as connected to legitimate religious convictions against interracial dating and

---

[106] TIME MAGAZINE, "About Face" (Jan. 18, 1982), https://proxy1.library.virginia.edu/login?url=https://search.ebscohost.com/login.aspx?direct=true&db=a9h&AN=54222182&site=eds-live
[107] Dean M. Kelley, "What's the issue at BJU: religious freedom," CHRISTIANITY AND CRISIS (Nov, 1, 1982), https://proxy1.library.virginia.edu/login?url=https://search.ebscohost.com/login.aspx?direct=true&db=rfh&AN=ATLA0000797573&site=eds-live.
[108] Brown v. Dade Christian Schools, 556 F.2d 310 (5th Cir. 1977).
[109] Kelley, *supra* n.107.

marriage.[110] Even though Bob Jones, the NAE admitted, would likely see the Association itself as too "liberal," they wanted to legitimize the religiosity of the institution's desire to discriminate.[111]

The very first citation to the record during oral argument was to testimony regarding Scriptures' rejection of interracial dating.[112] Bob Jones argued that their plan and purpose of discrimination is longstanding, with reference a radio address from 1960 on the dangers of racial intermarriage as evidence of the sincerity of their beliefs.[113] Yet, the record on whether these beliefs were genuinely religious in their nature was debated; for example, as the NAACP argues with regards to Goldsboro, not all of the students at the school adhere to its religious doctrines, and both the founder and principal did at one point trace their opposition to admitting black children "to the current political climate in the South."[114]

Bob Jones and the institutions which submitted amicus briefs on its behalf relocate the real harm of the case in an excess of government power, unbounded administrative discretion, and the risks these pose to American pluralism. Some Christian voices questioned whether desegregation of private educational institutions was a compelling governmental interest at all, by minimizing the harm that Bob Jones' policy had on Black applicants to the university. Bob Jones, too, emphasized that compelling governmental interests are limited to where there is "some substantial threat to public safety, peace, or order."[115] Racial segregation in sectarian schools, in their view, comprises no

---

[110] Bob Jones University v. United States: Brief of National Association of Evangelicals as Amicus Curiae in Support of Granting Certiorari (No. 81-3) July 29, 1981), at 4, https://supremecourt-proquest-com.proxy1.library.virginia.edu/supremecourt/result/pqpresultpage.gispdfhitspanel.pdflink/$2fapp-bin$2fsupreme-court$2f7$2f9$2f9$2f8$2f81-3_acb_0005.pdf/entitlementkeys=1234%7Capp-gis%7Csupreme-court%7C81-3_acb_0005.
[111] *Id.* at 2.
[112] Goldsboro Christian Schools v. United States, et al.: Oral Argument, *supra* n.9 at 6.
[113] Goldsboro Christian Schools v. United States, et al.: Oral Argument, *supra* n.9 at 7.
[114] Bob Jones University v. United States, et al.: Brief of the National Association for the Advancement of Colored People, et al. as Amici Curiae in Support of Affirmance (No. 81-3) (Oct. 1, 1982), at 63-64, https://supremecourt-proquest-com.proxy1.library.virginia.edu/supremecourt/docview/%7Capp-gis%7Csupreme-court%7C81-3ea_acb_0032/Amicus Curiae Brief?accountid=14678.
[115] Bob Jones University v. United States: Brief for Petitioner (No. 81-3) (Nov. 27, 1981) at 29, https://supremecourt.proquest.com/supremecourt/docview/%7Capp-gis%7Csupreme-court%7C81-3_peb_0015/Brief?accountid=14678.

such threat. The Christian Legal Society, too, emphasizes that Bob Jones did not actually practice racial *exclusion* in principle, which might comprise a harm, but rather imposed social rules based "on racial distinctions," the ban on interracial dating.[116]

Bob Jones and Goldsboro took extensive, and confusing, measures to obfuscate the factual record as to the nature and extent of their racial discrimination. Bob Jones' records, which they offered to prove the religious foundation of their objections to interracial dating, included the President of the school's assertion that God's intent "for the races to remain distinct and different" does not in fact "involve[]" "inferiority."[117] The divine design for the nations to remain separate and not to intermarry, according to a speech given at the university in 1960, was actually threatened by the wrongful slave trade: "Africa could have been a great nation of colored Christians."[118] The refrain of this sermon was that integration risks "overthrow[ing] the established order of God in this world," which includes the separation of the races.[119]

Further, Bob Jones argues that there was no discrimination in the admissions process, and that that Black students' applications are processed "just like the white student's applications," and that "it's been a very, very happy situation."[120] An internal memoranda was offered as evidence that the school was formally desegregated on May 29, 1975, although they decided to continue to, unofficially, oppose interracial marriage and dating, and issued no press release regarding the school's alleged desegregation. At the time of the case, seven years later, only five students were

---

[116] Bob Jones University v. United States: Brief for the Center for Law and Religious Freedom of the Christian Legal Society, as Amicus Curiae in Support of Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit (No. 81-3) (Aug. 1, 1981), at 8, https://supremecourt.proquest.com/supremecourt/docview/%7Capp-gis%7Csupreme-court%7C81-3_acb_0007/Amicus Curiae Brief?accountid=14678.
[117] Bob Jones University v. United States: Joint Appendix, Interview of Dr. Bob Jones III (No. 81-3) (Oct. 1, 1981), at A69, https://supremecourt.proquest.com/supremecourt/docview/%7Capp-gis%7Csupreme-court%7C81-3_ja_0014/Appendix?accountid=1467.
[118] Bob Jones University v. United States: Joint Appendix, "Is Segregation Spiritual" Address, (No. 81-3) (Oct. 1, 1981), at A105, https://supremecourt.proquest.com/supremecourt/docview/%7Capp-gis%7Csupreme-court%7C81-3_ja_0014/Appendix?accountid=1467.
[119] *Id.* at A113.
[120] Bob Jones University v. United States: Joint Appendix, Interview of Dr. Bob Jones III, *supra* n.117 at A73.

Black. This discrepancy was explained away in Bob Jones' reply brief in terms of the white demographics of the Southern fundamentalist community, from which the school generally drew.[121] The Director of Admissions argued that, after desegregation, they would ask Black applicants what the race of their spouse was, but that they did not otherwise discriminate in their admissions process.

What *was* the actual harm, then, by these schools' telling? "No particular religious practice" was being curtailed, by the telling of Bob Jones' attorneys at oral argument, but rather "the entire religious enterprise. It's the religious organism, the whole ministry. A whole bundle of religious manifestations which is threatened, hurt, by the IRS policy."[122] In its amicus briefing, the Christian Legal Society echoed this focus on administrative excesses, recurringly disparaging the idea that the IRS might be able to enforce "whatever" policy it "may choose from time to time to favor."[123] This was an "ill-defined concept of 'public policy'" that has been weaponized to "dilute[] the substantive protections of free exercise," and which confers upon the "officialdom a roving commission to impose its views on others."[124] "All distinctions," the Christian Legal Society mused, "may in some sense be against 'public policy.'"[125] The American Baptist Church's petition for writ of certiorari agreed that the "real issue in this case," they baldly asserted, "cannot" be "the wrongness of racism"; rather, "the very existence of a religious organization is at stake in this case."[126] The Religious Right

---

[121] Bob Jones University v. United States: Reply Brief for Petitioner Bob Jones University (No. 81-3) (Sept. 30, 1982), at 3, https://supremecourt.proquest.com/supremecourt/docview/%7Capp-gis%7Csupreme-court%7C81-3ea_rb_0034/Brief?accountid=14678.
[122] Goldsboro Christian Schools v. United States, et al.: Oral Argument, *supra* n.9 at 7.
[123] Bob Jones University v. United States: Brief for the Center for Law and Religious Freedom of the Christian Legal Society, as Amicus Curiae in Support of Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit (No. 81-3) (Aug. 1, 1981), at 5, https://supremecourt.proquest.com/supremecourt/docview/%7Capp-gis%7Csupreme-court%7C81-3_acb_0007/Amicus Curiae Brief?accountid=14678.
[124] *Id.* at 6.
[125] *Id.*
[126] Bob Jones University v. United States: Brief Amicus Curiae of the American Baptist Churches in the U.S.A. Joined by the United Presbyterian Church in the U.S.A. (No. 81-3) (Oct. 1, 1981), at 14, https://supremecourt.proquest.com/supremecourt/docview/%7Capp-gis%7Csupreme-court%7C81-3_acb_0012/Amicus Curiae Brief?accountid=14678.

