

Church, State, and Society:

Constitutional Consequences of the Rise of Christian Conservatism

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At first glance, an analysis of the relationship of modern Christian conservatives to American constitutional law might seem out of place in a panel on “Christian Conservatives and America’s Social Institutions.” Political scientists often link the rise of a politically mobilized Christian conservative movement to two great constitutional controversies: restrictions on officially sponsored prayers and other religious observances in public schools stemming from the 1960s school prayer decisions, Engel v. Vitale (370 U.S. 421 [1962]) and Abington School District v. Schempp (374 U.S. 203 [1963]); and constitutional limits on state powers to regulate abortions, first announced in Roe v. Wade (410 U.S. 113 [1973]) (Brown 2002, 22-23; Hacker 2005, 2, 24). These two undeniably seminal issues involve public institutions and public policies, not social institutions. The other most visible constitutional battle involving religion, public aid to elementary and secondary parochial schools, does involve social institutions. But though the lines have blurred, it is still identified more with longstanding struggles over the place of the Catholic Church in American life than with the causes of predominantly Protestant “New Christian Right” conservatives like Jerry Falwell, Pat Robertson, and James Dobson (Sorauf 1976, 14-15, 185, 188; Cremin 1988, 552-53; Flowers 2005, 71, 94-98).

Nonetheless, my thesis here is that a major source of the emergence and of the mission of New Christian Right political activism generally, and litigation in particular,

has been concern to protect and enhance the distinctive social institutions that Christian fundamentalists and evangelicals forged throughout the 20th century, initially as alternatives to the predominance of “mainline” Protestantism in the U.S. up through the early New Deal. In order to preserve and propagate their own visions of Christianity, Christian conservatives created radio and TV programs, book stores, publications, schools at all levels, medical, retirement, and social service programs, youth and adult community groups, and other organizations. Though otherwise largely apolitical, these institutions often sought and received access to public facilities or governmental assistance in creating facilities of their own. Perceived threats to different forms of such access and assistance have often been the initial spurs to heightened Christian Right political and judicial involvement. Beginning as far back as the 1940s, and accelerating and taking a more litigative turn in the late 1980s, much of the political and legal activism of Christian conservative groups has been devoted to trying to insure that government policies do not hinder these social institutions but instead assist them.

This goal helps explain some limiting features of New Christian Right litigation that recent analysts have noted. In the last quarter century, Christian conservatives have won important changes in prevailing constitutional doctrines governing state/church and, more broadly, state/society relations; but the changes have been far less than many in the Christian Right have wished. In establishment clause cases, they have had most success when they have argued for “equal treatment” of religious and secular groups, including equal access to public forums and governmental funds for charitable purposes. In free exercise cases, their greatest success has come when they have joined religious claims to broader free speech claims. In consequence, they have often preserved and sometimes

expanded important traditional accommodations of religious groups, such as tax exemptions for religious charitable activities and facilities and fund-raising via the sale of tax-exempt bonds, and they have also gained or most often regained access to public institutions and public funding on an equal basis with other organizations. In so doing, they have successfully countered those movements in contemporary American liberal thought and politics that have sought to keep religion out of public institutions.

But to be sure of winning this much, Christian Right litigators have foregone seeking the full-fledged recognition of America as a “Christian nation,” or at least one in which religions receive special recognition, protection and privileges, that many Christian conservatives desire. The political challenges of defining positions that can win the support of coalitions sufficiently powerful to protect their core institutional interests in the modern United States also indicate that Christian conservatives are not likely to be able to go much further in these directions. Their distinctive social institutions are likely to survive and thrive, serving as a basis as well as a motive for influential political and legal mobilization. But under the constitutional regime of equal treatment and broad freedoms of expression they have felt compelled to support, they are likely to remain only one set of voices among many, and a minority set, in American life.

I. Backdrop to Modern Constitutional Litigation: The Spread of Conservative Christian Institutions. Let me first rehearse some well-documented background circumstances on which my argument builds. Although the American founders created the first national state in history without an established church, most Americans have always professed religions, and national, state, and local governments have provided many types of accommodation and assistance to religiously affiliated schools, hospitals,

child welfare, and other social service agencies through much of U.S. history (Minow 2003, 10-11). In the 19th century, when the courts did not regard the First Amendment as restricting the states and when, in any case, most Americans thought it appropriate for governments to support broadly Christian values and endeavors, these kinds of aid were rarely challenged in litigation (Morgan 1972, 27-52; Monsma 1996, 13, 40).

Most of those forms of assistance have, in fact, never ended. They have only gone to a greater range of religiously-affiliated organizations over time.¹ Since the mid-1920s, especially, and accelerating in the last third of the 20th century, those organizations have included distinctly fundamentalist, evangelical, and recently New Christian Right institutions. Most historians have long agreed that as the mainline “Protestant establishment,” represented after 1908 in the Federal Council of Churches, embraced a “Social Gospel” agenda of reform politics and more liberal theological views, many more traditionalist Protestants became disaffected. They favored premillennialist beliefs that, seeing little hope for progress, often blended with politically conservative or apolitical stances; evangelism aimed at personal salvation, not social reform; and greater biblical literalism. The turning point in their relationship to mainline Protestantism and American public life more generally is often said to be the Scopes trial of 1925, in which John Scopes was convicted of violating Tennessee’s Butler Act banning the teach of “Evolution Theory” in public schools. Though Scopes lost the case, the widespread ridicule heaped upon state’s law and its evangelical defender, William Jennings Bryan,

¹ Stephen Monsma has noted that in 1993, even before the rise of recent “charitable choice” provisions that began with the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, “65 percent of Catholic Charities’ revenues came from government sources, as did 75 percent of the Jewish Board of Family and Children’s Services’ revenues, and 92 percent of Lutheran Social Ministries’ revenues” (Monsma 1996, 1; Wuthnow 2004, 14).

convinced many fundamentalists and evangelicals that they were no longer welcome in the nation's public spaces (Ahlstrom 1972, 909-10; Silk 1989, 280; Balmer 2006, xvi).

