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A Study of the Evangelical Movement's Influence through National and International Courts

Hanne Amanda Trangerud

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"Law is more than a profession, it's a calling."

Regent University School of Law (motto)

Abstract

Since Evangelicals entered the political arena in the late 1970s, scholars and media have paid much attention to the so-called New Religious Right of American politics. Far less attention has been given to a related and simultaneously emerging phenomenon: Evangelical law firms. This MA thesis examines the reasons for the establishment of American Evangelical law firms, their main strategies, and their influence on societal development in the United States and internationally. While recent studies indicate that the earliest research on the Evangelical movement's political influence overestimated its impact, this thesis argues that the influence of Evangelical law firms has been underestimated and that their potential power has not been fully understood. Serving the same causes as the Evangelical political lobby groups, though less visible to the public, the impact of the law firms can be felt in a variety of fields, affecting the lives of millions: the right of American students to establish bible study groups or pray together on public school ground; the presence of religious monuments in the cultural landscape; abortion and marriage regulations; the drafting of significant legislation, such as the USA PATRIOT Act; and the display of crucifixes in Italian class rooms. This thesis highlights the role that the law firms' argumentation plays for their influence. Concentrating on one leading law firm – the American Center for Law and Justice, founded by Pat Robertson in 1990 – the thesis shows that the Evangelical law firms function as 'mediators' between the Evangelical movement and governmental institutions, and as translators of the movement's religious and moral causes into a neutral, secular language. This translation is not only necessary to convince a (per definition) secular court on a certain issue. More important, the law firms provide supportive judges with neutral arguments that can be used as legitimate justifications for the court's decision in a pluralistic society. The thesis focuses on two issues which have been particularly important to the Evangelical movement: the fight against abortion and the protection of public religious expressions. A main contention is that the arguments presented by the law firms must be understood in light of the overall cause of the Evangelical movement, which involves the notion of a Christian national identity. The thesis further shows how this notion is connected to a certain interpretation of the American constitutional order, which in turn gives a different understanding of popular terms like religious freedom, liberty and (human) rights than how these terms are usually understood from a liberal point of view. The main focus of the thesis is on the US federal court system, but it also discusses cases from the European Court of Human Rights.

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Abbreviations

ACA = Affordable Care Act (2010) (also: ObamaCare)

ACLJ = American Center for Law and Justice (1990)

ACLU = American Civil Liberty Union (1920)

CBN = Christian Broadcasting Network (1961)

DOMA = Defense of Marriage Act (1996)

ECHR = European Convention of Human Rights (1953)

ECLJ = European Centre for Law and Justice (1997)

ECtHR = European Court of Human Rights (1959)

IBSM = identity-based social movements (e.g. the civil rights movement, the women's rights movement, the gay rights movement)

NAACP = National Association for the Advancement of Colored People (1909)

NAE = National Association of Evangelicals (1942)

RFRA = Religious Freedom Restoration Act (1993)

USA PATRIOT Act = Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (2001)

WCFA = World Christian Fundamentals Association (1919)

Central Legal Terms

Legal terms are explained in the text. To provide an easily accessible 'dictionary', simple definitions of the most central terms are included here:

Amicus curiae – (lat. "friend of the court) a third-party intervener, i.e. a party that is not directly involved in a case, but who offers (written) information to the court in the form of an → *amicus brief*.

Amicus (curiae) brief – a letter to the court from a third-party intervener in support of one of the parties involved in a case.

Appellant – the party appealing a case from a lower court.

Appellate court – see *circuit court*.

Appellate jurisdiction – the authority of a court to review a case which has already been decided by a lower court (e.g. the → *circuit courts* may review cases that are appealed from the → *district courts*).

Brief – see *legal brief* or *amicus (curiae) brief*.

Case sponsor – see *test case selection strategy*.

Circuit court (also *appellate court*) – the second level of the US federal court system, located between the → *district courts* and the → *Supreme Court*.

District court – a → *trial court* at the lowest level of the US federal court system. There are 94 district courts located across the United States, each belonging to one of the twelve → *circuit courts*.

Due Process Clause (14th Amendment) – "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; **nor shall any State deprive any person of life, liberty, or property, without due process of law**; nor deny to any person within its jurisdiction the equal protection of the laws."

Equal Protection Clause (14th Amendment) – "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall

any State deprive any person of life, liberty, or property, without due process of law; **nor deny to any person within its jurisdiction the equal protection of the laws**."

Establishment Clause (1st Amendment) – "**Congress shall make no law respecting an establishment of religion**, or prohibiting the free exercise thereof; or abridging the freedom of speech…"

Free Exercise Clause (1st Amendment) – "Congress shall make no law respecting an establishment of religion, or **prohibiting the free exercise thereof**; or abridging the freedom of speech…"

Free Speech Clause (1st Amendment) – "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or **abridging the freedom of speech**…"

Judicial review – the power of the judicial branch to declare presidential acts and congressional laws unconstitutional.

Legal brief – a written document which points to relevant facts and laws, field with the court by a client or his/her lawyer.

Opinion (also *legal opinion*) – the written explanation of a court which clarify the reasons and legal principles for its ruling.

Original intent – what the authors of the Constitution intended when they wrote it.

Original jurisdiction – the authority of a court to hear a case for the first time (e.g. the → *district court* has original jurisdiction in federal questions involving the US constitution).

Plaintiff – the party that filed the original lawsuit.

Precedent – a legal decision which works as a rule for subsequent cases involving similar situations.

Supreme Court (US) – the highest court of the US federal court system. Its decisions cannot be appealed. Consists of nine justices (one chief justice and eight associate justices).

Test case – a case with sympathetic facts that is used to challenge (or test) the validity of a certain law with the desire of changing it.

Test case selection strategy – when a law firm chose to sponsor a → *test case* or a serial of cases. The strategy enables the law firm to control the course of the litigation.

Third-party intervener – see *amicus curiae*.

Trial court – the first court in which a case is heard, i.e. the trial courts have → *original jurisdiction*.

Writ of certiorari – the decision of the Supreme Court to hear an appeal from a lower court.

Legal cases are referred to by the first named party on each side of the case, for instance:

***Roe v. Wade* (1973)**

The first name (*Roe*) represents the plaintiff or appellant, while the second (*Wade*) names the responding party. The year in parenthesis shows when the court rendered its decision. When a case is referred to again, only the name that has been established as an abbreviation is used (e.g. *Roe*).

Content

Introduction

> In these shifts that have come in law, where were the Christian lawyers during the crucial shift from forty years ago to just a few years ago? (…) [S]urely the Christian lawyers should have seen the change taking place and stood on the wall and blown the trumpets loud and clear. A nonlawyer like myself has a right to feel somewhat let down because the Christian lawyers did not blow the trumpets clearly between, let us say, 1940 and 1970.
>
> Francis Schaeffer, *A Christian Manifesto* (1981:47)

In his 1994 book on secularization and the role of religion in the public sphere, sociologist José Casanova described the idea that Evangelicals[1] have power and influence on American politics and societal development as misconceived and unfounded. Although Evangelicals became more visible in politics during the 1980s, not least thanks to the establishment of Jerry Falwell's Moral Majority, they did not represent the force that many sympathizers, opponents, and even social scientists seemed to think. Rather, Casanova concluded, this unexpected political mobilization was no more than a "well-organized, vociferous minority" which "had miraculously become, in the minds of many, a threatening majority" (1994:161). However, the Evangelical effort to influence society was not limited to presidential campaigns and congressional lobbying. While still a rather new phenomenon in the 1980s, with limited influence due to their lack of funding, staff, and experience, the Evangelical law firms have developed into highly effective actors who influence societal development, both in America and internationally. For the lawyers involved, this activity is often seen as a religious call to protect and promote certain values and rights, not only for the individual, but also for society as a whole (den Dulk 2006:207-208; Scheingold and Sarat 2004:114-115). These law firms do not represent clients in the traditional sense. Instead they work for *causes*, the most prominent being religious liberty, a category which typically involves religious expressions in schools and other public places, the traditional family, parental rights, and the protection of life. In addition to litigation, the law firms' strategies include training and education of lawyers; legal services and advice to individuals, businesses, and politicians; publication of information; and, not least, visibility in the media. As Liberty Institute, an Evangelical law firms based in Texas, puts it: "[W]e must also win in the marketplace of ideas to truly succeed in our mission to restore religious liberty in America" (2013). The activity of the Evangelical law firms can indeed be described as involvement in a cultural battle – a battle fought against liberal social movements, anti-religious groups, and secularism – in defense of conservative Christian values and the so-called (Judeo-)Christian