used its position to argue that the true harm of restrictions upon expressive exclusion had come in the form of stifling regulations upon religious communities. Bob Jones, after dismissing the real impacts of the school's perspective on race, goes so far as to say, "We feel the government has raped us," with regards to the revocation of their tax-exemption by the IRS.[127]

Despite these arguments regarding Bob Jones as a threated religious body, these, as Coleman argued on behalf of the IRS, are schools, public places that provide state-certified educations satisfy compulsory attendance laws and provided a reputable secular training. Only in order to win this case, "by the time that Bob filed its Reply Brief, at the end it is exclusively 'a religious ministry.'"[128] The attorney defending the government's policy thus questioned the legitimacy of this alleged threat to the "very existence" of an essentially religious organization. The NAACP's amicus brief elaborated upon this argument, by pointing out that a religious group's entry into a "field of business" means that it cannot "erect its religious beliefs as a shield against neutral regulations that its competitors must obey for the protection of the public."[129] Further, the entanglement concern cut the other way, as the NAACP pointed out; there would need to be a case-by-case Free Exercise analysis after a decision in favor of Bob Jones, investigating the theological sincerity of the stances adopted by many segregated private schools clamoring for tax exemptions.[130]

The real harm to the Black applicants to Bob Jones was ignored by the institutions' fiction that this was a de facto result of the institution's idiosyncratic opposition to racial intermarriage, rather than the result of a direct policy against racial integration. Coleman during his oral argument drew attention to this attempted deception by going fastidiously through the painful specifics of the religious precepts against racial dating at Goldsboro, which included, on record, "a belief that

---

[127] Bob Jones University v. United States: Joint Appendix, Interview of Dr. Bob Jones III, *supra* n.117 at A84.
[128] Goldsboro Christian Schools v. United States, et al.: Oral Argument, *supra* n.9 at 33.
[129] Bob Jones University v. United States, et al.: Brief of the National Association for the Advancement of Colored People, et al. as Amici Curiae in Support of Affirmance, *supra* n.114 at 41.
[130] *Id.* at 62-63.

Blacks, being descendants of Ham, 'were not especially blessed,'" and would only become prosperous by drawing upon "the political leadership of the whites."[131] Where the attorney representing the schools took pains to distinguish religious justifications for segregation from the belief that Blacks and Whites are not equal, Coleman forced the Court to witness the real harm of beliefs like these. While it is unusual for so much of oral argument to be spent discussing the factual record, Coleman attempts to draw attention back to the real effects of allowing institutions to continue discriminatory conduct.

The Court ultimately ruled against that the burden of the IRS' policy on religion was constitutional because it accepted that prohibiting racial discrimination was an "overriding governmental interest."[132] After Bob Jones University lost the case, the university accepted the loss of its tax-exempt status and did not drop their interracial dating ban until 2000.[133] The tone in Christianity Today's commentary on Bob Jones switched after the litigation intensified and ultimately failed. While throughout the 1960s-1970s the university was described as exceptionally and stridently discriminatory, in the 1980s, the reporting even in the anti-segregation evangelical mainstream uniformly worried that the decision would have "ominous," anti-religious liberty implications.[134] Christianity Today reported on the threat that the decision posed in terms of threatening the ordination of women, and claimed that "none who came to Bob Jones' defense

---

[131] Goldsboro Christian Schools v. United States, et al.: Oral Argument, *supra* n.9 at 33-34.
[132] Bob Jones Univ. v. United States, 461 U.S. 574, 603 (1983).
[133] Evangelical Press, "Bob Jones University Drops Interracial Dating Ban," CHRISTIANITY TODAY (Mar. 1, 2000), https://www.christianitytoday.com/ct/2000/marchweb-only/53.0.html.
[134] Beth Spring, "The Ominous Implications of the Bob Jones Decision," CHRISTIANITY TODAY (July 15, 1983), https://www.christianitytoday.com/ct/1983/july-15/ominous-implications-of-bob-jones-decision.html; Kenneth S. Kantzer, "The Bob Jones Decision: A Dangerous Precedent," CHRISTIANITY TODAY (Sept. 2, 1983), https://www.christianitytoday.com/ct/1983/september-2/editorial-bob-jones-decision-dangerous-precedent.html . The tone of these articles is quite different from the treatment of Bob Jones before the decision*; see, e.g.*, George Williams & J.D. Douglas, "Negroes and the Christian Campus," CHRISTIANITY TODAY (Nov. 20, 1964), https://www.christianitytoday.com/ct/1964/november-20/special-report-negroes-and-christian-campus.html; "Race Policies Cut Student Aid," CHRISTIANITY TODAY (May 13, 1966), https://www.christianitytoday.com/ct/1966/may-13/race-policies-cut-student-aid.html.

advocated racial discrimination," but rather "religious freedom."[135] Even the attorney that represented the college before the Supreme Court refused to do so until "he was convinced their position was not based on covert racism," but rather on Christian ideals of divinely-sanctioned order and theologically-ordained difference between the races.[136]

B. *Free Exercise Retrenchment and A New Sense of Urgency*

Evangelical theologian Francis Schaeffer asked in his 1981 "Christian Manifesto," "Where have the Christian lawyers been," to stop the courts from becoming a vehicle of secularization?[137] The Religious Right would heed Schaeffer's call in the coming decades. Bob Jones University may have acted too quickly when it hung its flag at half-mast "to mark the death of freedom," as the Supreme Court in the coming decades would find that states' efforts to extend marketplace equality to LGBTQ individuals could, indeed, be curtailed by others' First Amendment rights.[138]

Over the course of the 1980s, the Religious Right began to organize "as never before to protect religious freedom," and founded Christian legal organizations with "ambitious plans to alter the course of church-and-state separation."[139] Especially after the adverse decision in *Bob Jones*, numerous Christian legal organizations participated as amici, contributed to funding, or even initiated lawsuits aimed at bolstering a favorable interpretation the First Amendment. As Williams chronicles in his chapter on the "Moral Majority," evangelicals had the financial and voting power to gain national political traction, and these political activists collaborated with televangelists and megachurch pastors to mobilize voters and raise funds for Christian legal organizations.[140] Christians

---

[135] Spring, *supra* n.134.
[136] *Id.*
[137] Schaeffer, Christian Manifesto; Rodney Clapp, "Fighting for the First Amendment," CHRISTIANITY TODAY (Dec. 11, 1981), https://www.christianitytoday.com/ct/1981/december-11/fighting-for-first-amendment.html.
[138] Kenneth S. Kantzer, "The Bob Jones Decision: A Dangerous Precedent," CHRISTIANITY TODAY (Sept. 2, 1983), https://www.christianitytoday.com/ct/1983/september-2/editorial-bob-jones-decision-dangerous-precedent.html.
[139] Rodney Clapp, "Fighting for the First Amendment," CHRISTIANITY TODAY (Dec. 11, 1981), https://www.christianitytoday.com/ct/1981/december-11/fighting-for-first-amendment.html
[140] *See* Williams, *supra* n.19, Chapter 8.

saw themselves as forced to rekindle an interest in politics, due to the pressing social issues of the day, and called for efforts towards organization of their unprecedented, and pressing, activist efforts.[141]

On the 200th anniversary of the ratification of the Constitution, in the summer of 1988, several hundred people, including representatives of the nation's major faiths, gathered at a First Liberty Summit to "commemorate the Constitution's religious liberty provisions."[142] The group prepared and signed a 23-page "Williamsburg Charter" that affirmed "the genius of the First Amendment" and "the place of religion in American public life." Signatories also included Supreme Court justices, former Presidents, Judge (and infamous detractor of Title II) Robert Bork, and leaders of Christian legal organizations. This event, which interpreted the bicentennial of the Constitution as an opportunity to reflect upon the unique status of the First Amendment, was emblematic of the period's focus upon the role of religion in society and the increasing political mobilization around freedom of expression by the Religious Right. By 1992, handbooks were being published, by the Institute for First Amendment Studies, on how "to fight the Religious Right," evidence of "how much their growing success troubles liberals."[143]

The growing political traction of the Religious Right at this time was also a reaction to a strong counterculture movement which, from the 1960's to 1980's, challenged the traditional family structure and the role of established religions.[144] The repeal of sodomy laws began in Illinois in 1962,

---

[141] "The Christian as Citizen," (April 19, 1985), https://www.christianitytoday.com/ct/1985/april-19/christianity-today-institute-christian-as-citizen.html; Tom Minnery, Christianity Today Institute Focuses Evangelical Thought on the Christian Citizen, CHRISTIANITY TODAY (April 5, 1985), https://www.christianitytoday.com/ct/1985/april-5/christianity-today-institute-focuses-evangelical-thought.html.