Consequently, they created their own. Bible institutes tripled from 1930 to 1950, along with the proliferation of fundamentalist religious magazines, missionary agencies, publishing houses, book stores, and, perhaps most momentously for the funding and growth of these organizations, radio programs with charismatic, essentially non-denominational preachers and inspirational gospel music (Ahlstrom 1972, 913-14; Carpenter 1984, 6, 11; Hart 2001, 24, 41n21). With the advent of both television and the spectacular Billy Graham Crusades of the 1950s, evangelicals were set on the path that would lead to modern "televangelists" who are national celebrities with tremendous fund-raising capacities, and to contemporary "megachurches" that break from traditional liturgy, hymns, and formality in favor of comfortable dress, revivalist sermons, popular music, films and videos, all joined with facilities supplying the "shopping-mall conveniences" of fast food franchises, fitness and recreation centers, and a range of family services (Silk 1989, 280, 282; Wolfe 2003, 26-31, 250; Henriques 2006). From the 1930s to the present day, these still-burgeoning institutions have comprised the organizational backbone of modern conservative Christian movements. More than many scholars have stressed, they have also provided a key motive for conservative Christians to become more politically active.

Writers have correctly contended that conservative evangelicals began organizing in the late 1930s and early 1940s in opposition to the more internationalist, more pro-labor, and less militantly anti-communist stances of the Federal Council of Churches (Schneider 1989 110-111). Carl McIntire's American Council of Christian Churches

formed in 1941 explicitly to attack Federal Council of Churches positions on virtually every theological and political issue. But it was the National Association of Evangelicals (NAE), founded the next year with the intent not only to resist religious liberalism but also to assist evangelical groups actively, that proved more enduring (Carpenter 1984, 12; Silk 1989, 278-279). By the 1950s, the Eisenhower administration had already begun to pay greater attention than ever before to the Christian conservatives who supported its main domestic and foreign policies (Matthews 1992, 135-36). The Federal Council's erstwhile policy spokesman, John Foster Dulles, had become Secretary of State, but while he still met with them, he moved away from their positions (King 1989, 128-132).

Yet though domestic and foreign policy concerns as well as religious differences certainly helped fuel evangelical organizing in this period and won them greater political recognition, the primary "issue which helped galvanize and unite evangelicals" into forming the NAE was "access to air waves" (Matthews 1992, 39). In the early 1940s, the national networks were apportioning free broadcast time to Catholics, Jews, and Protestants, with the Federal Council of Churches treated as the sole representative of Protestantism. Network executives also resisted selling time to religious broadcasters, in part because their programs included extensive fund-raising appeals. Establishing an office in Washington, D.C. and lobbying hard, the NAE sought successfully to preserve and extend evangelist access to paid and free radio and television broadcasting, strengthening this key organizational and financial instrument of evangelical groups. According to veteran evangelical journalist Arthur Matthews, the broadcast access issue was central to the NAE's formation and early agenda because it was "the point at which

Bible-believing Christians throughout the country thought their freedom was most at risk” (Ostling 1984, 49; Carpenter 1988, 27, 44; Matthews 1992, 29, 40-47).

Evangelical broadcasts and revival crusades then expanded their numbers and institutional basis throughout the 1950s. Even so, in the 1960s Christian conservatives again found themselves out of step with many of the most vibrant domestic political developments of the day. The NAE and other conservative Protestant groups questioned the legitimacy of the Catholic John Kennedy’s presidential candidacy, adding to their image as reactionary foes of a more pluralistic modern America (Silk 1989, 292; Matthews 1992, 138). The fading of strident 1950s anti-communism with which conservative evangelists like McIntire and Billy James Hargis were identified (and Hargis’s eventual discrediting via a sex scandal) also worked against a strong conservative Christian presence in public life (Pierard 1984, 163-65).

Perhaps most importantly, few conservative evangelicals embraced the civil rights activism of the 1950s and 60s, and a number instead responded to school desegregation orders by creating new fundamentalist Christian academies that tended to be overwhelmingly white. From the 1960s to the 1990s, and especially with the advent of court-ordered bussing for desegregation in the 1970s, these schools would grow to one-fifth of all private schools in the nation, with 90% of the conservative Christian private schools created after Brown v. Board of Education and nearly 40% located in the south (Cremin 1988 100; National Center for Education Statistics). Though these schools gradually became more racially diverse, they did so under governmental pressures that white conservative Christians resisted, as noted below. Partly as a result of civil rights tensions, black evangelicals formed what became the National Black Evangelical

Association in the 1960s, officially with amicable relations with the NAE, but clearly without a strong sense of a shared agenda (Matthews 1992, 143). As a result of these and related difficulties, the evangelical Christian right “was in a state of disarray” by the early 1970s (Pierard 1984, 169).

II. The Birth of the “New Christian Right.” At this juncture, the U.S. Supreme Court decided Roe v. Wade, an event sometimes regarded as pivotal in the rise of the New Christian Right (Brown 2002, 22). It certainly cannot be denied that opposition to abortion figures centrally in New Christian Right agendas today. Also in this period, perhaps the most influential American liberal philosopher of the second half of the 20th century, John Rawls, published A Theory of Justice, a work that gave elaborate philosophic expression to the egalitarian reform spirit of the 1960s. There Rawls argued that public institutions should be structured so that “the concept of right is prior to that of the good,” a criterion that, it became clear as Rawls developed and modified his position, made it desirable for candidates and office-holders to avoid advocating religious views.² Some writers suggest that at a deeper level, the “emerging movements in Protestant and Catholic circles” that sought to return religion to the public square arose in reaction to the spread in American culture of these sorts of liberal political and philosophic views, which they saw as dismissive and repressive of religious perspectives (Skillen 1998, 57, 61, 68-74; see also Carter 1993, 54-58, 216).

² Rawls 1971, 31, 216; 1987, 5, 20 (where Rawls claims that “no one any longer supposes that a practicable political conception for a constitutional regime can rest on a shared devotion to the Catholic or the Protestant Faith, or to any other religious view” and contends that comprehensive “claims of religion and philosophy” should be “excluded” as “a condition of establishing a shared basis for free public reason”); 1999 150, 174-75 (where Rawls contends that public reason involves a “duty of civility” that means political candidates should not seek to ensure the “influence and success” of their religious views).