[1] Casanova uses the word *Fundamentalists*, but acknowledges that the boundaries between Fundamentalists and Evangelicals have "always been fuzzy and porous", almost disappearing after the 1970s (1994:162). Since Casanova's *Fundamentalists* corresponds to what I in this thesis call *Evangelicals*, I have chosen to replace his term.

heritage. Using, for descriptive purposes, Casanova's categorization of secularization as three distinct processes (1994:19-39), we could say that the Evangelicals engaged in this enterprise adapt to the *differentiation* of secular spheres from the religious sphere, and oppose the *privatization* (or marginalization) of religion, fearing the *decline of religion* as its result.

Purpose and Aim of Inquiry

The purpose of this inquiry is to throw light on the phenomenon of American Evangelical law firms and their real and potential influence on societal development in the United States and internationally. My aim is to highlight the role that their argumentation in court may play for this influence, as well as to examine whether litigation has provided Evangelicals with a tool which gives them the power that Casanova some 20 years ago concluded they did not have (1994:159-161)[2]. In order to do so, I will concentrate on three aspects: the method (litigation), the arguments, and the consequences. Presbyterian pastor and philosopher Francis Schaeffer's disappointment with the failure of Christian lawyers to stem the social changes in the mid-20th century (see above), may serve as a starting point for my first question: *Why did Evangelicals turn to litigation?* The Evangelical law firms did not emerge until the latter third of the 20th century. Hence I will also examine why it happened at this particular time. Understanding the historical-social and religio-political context will be essential in this regard. As already indicated, my main focus will be on the law firms' arguments, as can be summed up in my second question: *How do Evangelical lawyers present their causes in a (per definition) secular court?* Here I will look at how these lawyers *translate* their religious and moral causes into a language which may increase their chances of success. Implicit in this second question is the assumption that religious arguments per se have little impact on a modern, secular court. However, as I hope to show in my thesis, the issue is more complex than that. This is not just a question of how to convince a group of judges to 'buy' a certain idea, but the court in turn also needs secular reasons for its rulings. This important point will become clearer when I present the ideas of Habermas below. Suffice it here to say that I will examine the law firms' arguments in and outside the court room, as well as their influence on the courts' decisions. My third and final question concentrates on the consequences – actual and potential – of a religious group engaging in cause lawyering: *What are the consequences of this group's use of litigation as a strategy to promote its goals and protect its interests, compared to other social or political movements?* Here too, history and the socio-

[2] According to Casanova, Evangelicals did not – despite the warning from their opponents – have the power or number to pose a threat to the free exercise of religion. They neither desired nor were able to become an established church. Further, it was unlikely that they would manage to reestablish the 19th century's cultural hegemony of conservative Protestantism, or the Protestant ethic as the American way of life (Casanova 1994:158-161).

political context will be important to gain some understanding. While my aim is not to make predictions, I find it relevant also to discuss possible future developments.

My inquiry will concentrate on one of the larger nonprofit law organizations, namely the American Center for Law and Justice (ACLJ), founded by the prominent Evangelical leader Pat Robertson in 1990. The ACLJ has developed into one of the most influential law firms in the United States. Its present Chief Council, Jay Sekulow, was named by TIME Magazine as one of the 25 most influential Evangelicals in America in 2005. With its headquarters strategically located in Washington DC, the ACLJ has also established affiliated offices in Israel, Russia, Kenya, France, Pakistan, and Zimbabwe. My main focus will be on the ACLJ's activities in the USA, while the law firm's international efforts will be limited to the European Centre for Law and Justice (ECLJ), through which the ACLJ also is in Special Consultative Status with the UN. My choice to limit the inquiry to the American and European offices has largely been determined by the online availability of court documents, as well as their better developed web pages. Thus, my inquiry will be limited to the role that Evangelical law firms play in the Western world, although I do want to stress that their influence also reaches further.

Clarification of Terms

Since the term *Evangelical*[3] is somewhat vague, it needs some clarification from the outset. The term not only embraces a rather heterogeneous group, cutting across traditional denominational boarders. Further confusion is added by the fact that researchers often use various terms – *Fundamentalists, born again Christians, conservative Protestants, Religious Right* – to describe the same group, irrespective of the terms' different meanings. Because *conservative* is easily associated with certain political views, many researchers have preferred the term *Evangelical,* as opposed to the "mainline" (liberal) Protestant wing. I choose to speak of *Evangelical* lawyers for the same reason. This is not to say that these lawyers are not politically conservative. Often they are, especially when it comes to social issues. I wish, however, to emphasize the religious aspect of their project. Hence, when I also use the term *conservative Protestants*, I refer to their theological position, and not the group's political views. However, these terms – *Evangelical* and *conservative Protestant* – are not interchangeable. I here follow Woodberry and Smith using *conservative Protestant* as a more general term, and *Evangelical* for "the moderate wing

[3] *Evangelical* was first used as a translation of the German *evangelisch*, an umbrella term which since the mid-16th century was linked with various Protestant churches: Lutherans (in particular), Mennonites, and Calvinists. While *evangelisch* refers to churches, not theology, the American use of *Evangelical* implies theologically conservative. A separate word (*evangelikal*) was therefore introduced in Germany in the 1960s to describe the latter (Hillerbrandt 2004:702; Geldbach 2004:714). I here use *Evangelical* in the American (theological) sense.

of [conservative Protestants] which emerged after World War II" (1998:26). Far from being a homogeneous group, Evangelicals are most easily identified by their adherence to certain beliefs, such as the authority of the Bible, the atoning sacrifice of Christ, conversion from a sinful life through a "born again" experience, spiritual transformation, and the importance of spreading the Gospel (Woodberry and Smith 1998:27-36; den Dulk 2006:201). The development of the Evangelical movements, as well as the complexity regarding its constituency, will be further elaborated in chapter 1.

What, then, is an *Evangelical law firm*? Here too researchers have used various terms to the describe the same phenomenon – *conservative evangelicalism, the conservative countermovement, cause lawyers in the Evangelical movement, right-wing cause lawyers, neo-conservatives, New Christian Right,* to name some. With the short discussion on *Evangelical* in mind, it should be clear that these terms are not synonymous. Some, like *the conservative countermovement* or *conservative groups*, also tend include other fields of conservative cause lawyering, such as economic and public interest litigation. Again, to avoid confusion with political conservatism, I will use the term *Evangelical* law firms. A possible definition, then, could be to say that these are law firms established and/or run by Evangelicals, as defined above. Many of the lawyers working for these firms, either as employed attorneys or as affiliated volunteer lawyers, are Evangelicals. However, the borders are not clear-cut. A simple illustration can be found in the leadership of the ACLJ. While founder Pat Robertson was a Pentecostal/charismatic Evangelical, the law firm's first executive director, Keith Fournier, was a Roman Catholic, and the present leader, Jay Sekulow, is a Messianic Jew[4]. This, in turn, highlights the importance of *causes* as a unifying factor.