[142] "Out of Many One—Almost," CHRISTIANITY TODAY (Aug. 12, 1988), https://www.christianitytoday.com/ct/1988/august-12/out-of-many-onealmost.html.

[143] "Handbook Tells How to Fight the Religious Right," CHRISTIANITY TODAY (Sept. 14, 1992), https://www.christianitytoday.com/ct/1992/september-14/politics-handbook-tells-how-to-fight-religious-right.html

[144] *See also* Du Mez, *supra* n.34 at 63, where she suggests that anti-gay activism within the evangelical movement was "rooted in the cultural and political significance they placed on the reassertion of distinct gender roles during those decades." Her work points to the evangelical activism against the proposed Equal Rights Amendment as evidence of the unification of white Christian women into a "shared domestic identity."

and the United Church of Christ ordained one of the nation's first openly gay preachers a decade later.[145] In 1971, the Supreme Court ruled that a law that discriminates against women is unconstitutional under the Fourteenth Amendment, and struck down a state statute that preferred men over women in estate administration.[146] Additionally, over the course of the 1970's, conservative Christians realized they would have to unite across denominational and segregationist lines to push their agenda to return prayers to the public schools.[147]

A neoliberal critique of anti-discrimination laws took hold of the imagination of many in and outside of the Religious Right at this period and was well suited to the untethered scope of First Amendment protections that the Court would come to recognize. Milton Friedman's wildly popular *Capitalism and Freedom* criticized the concept of invidious discrimination, arguing that "[i]t is hard to see that discrimination can have any meaning other than a 'taste' of others that one does not share," and that laws opposing such discrimination are an "interference" with the "freedom of individuals to enter voluntary contracts."[148] Melinda Cooper and Jason Hackworth both suggest that neoliberals and neoconservative alliances joined forces because the liberation movements of the 1960s undermined the normativity of the family unit as the foundation of welfare capitalism.[149] The Religious Right was both socially and economically conservative, and its fervent commitment to traditional "family values" included an economic commitment to "white, married masculinity as a point of access to full social protection," as opposed to the radically egalitarian possibilities of redistribution.[150]

---

145 "Homosexual's Ordination Voted in the United Church of Christ," (May 2, 1972), N.Y. TIMES, https://www.nytimes.com/1972/05/02/archives/homosexuals-ordination-voted-in-the-united-church-of-christ.html.
146 Reed v. Reed, 404 U.S. 71 (1971).
147 *See* Kruse, *supra* n.20, particularly Chapter 7.
148 Milton Friedman, CAPITALISM AND FREEDOM 110 (1982).
149 Cooper, *supra* n.21; Jason R. Hackworth, FAITH BASED: RELIGIOUS NEOLIBERALISM AND THE POLITICS OF WELFARE IN THE UNITED STATES (2012).
150 Cooper, *supra* n.21.

Intervening developments in the Court's Free Speech jurisprudence also cleared the path for a constitutionally protected expressive exclusion. Specifically, the "essence" of the First Amendment, as scholar Robert Post wrote regarding the Court's test in 1974, was located no longer in the "social context" of the communication, such as whether the event was an "organ[] of public opinion," but rather, quite abstractly and vacuously, whether the medium constitutes the successful communication of a particularized message.[151] This decontextualization of the First Amendment fails to acknowledge that there might be "events without First Amendment value," in light of some democratic "free speech principle."[152] Likewise, the cases which struck down campaign finance reform laws, like *Buckley v. Valeo* and *Citizens United*, are evidence of the neoliberalization of the First Amendment, the mobilization of "law and even the Constitution for the relentless remaking of political life with market values, not merely by market forces."[153] In one clear sign of the changing tides, the Rehnquist Court even initiated its own call for reconsideration of *Runyon*, a key case for regulation of private discriminatory institutions, in 1988.[154]

In 1990, the Supreme Court ruled that religion would not receive special protection under the Free Exercise Clause, where a law is facially neutral and generally applied.[155] Any state which cannot regulate religiously inspired conduct unless in favor of "an interest of the highest order" would be "courting anarchy," Justice Scalia famously wrote in the opinion striking down heightened scrutiny for incidental burdens on religious practice.[156] Religious groups "from across the theological and political spectrum joined to denounce" this opinion, which the religious liberty director of the

---

[151] Post, *supra* n.13.
[152] *Id.*
[153] Wendy Brown, UNDOING THE DEMOS 155 (2015).
[154] Aaron Epstein, "Supreme Court makes surprising call to restudy civil rights weapon," COLUMBUS LEDGER (April 26, 1988). The Rehnquist Court voted 5-4 to schedule re-argument but upheld the prior decision on grounds of stare decisis.
[155] Emp. Div., Dep't of Hum. Res. of Oregon v. Smith, 494 U.S. 872, 877 (1990).
[156] *Id.* at 888.

National Council of Churches described as having "gutted the free-exercise clause of the First Amendment."[157]

Congress then set to work on what would eventually be called the Religious Freedom Restoration Act (RFRA), an effort to, in the words of Sen. Daniel K. Inouye, "assur[e] that the protections of the first amendment to the U.S. Constitution will not be diminished."[158] Dozens of religious organizations lobbied for the bill, which sought to overturn *Smith* and put the burden of proof on the government to show a compelling reason for restricting any religious practices. The concerns which did halt its passage are indicative of the interest groups who controlled the process. Prolife and evangelical groups worried the bill could be used to expand abortion rights, and others expressed concern that inmates' religious preference would work to the "detriment of security and order," but little ink was spilled in evangelical publications about the potential risk of religiously founded discrimination against marginalized groups.[159]

Discussions around the passage of state RFRA's often explicitly addressed the problem of discrimination, particularly against members of the LGBTQ community.[160] Although RFRA was ultimately limited from application to the states by the Supreme Court, starting in 1993, groups successfully lobbied the states to pass their own versions.[161] The coalition in support of the Act even considered lobbying for a constitutional amendment, and described *Boerne* as the "Dred Scott" of church-state law.[162] Striking down RFRA was described as the next step towards "majoritarian

---

[157] "Church/State Issues: Confusion in the Court," CHRISTIANITY TODAY (July 16, 1990), https://www.christianitytoday.com/ct/1990/july-16/churchstate-issues-confusion-in-court.html.
[158] *See* Marci A. Hamilton, GOD V. THE GAVEL: RELIGION AND THE RULE OF LAW (2009), Chapter 7.
[159] Michele P. Tapp, "Congress: RFRA Passage Inches Closer," CHRISTIANITY TODAY (Oct. 4, 1993) https://www.christianitytoday.com/ct/1993/october-4/congress-rfra-passage-inches-closer.html.
[160] Bob Smietana, "Why 'RFRA' is America's Latest Four-Letter Word," CHRISTIANITY TODAY (April 1, 2015), https://www.christianitytoday.com/news/2015/april/rfra-indiana-arkansas-four-letter-word-religious-freedom.html.
[161] City of Boerne v. Flores, 521 U.S. 507 (1997) limited RFRA's application to only federal action. Despite this limitation, the federal RFRA does still have teeth. *See, e.g.,* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006), and Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014), for recent examples of its application.
[162] "RFRA Coalition Frays in the Wake of Ruling," CHRISTIANITY TODAY (Aug. 11, 1997), https://www.christianitytoday.com/ct/1997/august11/7t9048.html.

oppression" by the state, which, the disappointed coalition complained, prefers the "bland cultural Protestantism of the American middle class" to religious behavior which is actually subversive of the social order.[163]