But though for some, both Roe and Rawls would become symbols of how modern secular elites disregard traditional religious values, few would suggest that the New Christian Right arose directly due to mass popular outrage with modern Rawlsian liberal doctrines, or even cognate legal advocacy by the ACLU and other organizations. More surprisingly, liberal evangelical Randall Balmer has recently argued that when Roe was decided, “the vast majority of evangelical leaders said virtually nothing,” while “many of those who did comment,” such as W. A. Criswell, pastor of the First Baptist Church in Dallas and former president of the Southern Baptist Convention, “actually applauded the decision” (Balmer 2006, 12). Balmer notes that at a 1990 conference, veteran Christian Right activist Paul Weyrich stated that he had “utterly failed” to prompt mass evangelical political involvement over the issues of school prayer and abortion, as well as the proposed Equal Rights Amendment (Balmer 2006, 14-15).

But if not the school prayer or abortion decisions or more general liberal intellectual and cultural trends, what, then, spurred modern New Christian Right political and legal mobilization? Weyrich contended that Christian Right organizing began to take off in the mid-1970s, when the Internal Revenue Service tried to deny Christian schools “tax-exempt status” to schools perceived as engaging in racial discrimination (Balmer 2006, 14-15). Steven Brown quotes Jerry Falwell as similarly saying that it was the IRS’s new policy on tax exemption that “made us realize that we had to fight for our lives” (Brown 2002, 23). That level of anxiety may seem somewhat inexplicable, since many evangelical Christian groups had nothing like the Bob Jones ban on interracial dating. But many favored fellow believers in hiring, had conservative religious content in their education programs, adhered to traditional gender roles, and had other practices

that, they feared, might be viewed by secular liberals as a basis for removing the sorts of government privileges they had long possessed. To be sure, a broad and internally diverse movement such as the New Christian Right is never caused by any single factor. Still, it seems fair to say that, just as the National Association of Evangelicals first coalesced around an effort to preserve access to the public airwaves for their profitable programming, at least one major source of concerted political action by modern New Christian Right groups was their desire to maintain governmental policies that helped them to finance their schools and many of their other institutions.

Significantly for the development of this new political and legal activism, that goal did not easily lend itself to any claim of privileged status for religious institutions, much less Christian ones. When the Internal Revenue Service adopted the new tax exemption policy to which Weyrich and Falwell referred, it did so in the wake of recent Supreme Court decisions underlining that federal, state, and local tax exemptions could not be provided to religious groups *per se*. In the leading case, Walz v. Tax Commission (397 U.S. 664 [1970]), Chief Justice Warren Burger did rule, with only Justice William Douglas in dissent, that the New York City Tax Commission had acted constitutionally in granting property tax exemptions to “religious organizations for religious properties used solely for religious worship” (666). Burger noted that all fifty states had tax exemptions for places of worship, most by constitutional guarantees, and that the federal income tax had also always not applied to churches, part of an unbroken pattern of congressionally authorized exemptions that went back to the nation’s origins (676).

He stressed, however, that churches received these exemptions not as “churches as such.” They were part of a “broad class of property owned by nonprofit, quasi-public

corporations which include hospitals, libraries, playgrounds, scientific, professional, historical, and patriotic groups,” all deemed “beneficial and stabilizing influences in community life” (673). Burger acknowledged that churches varied greatly in the extent of the social welfare programs or other “good works” they undertook, but he thought that for that very reason, government should not seek to evaluate the worth of each church’s particular social welfare efforts. To do so would be a source of extensive “day-to-day” involvements and potential “confrontations” between religious groups and government agencies that the First Amendment sought to minimize (674).

The upshot was that all churches could continue to receive this exemption, as they had throughout U.S. history; but they did so as socially beneficial nonprofit organizations, not because religion could be “specially promoted” by government. As Justice Brennan noted in concurring, the Court held only that “government may properly include religious institutions among the variety of private, nonprofit groups that receive tax exemptions, for each group contributes to the diversity of association, viewpoint, and enterprise essential to a vigorous, pluralistic society” (689).

On the question of just how religious groups contributed to public life, there were differences in the reasoning of Burger, Brennan, and obviously Douglas in dissent; but all three plainly agreed that the tax exemption would have been much more questionable if it had not extended equally to a wide range of other socially beneficial nonprofits.

Christian conservatives and all other religious groups therefore must have realized that they were far more likely to maintain their tax exemptions, winning support from judges and secular non-profit organizations, if they did not seek any exclusive or special

treatment for religious bodies. They needed instead to present themselves as meriting the same status as other socially beneficial groups.

That conclusion was reinforced by a number of Supreme Court decisions over the next three years, both favorable and unfavorable to religious litigants. The favorable cases included the upholding of direct federal grants to religiously-affiliated colleges and universities in Connecticut (Tilton v. Richardson, 403 U.S. 672 [1971]) and a decision sustaining a South Carolina law that authorized a state agency to issue tax-exempt revenue bonds to assist in financing capital construction by higher educational institutions, including a Baptist-controlled college (Hunt v. McNair, 413 U.S. 734 [1973]). Although in each case the Court perpetuated its historical pattern of approving most forms of governmental financial aid to religious institutions, it did stress that the institutions in question all served “secular education goals” and were not “pervasively sectarian” (Hunt v. McNair, 743-44). Again the lesson was that religious institutions were more likely to sustain their privileges if they stressed the contributions they made in common with non-religious organizations, rather than claiming any special status.

Beginning with Lemon v. Kurtzman (403 U.S. 602, 614 [1971]), moreover, the Court embarked on a series of decisions through the 1970s that struck down many forms of financial aid for parochial schools, now seen as involving the sorts of “excessive entanglement” between church and state that Walz had held to be forbidden by the establishment clause.³ These cases largely involved Catholic schools, and they did not spark any conservative Protestant political mobilizations. But they did reinforce lawyerly

³ See also e.g. Levitt v. Commission for Public Education and Religious Liberty (413 U.S. 472 [1973]); Committee for Public Education and Religious Liberty v. Nyquist (413 U.S. 756 [1973]); Sloan v. Lemon (413 U.S. 825 [1973]); Meek v. Pittenger, 421 U.S. 349 [1975]; Wolman v. Walter (433 U.S. 229 [1977]).

awareness that public programs seen as aids to religion were likely to be viewed by modern judges far more critically than they had been in most of America's past.