The ACLJ lawyers are *cause lawyers*. Again, we find a term that has been variously defined by scholars. I follow Scheingold and Sarat's description of *cause lawyers* as lawyers who are committed to pursue certain causes, as opposed to giving legal service to clients. Such cause lawyering may take a variety of forms, but is primarily characterized by a social and/or political commitment (Scheingold and Sarat 2004:2-4). A telling example is the Evangelical law firms' defense of abortion protesters as a part of their commitment to limit abortion.

One final term that is central to comprehend the influence of Evangelical law firms, and which therefore should be clarified already at this point, is the concept of *cobelligerency* ("co-fight"). The term describes military or political cooperation between parties to fight a common enemy, the relationship between the parties being not as close as in an alliance. The term was

[4] A Jew who believes that Jesus in the New Testament is the promised Messiah of the Old Testament.

popularized in the Evangelical movement through Schaeffer's efforts to stimulate cooperation on causes without making theological compromises (Strange 2005). Schaeffer's idea of cobelligerency was central to the establishment of Moral Majority, which brought together people of various theological views to promote particular goals (Martin 1996:197,204). Moreover, the strategy has been pivotal to Evangelical law firms, both in and outside the United States. A good example is seen in the *Lautsi* case, which will be presented in chapter 5.

A Theoretical Model

In line with the aim of this inquiry, I need a model that can help highlight the role that arguments play for the influence of Evangelical law firms on societal development. For this purpose I have borrowed some ideas from the German philosopher and sociologist Jürgen Habermas and the American anthropologist Clifford Geertz.[5] In his discussion on the appropriate role of religion in the political public sphere[6] at The Holberg Prize Seminar of 2005, Habermas takes as his point of departure the 'ethics of citizenship' as described by philosopher John Rawls: in a secular, democratic state, all citizens are expected to respect each other as free and equal members of the political community, and to offer each other 'good reasons' for their political statements. All political decisions must be justified in a neutral language that is understandable to both non-religious citizens and citizens of various faiths, something which excludes the use of religious reasons in public debates. Rawls' position has been criticized for placing an undue burden on religious citizens, since no such division between religion and secular politics naturally exists in their minds. Since religion plays an integral role in the lives of religious citizens, Habermas argues that it is unreasonable to expect them to justify their political statements independent of their religious convictions and worldviews. He seeks to solve this problem by making a distinction. He agrees with Rawls that only secular reasons can justify political decisions (e.g. laws, court rulings, decrees, etc.) in the *formal public sphere*, that is, the political debate at the institutional level of parliaments, courts, and administrations. Allowing religious arguments here, Habermas contends, can turn governmental authority into "the agent of a religious majority that asserts its will while violating the democratic procedure", the result being repression of the losing secular minority and people of other faiths (2005:15). However, Habermas proposes to dismiss the

[5] I do not include the whole theoretical framework of these authors. I have chosen those parts of their theories that I find most useful and relevant for the purpose of my study. The model presented here is used independently, and my conclusions need not correspond with these authors' own views. I do not include Habermas' theory of how the public sphere developed. Rather, the model I draw up is static, and I will use it to highlight central aspects of US history at various times, regardless of how the 'public sphere' was at that particular time.

[6] Habermas defined the *public sphere* (Öffentlichkeit) as a social realm in which public opinion can be formed, and where all citizens have access to express their opinions. The *political public sphere* is the part of this sphere where the "public discussion deals with objects connected to the activity of the state" (Habermas 1974:49).

requirement of neutral language from the *informal public sphere*, that is, from the part of the political debate which is situated outside governmental institutions. Habermas thus opens up for the use of religious arguments in the political public sphere, and suggests that these can make valuable contributions of meaning and identity to society. Nevertheless, to enter the formal public sphere, these arguments still need to be translated into a language that is equally accessible to all citizens. Here, Habermas suggests that both religious and secular citizens should share the burden of translating, something which requires that also secular citizens must be open to the possible truth content of a religious argument (Habermas 2005:12-17). This final point, however, has limited relevance for my inquiry since I concentrate on how Evangelical lawyers themselves translate their arguments. What I borrow from Habermas, then, is the distinction between a formal and an informal public sphere, along with the idea that religious arguments need to be translated in order to pass from the informal public sphere – for instance, as expressed on a law firm's web page – to the formal public sphere of courts.

To supplement the model sketched out so far, I borrow some thoughts from Geertz' description of *culture*. According to Geertz, a culture consists of "socially established structures of meaning" (Geertz 1973:12). *Meaning* in this context does not represent a private opinion or idea, but is something that is public and shared, and therefore essential for communication and interaction. To understand a culture, or a part of a culture (such as religion), it is necessary to understand the meaning behind a symbol (e.g. the crucifix) or an act (e.g. public prayer or citing the Pledge of Allegiance). As a system of symbols, religion – as well as the debates about religion – must be understood in their own context (Geertz 1973:10-17, 91-92). To illustrate this, we may think of how meaningless a Latin cross would be to someone who has never seen one before. A symbol may, of course, have several meanings, and various individuals and groups in a culture may not perceive the same message when they are exposed to the same object or act. Symbols are 'multivocal, manipulable, and ambiguous', to use anthropologist Victor Turner's words, and as dynamic social constructions they may shed meaning or gain new (Turner 1975:146,154-155). This not only complicates the debate on the proper place of religion and religious expressions in the public sphere, but is also used as an argument in itself by the parties involved, not least on the religious side. A good example is how religious objects frequently are portrayed as symbols of national identity or certain values. In her book *Religion in Modern Europe; A Memory Mutates*, Grace Davie describes how buildings, artefacts, and education are important for the transfer of a religious memory from one generation to another (2000:chap.5,9). Linking this with Geertz' description of culture, we could talk about a transfer of meaning, or knowledge about meaning. The fear

that a break in this transfer will cause religious decline in society seems to trigger Evangelicals to oppose the privatization of religion, as expressed through their protests against the ban on prayer and Bible reading from public schools, or their resistance to the removal of public monuments with Judeo-Christian associations.

What has so far been said about symbols can also be said about words. Like material artefacts, words are also symbols, and their meaning needs to be shared to enable communication. Consequently, in a debate between religious and secular actors, difficulties may arise when the religious actors use a theological language that may be hard to comprehend for secular citizens. This brings us back to Habermas. While Habermas considers these challenges acceptable in the informal public sphere – since they are possible to solve through mutual open-mindedness and cooperation – they are incompatible with a religiously neutral state's need to justify its political decisions in a neutral language. However, one question arises from the model that has now been drawn up: Will a religious cause become less religious if the arguments to justify it are secular? This question should be kept in mind as my inquiry proceeds.

Material: Legal Briefs, Petitions, and Articles

Evangelical law firms are engaged in a variety of issues (see above). I will look at two fields in which the ACLJ is at the forefront, namely the fight against abortion, and the protection of public religious expressions[7] (church/state relations). My desire is to make the presentation of the law firm's activities and strategies as broad as possible within the limits of this thesis. I therefore include documents filed by the ACLJ with courts at various levels. As for the United States, where my focus is on federal laws and the US Constitution, the inquiry is limited to the federal court system. Decisions made by these courts, especially the US Supreme Court, have much greater implications for the American society as a whole than various state court rulings. My main material is the ACLJ's legal briefs, which represent their argumentation in the formal public sphere of courts. The exclusion of oral arguments may reduce the full picture of the law firm's argumentation, but not the validity of written arguments as 'translated arguments'. In order to evaluate the translation of arguments and examine its effects, I will also look at how the law firm presents the same causes in the informal public sphere. This will, however, receive less attention than the legal documents. Since a full inclusion of all their published material is not practically possible, I concentrate on the ACLJ's web page. More precisely, I look at the law firm's petitions, which are invitations to supporters to join letters to the Court, the president, or members of

[7] This concept is inspired by Casanova's 'public religion' in the title of his 1994 book.