On account of these perceived "secular victories," the Religious Right was compelled to move "from attacker to victim," and to portray their own constitutional rights as endangered rather than attacking the qualities and conduct of members of the LGBTQ community.[164] The triumphant, organized "Moral Majority" of the 1980s reidentified as the "moral minority," as even political victories did not result in the fulsome adoption of the Religious Right's agenda.[165]

V. The Constitutionalization of the Right to Discriminate

The South Boston Allied War Veterans Council first received mayoral authorization of the city of Boston to co-sponsor the St. Patrick's Day Parade in 1948, and continues to assist with the event to this day.[166] The City did financed and organized the Parade, which included participants ranging from the Leukemia Society to the Budweiser beer company.[167] In 1993, a Massachusetts State Court ordered the Council to include the Irish American Gay, Lesbian, and Bisexual Group of Boston (GLIB), under a state law which prohibited discrimination on the basis of sexual orientation in public accommodations. The GLIB was a small group of gay men and women, inspired by the Irish Lesbian and Gay Organization's involvement in New York's St. Patrick's Day Parade, who wished to march in the parade to express their pride in their "dual identities" as "gay, lesbian, or bisexual

---

[163] "Religious Freedom is No Luxury, CHRISTIANITY TODAY (Sept. 1, 1997), https://www.christianitytoday.com/ct/1997/september1/7ta014.html.
[164] See Kyle C. Velte, All Fall Down: A Comprehensive Approach to Defeating the Religious Right's Challenges to Antidiscrimination Statutes, 49 CONN. L. REV. 1, 9 (2016).
[165] Paul Weyrich, The Moral Minority, CHRISTIANITY TODAY (Sept. 6, 1999), https://www.christianitytoday.com/ct/1999/september6/9ta044.html
[166] South Boston St. Patrick's Day Parade, About Page, https://southbostonparade.org/about-sbawvc/.
[167] Gretchen Van Ness, "Parades and Prejudice: The Incredible True Story of Boston's St. Patrick's Day Parade and the United States Supreme Court," 30 NEW ENG. L. REV. 625, 631 (1996), citing to the lower court's records.

people who are also Irish."[168] The Council appealed, contending that they had a First Amendment right to express their "religious and social values" by excluding the pro-gay rights group from the parade.

The Council's brief before the Supreme Court had the same, complex relationship to the Free Exercise clause that characterized earlier expressive exclusion cases; while they did not claim that the parade is an exercise of their freedom of religion, they repeatedly return to the centrality and sincerity of their "religious and social values," and were even asked during oral arguments whether the Roman Catholic religion was part of the message they wished to express.[169] The Council responded that the Ancient Order of the Hibernians, a valued member of the parade and an Irish Catholic organization, did refuse to participate because of the forced inclusion of the GLIB.

The amici of the Religious Right argued that a ruling in favor of GLIB would "lead inexorably to the devaluing of the free speech of religion," given that the orthodox forms of three major religions in the country continued to condemn homosexuality.[170] Drawing such close connections between the "subordination" of free speech and religious liberty covertly draws in the underlying concerns of the Free Exercise clause, without forcing the Court into the limited scrutiny of state regulations with an incidental effect on religions mandated by *Smith*.

Likewise, in defense of a right to expressive exclusion, the Council repeatedly returned to its discomfort with the intrusive gaze of the trial court into their substantive belief systems. This inquiry

---

[168] *Id.* at 638, citing to the lower court's records.

[169] Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.: Brief for Petitioners (No. 94-749) (Feb. 21, 1995), https://supremecourt.proquest.com/supremecourt/docview/%7Capp-gis%7Csupreme-court%7C94-749_peb_0008/Brief?accountid=14678; Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.: Oral Argument (No. 94-749) (April 25, 1995) at 12, https://supremecourt.proquest.com/supremecourt/docview/%7Capp-gis%7Csupreme-court%7C94-749_oa_0019/Oral Argument?accountid=14678.

[170] Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.: Brief Amici Curiae of Christian Legal Society, Christian Life Commission of the Southern Baptist Convention, Family Research Council and National Association of Evangelicals in Support of Petitioners (No. 94-749), (Feb. 20, 1995) at 22, https://supremecourt.proquest.com/supremecourt/docview/%7Capp-gis%7Csupreme-court%7C94-749_acb_0014/Amicus Curiae Brief?accountid=14678.

echoes the entanglement concerns of the Free Exercise clause. The lower court did come to substantive, but perhaps unsubstantiated, conclusions regarding the authenticity of the Council's "religious and social" beliefs, writing that "History does not record that St. Patrick limited his ministry to heterosexuals, or that General Washington's soldiers were all straight. Inclusiveness should be the hallmark of their Parade."[171] When the Court asked, with a joking tone, whether the inclusivity of St. Patrick was a finding of the district court, the attorney representing the Council said, "that was a homily that was added at the end of the judgment in the superior court decision."[172] Petitioners, who voluntarily appealed this case to the Supreme Court in order to seek First Amendment protection against the state's public accommodations law, complained that for "three and a half years" now they have been asked "absurd questions" about the content of the religious values that the Irish parade seeks to express.[173] The Council sought deference to the factual record as they had construed by it, by complaining about the length of time of the state's intrusion into their internal affairs and belief system.

Much of Respondents' argument struck at the inauthenticity of the Council's discriminatory beliefs. The facts had changed drastically from the beginning of the suit to the end, as the Council shifted its justification for excluding GLIB several times before settling on their commitment to rather vaguely stated "religious and social values." There were no written criteria and seemed to be no unitary established process for determining what groups could participate on the day of the parade; indeed, this was the first time in history that the Council voted to revoke the registration of a group admitted to the parade.[174] The justifications for the revocation varied: GLIB had applied "too

---

[171] Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., by Daley v. City of Bos., No. 921518, 1993 WL 818674 (Mass. Super. Dec. 15, 1993).
[172] Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.: Oral Argument, *supra* n.169 at 13.
[173] *Id.* at 11-12.
[174] Larry W. Yackle, "Parading Ourselves: Freedom of Speech at the Feast of St. Patrick," 73 B.U. L. REV. 791, 834 n.199 (1993).

late," although there was no deadline, it "did not know anything about GLIB," and GLIB presented a risk of disrupting the parade. GLIB was informed, via letter, that it had been "denied for safety reasons and insufficient information regarding the social club."[175] Respondent argued that this shifting justification provided evidence of reorganization of a public accommodation around a discriminatory purpose, which could not be the means by which an entity becomes private. GLIB argued that the Council, in bad faith, reorganized their justifications, from safety concerns and accusing the gay group of being radicals, to some vague idea of their intended expression.

The core of the Court's analysis of *Hurley* ultimately echoed their recent decision requiring the inclusion of women in a private club in *Roberts v. Jaycees*: was this status or message discrimination, or are status and message inextricably intertwined? Respondent called upon the Court to follow their reasoning in *Roberts*, and not to engage in the type of "stereotyping" required to make assumptions about the effects that including women would have on the Jaycees' expression.[176] During oral argument, the attorney representing GLIB repeatedly makes the point that "the conflation of mere identity with message and values is paradigmatically what discrimination is."[177]

The Religious Right's developing sexual theology of homosexuality, however, became particularly well-suited to respond to this argument, as many denominations chose to acknowledge the real existence of same-sex desire in some individuals, but to draw distinctions between sinfully "choosing to act" upon those desires as opposed to maintaining a life of celibacy or undergoing conversion therapies.[178] The status of having homosexual desire is not a sin; the "acting upon it" is.

---

[175] Van Ness, *supra* n.167 at 631, citing to the trial court records.

[176] In *Roberts*, the Court concluded that they would decline to "indulge in the sexual stereotyping" that underlies the belief that imposing nondiscriminatory standards for admission to the group would inherently change the content or impact of the group's expression. *See* Roberts v. U.S. Jaycees, 468 U.S. 609, 628 (1984). Indeed, after *Hurley* came down, many wondered if the *Roberts* line of cases would now be disturbed. *See* David E. Bernstein, Antidiscrimination Laws and the First Amendment, 66 MO. L. REV. 83, 87 n.17 (2001).

[177] Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.: Oral Argument, *supra* n.169 at 28, 30, and 45.