At the lower court level, the D.C. federal district court handed down a decision in 1971 initiating the developments that would make many conservative Christians particularly anxious about preserving their own traditional governmental privileges. In Green v. Connally (330 F. Supp. 1150 [1971]), African American parents in Mississippi sued to enjoin U.S. Treasury officials from according tax-exempt status to private schools in the state that discriminated against their children. In response to the suit, the IRS announced it would no longer allow tax-exempt status or permit deductions for contributions in the case of any private schools that practiced racial discrimination. They could not be viewed as "charitable" institutions, for they operated "contrary to declared Federal public policy," as embodied in the Civil Rights Act of 1964. The court recognized that "the promotion of a healthy pluralism" was one purpose of the tax exemption, but it held that the "declared Federal public policy against support for racial discrimination" overrode "any assertion of value in practicing private racial discrimination, whether ascribed to philosophical pluralism or divine inspiration" (33). Though the schools challenged in the case were not religious institutions, the court discussed the recent Walz ruling, holding that it did not prevent interpreting the First Amendment "in harmony with" the post-Civil War Amendments by requiring even religious institutions receiving the "indirect economic benefit" of tax exemption to operate in accord with federal opposition to racial segregation (52-55).

With this ruling, and with conservative Christian schools proliferating just as many federal courts were imposing aggressive desegregation orders, it was inevitable that

the IRS would scrutinize the new evangelical institutions for practices of racial discrimination. Though Weyrich and Falwell later excoriated Jimmy Carter, an evangelical Christian that Pat Robertson and many other evangelicals supported in 1976, for setting the IRS on this course, the case that most spurred them into action actually began prior to his election. Bob Jones University, founded in the first wave of new evangelical institutions in 1927 and located in Greenville, South Carolina since 1947, banned all African American students until 1971. In response to the IRS policy announced during the Green litigation, it then permitted married African Americans to enroll. The University also sought a ruling prohibiting the IRS from revoking its tax exemption, but in Bob Jones University v. Simon (416 U.S. 725 [1974]), the Supreme Court held that no action could be taken until the IRS did so. In 1975, the University permitted unmarried African Americans to enroll, while continuing its longstanding ban on interracial dating. The IRS then moved to revoke its tax exemption in January, 1976, just before Carter's inauguration, with the change retroactive to 1970 (Martin 1996, 168-73; Turner 1997, 226-27; Balmer 2006, xvi, 14-16).

The University fought the IRS decision in court, winning at the district level, losing on appeal at the circuit court level, and then appealing to the Supreme Court. But though these efforts contributed to the first major mobilization of the New Christian Right, with Jerry Falwell forming the Moral Majority in 1979, the main focus of conservative Christian activism in this period was not litigation. It was on legislative lobbying, including congressional efforts to prevent the IRS from implementing policies that would deny tax-exempt status to "religious, or church-operated schools," and on the election of candidates favorable to evangelical Christian views, especially Ronald Reagan

in 1980 (Pierard 1984, 169-70; Hacker 2005, 6; Balmer 2006, 15-16,).⁴ As President, Reagan tried to get to the Justice and Treasury Departments to drop the denial of the tax exemption, but a political outcry led the administration to reverse its position. Perhaps wary of the Reagan Justice Department, the Court then invited the distinguished African American lawyer William Coleman to file an amicus brief on behalf of the government. Finally it ruled against the University, with only Associate Justice William Rehnquist in dissent (Bob Jones University v. U.S., 461 U.S. 574 [1983]). The University paid a million dollars in back taxes and saw donations decline (Turner 1997, 230). It seemed clear to many conservative evangelicals that their organizations were indeed at risk of losing forms of beneficial governmental treatment they had long enjoyed, whatever their other dissatisfactions with modern American life.

While the main conservative Christian response to the threat of losing their tax exemptions was political, in 1975 the Christian Legal Society (CLS), founded in 1961 to promote fellowship among Christian lawyers, created a Center for Law and Religious Freedom, the first Christian Right litigation organization (Brown 2005, 31). When the Bob Jones case went to the Supreme Court, the Center filed an amicus brief on behalf of the University, as did the National Association of Evangelicals, the American Baptist Churches, and Congressman Trent Lott. The ACLU, the NAACP, and the United Church of Christ, among others, filed briefs on behalf of the IRS decision (461 U.S. 576).

For the Christian Legal Society lawyers, the Bob Jones case represented a challenge to the preferred litigation approach they were developing, a challenge they proved unable to meet to the satisfaction of the Supreme Court. From early on, informed

⁴ See Public Law 96-74, 96th Congress, H.R. 4393, enacted Sept. 29, 1979, for provisions denying funds to efforts to deny tax-exempt status to religious or church-operated schools.

by the Walz opinions and the school cases, they generally sought to argue that religious groups should have “equal access” to public programs and institutions, including tax exemptions for all publicly beneficial nonprofit organizations (Brown 2002, 69; Casey 2006, 7). But the IRS policy denied access equally to all racially discriminatory groups; so their brief stressed instead that the policy unduly burdened the free exercise of sincere religious beliefs and thereby threatened all religious practices (Center for Law and Religious Freedom 1981, 4-11). It added that Congress had not directly authorized the IRS to deny tax exemptions on this basis and that religious freedoms should not be impaired on the basis of inference (13). Justice Rehnquist’s dissent agreed with the second argument--but like all the other justices, he accepted that Congress could deny religious groups the exemption on these grounds if it did so decide, rejecting the claim that the free exercise clause gave them any special constitutional privileges in this regard (461 U.S. 622 [1983]). Thus the Bob Jones litigation underlined that conservative Christian groups were not likely to win in court by claiming that they as religious communities enjoyed any constitutionally preferred status.