Congress (http://aclj.org/Petitions/List), and on articles written by leading ACLJ lawyers on the law firm's blog (http://aclj.org/docket-blog). My choice of legal cases is based on topic and the availability of court documents online. As for abortion, I will look at the perhaps hottest debate at the moment: whether or not owners of large secular corporations can be exempted, on religious grounds, from a federal act which requires all employers to offer their employees an insurance plan which covers contraceptives, including the contested 'abortion-pill'. Here I examine all documents filed by the ACLJ in a case where it represented two Catholic business owners and their company in two lower federal courts. As for the second issue, public religious expressions, I will look at one American and one European case. The first involves the public display of a Ten Commandments monument in Utah, and is chosen because it revolves around an interesting argument: *governmental speech*. Here I look at the legal briefs filed by the ACLJ with the US Supreme Court. The European case involves the display of crucifixes in Italian public schools. For this case I analyze a third-party letter filed by the ECLJ with the European Court of Human Rights. To evaluate the translation in this case, I analyze the arguments presented in an article by the ECLJ Director General for a Vatican newspaper. The article is particularly interesting because it explains in plain words what the law firm perceives as the 'real issue at stake'.

Method: Text Analysis

As with symbols (see above), the Evangelical law firms' activities and arguments can only be understood in light of their context. Hence I put much emphasis on contextualization, both when it comes to explaining the rise of Evangelical law firms, and for the presentation of the legal cases in question. For this I rely primarily, but not solely, on secondary sources. My analysis of the legal briefs, the petitions, and the various articles has followed the model of interview analysis as explained in Malterud (2011) and Kvale and Brinkmann (2010). However, since my material does not represent spontaneous statements, but are more or less carefully planned expressions tailored for a specific purpose, it would make little sense to look for 'meaning units' as with an ordinary interview. My focus has been to identify what kind of arguments that have been used, how they relate to each other, and whether they center on particular words or phrases. For each of the two issues (abortion and public religious expressions), I first read the ACLJ's texts aimed at the informal public sphere. Using coding to identify the most central themes, I later used these categories as a starting point for reading through the law firm's legal briefs. This procedure revealed whether any of the arguments, themes, words, or phrases had been transferred to the brief, or if they had been translated or replaced by something else. In the abortion case, the choice of words seemed to play a significant role. I

therefore made an additional word search, using Word Navigation Tool. Categories that were of little use for my inquiry have been left out of the presentations.

Former Research

To my knowledge, there has not been conducted any studies on Evangelical law firms by historians of religion, apart from a brief mentioning in Vik, Stensvold and Moe (2013).[8] Most research on the topic has been carried out by political scientists, social scientists, legal scientists, and historians. The attention given to the activity of Evangelical law firms is, however, relatively small compared to the research on interest group litigation in general. The first study of the use of courts by interest groups was conducted by political scientist Arthur Bentley in 1908. Bentley concluded that the US Supreme Court – like the other branches of government – was receptive to pressure (Epstein 1985:4). As the research on interest group litigation increased in the 1970s, the focus was primarily on the liberal movements which dominated the field, such as the civil rights movement and the women's rights movement. One of the earliest studies of conservatives and litigation was carried out by Lee Epstein, a scholar of law and judicial politics, in 1985. At that time, Evangelical lawyers had just begun to appear as cause lawyers, and they received little scholarly attention. Epstein's book is interesting, though, since it traces the history of the emergence of conservative litigation. Research on conservatives in court was still scarce when political scientist Stephen Brown in 2002 published his study on the New Christian Right and their strategic use of courts. Here, he touches upon the field of argumentation as he points to the Evangelical lawyers' frequent references to the Free Speech Clause of the US Constitution. Prior to this, studies of liberal movements had already brought attention to the role that arguments played when trying to bring about legal change (e.g. Epstein and Kobylka 1992). Another study worth mentioning is law professor William Eskridge's extensive analysis of the influence of identity-based social movements on constitutional law in the 20th century. While his main focus is on liberal movements and how they translated their social and political arguments into constitutional arguments, he also includes the reactions of the countermovements (Eskridge 2002). Much of the recent research involving Evangelical lawyers has focused on their motivations and background (e.g. Southworth 2008; Hacker 2005; Scheingold and Sarat 2004). This receives limited attention in my inquiry, but is helpful to understand why Evangelicals turned to litigation. Other major contributions to this understanding are given by political scientist Kevin den Dulk (2006) and sociologist William Martin (1996).

[8] My search has been conducted primarily in JSTOR, Article First, ATLA, and library databases (Jun-Oct 2013).

Content

The question of why Evangelicals turned to litigation is mainly treated in the first two chapters, which also work as a foundation for the rest of the inquiry. In *chapter 1*, I present the historical background of the American Evangelical movement, and show how its complexity grew out of a similar complexity among conservative Protestants in the 19th century. I explore how the movement gradually became involved in politics, and eventually litigation, pointing to at least four important stimuli: influential leaders, liberal social changes, presidential candidates desiring their votes, and the powerful tool of broadcasting. The rise of Evangelical law firms is further elaborated in *chapter 2*, which begins with a presentation of the United States' founding documents and the American judicial system. The chapter describes the potential for bringing about social change through the judicial branch of government, and shows how the Evangelical law firms have followed the path of strategic litigation pioneered by the civil rights movement, and successfully used by other liberal movements in the mid-20th century. The last four chapters concentrate on the ACLJ and its position in society, highlighting the role that the law firm's argumentation may play for the Evangelical movement's influence on the societal development. In *chapter 3*, I introduce the ACLJ and its most prominent figures. The law firm's aim is to achieve legal protection of certain values and interests, and I will describe its most important strategies in and outside the courtroom. In *chapters 4* and *5*, I turn to the law firm's arguments as presented in legal briefs and web site publications. I here present the result of my analysis, as well as the historical-social context of the issues in question. *Chapter 4* concentrates on the abortion issue and looks at the ACLJ's arguments against the Affordable Care Act's requirement that employer sponsored health insurance plans must cover contraceptives, including the so-called 'abortion-pill'. *Chapter 5* presents the arguments of the ACLJ and the ECLJ in defense of public religious expressions, exemplified by a Ten Commandments monument in a public park in Utah, and the display of crucifixes in Italian classrooms. In *chapter 6*, I follow up the rationale for the translation of the Evangelical movement's causes into secular or neutral arguments, and show why it is necessary to understand the ACLJ's argumentation in light of the Evangelical cause as a whole. I close the chapter with a discussion on the consequences of a religious group's use of litigation to promote its goals and interests. In *chapter 7*, I provide a brief summary of the main findings of my study, and some concluding remarks.

