US supreme court

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‘Warped history’: how the US supreme court justified gutting gay rights

Rightwing justices claim to rule in the Founders’ image. In reality, they disregard 250 years of constitutional law, simply to punish fellow Americans who do not share their values

A pride flag flies in front of the US supreme court, in Washington. Photograph: Manuel Balce Ceneta/AP

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The extreme religious right’s mission to roll back civil rights from abortion to public accommodations is being fueled by false facts and false history. Recent articles in the New Republic have documented the shaky factual foundation behind 303 Creative LLC v Elenis, the case in which the supreme court held that a website design business owned by an evangelical Christian, Lorie Smith, could refuse service to same-sex couples. Even more troubling, the history undergirding

the majority's reasoning is misleading and dangerous to the separation of church and state.

Tragically, the religious right knows it has a friendly audience in the six conservative Catholic justices on the supreme court, who have been partners in shaking the foundations of fundamental rights. The justices' new standard is whether a constitutional right is grounded in "history and tradition", the latest byword for the bogus doctrine of "originalism". So they need some history, and apparently any history will do.

The legal end to reach a thunderous ruling justifies their debatable means. So the concept of "religious autonomy", built on a foundation of misleading scholarship, "impact" litigation and, above all, false history, has become the method for restricting rights. Its logic of power rests on its illogic; its warping of the constitution depends on the distortion of history.

Tossing aside established history

Since the first religious free exercise case in 1878, the supreme court has held that the first amendment protects belief absolutely, but speech and conduct reflecting those beliefs can be regulated if the government's interest is strong enough.

According to the founders, the reason speech and conduct should be subject to the law is the potential for harm. For example, as Justice Oliver Wendell Holmes famously remarked, it is illegal to shout "Fire!" in a crowded theater when there are no flames. It is also illegal to cover up child sex abuse or to let a child die from medical neglect despite religious motives. This foundational no-harm doctrine used to apply to *all* Americans. But now, with its recent decision, the conservative supreme court majority has carved out a gaping exception to the no-harm doctrine for the extremist Christian right, tossing aside established history.

For the court to reach its holding that an evangelical website designer has a constitutional right to engage in invidious discrimination against same-sex couples, the majority fraudulently inflated the value of Smith's speech from expressive conduct (regulatable) to highly valued "pure speech" (untouchable).

Two conservative amicus groups, the Becket Fund and the Catholic League, provided the court with the necessary tools to assemble this phony argument by concocting fraudulent histories on the freedom of religious speech.

Both the Becket Fund and the Catholic League rely heavily on a 1990 article by the conservative law professor Michael W McConnell that cherry-picks history to make the argument that the constitution mandates religious exemptions from the law. No legitimate scholar outside the realm of the religious right takes McConnell's arguments seriously - they were thoroughly debunked by Philip Hamburger, Ellis West and myself 20 years ago. As I wrote in 2004, "the power to act outside the law-was not part of the framers' intent, the framing generation's understanding, or the vast majority-and the best-of the supreme court's free exercise jurisprudence."

An abortion rights demonstrator is covered in fake blood during a rally outside the supreme court in July last year. Photograph: Bloomberg/Getty Images

Unlike what the Becket Fund and the Catholic League wish the justices to believe, the historical truth is that the founders believed that obedience to the rule of law was necessary for true liberty. And it is the true history repeatedly stated in the sermons of the leading clergy of the late 18th-century United States. The most influential of them all, president of Presbyterian College of New Jersey (now Princeton University), the Rev John Witherspoon, who trained more framers than any other educator -including the architect of the constitution, James Madison - stated that the "true notion of liberty is the prevalence of law and order, and the security of individuals". According to Israel Evans, chaplain of the American army in the Revolution and a friend of George Washington, when a believer "counteract[s] the peace and good order of society" and harms others, "he would be punished not for the exercise of a virtuous principle of conscience, but for violating that universal law of rectitude and benevolence which was intended to prevent one man from injuring another."

The founders believed churches should have the "power to make or ordain articles of faith, creeds, forms of worship or church government", in the words of the congregational pastor, Rev Elisha Williams, rector of Yale University. Yet the ecclesiastical domain had to give way when others are hurt. As the founder Baptist Rev John Leland stated, the civil law is intended to constrain the actions that harm others and the public good: "[D]isturbers ... ought to be punished." Leland was close to Madison and Thomas Jefferson and influenced their views on separation of church and state. "Never promote men who seek after a state-established religion; it is spiritual tyranny - the worst of despotism," Leland wrote.

In short, the founders definitively rejected the notion that religious believers have special rights to avoid the duly enacted laws that apply to everyone else. The inconvenience of this deeply rooted historical fact must be glossed over by the Becket Fund and the Catholic League, because acknowledging it would undermine their entire argument.