III. The Turn to “Equal Treatment.” At the same time, conservative Christian lawyers began to gain some signal judicial and legislative victories with the alternative “equal access” or “equal treatment” approach. In Widmar v. Vincent, 454 U.S. 263 (1981), with the NAE filing an amicus brief, the Supreme Court sustained a challenge to the decision of the University of Missouri at Kansas in 1977 to withdraw from student religious groups the same access to university facilities it provided to all other registered student organizations. With only Justice White in dissent, the Court ruled that rather than avoiding a form of religious establishment, the University’s new policy violated the free

speech rights of the student group in question, which religious speakers possessed on the same basis all others (269, 274).

Building on this precedent, Christian Legal Society lawyers helped draft the Equal Access Act of 1984 (20 U.S.C. §4071-74), requiring public secondary schools that offered their facilities to non-curriculum student groups to do so on a non-discriminatory basis. With the charismatic Messianic Jewish lawyer Jay Sekulow arguing on behalf of a student Christian club denied the opportunity to meet in a Nebraska high school, the Supreme Court sustained the Act in Board of Westside Community School District v. Mergens, 496 U.S. 248 (1990). Since the passage of the Equal Access Act, conservative Christians have gone on to organize thousands of new student Bible groups that meet in public schools. But in an example of why many conservatives are dissatisfied with the “equal treatment” approach, the Act has most recently been invoked chiefly on behalf of gay and lesbian student groups (Hacker 2005, 17-18, 24-27; ReligiousTolerance, 2007).

Yet out of a combination of principle and pragmatism, the leading New Christian Right litigation groups have since adhered overwhelmingly to “equal treatment” approaches to both establishment and free exercise issues. In 1982, former CLS lawyer John W. Whitehead founded the second major Christian litigation body, the Rutherford Institute. It has sought aggressively to initiate lawsuits broadening religious freedom rather than waiting for hostile governmental actions, in keeping with Whitehead’s philosophy of Christian activism. But from the outset, Whitehead has championed religious free expression not as specially privileged, only as a part of broad and equal liberties for all expression, professing not to aim “to have a Christian nation, but to enable religious people to survive” (Lienesch 1993, 167, 187-90; Brown 2002, 32-35).

This position has helped sustain laws providing federal funds to religious groups on the same basis as secular ones. Notably, in Bowen v. Kendrick (487 U.S. 589 [1988]), the Court sustained the 1981 Adolescent Family Life Act (AFLA), which expressly included religious groups among those eligible for federal grants to organizations providing counseling on premarital sex and pregnancy. With the Rutherford Institute filing a brief, Chief Justice Rehnquist ruled that since the funds were available to non-religious groups and financed essentially non-religious services, religious groups were not rendered ineligible because their counseling might reference religious beliefs (592, 607, 613).

The same subordination of religious free exercise claims to free speech arguments in order to keep religious groups eligible for public aid has also been the leitmotif of Sekulow's advocacy. He led his own small religious litigation firm from 1987 to 1990 and then became lead attorney in 1990 for the American Center for Law and Justice (ACLJ), founded by Pat Robertson to be a "Christian counterpart to the ACLU" (Brown 2002, 36; Hacker 2005, 21-23). In Mergens and subsequent cases, Sekulow and the ACLJ have consistently argued that religious groups are entitled to a "place at the table," but that free expression also extends to "the Satanists and the Nazis," despite predictable objections from others in the New Christian Right (Hacker 2005, 25).

It seems likely that, scarred by the defeat of distinctive free exercise claims in Bob Jones University and many other cases of the 1980s involving organizational financial interests, most of those shaping New Christian Right litigation in the past quarter-century have concluded that they would risk losing essential protections if they undertook more militant litigation strategies, claiming privileges for Christian groups or

even for religious groups that others could be denied.⁵ Their concerns for “institutional maintenance” required them to adopt arguments that could actually win in court, especially since conservative Christians found they could not always rely on promised support elsewhere (Ivers 1992, 247, 265). Despite their enthusiasm for Reagan, many Christian Right activists felt that his administration provided them relatively little in the way of concrete improvements either in public policy or assistance for their institutions during the 1980s (Pierard 1984, 170; Lienesch 1993, 14). The aggressive lobbying tactics pursued by Jerry Falwell’s Moral Majority also seemed to generate more controversy than benefits, and he dissolved his organization in 1989, though Pat Robertson created the Christian Coalition the same year to carry similar efforts forward.

But even as Christian conservatives experienced disappointments in other political arenas, equal treatment arguments were providing protection and some new gains for religious groups both in establishment and free exercise judicial decisions. So while the New Christian Right’s focus on electoral and legislative activities did not vanish, many in the movement came to agree that they should devote more energy to winning in court. Not only did older groups like the NAE begin to litigate more often in the 1980s; toward the end of the decade, new conservative Christian litigation groups began to proliferate rapidly (Ivers 1992, 255-56; Hacker 2005, 7-9). In 1990, Matthew

⁵ In addition to Bob Jones University, defeats for claims of special religious privileges under the free exercise clauses occurred during these years in Heffron v. International Society for Krishna Consciousness (452 U.S. 640 [1981]), denying special rights to solicit funds at a fairground; U.S. v. Lee (455 U.S. 252 [1982]), denying the Amish exemption from Social Security taxes; Alamo Foundation v. Secretary of Labor (471 U.S. 290 [1985]), requiring religious organizations to comply with minimum wage laws; Texas Monthly, Inc. v. Bullock (489 U.S. 1 [1989]), striking down a Texas tax exemption for religious publications because it did not apply to “a wide array of nonsectarian groups...in pursuit of some legitimate secular end” (2); and Hernandez v. Commissioner of Internal Revenue (490 U.S. 680 [1989]), holding that payments made to the Church of Scientology for training purposes are not tax-deductible contributions, among other cases. These decisions all affected adversely the financial viability of the religious groups in question.