1 How the Evangelical Movement Went Political

> These evangelical Christians may all look alike to the press, but in fact they are very different from each other. They attend great cathedrals and tiny storefront churches. Some shout and weep and lift their arms in praise. Others kneel in ordered, liturgical silence. Their biblical translations vary. They celebrate the Lord's Supper in dozens of different ways. … But in recent months evangelicals are finding themselves more and more united in their concern for the nation's spiritual and political renewal. When they pledge their allegiance to "one nation, under God", they really mean it. … Fortunately it didn't take long for these newly awakened evangelicals and their allies to learn that they have to change their political ways before they can change the ways of the nation.
>
> Pat Robertson, *America Dates With Destiny* (1986:298-299)

The great diversity among Evangelicals underlines the fact that it is a movement. As indicated in the introduction, the word *Evangelical* has been used differently by various researchers, the media and ordinary people, thus complicating the picture of who exactly this movement comprises. Surveys have shown that some people who according to established definitions should be classified as Evangelicals, do not identify themselves as such, while others who do not hold traditional 'Evangelical' beliefs, call themselves Evangelicals (Hackett and Lindsay 2008; Noll 2004:433-434; Woodberry and Smith 1998:25-26). Consequently, the Evangelical movement might include Christians from almost any denomination, even Roman Catholics[9]. Evangelical, then, could perhaps best be described as a term similar to Protestant or Christian; covering a diversity, yet with something in common. In this chapter, I will show how the complexity of 'the Evangelicals' is related to the movement's history, beginning with a similar complexity among conservative Protestants in the 18th and 19th century, when great revivals contributed to the spread of religious piety across denominational borders, and entrusted lay people with a greater responsibility in the work for God's kingdom. Following the development of what eventually became the Evangelical movement, I pay particular attention to how doctrines and social values caused splits and unity, and to the political and social engagement of the various groups. While the Evangelical movement that emerged in the 1940s certainly can be seen as a reaction to the sociopolitical withdrawal of Fundamentalist Protestants in the previous decades, it would be wrong to consider it as 'suddenly occurring'. Rather, both groups developed from the same roots, and the relationship between them is best described as a parallel set of conflicting, or competing ideas about how to relate to society at large. The pendulum initially seemed to swing towards a policy of separation and isolation, but the efforts of prominent Protestant leaders eventually turned it towards a strategy of infiltration. The chapter further examines the factors that contributed to the boost of Evangelical engagement in politics and social issues

[9] According to one survey, 13% of Americans who called themselves Evangelicals were Catholics (Noll 2004:434).

from the late 1970s. In addition to the already mentioned change in mentality championed by influential leaders, three other stimuli seem pivotal: liberal social changes sanctioned by the government; the recognition of Evangelicals as an influential voting group; and the use of media to spread ideas.

The Influence from the Great Awakenings

The diversity that characterizes the Evangelical movement today has its roots in a similar diversity found within some of its most influential predecessors, the Great Awakenings of the 18th and 19th centuries. These were religious revivals lead by Protestant preachers who sought to restore the 'true religion of the heart' to counteract the increasing religious formalism found in various denominations. The First Great Awakening (c.1720-50) began in New Jersey and spread across the American colonies as people embraced the message of ministers like Presbyterian Gilbert Tennent, Puritan Congregationalist Jonathan Edwards and Calvinist Methodist George Whitfield. Although the revival did not result in a massive growth of Christianity, it gave lay people a more prominent role in the work of spreading the Gospel (Noll 2011:51-55; Martin 1996:2-3). Interestingly, the Protestant clergy in the 18th century also engaged in political matters. Unrelated to the Great Awakening, some ministers, like Congregationalists Charles Chauncy and Jonathan Mayhew, used their pulpits to criticize the British for their colony policies. But also the Great Awakening kindled a revolutionary spirit, which spread from the religious to the political realm. Dissenters, like Baptists, Presbyterians, and Methodists, opposed the established church[10], and later gave their firm support to Thomas Jefferson's *Virginia Statute for Religious Freedom* (1786), which formally separated church and state (Corrigan 2004:168-169). According to Martin, this unconventional and democratic attitude towards religious authority, coupled with millennial expectations, fueled the political desire to break free from the British and establish an independent American republic. The great revival thus increased the popular support for the American Revolution (Martin 1996:3).

The Second Great Awakening (c.1810-60) followed a period of cooling off of religious fervor. Again millennial expectations were central, along with an emphasis on sanctification, or perfection of character. Northern and southern states now seemed to turn in different directions. While piety, firm confidence in the Bible, and evangelization came to dominate the southern culture, Protestants in the north invested considerable efforts on social issues, such as temperance,

[10] The British *Act of Toleration* (1689) gave a limited religious liberty to Protestants outside the Church of England, which had been the state church of Virginia since the first settlers arrived in 1607. In Virginia, the dissenters also had to pay taxes to support the Anglican clergy (Virginia Memory 2013).

abolition of slavery, suffragism, and elimination of war, poverty, and various immoralities. These social movements were related to the belief that a positive transformation of society could bring about the Millennium, a period of 1000 years of peace on earth prior to the second coming of Christ[11] (Corrigan 2004:170; Woodberry and Smith 1998:27; Martin 1996:3-4). By the mid-19th century, America was on its height as a Christian nation. The congregations were, however, seldom directly involved in politics. Most members considered local congregations and voluntary associations as the main tools for moral improvement of society (Witte 2004:303).

While dominated by Protestantism, American culture in the 19th century was not uniform. From the very outset the American colonies had been religiously and ethnically pluralistic (Noll 2011:47). The First Great Awakening divided many Protestant denominations into two groups: traditional 'Old Lights', and evangelical 'New Lights'. Later, the Second Great Awakening split the traditional Reformed, Lutheran and Anglican denominations further. At the same time their hold on the American population decreased as both revivals saw a considerable growth in size and influence of Baptist and Methodist churches (Witte 2004:302). Notwithstanding the many splits, there were also attempts to urge cooperation. Evangelical Protestants from various countries and denominations tried to unite to promote their common cause. In 1846 a number of clergymen gathered in London to establish a global Evangelical Alliance. The project was headed by the British, who wished to counter the efforts of the Oxford Movement to make the Anglican Church more Catholic. Hence most of the delegates were British (84%). The rest were primarily from the United States (8%) and Europe. The project partly failed, however, due to disagreement between British and American delegates over the issue of slavery. Instead, the Evangelical Alliance remained a loose network of independent national and regional alliances (Hillborn and Randall 2001). There were still numerous grounds on which Americans could cultivate interdenominational cooperation. In addition to the social causes already mentioned, these included the American Bible Society (1816), the American Sunday School Union (1824), foreign mission, and Bible institutes – such as the Moody Bible Institute in Chicago, an influential training center for conservative Protestants established in 1886 by the non-denominational evangelist Dwight L. Moody (Blumhofer 2004a:726-731). American Protestants in the 19th century, then, were indeed concerned about the societal development, but they did not systematically utilize the political system to increase their influence, as would the later Evangelical movement. Neither was there a pressing need to do so, since the culture was still dominated by Protestant views and values.

[11] This belief is known as post-millennialism.

The Fundamentalist Isolation after the Scopes Monkey Trial

While conservative Protestants were actively engaged to influence societal development in the late 19th and early 20th century, the decision of a large group to isolate itself in the 1920s could have brought religion to a marginalized position in the American society, similar to the privatization that has taken place in many European countries (see e.g. Casanova 1994:213-215). Such a development was a 'historical option', to borrow Casanova's term (1994:215), not passively resulting from the structural changes in a modern society, but, in this case, from an active choice to back off. This development, however, would later be counteracted by a different choice made by the new Evangelical movement.

Prior to the Civil War (1861-65), disagreement about slavery had split Baptists, Presbyterians, Methodists, and Anglicans into northern and southern denominations (Corrigan 2004:171). The north-south divide was enhanced by a similar geographical split in response to two of the greatest challenges to the conservative Protestants in the 19th century: the historical critical approach to the Bible ('higher criticism') and Darwinism. While the southern denominations opposed both, the northern were divided (Woodberry and Smith 1998:27). Here, theological liberals promoted the critical approach to the Bible, and adapted their world view to the Darwinian theory. Conservatives thus experienced these challenges both from the inside and from the outside. The internal struggle was most severe in the churches and seminaries of Presbyterians and Northern Baptists (Martin 1996:13-15). In 1881, theologians at the Presbyterian Princeton Seminary developed a doctrine which stated that the Bible was infallible in its original autograph. This doctrine of biblical inerrancy[12] had considerable influence on other denominations, and was paramount in the rising Fundamentalist movement (Trollinger 2004:345; Ellingsen 1988:74). Nonetheless, the conservatives lost the battle for denominational and seminary control. As liberalism prevailed at Princeton and various leading Baptist seminaries in the 1920s, conservative theologians left to create their own institutions (Trollinger 2004:347-348; Martin 1996:16).

