

THE CONSTITUTIONAL GOALS OF TODAY'S CHRISTIAN CONSERVATIVES



CONSERVATIVE CHRISTIAN LITIGATION GROUPS WIN ON SOME POINTS
BUT DO NOT WIN ALL THEY SEEK, EVEN BEFORE A SUPREME COURT THICKLY
POPULATED WITH RELIGIOUS CONSERVATIVES.

ESSAY BY ROGERS M. SMITH
PHOTO BY JON PERLMUTTER

In the last three decades, conservative Christians have created many organizations to litigate religious issues.

The process started in 1975 with the Christian Legal Society's Center for Law and Religious Freedom and accelerated in the 1980s with new groups including the Rutherford Institute, the American Center for Law and Justice, Liberty Counsel and the Alliance Defense Fund. These organizations have brought suit or filed amicus briefs in every Supreme Court decision dealing with religious liberties in the last 15 years, often on the winning side. Some have suggested that via such litigation, these "New Christian Right" forces are shaping public policies and moving America closer to official acceptance that it is a "Christian nation."

The Supreme Court's recent decision in *Morse v. Frederick* (2007) illustrates why hopes or fears that this litigation is producing radical change prove unfounded. Alongside the American Civil Liberties Union, all the organizations above filed briefs on behalf of Joseph Frederick, the high school senior who was suspended for holding up his "Bong hits 4 Jesus" banner at a televised parade. A closely divided court sustained his suspension, holding that Frederick's message could be seen as advocacy of illegal drugs, contrary to the school's educational mission. The justices agreed with one main point in the New Christian Right briefs — that students could not be suspended for speech that might seem "offensive" because that would unduly burden protected religious as well as political and artistic expression. Despite the pleas of both liberal free-speech and conservative religious advocates, the majority did not accept that speech freedoms extended far enough to encompass this sort of "Jesus" talk.

Frederick shows that conservative Christian litigation groups win on some points but do not win all they seek, even before a Supreme Court thickly populated with religious conservatives. Still more significantly, it dramatizes the sorts of litigation strategies these groups have concluded they must pursue, if they are to win on issues most crucial to the survival of their institutions. And it illustrates why those strategies are far from what many conservative believers want — for they involve alliances with non-Christian groups and demand only

a legal status "equal" to such associations. To do so, litigants must abandon claims that the courts should recognize the United States as a "Christian nation."

Many assume that this litigation strategy arose in response to Supreme Court rulings limiting school prayer and establishing abortion rights. But Religious Right leaders have stated that it was only when the Internal Revenue Service denied tax exemptions to religious bodies with practices contrary to public policies, notably racial discrimination, that they realized "we had to fight for our lives." The catalyst was the 1976 IRS denial of tax exempt status to Bob Jones University, which forbade interracial dating. Most conservative Christian churches did not have such bans, but they had other restrictions regarding sexual conduct, the hiring of non-believers and kindred matters that they feared might result in the loss of tax-exempt status and eligibility for other forms of governmental assistance. The Reagan administration supported them, but Congress in the 1980s did not. So they turned to the courts.

They faced a problem. Supreme Court precedents on tax exemptions, notably *Walz v. Tax Commission* (1970), indicated that "churches as such" could not receive exemptions or other financial benefits from government. They could get them only as part of a "broad class" of non-profit corporations such as "hospitals, libraries, playgrounds" that had "beneficial and stabilizing influences in community life." Christian litigants were most likely to

succeed if they sought "equal treatment" with other "beneficial" organizations rather than claiming special treatment due to their religious character.

Virtually all of the new Christian litigation groups have since sought only "equal treatment" in "establishment clause" cases involving government funding of private group activities. Though they lost the Bob Jones case, they soon began to win major victories, such as *Rosenberger v. Rector of the University of Virginia* (1995), which required the university to fund an evangelical student newspaper on the same basis as other student publications, and *Zelman v. Simmons-Harris* (2001), which upheld the use of public vouchers to attend private parochial schools. Because these successes have been keys to the financial health of their core institutions and operations, conservative Christian litigant groups have only become more firmly attached to the "equal treatment" strategy.