Staver founded Liberty Counsel, now associated with Falwell, which has also stressed free expression arguments, rather than specifically religious free exercise claims, in its litigation (Brown 2002, 55, 58; Hacker 2005, 39-41). Donald Wildmon's American Family Association, which had a network of 160 radio affiliates by the late 1980s, also created a Center for Law and Policy in 1990. It did so in part to counter a libel suit by Penthouse Magazine, filed in response to an AFA boycott campaign, and to protect its newsletter from a separate lawsuit. The new Center won both cases, though again on free expression rather than free exercise grounds (Hacker 2005, 93-96). Then in 1994, a number of New Christian Right leaders, including Wildmon and also Bill Bright of the Campus Crusade for Christ, James Dobson of Focus on the Family, and James Kennedy of Coral Ridge Ministries, joined in creating the Alliance Defense Fund (ADF), in hopes of achieving coordination among the burgeoning conservative Christian litigation groups. In part due to controversies surrounding its initial leader, Alan Sears, the ADF has never succeeded in playing that role. Still, it has provided numerous grants to Christian litigators, striving to insure that New Christian Right activists file in every Supreme Court case on religion, as they have done unfailingly since 1990 (Brown 2002, 41-52).

IV. The Qualified Triumphs of "Equal Treatment" Strategies. In the course of so much litigation, many New Christian Right lawyers have not lacked for aspirations to win more resounding support for doctrines assigning religions in general, and Christianity in particular, the support of preferred position Protestant Christianity enjoyed in practice during most of American history. Though for litigators like Sekulow and Staver, winning religious groups "a place at the table" equal to but not superior to others appears to represent a principled position, for others the stresses on "equal access," "equal

treatment,” and “equal freedom of expression for all” seem to represent second-best positions, concessions to the political realities of a pluralist society. Exemplary here is Michael W. McConnell, architect of some of the New Christian Rights’ greatest judicial victories and now himself a federal judge on the U.S. 10th Circuit Court of Appeals. As an Assistant Professor at the University of Chicago Law School, McConnell argued in 1985 that the First Amendment’s clauses banning religious establishment and protecting free exercise should both be construed to facilitate specifically “religious liberty,” often through giving religious groups “special treatment” in the form of “accommodations” not provided others (McConnell 1985, 3, 5). Five years later in a major Harvard Law Review article, McConnell contended that the free exercise clause could plausibly be interpreted as compelling “exemptions” for religious groups from “generally applicable laws,” although he did hold that “religious” associations included groups concerned to raise doubts about religion (McConnell 1990, 1415-1416). In these years McConnell was also becoming a favorite attorney for the Christian Legal Society and other conservative Christian groups (Brown 2002, 27, 66).

But the same year McConnell published his free exercise argument, the Supreme Court delivered a devastating blow to efforts to win constitutionally privileged status for religious groups in Department of Human Resources of Oregon v. Smith (494 U.S. 872 [1990]). Two members of the Native American Church sued to obtain unemployment benefits denied them by the state when they were fired from their jobs at a private drug rehabilitation center after their employers learned that they regularly used peyote as part of Native American Church ceremonies. Because few among the New Christian Right identified with these religious claims to drug use, no New Christian Right litigators

participated in the case (Brown 2002, 77). But Justice Antonin Scalia, writing for a bare majority of the Court, not only refused to limit the state's powers to deny benefits to consumers of illegal drugs. He also denied that any "individual's religious beliefs" could ever "excuse him from compliance with an otherwise valid law" (878-89). Scalia also argued that free exercise claims should only receive "strict scrutiny" protection, with the Court determining if burdensome laws are justified as necessary for "compelling" governmental interests, when they were combined with other constitutional protections, "such as freedom of speech and press" (881).

The decision aroused a thundering chorus of criticism that included most liberal as well as conservative champions of religious and expressive liberties, the ACLU and the ACLJ. With the CLS Center for Law and Religious Freedom again closely involved in the drafting, Congress quickly passed the Religious Freedom Restoration Act of 1993 (42 U.S.C. § 2000bb), which sought to restore the "compelling interest" test even when a case involved only religious free exercise claims (Casey 2006, 8). But in City of Boerne v. Flores, Archbishop of San Antonio (521 U.S. 507 [1997]), a case involving the freedom of a church to restructure its own "historical landmark" building, Justice Anthony Kennedy ruled for a plurality of the Court that Congress had no power to command the sort of scrutiny the Court should apply to constitutional claims (535-36). The Court was undeterred by numerous amici briefs for the church, including ones by Jay Sekulow for the ACLJ and Michael McConnell representing the United States Catholic Conference (510-511). The message remained clear: the Court was very receptive to claims that religious expression is strictly protected like other forms of expression, but not more so. New Christian Right litigants remained well advised to structure their

arguments as general free speech claims, not as claims for distinctive rights of religious free exercise. Since 1994, they have done so in most of the cases they have litigated and in most of the cases that they have won (Brown 2002, 78, 100).

And through the 1990s on up to the present, even as the Court has rejected strong free exercise claims, arguments cast in favor of equal treatment also have continued to win renewed and sometimes expanded access to public facilities and public funds for New Christian Right organizations. The capacity of this position to build broad coalitions was evident in Lamb's Chapel v. Center Moriches School District (508 U.S. 384 [1993]), where the ACLJ, the ACLU, the AFL-CIO, the Christian Legal Society, the Rutherford Institute, and the National Jewish Commission on Law and Public Affairs all filed briefs on behalf of an evangelical church seeking to use school facilities to show a religious film series on family values and child-rearing (386). With some differences in reasoning but no dissents, the Supreme Court addressed the issue strictly as a free speech matter and upheld the church's right of access to public facilities for its expression on the same basis as other community groups (387, 397).

The landmark case in this regard is generally seen to be Rosenberger v. The Rector and Visitors of the University of Virginia (515 U.S. 819 [1995]). The University of Virginia had denied to a new evangelical Christian student group, Wide Awake Productions, aid from the University's student activity fund. Michael McConnell argued on behalf of the students that their religious speech was entitled to "equal status" with non-religious speakers, such as gay rights groups (McConnell 1995, 5-7). For the majority of the Court, Justice Kennedy similarly treated the issue as fundamentally one of free speech for all, not protection for religious free exercise (828-29). Given that it was a

5-4 decision, the case probably could not have been won by arguments stressing special religious claims. Subsequently, McConnell argued before Congress and in some of his scholarship for “equal rights of expression” for religious and non-religious speakers, foregoing explicit advocacy of the sorts of distinctive free exercise claims he had previously favored (McConnell 1998, 38).