In 1919, conservative Protestants from various denominations established the World Christian Fundamentals Association (WCFA) desiring to fight modernism and promote the true faith. With World War I fresh in mind, leading figures like Baptist minister William B. Riley declared that the reason for Germany's destruction was found in its embracement of higher criticism, liberal theology and Darwinism. The same could happen to the USA, he claimed, if the modern trends were not reversed (Trollinger 2004:347-348; Martin 1996:11). The following

[12] While many Evangelicals now distinguish between *inerrancy* [in all matters] and *infallibility* [in what regards salvation] (Olson 2004), the Princeton theologians used both words to describe their position: All original manuscripts were written under divine inspiration and rendered true historical events (Hodge and Warfield 1881).

year, the weekly Baptist *Watchman Examiner* suggested that those "who still cling to the great fundamentals and who mean to do battle royal for the faith" should be called *Fundamentalists* (quoted in Sweeney 2005:166). The inspiration for the term was found in a series of booklets called *The Fundamentals: A Testimony to the Truth*, published in 1910-15 by a press associated with the Moody Bible Institute. These publications contained high-quality essays opposing higher criticism, liberal theology, Darwinism, democratic socialism, women's demands, Catholics, and Mormons, among others (Sweeney 2005:165; Corrigan 2004:175; Martin 1996:10-11). Although their direct impact was rather limited, *The Fundamentals* had great symbolic value for the new movement taking form after World War I (Ellingsen 1988:51). The 'great fundamentals of faith', to which these conservative Protestants clung, included biblical inerrancy, the virgin birth, and Christ's divinity, substitutionary atonement, bodily resurrection, and imminent return (Martin 1996:11; Noll 2004:422).

Outside the denominations the challenge from Darwinism found an arena in public schools. Fundamentalists joined the WCFA and the former Secretary of State and three-time presidential candidate William Jennings Bryan in campaigns to make state legislatures ban the teaching of evolution in schools. Some states passed restrictive laws, starting with Oklahoma in 1923, and soon followed by other southern states. In 1925, Tennessee banned the teaching of any theory contradicting the biblical story of creation (Trollinger 2004:348; Ellingsen 1988:90-91). Although Governor Austin Peay publicly declared that he doubted the law would ever be an active statue, this Butler Antievolution Act soon caught the eye of the whole nation. In a newspaper advertisement, the American Civil Liberty Union (ACLU) called for volunteers to test the constitutionality of the new law, offering to cover the costs. Biology teacher John T. Scopes accepted the challenge, even though he was not sure if he had actually taught evolution himself, being only a substitute (Gatewood 1969:331-341). Conducted in the small city of Dayton in July 1925, the so-called 'Monkey Trial'[13] was given a surprisingly vast attention in the media. The

[13] The ban on evolution and the Scopes Trial has frequently been portrayed as an attack on science, and a battle between tradition and modernity. This depiction fails to take into account some other central issues involved. Long before the trial, Bryan, a progressive social reformist, expressed his concern that Darwin's theory was used by proponents of *eugenics* – the idea that human evolution could be furthered by promoting good genes and/or eliminating bad genes – to justify "the strong crowd's killing of the weak". By the time of Scopes Trial, several states had enacted sterilization laws, aiming at 'unfit' individuals like the mentally ill and retarded, criminals, and epileptics. The eugenic ideal was promoted by the biology textbook used by Scopes, *A Civic Biology* by G. W. Hunter. Here the Caucasian race, i.e. the "civilized white inhabitants of Europe and America", was presented as the highest type of humans, and the book mentioned separation of sexes in asylums and other measures as solutions to prevent the transmission of low and degenerated genes. Another issue involved in the Scopes Trial, was the free speech of public teachers. During and after World War I, many states required their teachers to sign loyalty oaths, which limited their academic freedom. While the anti-evolution laws were a principal issue, this freedom of speech was the main reason for the ACLU's involvement (Magat 2006:542-547; Davis 2005:254-255).

ACLU lawyers and the press portrayed the Fundamentalists and their famous spokesman Bryan as rural ignorant bigots. Although Scopes lost the trial[14], the show caused great harm to the public reputation and popularity of Fundamentalism. In subsequent years all states abolished their anti-evolution laws. This defeat coincided with the Fundamentalists' losing battle for influence in their churches and seminaries. Consequently, they withdrew and established their own denominations, educational institutions, and mission organizations, which all flourished on a local level (Trollinger 2004:349; Martin 1996:14-15; Ellingsen 1988:91-93).

The New Evangelical Movement of the 1940s

After the failure of the 1920s, some Fundamentalists came to emphasize separation from those who did not concur with their 'fundamentals of faith'. In 1941, Carl McIntire championed the creation of a national coalition of Fundamentalists, the American Council of Christian Churches, to oppose the liberals' Federal Council of Churches. McIntire, who had left the Presbyterian Church to establish the Orthodox Presbyterian Church, which he later left to establish the Bible Presbyterian Church, promoted strict separation, even from those who theologically concurred, but cooperated with non-Fundamentalists (Ellingsen 1988:98-99). However, not all Fundamentalists agreed on the policy of separation. Some, like J. Elwin Wright and Harold J. Ockenga, wanted to reengage with society and promote the 'fundamentals of faith' in a more positive manner. Already in 1929, Wright had launched a conservative coalition, the New England Fellowship, and he continued to work for a national alliance. In 1942, Wright and other Fundamentalists who disagreed with McIntire's separatism, established the National Association of Evangelicals for United Action (now: NAE). To distance themselves further from the separationist Fundamentalists, they chose to refer to themselves as *neo-Evangelicals*, later shortened to *Evangelicals*, thus trying to establish a direct link of identification with the Evangelicals of the 19th century (Trollinger 2004:350; Martin 1996: 22-23; Ellingsen 1988:97-102). The Evangelicals criticized the separationist Fundamentalists for their lack of social engagement. Rather than isolation, they would themselves employ the strategy of "infiltrating" society and denominations (Ockenga cited in Ellingsen 1988:100). The Evangelicals' idea of a comprehensive and active strategy can be illustrated by the following statement by Carl F. Henry, one of their most influential theologians:

> If historic Christianity is again to compete as a vital world ideology, evangelicalism must project a solution for the most pressing world problems. It must offer a formula for a new world mind with spiritual ends, involving evangelical affirmations in political, economic, sociological, and educational realms, local and international. (Henry 1947:65)

[14] In 1927, the appellate court upheld the antievolution act, but reversed the Dayton court's decision as the fine of $100 was too severe. It thus prevented further appeal of the case to the Supreme Court (Gatewood 1969:334).

We could say, then, that the idea of direct involvement in politics and other public arenas – as a *part* of the Evangelical mission – was worked out in the 1940s, although several years were to pass before its fruits became visible. Meanwhile, Evangelicals made use of a powerful tool which indeed opened up the American society to their voice: the radio. But also in this field they had to fight for their position. In the early 1940s, Evangelicals bought considerable airtime from national radio networks. New regulations, supported by the Federal Council of Churches, were introduced in 1943, providing free airtime to the mainline churches as a public service, while forcing Evangelicals off the air. The subsequent year the NAE formed the National Religious Broadcasters to promote the cause of Evangelical media. Their lobbying – which could be viewed as a forerunner to their later political engagement – brought success, and in 1949 religious broadcasters were again allowed to buy airtime (NRB 2013). The following decades, parallel to a more liberal development of the American society, the radio became a central tool to build up unity among Evangelicals and to spread their message across the nation.