Initially, some conservative Christian lawyers favored a different approach in cases involving claims on behalf of the "free exercise" of religion. Federal judge Michael McConnell, formerly a law professor and favorite attorney for Christian organizations, argued in a major 1990 *Harvard Law Review* essay that the First Amendment expressly conferred on religious adherents rights to express and pursue beliefs that members of other groups did not have. But Justice Antonin Scalia, perhaps today's most conservative justice, wrote for a bare majority emphatically rejecting such

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contentions. In *Department of Human Resources v. Smith* (1990), he ruled that Oregon could refuse unemployment benefits to former drug counselors who were discharged because, as members of the Native American Church, they consumed peyote in religious ceremonies. He also denied that any “individual’s religious beliefs” could ever “excuse him from compliance with an otherwise valid law.” Scalia’s view was criticized by four dissenters, by most of Congress and by many advocacy groups, both conservative and liberal, but it has effectively prevailed.

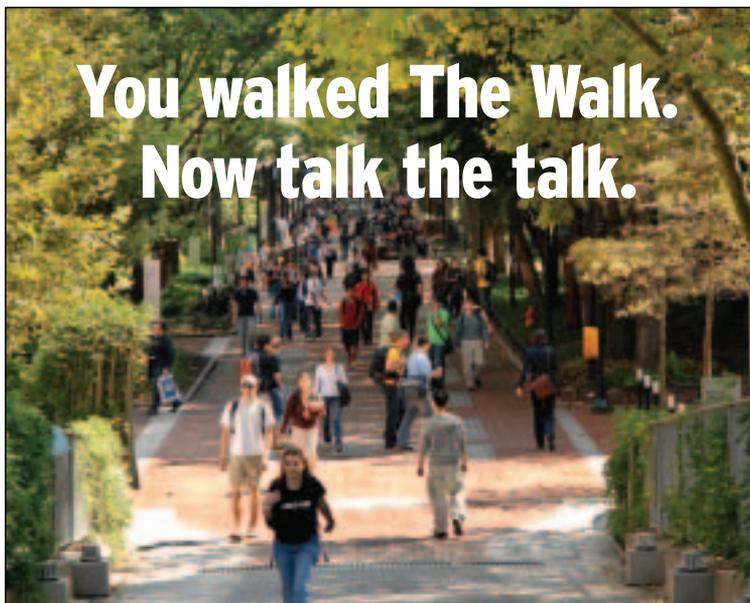
Most conservative Christian litigants avoid making claims for distinctive rights of religious “free exercise” and seek instead to claim that religious expression is part of the broad “freedom of expression” protected by the First Amendment. That is why they often find

themselves joining the ACLU. Many do not relish paying lawyers to urge that gay and lesbian student organizations receive funding on the same basis as evangelical Christian ones or to argue that strippers have the same expressive freedoms as preachers. Litigation cast in terms of “equal treatment” for religious and secular groups and “free expression” of secular and religious beliefs also holds little promise of winning governmental embrace of their view that American law should express only Christian moral values. At the same time, these strategies are gaining victories that have checked the earlier trend toward greater secularization of public policies, institutions and practices. And because conservative Christian organizations have been the fastest-growing American religious communities, they are the chief

beneficiaries of decisions upholding public funding for religious groups on the same basis as others.

Those who fear that government is doing more on behalf of conservative Christians do have some reason to worry. Yet there is so little prospect that judges will embrace a “Christian nation” view of the Constitution that Christian litigants rarely articulate this goal in court. Hence, there is also reason to believe that, in law if not fully in life, the United States remains committed to a pluralistic, democratic society with equal rights, and liberty and justice for all — Christians and non-Christians alike. ■

Rogers M. Smith is the Christopher H. Browne Distinguished Professor of Political Science and chair of the Penn Program on Democracy, Citizenship and Constitutionalism.



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