In the wake of Rosenberger, arguments stressing equal treatment, equal access, and free speech then won a series of further, often closely contested victories for public aid to religious schools, a cause that increasingly brought evangelical Protestants and their modern academies into alliance with Catholic institutions they had historically opposed. Overturning two 1985 precedents, Agostini v. Felton (521 U.S. 203 [1997]) held that the City of New York could send public employees inside parochial schools to provide remedial education to disadvantaged students. Justice Sandra Day O’Connor ruled for a 5-4 Court that such instruction did not amount to state religious “indoctrination” or “endorsement” and involved no excessive “entanglement,” so there was no reason why disadvantaged parochial students should not also receive this public assistance (230-235).

Then in Mitchell v. Helms (530 U.S. 793 [2000]), a 6-3 Court permitted the public schools in Jefferson Parish, Louisiana to loan computer software and hardware to local religious schools (801). It did not matter that the institutions might be seen as “pervasively sectarian” so long as they served the community’s educational objectives. Representing the petitioners, Michael McConnell argued that religious groups were entitled to “receive their fair share of neutrally available public funds” for such services, without having “to secularize their own speech as the price of receiving equal treatment.”

Even so, his brief firmly rejected any claim of privileged status for religion. It stated that “the Establishment Clause prohibits the government from expending money for religious purposes; it prohibits targeting public subsidies to religious groups, discriminating in their favor, or endorsing their messages; and it prohibits the government itself from promoting religion by supplying materials or personnel that advance indoctrinating messages” (McConnell et al., 1999, 15).

Again, to have sought more doctrinally would probably have resulted in the loss of Court approval in a context where important financial aid was at stake. And the Mitchell case helped pave the way to an even more significant decision, Zelman v. Simmons-Harris (536 U.S. 639 [2001]). There a 5-4 Court rewarded New Christian Right litigants filing amicus briefs by sustaining Cleveland’s voucher program that gave parents public funds to pay part of the costs of their children’s attendance at parochial schools (649, 653). In contrast, when Alan Sears and Jay Sekulow sought to persuade the Court that the free exercise clause, especially, prevented the State of Washington from denying scholarship funds to a theology student, seven of the nine Justices balked (Sears and Sekulow 2003, 15-16). Consistent with his opinion in the Bob Jones case that had so alarmed conservative Christians, Chief Justice Rehnquist ruled that there was no constitutional obligation to assist religious free exercise, even when the state was choosing to finance those pursuing other ways of life. Significantly, the justices saw no burden on the student’s free speech rights or equal protection rights, which might have turned the tide (Locke v. Davey, 540 U.S. 712, 715, 721 [2004]). It remains true, then, that New Christian Right litigants face serious risks of losing public access and public aid

if they cast their arguments as religious free exercise claims alone, much less as contentions for the privileged status of Christianity.

V. Charitable Choice. Equal treatment arguments have also continued to serve New Christian Right advocates well on another front that many see as crucial to the flourishing of their social institutions. Operating in legislative rather than litigative processes, Christian conservatives have built on the provisions of the Adolescent Family Life Act that explicitly included religious groups as recipients of public funds for social services, provisions upheld as facially constitutional in Bowen v. Kendrick. In 1995 Carl Esbeck, a law professor at the University of Missouri, sent draft legislation to conservative Christian Senator John Ashcroft designed to insure that “faith based organizations” could receive federal funds to provide welfare services (Esbeck 1998, 21-22; Sider 2005, 485-89). Those organizations were, moreover, to include not only social service bodies associated with religious groups. Congregations themselves were also to be eligible to receive federal grants, so that churches too small to have affiliated non-profits could still get assistance for their direct charitable work (Minow 2003, 12).

Supported by New Christian Right advocates like the Christian Legal Society, the idea, deemed “charitable choice,” caught on quickly (Casey 2006, 8). Congress enacted “charitable choice” provisions specifically requiring governments to include faith-based organizations when commissioning social services from nongovernmental agencies in the landmark Personal Responsibility and Work Opportunity Reconciliation Act that ended the AFDC program in 1996. It went on to include similar provisions in the Welfare-to-Work Program in 1997, the Community Services Block Grant in 1998, and a substance abuse law in 2000. Both presidential candidates endorsed the concept in the 2000

election campaign, and President George W. Bush then established an Office of Faith-Based and Community Initiatives that further promoted federal aid to charitable religious groups (Carlson-Thies 2001, 117-23; Chaves 2003, 30; Sider 2005, 485).

The Supreme Court has not yet ruled on these “charitable choice” measures, though on February 28, 2007 it heard a case that might allow it to do so (Hein v. Freedom from Religion Foundation, Sup. Ct. Docket 06-157). Its proponents defend charitable choice as an extension of the modern equal treatment approach that provides “a level playing field” for religious organizations, without any preferences either way (Carlson-Thies 2001, 119; Sider 2005). Sociologist Mark Chaves has argued, however, that instances of discrimination against religious groups in the distribution of social service funds were rare even prior to these enactments, and that in a 1993-94 survey, only 11% of religiously affiliated, government-funded child service agencies reported “having to curtail religious activities” in order to retain funding (Chaves 2003, 32). He also contends that only a small percentage of congregations actually engage in any extensive social service work, a fact that supporters of charitable choice acknowledge while saying that matters are slowly changing (Carlson-Thies 2001, 125; Chaves 2003, 33).

Controversy also continues over how the services provided by faith-based organizations compare to those of secular non-profit groups. Critics are concerned that what they see as false claims for the superiority of religious service providers might mean that these programs actually work to privilege religious groups (Chaves 2003, 33-34; Henriques 2006). But, doubtless educated by their experiences in modern litigation, conservative Christian advocates of charitable choice have been careful to insist that it remains based on a principle of “equal public treatment of all faiths, with none having the

right, through control of government, to monopolize public policy and funding for its point of view” (Sider 2005, citing Skillen 2001, 298). Here as elsewhere, notions that these policy innovations are part of transforming modern America into a more explicitly “Christian nation” or even one that gives primacy to religion are steadfastly disavowed.