[178] *See, e.g.* Sears, *supra* n.29, discussing litigation strategies and the Religious Right's perspective on homosexuality moving forward. *See also* John D. Inazu, "Religious Freedom vs. LGBT Rights? It's More Complicated," CHRISTIANITY

The amicus brief filed by the Christian Legal Society, Christian Life Commission of the Southern Baptist Convention, Family Research Council and National Association of Evangelicals hammers this distinction in, inferring, based on their own religious perspectives, that because GLIB has heterosexual members who support the gay community, the Council has taken issue with the expression of the religious and social value of accepting homosexual behavior, rather than with the personal characteristic of homosexuality itself.[179]

Religious amici stepped in to validate the authenticity of the Council's desire to exclude those who stand in solidarity with the Irish gay community, by pointing out how few states have laws like these opposing discrimination on the basis of sexual orientation, as opposed to the longstanding, "unbroken line of cases" opposing racial discrimination.[180] Just over a decade after these same groups argued for a First Amendment right for *Bob Jones* to persist in denying students racial equality, the Court's resolution to deny a right of expressive exclusion was assimilated into their argument as a specific shield against racial, and no other, discrimination.

The amicus brief filed by these religious groups began by re-defining the nature of the actual harm of the exclusion of gay individuals from a parade celebrating their Irish heritage. "This case," they began, "is not an example of the simmering conflict between anti-discrimination laws and constitutional rights. Instead, it is truly about the content of speech."[181] Further, as the Council emphasized in their briefing, there was no "monopoly" on parades, and therefore, they argue, little harm to a group excluded from Boston's historic St. Patrick's Day Parade.[182] The real harm of the

---

TODAY (July 16, 2014), https://www.christianitytoday.com/ct/2014/july-web-only/religious-freedom-vs-lgbt-rights-its-more-complicated.html, defending the theological distinction between homosexual status and behaviors.

[179] Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.: Brief Amici Curiae of Christian Legal Society, Christian Life Commission of the Southern Baptist Convention, Family Research Council and National Association of Evangelicals in Support of Petitioners, *supra* n.170 at 5.

[180] *Id.* at 21, citing to Richard F. Duncan, "Who Wants to Stop the Church: Homosexual Rights Legislation, Public Policy, and Religious Freedom," 69 NOTRE DAME L. REV. 393 (1994).

[181] *Id.* at 1.

[182] Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.: Reply Brief for Petitioners (No. 94-749) (April 14, 1994), https://supremecourt.proquest.com/supremecourt/docview/%7Capp-gis%7Csupreme-court%7C94-

case was the risk to the constitutional rights of groups who wish to express their opposition to homosexuality, and not exclusion from public accommodations on the basis of invidious characteristics.

The Supreme Court decided unanimously in favor of the Council, on the basis that forcing the inclusion of the LGBTQ group would affect the message of the parade. The BSA wrote as amici curiae during the litigation in *Hurley*, cataloguing the numerous troubles that state public accommodations laws which opposed discrimination on the basis of sexual orientation were presenting to their organization. After the Court decided in favor of a right to expressive exclusion of the LGBTQ community in *Hurley*, the Boy Scouts revoked openly gay troop leader James Dale's membership in the organization.

The Boy Scouts' briefing blurred the line between free speech and free exercise claims. They founded the validity of their expressive exclusion upon the centrality of a defined moral code to their organization's identity and membership requirements. Their brief distinguished from the Jaycees, who were refused a constitutional right to discriminate against women, on the basis that those clubs "did not have any moral code or philosophy that was logically related to their challenged membership criteria."[183] The BSA, however, had a defined, written moral code, to be "morally straight and clean in thought," which they interpret before the Court as implicitly precluding homosexual conduct.[184]

After the Court and Dale's attorney questioned the lack of specificity in the manuals as to "moral straightness" entailing a certain sexual orientation, the BSA pushed for deference to the record for the sake of preserving the independence of the association—"if you have to dissect each

---

749_rb_0010/Brief?accountid=14678; Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.: Brief Amici Curiae of Christian Legal Society, Christian Life Commission of the Southern Baptist Convention, Family Research Council and National Association of Evangelicals in Support of Petitioners, *supra* n.170 at 18.

[183] Boy Scouts of America v. Dale, Petitioner's Brief, 2000 WL 228616 (Feb. 28, 2000), at *34.

[184] *Id.* at *6.

butterfly in order to classify it, there are not going to be many butterflies left."[185] By the BSA's reasoning, it would kill the very nature of private associations for courts to engage in analysis of which of their beliefs are expressive and which are merely peripheral, and therefore a wide berth should be allowed for discrimination by private associations.

The BSA's reply brief relied upon a statistic about how many religious denominations support exclusions of members of the LGBTQ community.[186] The amicus brief of the Liberty Legal Institute, an organization founded in the 1970's on "commitment to religious liberties of all faiths," followed suit of amici in *Hurley*, by arguing that there was no essential difference between the BSA and any large religious denomination or organization, so requiring the Boy Scouts to comply with state antidiscrimination groups would threaten religious freedom.[187] The American Center for Law and Justice, representing the southern Baptists, wrote an amicus brief detailing a list of First Amendment litigation they were involved in that "opposes the misuse of state antidiscrimination laws to compel individuals and organizations to endorse currently fashionable sexual ethics."[188] Similarly, the Claremont Institute Center for Constitutional Jurisprudence filed a brief arguing that antidiscrimination laws threaten the ability to inculcate moral values in the young, which is "intimately tied to religion."[189] Agudath Israel's brief was straightforward in suggesting to the court that free speech and free association may provide a "constitutional refuge" from *Smith's* narrowing

---

[185] Boy Scouts of America v. Dale: Oral Argument, *supra* n. 40.
[186] Boy Scouts of America v. Dale: Reply Brief for Petitioners (No. 99-699) (Dec. 6, 1999) at 8 n.6, https://supremecourt.proquest.com/supremecourt/docview/%7Capp-gis%7Csupreme-court%7C99-699_rb_0005/Brief?accountid=14678.
[187] Boy Scouts of America v. Dale: Brief of the Liberty Legal Institute as Amicus Curiae in Support of Petitioners (No. 99-699) (Feb. 25, 2000), https://supremecourt.proquest.com/supremecourt/docview/%7Capp-gis%7Csupreme-court%7C99-699_acb_0035/Amicus Curiae Brief?accountid=14678.
[188] Boy Scouts of America v. Dale: Brief Amici Curiae of the American Center for Law and Justice, the Ethics & Religious Liberty Commission of the Southern Baptist Convention, and Focus on the Family Supporting Petitioners (No. 99-699) (Feb. 28, 2000), at 3-4, https://supremecourt.proquest.com/supremecourt/docview/%7Capp-gis%7Csupreme-court%7C99-699_acb_0024/Amicus Curiae Brief?accountid=14678.
[189] Boy Scouts of America v. Dale: Brief of Amicus Curiae the Claremont Institute Center for Constitutional Jurisprudence in Support of the Petition for Writ of Certiorari (No. 99-699) (Nov. 24, 1999), at 5, https://supremecourt.proquest.com/supremecourt/docview/%7Capp-gis%7Csupreme-court%7C99-699_acb_0010/Amicus Curiae Brief?accountid=14678.

of the Free Exercise clause.[190] These arguments captured the attention of the Court, who repeatedly returned to the question of whether a religious organization would be immune from the state's antidiscrimination laws during oral arguments.[191] The sheer number of anti-gay religious groups is a silent factor weighing in favor of the importance of treating the secular organization's views as sincere.

The BSA used the same distinction between acceptable secretive homosexual status versus open messaging about sexual orientation that was proposed in *Hurley*. This argument minimized the extent of the harm to gay members of the Boy Scouts; Scouting would "not investigate the sexual orientation of applicants, and only excludes those that are open about their sexual orientation."[192] The policy is not to inquire, and only to "exclude those who are open."[193] Further, if a heterosexual person were to advocate the morality of homosexual conduct, they could be, hypothetically, excluded on that ground.[194] The extended conversation about the range of the exclusion was intended by the Boy Scouts to diminish the potential injury to gay men who wish to join the organization, who merely have to avoid "messaging" their sexuality and otherwise will not meet status discrimination.