Exaltation of religious speech through revisionism

The argument for placing religious speech on a pedestal above all other speech is especially suspect. The Becket Fund argues that the freedom of religious speech has historically occupied a "preferred position" in the "constitutional order", over other forms of speech. By "preferred" they mean untouchable by law. They even concoct a new label for valuable speech: "core religious speech". The Fund's so-called "history" argues that the freedom of speech started with the freedom of religious speech for churches, which then devolved to freedom of speech for legislators, and

then finally individuals. The history they tick off is in fact a history of the suppression of religious dissenters' speech, which was often brutal. From that bloody history, they conclude that at the founding, "the framers elected to follow a broad view of freedom of speech".

Yet their history is just spin. First, it's not supported in the history of the first amendment itself. As they have to admit, "neither the debates in Congress nor the ratification debates within the several states shed light on the exact scope of the right protected, much less to what extent religious speech was covered." Second, the first amendment's free speech and press clauses were ratified in an era of vibrant political speech aired by a vital press. It is clear the founders believed that the press and political speech were highly valued, not ranked below that of religious speech in some recently invented imaginary hierarchy.

Today, the first amendment holds that political and religious speech are highly valued (though not one over the other), but at the time of the framing, the framers knew that when they limited the first amendment to the federal government, the state anti-blasphemy laws would stand. They placed political speech above dissenters' religious speech. Thus, the first amendment was consistent with putting in jail those who criticized Christianity. Indeed, there were prosecutions for blasphemous and sacrilegious speech until Burstyn v Wilson in 1952, which held such a law unconstitutional. Of course, that is religious speech suppression. So much, in the light of the founders, for religious speech's "preferred position" by history. What they really mean, based on their twisted interpretation, is that Christian speech has a preferred position.

The Justices of the court pose for their official photo, in October last year. Photograph: Fred Schilling/Collection of the Supreme Court/AFP/Getty Images

The Catholic League in fact leans into the fantastical concept of exalting a subset of religious speech over all other religious speech when it bizarrely attributes to the framers their acceptance of what they claim as Madison's supposed view "that the governor of the universe supersedes any earthly authority, religious convictions were understood to command greater deference than mere personal opinions".

Justice Neil Gorsuch's majority opinion elevates certain religious speech exactly as the Becket Fund and Catholic League suggest, and achieves this feat by intentionally misapplying free speech doctrine at its most basic. As a matter of law prior to this court, 303 Creative's website design would have been expressive conduct. 303 Creative's commercial speech is not the traditional, highly protected speech the court has recognized again and again: it's not speech in a public park or on a public sidewalk or a parade. The speech is by a commercial business, whose product has expressive elements to it, which means it is expressive conduct, on which the public accommodation laws impose merely incidental burdens. However, the majority pulls a proverbial rabbit out of its hat by saying that the parties "stipulated" the commercial speech is "pure speech" - and so it must be. But that's not how free speech cases are decided. The courts decide whether expression is traditionally highly protected, lesser valued speech, expressive conduct, or unprotected altogether. Hiding behind the parties' stipulation is in derogation of the court's duties and constitutional nonsense.

Having transformed commercial expressive conduct into highly protected speech, Gorsuch nudged the law closer to McConnell's debunked thesis of mandatory exemptions, which downplays any government interest. Gorsuch takes 12 pages to even acknowledge Colorado's interest in public accommodations law, granting it one full paragraph and a quick tip of the hat: "The vital role public accommodations laws play in realizing the civil rights of all Americans." Then he segues to suggesting that newer rights in the public accommodations laws haven't been fully examined in the law. It's easy to read between the lines: the majority is suggesting that LGBTQ+ discrimination isn't nearly as bad as race discrimination; it's a second-order interest. This is exactly what the Institute for Faith and Family argued with some dubious 14th amendment assertions. The disgraced John Eastman, writing for the Claremont Institute Center for Constitutional Jurisprudence, would have moved all the way to McConnell's conclusion, arguing no state interest could possibly overcome the exalted speech of the wedding website. The court got very close.

Dangerous moves

These are dangerous moves by the court that unleash biased and destructive religious speech and conduct. The founders would not recognize the lawless world this court is building.

Let's be frank. The extreme right Christian groups supporting 303 Creative are still burned up about the Obergefell decision, which enshrined gay marriage as constitutional. They have manufactured a fictional guarantee to so-called "pure speech" and trivialized the anti-discrimination laws to make up for the fact they lost the war on LGBTQ+ marriage.

The majority's decision in 303 Creative is, in fact, an expression of the Christian right's constitutional sour grapes. The supreme court majority has deconstructed the first amendment to fit their Bibles.

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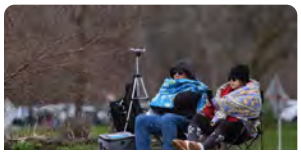

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