VI. The Prospects for New Christian Right Constitutionalism. The thrust of my argument at this point will be abundantly clear. Though modern conservative Christian political mobilization in general and New Christian Right litigation in particular have had numerous causes, the proximate sources of heightened activism have frequently been perceptions that governmental policies benefiting fundamentalist and evangelical institutions, especially their financing, were in danger of ending. Thus galvanized, contemporary Christian conservatives have for the most part succeeded in preserving the forms of public assistance, such as tax exemptions, that they have had throughout U.S. history. They have frequently regained other types of aid, such as public funds for parochial schools, which were temporarily limited in the years from the mid-1960s through the mid-1980s when courts were especially concerned to advance the anti-discrimination goals of the modern civil rights movement. And they have recently won support for expanding aid even to “pervasively sectarian” institutions doing educational and social service work in ways that go beyond what was common in the more distant past, when social service systems were far less elaborate. Let me add that one can also perceive in recent American liberal theory a growing tendency to reject the calls to restrain the presence of religion in discourses of “public reason” that characterized the heyday of Rawlsian liberalism (e.g. Spinner-Halev 2000; Galston 2002; Dostert 2006; Swaine 2006).

Even so, the story of New Christian Right litigation is far from one of unbridled success from the viewpoints of conservative evangelicals. Along with Steven Brown and Hans Hacker, I have argued that modern Christian Right litigators have relied more and more on arguments for equal treatment and freedom of speech, portraying fundamentalists and evangelicals simply as equal members of a pluralistic America and abandoning, at least in court, the aspirations that many have had to, in Jerry Falwell's words, "return America to her religious heritage" as a Christian nation (Brown 2002, 35, 78, 100; Hacker 2005, 2-4, 9). More than these authors, I have stressed how New Christian Right leaders have felt compelled to do so in order to protect the funding systems and organizations that are the life's blood of their existence. But I also agree with these authors that as a result, many New Christian Right leaders feel they are failing to achieve the kinds of change they really want (Brown 2002, 4, 118, 142; Hacker 2005, 7-9). By the same token, we might conclude that fears of the rise of premillennialist Christians to dominance in American life can be laid to rest, for all efforts to give extraordinary privileges to religions in general, much less to these forms of evangelical Christianity, are bound to have too little political and judicial support to succeed.

That is indeed my conclusion; but let me acknowledge a couple of points that may appear to tell in the other direction. First, as religious groups accumulate victories using equal access and free expression arguments, they also are acquiring a wide range of concrete forms of governmental assistance. In the fall of 2006, the New York Times ran a series of stories by Diana B. Henriques arguing, as the first installment contended, that since 1989, "more than 300 special arrangements, protections or exemptions for religious groups or their adherents were tucked into Congressional legislation," suggesting that

under the guise of achieving a more level playing field, modern developments are actually strengthening religious sectors of society at the expense of secular ones (Henriques 2006, 1).

Second, Jay Sekulow has recently argued that throughout U.S. history and still today, judges have voted their religious beliefs. In his study Witnessing Their Faith, he canvasses religious litigation from the nation's founding to the present and contends that in "every one of the cases discussed in this book, the opinion of the justices coincided with the official positions held by the religious denominations that had influenced them" (2006, xii-xiii). If that pattern really has existed and holds in the future, secular Americans may have added cause for concern. In what is possibly a consequence of successful mobilization against Roe v. Wade, five of the current Supreme Court justices are Roman Catholics (Chief Justice John Roberts and Associate Justices Scalia, Kennedy, Samuel Alito, and a convert, Clarence Thomas). Though conservative evangelical Protestants and Catholics have been often bitter opponents through most of U.S. history, in the modern era they are frequently found on the same side of issues involving governmental aid to and accommodation of religious groups. Perhaps, then, the pattern of greater and greater practical privileging of religion that Henriques perceives will get greater and greater support from the Supreme Court in the years ahead.

There is something to these arguments; and let me note that in the late 1990s, I expressed strong worries that New Christian Right advocates would win public funding via equal treatment arguments in establishment clause cases, while also winning preferred position status for their religious groups in free exercise cases, thereby ending up, on balance, unduly privileged (Smith 1998). Currently, however, I do not find any of these

concerns as significant as the New Christian Right's relinquishing of efforts to argue openly either in court or in legislative processes for a privileged status for religion in American life. As Henriques acknowledges and as the case law shows, for better or worse, most of the forms of governmental aid now being upheld have existed throughout U.S. history. In some cases, recent measures simply represent restoration of past privileges, and those that go beyond the past do not appear thus far to be fuelling any major expansion of New Christian Right organizations or activities. Their most vital financial resource remains religious broadcasting, and even their broadcasting is constrained by concerns to maintain their non-partisan, tax exempt status (Brown 2002, 125).

In sum, whatever their deepest aspirations, nothing in recent litigation, legislation, or social experience suggests that New Christian Right groups are likely to succeed in displacing secular social service providers, community groups, or broadcasters in law, public policies, or in social practices, only that they will exist alongside them within a highly pluralistic society. If Justices Scalia and Kennedy are any indication, the presence of Catholics on the high court is unlikely to alter those circumstances. Both have been very receptive to equal treatment and free speech arguments in religion cases, but both have frequently voted to reject claims made in the name of religious free exercise alone. Scalia is in fact the Court's most persistent champion of relatively minimal scrutiny of alleged burdens on free exercise. And though Catholics and Protestant evangelicals may be able to converge on arguments for giving religious groups "a place at the table" and on access to public funds for their schools, their notions of the Christianity that should prevail in a "Christian America" remain very different.

It is true, nonetheless, that New Christian Right litigants have altered major constitutional doctrines over the last three decades, and that they have done so in ways that have directly assisted their institutions and programmatic activities. In the early 1970s, few would have predicted such success. So while at present I am more impressed with the limits on New Christian Right constitutional advocacy than its potential reach, I still hesitate to forecast very precisely or confidently about what the future may bring. As an unconventionally religious American leader once remarked, the Almighty has His own purposes.

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