The Court decided in favor of the Boy Scouts' right to discriminate on the basis of a First Amendment freedom "not to associate" where a group participates in "expressive association."[195] While *Dale* weakened public accommodations laws in the context of expressive private membership

---

[190] Boy Scouts of America v. Dale: Brief of Agudath Israel of America as Amicus Curiae in Support of the Petition (No. 99-699) (Nov. 26, 1999) at 4, https://supremecourt.proquest.com/supremecourt/docview/%7Capp-gis%7Csupreme-court%7C99-699_acb_0014/Amicus Curiae Brief?accountid=14678.
[191] Boy Scouts of America v. Dale: Oral Argument, *supra* n.40. Further litigation against the Boy Scouts flipped this argument on its head: San Diego residents sued the city for Boy Scouts' use of public lands, on the basis that they are a religious institution. *See* Ted Olsen, "Supreme Court Turns Down Boy Scouts Case," CHRISTIANITY TODAY (March 1, 2004), https://www.christianitytoday.com/ct/2004/marchweb-only/3-8-21.0.html.
[192] Boy Scouts of America v. Dale: Oral Argument, *supra* n.40 at 4.
[193] Boy Scouts of America v. Dale: Oral Argument, *supra* n.40 at 6.
[194] *Id.*
[195] Boy Scouts of Am. v. Dale, 530 U.S. 640, 648 (2000).

organizations, the Religious Right had bigger aspirations, to protect expressive association within the entire commercial marketplace. Especially after the Court narrowly resolved *Obergefell v. Hodges* in 2015 in favor of a right for same-sex couples to marry, Christian litigators sought to limit the impact of expanding equal rights. They would come to treat passing dicta in *Obergefell*, where the Court claimed that "Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises," as a promise that the individual rights of "principled" objectors to gay marriage would receive constitutional protection.[196]

The Alliance Defending Freedom saw an opportunity to advance these interests in Jack Phillips, a baker in Colorado who refused to bake a wedding cake for Charles Craig and David Mullins on account of his religious beliefs against same-sex weddings. Craig and Mullins were browsing pictures of wedding cakes at Masterpiece, when Phillips informed the couple that he categorically does not make cakes for same-sex weddings.[197] They filed charges with the Colorado Civil Rights Division, alleging sexual orientation discrimination under the state's public accommodations law. The Supreme Court ultimately ruled in favor of the baker, but on the limited basis that there was religious animus underlying the specific deliberations of the civil rights agency regarding Phillips'

---

[196] Obergefell v. Hodges, 576 U.S. 644, 672 (2015); Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission: Brief Amicus Curiae of Public Advocate of the United States, U.S. Justice Foundation, Citizens United Foundation, Citizens United, One Nation Under God Foundation, Conservative Legal Defense and Education Fund, and Constitution Party National Committee in Support of Petitioners (No. 16-111) (Sept. 7, 2017) at 2, https://supremecourt-proquest-com.proxy1.library.virginia.edu/supremecourt/docview/%7Capp-gis%7Csupreme-court%7C16-111_acb_0034/Amicus Curiae Brief?accountid=14678; Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission: Brief of Amici Curiae Ethics & Religious Liberty Commission of the Southern Baptist Convention; Christian Life Commission of the Missouri Baptist Convention; John Paul the Great Catholic University; Oklahoma Wesleyan University; Spring Arbor University; William Jessup University; American Association of Christian Schools; Jews for Religious Liberty; and Imam Omar Ahmed Shahin in Support of Petitioners (No. 16-111) (Sept. 7, 2017), at 1, https://supremecourt-proquest-com.proxy1.library.virginia.edu/supremecourt/docview/%7Capp-gis%7Csupreme-court%7C16-111_acb_0040/Amicus Curiae Brief?accountid=14678.

[197] Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission: Brief for Respondent Colorado Civil Rights Commission (No. 16-111) (Oct. 23, 2017) at 11, https://supremecourt-proquest-com.proxy1.library.virginia.edu/supremecourt/docview/%7Capp-gis%7Csupreme-court%7C16-111_resb_0107/Brief?accountid=14678.

motivations. The case was decided ostensibly on narrow Free Exercise grounds, and the Free Speech question remained open for future resolution.

As this case pertained to a commercial enterprise, and not a quasi-private association like the Boy Scouts or a paradigmatically expressive activity like a parade, the clear comparisons to the Jim Crow South created more anxiety for the proponents of discriminatory expressive exclusion. Christianity Today collected four views on why Black evangelicals had "mixed feelings" about the Court's decision in *Masterpiece*.[198] These reflections include the importance of the ability to "distinguish between the value of persons and the values they espouse," loving the sinner, but hating the sin.

The oral arguments began with the confusion about the factual record that has come to characterize these cases. Whether Phillips had been compelled to write anything on a custom cake, or whether they just wanted to buy a pre-made cake, was the first topic of debate, one which already located the harm in the compulsion of the baker and not the real stakes of rejection for the gay couple.[199] In Phillips' factual world, he has been ordered by the state to "sketch, sculpt, and hand-paint cakes that celebrate a view of marriage in volition of his religious convictions."[200] The fact that he also refused to offer cupcakes that he sold regularly to the public to same-sex couples who intend to marry was erased from "the complaint, the formal charges," even though his attorney was obviously familiar with the allegation.[201]

The harm in *Masterpiece* was shifted to an attack upon the Christian faith, rather than another step towards exclusion of gay people from the commercial marketplace. In one stark reframing from

---

[198] Kate Shelnutt, "For Black Evangelicals, How Does Masterpiece Cakeshop Compare to Jim Crow?", CHRISTIANITY TODAY (June 10, 2018), https://www.christianitytoday.com/ct/2018/june-web-only/masterpiece-cakeshop-jim-crow-service-refusals-gay-weddings.html.
[199] Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission: Oral Argument (No. 16-111) (Dec. 5, 2017), at 4-6, https://supremecourt-proquest-com.proxy1.library.virginia.edu/supremecourt/docview/%7Capp-gis%7Csupreme-court%7C16-111_oa_0105/Oral Argument?accountid=14678.
[200] *Id.* at 6.
[201] *Id.*

a Religious Right amici brief, "The practical effect of CADA [the Colorado public accommodations law] is that any person in Colorado is empowered to target Christian businesses for extinction."[202] The power involved in this case is not the power of businesses to refuse service to members of a minority group, but rather "the power of homosexuals to regulate the business conduct of those who disagree with their behavior."[203]

Some amici in *Masterpiece Cakeshop* made efforts to break the lineage between the theology of segregation and the Religious Right's contemporary stance against LGBTQ equality. Ryan T. Anderson of the Heritage Foundation's contrasted the "racist bigotry" which undergirded opposition to interracial marriage to the "decent and honorable premises," dicta drawn from *Obergefell* that lent some credit to objectors to gay marriage.[204] Another amicus brief took the more direct, alarming tactic of questioning the validity of Title II, noting that the provision against racial discrimination in the marketplace still had quite a few senators, on both sides of the aisle, who voted against its passage.[205]

Justice Breyer asked the ADF attorney to distinguish cake-baking from all other commercial enterprises, for searching "some kind of distinction that will not undermine every civil rights law."[206] When the attorney for Phillips pivoted to analyzing *Hurley*, rather than line-drawing for the

---

[202] Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission: Brief Amicus Curiae of Public Advocate of the United States, U.S. Justice Foundation, Citizens United Foundation, Citizens United, One Nation Under God Foundation, Conservative Legal Defense and Education Fund, and Constitution Party National Committee in Support of Petitioners, *supra* n.196 at 17.
[203] *Id.* at 24.
[204] Linca C. McClain, "The Rhetoric of Bigotry and Conscience," at 12, in RELIGIOUS FREEDOM, LGBT RIGHTS, AND THE PROSPECTS FOR COMMON GROUND 212 (William N. Eskridge Jr and Robin Fretwell Wilson ed., 2018), discussing the amicus brief filed by Ryan T. Anderson of the Heritage Foundation.
[205] Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission: Brief Amicus Curiae of Public Advocate of the United States, U.S. Justice Foundation, Citizens United Foundation, Citizens United, One Nation Under God Foundation, Conservative Legal Defense and Education Fund, and Constitution Party National Committee in Support of Petitioners, *supra* n.196 at 26-27 n.30.
The brief also mentions, in another effort to legitimize principled objections to expansions of civil rights, that Barry Goldwater, who famously opposed anti-discrimination laws in public accommodations even in the civil rights context, was influenced by Justice Rehnquist and Robert Bork.
[206] Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission: Oral Argument, *supra* n.199 at 19-20.

concerned Court, Justice Sotomayor re-focused the inquiry, and asked directly whether this would apply to racial discrimination. Phillips' attorney responded with a historical claim, that the Court had never compelled speech in the context of race. After Justice Sotomayor presented *Piggie Park* as a counterexample, where the Court rejected discriminatory free expression and free exercise argument, the attorney from the ADF again said the Court had never compelled speech in the context of race. Justice Sotomayor responded, with some exasperation at the erasure of the historical lineage, "I'll read *Newman* [versus Piggie Park] myself."[207] The ADF did not attempt to draw any principled line between racial and sexual orientation discrimination, besides some vague idea that racial discrimination is status based, whereas distinctions regarding homosexuality arising from messaging, because gay behavior is a choice. This distinction is even more illegible in light of the historical centrality of opposition to interracial marriage to segregationist arguments.