Action to Influence the Destiny of the Nation

The 1980s has been described as the decade when Evangelicals entered the American political arena (see e.g. Simpson 1994:291; Casanova 1994:3). In her essay, *Imagining the Last Days: the Politics of Apocalyptic Language*, cultural anthropologist Susan Harding points to a possible relationship between the political engagement of Evangelicals and a shift in their view on the future. Although their beliefs have always shown great variation, the 1980s seems to reveal a new narrative (Harding 1994:67-71). The narrative in question is the understanding of the last days of earth's history, as related to the second coming of Christ. In the late 18th century, as well as most of the 19th century, many American Protestants believed that a kingdom of peace and prosperity – the so-called Millennium[15] –would soon be established on earth. The kingdom, which was to last for 1000 years, was seen as a fulfilment of Bible prophecies. As Jesus was expected to return *after* the 1000 years, this understanding of the future events is often spoken of as post-millennialism (Trollinger 2004:346; Beam 1976:182). As mentioned earlier, it was the belief that a positive transformation of society could bring about the Millennium which inspired many Protestants in the 19th century to engage in social issues, like temperance and abolition of slavery (see above). An alternative view of the future events is that the second coming of Christ will take place *before* the 1000 years. This view is known as pre-millennialism, and took over as the dominant understanding among American Protestants after the Civil War (Harding 1994:57).

[15] The word 'millennium' does not occur in the Bible, but a period of 1000 years is mentioned several times in the Book of Revelation (chapter 20).

While pre-millennialism has old historical roots, a new version of this teaching entered America when John Nelson Darby, a leading member of the British Plymouth Brethren[16], travelled to the northern states in the 1860s and 70s to spread his theory of 'dispensational pre-millennialism'. According to Darby, history is divided into several dispensations, or eras, each following a distinct and divinely fixed scheme ending with a judgment, like the flood of Genesis. The present dispensation, Darby claimed, was characterized by increasing apostasy in institutional churches and perversion of society; the true Christians should therefore separate from it all and wait 'passively' for the secret coming of Christ[17]. Darby's theory was widely accepted, not least among conservative Baptists and Presbyterians. In the early 20th century, it became dominant thanks to the widespread use of the *Scofield Reference Bible* (1909), a study bible filled with dispensationalist comments. Darby's theory thus became highly influential on the Fundamentalist's policy of separation and retreat from society (Trollinger 2004:346; Ellingsen 1988:63-65,81).

Since the last decades of the 19th century, pre-millennialism – in various forms – has dominated the end time understanding of American conservative Protestants. In her essay, Harding argues that new narratives in the 1980s gave Christians an *active* role in influencing future events – somewhat similar to the post-millennial understanding of the 19th century, yet without letting go of the pre-millennial scheme. While dispensationalist sermons and publications prior to 1980 portrayed global events as *signs* that the end was near, leading Evangelicals in the 1980s increasingly pointed to the need for political action to avoid God's judgment of the nation (Harding 1994:67-71). Action was, in other words, seen as a means to influence the destiny of America, as can be illustrated by the warnings of bestselling author Tim LaHaye in 1980, that the nation would be destroyed "unless Christians are willing to become much more assertive in defense of morality and decency than they have been during the past three decades" (quoted in Harding 1994:69). However, rather than as the cause of political engagement, I suggest this change in narrative is better understood as a 'tool' employed to mobilize ordinary church members to engage in politics, or as a part of a larger religious call worked out by influential Evangelical leaders. Although there was an increase in Evangelical rhetoric calling for political engagement in the late 1970s and 1980s (see also Southworth 2008:25-26 and Martin 1996:195-198), the real shift in mindset did, as we saw, take place earlier, in the 1940s, as the new Evangelicals sought to distance themselves from the separationist Fundamenta-

[16] The Plymouth Brethren was a British movement established in the 1820s by Darby and others who had left the Anglican Church because of its formalism and ecclesiasticism (Ellingsen 1988:62).

[17] According to Darby, the true Christians will one day be raptured and taken to heaven. Meanwhile the remaining people will experience seven years of tribulation under the reign of the so-called Antichrist. After the seven years, Jesus will return together with the saints to establish the Millennium on earth, centered around Israel, the holy land (Trollinger 2004:346; Ellingsen 1988:62-63).

lists and pursue a strategy of 'infiltration'. The boost of political and social engagement in the late 1970s and 1980s was a result of major changes that had taken place in the American society after World War II. Evangelicals felt that politicians and courts not only approved, but also contributed to the escalating immoralities they perceived around them (Martin 1996). However, the mobilization of Evangelicals into politics was not only the result of a desire to have their voice heard and to change the development to avoid God's wrath. Evangelicals were also 'pulled into the game' by politicians with presidential ambitions and influential preachers with strong opinions.

A Call to Involve in Politics

The split between Fundamentalists and Evangelicals was enhanced by the work of the most prominent Christian leader in the mid-20th century, evangelist Billy Graham. In 1949, Graham, a Southern Baptist minister and then leader of the flourishing Youth For Christ movement, lead a revival in Los Angeles. In line with the political fear of the day, Graham warned against the dangers of Communism, and claimed that he could see "the judgment hand of God over Los Angeles" because of the communist influence in the city (quoted in Martin 1996:29). Further, it was the prayers of God's people that had saved America from the destructions of World War II. The media attention Graham received gave him a national breakthrough. On a crusade in South Carolina the following year, Graham was invited by the governor to address state legislature and several high-school assemblies. From then on he continued to mingle with leading politicians. In 1952, he was invited by congressmen to hold a crusade in Washington, and a fresh act of Congress allowed him to conduct the first religious service ever on the steps of the Capitol in front of some 40.000 attendants (Martin 1996:25-31). By then Graham had already taken the steps to engage in politics. Christians, he said, would "vote as a block for the man with the strongest moral and spiritual platform, regardless of his views on other matters" (quoted in Martin 1996:31). While careful not to give a too explicit candidate endorsement, Graham used his influence to mobilize supporters for conservative candidates, like Dwight D. Eisenhower (1952/56) and Richard Nixon (1960/68/72). Graham's support was helpful. In addition to his implicit favor, Graham gave Nixon advice on how he could attract Evangelical voters by attending church and using more Bible quotes in his speeches. Nixon, on his side, knew how to exploit the potential. He invited Evangelical leaders to the White House, and consciously used prayer breakfasts and sponsored Sunday services to achieve his political goals (Martin 1996:99,145-147). While Evangelicals by and large supported Graham, his cooperation with non-Fundamentalist Christians, even liberals, made him unpopular among separationist Fundamentalists (Ellingsen 1988:103-104).

The election of John F. Kennedy (1960), the first Roman Catholic president of the USA, and the Supreme Court's ban of prayer and Bible reading in public schools (1962/63) worked as catalysts for conservative Protestants' engagement in politics. During the 1960 campaign, Graham, Ockenga and other Evangelicals expressed concern that Kennedy, in fear of excommunication, would show greater allegiance to the Vatican than to the USA. With a small margin Kennedy nevertheless defeated Graham's favorite, Nixon (Martin 1996:47-52). In the 1964 election, Republican candidate Barry Goldwater mobilized conservative Christian support by blaming the Supreme Court's ban on prayer and Bible reading for the moral decay of society (Martin 1996:86). After the Watergate scandal (1972), which left the whole nation in disappointment and political distrust, Evangelicals found a new representative for their values in Democrat candidate Jimmy Carter, an active layman Baptist. Although he did not talk much about religion and seldom quoted the Bible, Carter openly confessed to be an "Evangelical" and a "born-again" Christian. To the mainstream media this represented something new, and the vast attention now given to the Evangelicals put them on the political map. Evangelical organizations actively supported Carter's candidacy by distributing information on how to vote and encouraged ministers to get involved. While initially a popular president, Carter's support among Evangelicals dropped when they found his politics to be more liberal than expected. His support for the Equal Rights Amendment (ERA), which forbade discrimination on account of sex, was perhaps most offensive as Evangelicals considered it harmful to the traditional family. However, largely due to opposition from women of the political and Religious Right, the ERA was never ratified by enough states to be amended to the Constitution (Martin 1996:145-162).