The Colorado public accommodations law did have an exception for religious groups, where a "place is principally used for religious purposes."[208] The bakery, a commercial shop, was not deemed to fit the exception. The amicus brief filed by a group of evangelical organizations, including Focus on the Family and the Billy Graham Evangelistic Association, argued, though, that the lower court's finding that the bakery was still not sufficiently religious to be exempted imposed an unconstitutional "religiosity" test, which "violates constitutional principles of religious deference and neutrality."[209] Their brief took issue with the exception as a "detailed governmental inquiry into" the religious activity, which should be prohibited by the establishment clause of the First Amendment.[210]

[207] *Id.* at 20-22,.
[208] Colo. Rev. Stat. § 24-34-601(1).
[209] Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission: Brief of Amici Curiae Billy Graham Evangelistic Association, Christian Care Ministry, Eco: A Covenant Order of Presbyterians, Focus on the Family, Kanakuk Ministries, Pine Cove, Samaritan's Purse, the Christian & Missionary Alliance, the Navigators, the Orchard Foundation, Tyndale House Publishers, Association of Christian Schools International, and Association of Gospel Rescue Missions in Support of Petitioners (No. 16-111) (June 26, 2017), at 5, https://supremecourt-proquest-com.proxy1.library.virginia.edu/supremecourt/docview/%7Capp-gis%7Csupreme-court%7C16-111_acb_0007/Amicus Curiae Brief?accountid=14678.
[210] *Id.* at 15.

By implication, any commercial enterprise which alleges to have religious beliefs that preclude compliance with anti-discrimination law should be shielded from inquiry into the sources of those beliefs, as the government has "no competence or Constitutional authority to interpret or apply religious beliefs."[211] The ADF seeks state deference to businesses' self-definition as a religious group, and then to the beliefs that they espouse as a part of those belief set, regardless of the harms to third parties.

Moreover, amici vouched for the centrality of Phillips' sincere religious beliefs to his discriminatory treatment of the couple, referencing the Nashville Statement, a 2017 statement signed by more than 150 evangelic leaders denouncing same-sex relations and marriage.[212] The brief filed by the Southern Baptist Convention and other religious institutions attempted to legitimize the theological bases of refusals to serve, by explaining that many faiths do teach that secular vocations are callings to integrate one's work and one's Christian witness, and that providing a cake for a gay wedding would create moral complicity with the sin.[213]

The Supreme Court avoided settling the question *in Masterpiece Cakeshop*, and instead endorsed the suggestion that the Colorado Civil Rights Commission had discriminated against Jack Phillips on the basis of his minority status, as a Christian.

After the question of expressive exclusion in commercial businesses was inelegantly ducked in *Masterpiece*, many were surprised that the Supreme Court soon granted certiorari in *303 Creative*. A

---

[211] *Id.* at 19.

[212] Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission: Brief Amicus Curiae of Public Advocate of the United States, U.S. Justice Foundation, Citizens United Foundation, Citizens United, One Nation Under God Foundation, Conservative Legal Defense and Education Fund, and Constitution Party National Committee in Support of Petitioners, *supra* n.196 at 10.

[213] Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission: Brief of Amici Curiae Ethics & Religious Liberty Commission of the Southern Baptist Convention; Christian Life Commission of the Missouri Baptist Convention; John Paul the Great Catholic University; Oklahoma Wesleyan University; Spring Arbor University; William Jessup University; American Association of Christian Schools; Jews for Religious Liberty; and Imam Omar Ahmed Shahin in Support of Petitioners, *supra* n.196 at 13. They also cite to then-Judge Gorsuch's concurrence in *Hobby Lobby* on the Tenth Circuit, which focuses upon the validity of religious convictions about complicity.

website designer who opposed Colorado's same antidiscrimination law, Lorie Smith, planned upon entered the wedding website business, but believed she faced a "credible threat" that Colorado would compel her "to create websites celebrating marriages she does not endorse."[214] The Alliance Defending Freedom was well-suited to craft a petition for writ of certiorari even for this nascent case that could point to Colorado's record of past enforcement actions under CADA, given it had represented Jack Phillips' Free Exercise appeal of the very same law only a few years prior, and could just collect all of the clients they served in other jurisdictions in the process of challenging anti-discrimination laws.[215]

The brief in opposition of granting certiorari pointed out that the Colorado Act retains a religious purpose exemption, and that because this was filed in advance of enforcement, the Court could not reliably analyze the role the exception would have played, under these facts.[216] During oral argument, when Justice Roberts asked the attorney representing Ms. Smith about Colorado's statutory exception for religion, she quickly changed the subject.[217] The ADF's purpose in bringing this case was to set precedent broader than the hypothetical conduct of Ms. Smith, precedent which would debilitate the antidiscrimination statute rather than resolve a specific client's problems. Likewise, there was some chance that her business would not actually be determined to be a public accommodation by the Colorado Civil Rights Division. The ADF chose to litigate this case, using this vendor, because its particular facts, or lack thereof, could motivate a ruling in their favor, one

---

[214] 303 Creative LLC v. Elenis, 600 U.S. 570, 580 (2023).
[215] *See* 303 Creative LLC v. Elenis: Petition for a Writ of Certiorari (No. 21-476) (Sept. 24, 2021) at 17-18, 31-32, https://supremecourt-proquest-com.proxy1.library.virginia.edu/supremecourt/docview/%7Capp-gis%7Csupreme-court%7C21-476_pwc_0002/Brief?accountid=14678, detailing a "toxic legal climate" for those who wish the state to protect their discrimination against the LGBT community. The petition exposes the ADF's aggressive and continued surveillance of the Colorado Civil Rights Commissions meetings, the results of which ultimately determined the Court's decision in *Masterpiece*.
[216] There is some risk that, were this case to have been decided from a Free Exercise angle, the Court would follow its reasoning in Fulton v. City of Philadelphia, Pennsylvania, 593 U.S. 522 (2021), where a "system of individual exemptions" was found to mean that a law is not generally applied as required by *Smith*.
[217] 303 Creative LLC v. Elenis: Oral Argument, *supra* n.8 at 36.

that would likely muddle future efforts at enforcing the anti-discrimination statute.[218] Even the question of whether there was any compelled speech boils down to a fiction, because this is a hypothetical case without real information as to the content of a real wedding website. Vague cases, with imaginative harms, can make for broad precedent in the fight against LGBTQ rights.

This proactive litigation posture is the ultimate form of sanitizing the harm of expressive exclusion, as there was, in fact, no harmed party. The only visible injury was the state's power over Ms. Smith, limiting her hypothetical creative expression, and not any married same-sex couples seeking a website domain to advertise the details of their celebration. As the ADF framed the issue at the close of oral argument, this Court should give guidance to "limit the cruelty that has been imposed by endless litigation on artists like Jack Phillips."[219] The brief by the Institute for Faith and Family reframed the very idea of discrimination as injurious to religious liberty, writing that "Labeling religiously motivated conduct as 'discrimination' tends to exhibit constitutionally protected hostility toward religion rather than neutrality."[220] As the Court endorsed by focusing on the Commission's commentary about the negative effects of religion in *Masterpiece Cakeshop*, the object of undue discrimination in cases of expressive exclusion is not the gay customer, but rather the religiously-motivated proprietor.

The Court's decision, which found there is a First Amendment expressive right to deny service to members of the LGBTQ community, repeatedly mentioned that Lorie Smith *sincerely* held her belief that marriage is a union between one man and one woman. One religious amicus brief tried to distinguish between racial discrimination and anti-LGBTQ discrimination on the basis of sincerity.

---

[218] Justice Alito drives the discussion repeatedly in the direction of whether this is a public accommodation, during oral argument. Justice Jackson points out that this issue has been stipulated, and so there is no record on that score.
[219] 303 Creative LLC v. Elenis: Oral Argument, *supra* n.8 at 153. The idea that litigation this proactive can be conceived of as "imposed" upon Lorie Smith is hard to credit.
[220] 303 Creative LLC v. Elenis: Brief of Amici Curiae Institute for Faith and Family and Jewish Coalition for Religious Liberty in Support of Petitioners (No. 21-476) (Oct. 26, 2021), at 12, https://supremecourt-proquest-com.proxy1.library.virginia.edu/supremecourt/docview/%7Capp-gis%7Csupreme-court%7C21-476_acb_0004/Amicus Curiae Brief?accountid=14678.

As in *Masterpiece*, many religious amici mention *Obergefell* as evidence of the sincerity of religious objections to same-sex marriage.[221] The tone in *Loving*, on the other hand, as Smith's attorneys suggest during oral argument, has precluded any arguments as to the "honorableness" or "decency" of objections to interracial marriage.[222]

Still, as this history has shown, there have been sincerely held religious justifications for racial discrimination, and the Court ought not be in the business of determining the relative odiousness of varieties of invidious discrimination.[223] The same litigants who urged deference to the record on account of the impropriety of state entanglement with religion, here, implicitly endorsed the Court's dicta regarding which religious beliefs are sincere or acceptable. Ruling in favor of Smith risks overturning *Runyon* and endorsing expressive exclusion in the context of race.

The NAE's amicus too asked how *303 Creative* could be distinguished from *Piggie Park*. Their brief focused upon the distinction that predominated *Hurley* and the discussion in *Masterpiece*, the line between a bare refusal to associate with an individual on the basis of their status, versus the refusal to associate "with a message." The flimsiness of this distinction was tangible during oral argument, though, where Waggoner alleged that it is "highly unlikely that anyone would be serving Black Americans in other capacities but only refusing to do so in an interracial marriage." Smith however would, hypothetically, make a wedding website for a gay person, were they to be getting married in a

---

[221] 303 Creative LLC v. Elenis: Brief of Amici Curiae National Association of Evangelicals, Anglican Church in North America, Congressional Prayer Caucus Foundation, the Family Foundation, Illinois Family Institute, National Legal Foundation, Pacific Justice Institute, and International Conference of Evangelical Chaplain Endorsers in Support of Petitioner (No. 21-476) (May 31, 2022), at 8, https://supremecourt-proquest-com.proxy1.library.virginia.edu/supremecourt/docview/%7Capp-gis%7Csupreme-court%7C21-476_acb_0027/Amicus Curiae Brief?accountid=14678; 303 Creative LLC v. Elenis: Amicus Brief of Christian Legal Society and Free Speech Advocates in Support of Petitioners (No. 21-476) (June 1, 2022) at 13, https://supremecourt-proquest-com.proxy1.library.virginia.edu/supremecourt/docview/%7Capp-gis%7Csupreme-court%7C21-476_acb_0033/Amicus Curiae Brief?accountid=14678.

[222] Justice Alito seems to endorse this distinction and asks Respondents twice whether Justice Kennedy would have said that religiously motivated opposition to integration is honorable.

[223] 303 Creative LLC v. Elenis: Brief of Amici Curiae Institute for Faith and Family and Jewish Coalition for Religious Liberty in Support of Petitioners (No. 21-476) (Oct. 26, 2021), *supra* n.220 at 11.

heterosexual ceremony.[224] However much weight the ADF assigns to the status versus message distinction, it is not new. This was exactly the reasoning urged by Bob Jones and others who opposed integration on account of the risk of interracial marriage yet claimed to hold no negative biases against the Black community as individual people. Hating the sin and loving the "sinner" has deep roots in First Amendment jurisprudence.

Despite the ADF's framing of the problem, much of the amici briefing contained attempts to overturn *Smith*. The Catholic League, for example, argues that, "as originally understood" by the founding generation, "religious convictions were understood to receive greater deference than mere personal opinion."[225] Although much has been made of the Supreme Court's decision to hold on Free Speech grounds rather than Free Exercise in 303 Creative, this paper has intended to question the meaningful difference between the types of arguments that get made in support of these claims, from the significance of the religiosity of the underlying speech to the Supreme Court, to the way that requests for deference to the factual record in associative cases echoes "entanglement" concerns.

VI. Conclusion: First Amendment Purposivism in an Age of Privatization

Evangelical mainstream commentary heralded 303 Creative as a "wonderful victory," but only a "halfway victory," as it still only protects speech and has not reversed *Smith*.[226] Yet given the factual stipulation that the website was speech, and the nascent posture of the facts in *303 Creative*, it remains to be seen how much of a limiting principle the "speech" requirement really imposes to future challenges to antidiscrimination laws.

---

[224] 303 Creative LLC v. Elenis: Oral Argument, *supra* n.8 at 14.
[225] 303 Creative LLC v. Elenis: Brief of Amicus Curiae the Catholic League for Religious and Civil Rights in Support of Petitioners (No. 21-476) (June 2, 2022) at 3, https://supremecourt-proquest-com.proxy1.library.virginia.edu/supremecourt/docview/%7Capp-gis%7Csupreme-court%7C21-476_acb_0059/Amicus Curiae Brief?accountid=14678.
[226] Jonny Williams, "Legal Advocates eye Next Big Victory for Religious Liberty," CHRISTIANITY TODAY (July 20, 2023), https://www.christianitytoday.com/news/2023/july/legal-advocates-eye-next-big-victory-for-religious-liberty-.html.

The Religious Right has worked over decades to perfect these litigation strategies of factual erasure and injury relocation, and the precedent being set in these cases poses serious threats to the enforcement of civil rights laws. A protracting view of public space has ceded authority over civic life and the marketplace to religious institutions and to individuals' consciences.[227] From the segregationist private schools of the Civil Rights era to today's church-driven foster agencies that deny the ability to start a family to gay parents, privatization and discrimination have always had a close relationship.

The Do No Harm Act has been introduced several times to address religious freedom's threats to civil rights laws.[228] While this would be a useful step in the direction of recovering the purpose of the First Amendment, even legislative action would not resolve the Supreme Court's elevation of expressive liberties over equal protection. To resolve this problem will require more careful consideration of the purpose of the First Amendment, beyond a rather empty value on speech for its own sake.

Discrimination is "profoundly expressive," and so there must be a second step, a way to evaluate whether it is the type of expression which should receive constitutional protection.[229] For example, in *Runyon*, the Black families seeking admission to private schools argued that the associational rights guaranteed by the First Amendment, given the overarching purpose of the First Amendment, would pertain to groups seeking more members for the sake of political traction, not for the purpose of commercial exclusion. As several scholars have argued, the Court should consider and recover the

---

[227] *See, e.g.,* Evelyn Brody, "Entrance, Voice, and Exit: The Constitutional Bounds of the Right of Association," 35 U.C. DAVIS L. REV. 821 (2002) for her argument regarding the significance of the continued blurring between the private and the public for Free Speech, and Nancy MacLean, DEMOCRACY IN CHAINS (2017), arguing that expanding civil rights have motivated the Right's efforts to shrink the public sphere.

[228] Human Rights Campaign, "Do No Harm Act," https://www.hrc.org/resources/do-no-harm-act.

[229] Jed Rubenfeld, The First Amendment's Purpose, 53 Stanford L. Rev. 767 (2001).

state's interest in protecting speech in order to interpret the meaning of the First Amendment, rather than deferring to all expressive activity as an inherent societal good.[230]

The Religious Right relies upon the erasure of its own history to succeed in convincing the Supreme Court that it is the aggrieved subject of discrimination, and that the precedent for which they are fighting does not risk eroding the entirety of the past sixty years of civil rights law. Distinctions as flimsy as the dicta in *Obergefell*, or the status-message distinction, seem unlikely to cabin the potential threats that the Court's continued sympathy to the demands of the Religious Right pose to social equality for the American public.

[230] *See* Lakier, *supra* n.27; Post, *supra* n.13.