In the late 1970s abortion emerged as a major Evangelical concern. The Christian Action Council[18], which was established in 1975 with assistance from Billy Graham, Presbyterian pastor Francis Schaeffer and pediatrician C. Everett Koop, began to lobby Congress to restrict abortion. The greatest impetus to Evangelical pro-life involvement came four years later, with Schaeffer and Koop's book and film *Whatever Happened to the Human Race?*, which plainly portrayed abortion as a publicly sanctioned practice of mass murder (Martin 1996:156,239). Since then the anti-abortion stance has navigated Evangelical votes, together with anti-homosexual politics, pro-family values, and the support of state autonomy rather than federal control (Wogaman 2004:290). Republican Ronald Reagan long seemed to represent the Evangelical cause. His

[18] In the 1980s, the organization changed its name to Care Net. It now represents a network of more than 1000 pregnancy centers across the US, which offer support to pregnant women as an alternative to abortion (Care Net 2014).

presidency, however, gave few practical results. A Human Life Statute bill received little attention from the White House and failed to pass through Congress, and Reagan's proposed school prayer amendment came 11 votes short of the necessary 2/3 majority. Evangelicals were disappointed. Reagan's Supreme Court nomination of Sandra Day O'Connor – a liberal minded pro-abortion, pro-ERA judge – only made it worse (Martin 1996:226-235).

Mapping the stimuli that motivated Evangelicals to take political action, the influence of Presbyterian pastor Schaeffer should not be ignored. According to Schaeffer, *secular humanism* – which he described as the antithesis of Christianity – had since the 1940s become dominant in the USA, increasingly affecting all parts of society. Most importantly, it controlled government and law, which had thus become "vehicles for forcing this view (with its natural results) on the public" (Schaeffer 1981:135). Schaeffer therefore urged Evangelicals to enter the public arena to change the course of the nation. One who responded to the call was Jerry Falwell, who on Schaeffer's advice used his influence as a TV-evangelist to mobilize more Evangelicals (Martin 1996:197). In line with Schaeffer's idea of cobelligerency – cooperation on specific goals despite theological differences – Falwell would later describe his Moral Majority as "a political organization, not a religious one", which included Jews, Catholics, Protestants, Mormons, and "even non-religious people who shared our views on the family and abortion, strong national defense, and Israel" (quoted in Martin 1996:204). However political, in light of Schaeffer's ideas it is difficult to consider the Moral Majority as anything but part of a religious project. While influential in the elections of Reagan, the Moral Majority dissolved in the 1980s due to lack of a solid grassroots base. In 1988, a new demonstration of the sincere ambitions of Evangelicals for political influence was seen in minister and broadcaster Pat Robertson's presidential campaign. Although defeated, Robertson's candidacy mobilized even more Evangelicals and gave rise to the Christian Coalition, one of America's most influential conservative Christian lobby groups (Trollinger 2004:351).

A Call to Involve in Litigation

The increased visibility of Evangelicals in the political arena in the 1980s soon caught the attention of both researchers and journalists (see e.g. Epstein 1985:xi and Casanova 1994:3). Far less consideration, if any, was given to a related and simultaneously emerging phenomenon: the Evangelical law firms. However, more recent studies indicate that the earliest research on the Evangelical movement's political influence overestimated its impact (see e.g. Brown 2002:3-4); it turned, to recall the words of Casanova, a "well-organized, vociferous minority" into "a threatening majority" (1994:161). While the movement's size and impact may have been exaggerated, it was nevertheless at this time Evangelicals began to experiment with litigation as a tool to influence

society. By then, the effectiveness of litigation was widely recognized, as can be illustrated up by this statement made by later Supreme Court Justice Lewis Powell in 1971: "[T]he judiciary may be the most important instrument for social, economic and political change" (quoted in Southworth 2008:15). The use of courts was, in other words, 'in the air'.

Just as the early Evangelicals had criticized the Fundamentalists for their lack of social engagement, Schaeffer blamed the Christian lawyers for being silent when the great shifts took place in society from 1940-70. Many of these changes were related to controversial Supreme Court decisions, such as the ban on prayer and Bible reading in public schools. According to Schaeffer, the secular humanist worldview had resulted in a relativism that pervaded the laws of the nation; there was no universal standard[19] to right and wrong. As the clearest illustration of this "arbitrary sociological law", he pointed to a 1973 Supreme Court case in which abortion had been declared a constitutional right (1981:48). In Schaeffer's view, both the law and the courts had become "*the vehicle to force* this total humanistic way of thinking upon the entire population" (1981:49). Christian principles and values were, in other words, under attack, and it was the duty of the Christian lawyers to defend them. Also other voices called for Evangelicals to engage in courts. Editorials in *Christianity Today*, a magazine founded by Billy Graham in the 1950s, blamed Evangelicals for their apathy in the abortion battle and urged them to stand up and speak out (Southworth 2008:25). Soon many did, and new Evangelical law firms were established in response to the call (den Dulk 1006:208).

As has been shown in this chapter, the Evangelicals' desire to influence society 'for the better', as well as an active engagement to do so, was not novel. Rather, it can be seen as a continuation of what various Protestant groups had done since the founding of the American republic. Neither was it novel to work for legislation to support certain principles or traditions – as can be illustrated by the 19th century's prohibition movement (see e.g. Munger and Schaller 1997:148), or the Fundamentalists' efforts to ban the teaching of evolution from public schools prior to the Scopes Trial (see above). What was new, was the establishment of professional Evangelical law firms, and a widespread and systematic use of courts to protect and promote certain interests, or causes. However, we may still ask *why* the Evangelicals turned to litigation. This will be explored in the next chapter.

[19] For Schaeffer and other Evangelicals, the only valid standard to distinguish between right and wrong was found in God's word, which in this case naturally represents the Evangelical interpretation of it.

2 Influencing Law Through Litigation

> The Constitution may be what the Supreme Court says it is, but a Supreme Court opinion means, for the moment at least, what the district judge says it means.
>
> Jack W. Peltason, *Fifty Eight Lonely Men* (quoted in Brown 2002:92)

Laws regulate social interaction and relations between human beings. As such they are important means of protection, for instance of liberties, values, and other interests. Moreover, they provide a foundation for sanctions and are thus powerful tools to limit – or eliminate – actions which work against those liberties, values, and interests. The present chapter focuses on the use of courts as a way to influence law. This avenue involves not only the interpretation of already existing laws, but, in an indirect way, also the entry of new laws into society. The efficiency of courts in this regard is related to the power of *judicial review*, which is the power of courts to declare an act unconstitutional. I begin the chapter by giving a short presentation of the most important official documents written in the decades between the two Great Awakenings: the Declaration of Independence and the US Constitution. While these were political documents, I will concentrate on their religious aspect. I will then explain the rationale for the division of federal powers into three distinct branches, having a particular focus on the judicial branch[20], which – in the context of my inquiry – is the main arena in which the Evangelical law firms fight their battles. However, the judicial branch alone is neither sufficient nor perceived as sufficient for the purpose of bringing about major social changes, or to prevent them from taking place. Accordingly, the Evangelical approach at large can be described as 'holistic' – holistic here referring to the adoption of strategies which approach all three branches of government, either directly (e.g. through engagement in political elections, judicial nominations, and litigation) or indirectly (e.g. by influencing the masses through the media). Having explained how the judicial system works, I turn to the use of litigation by interest groups as a means to bring about social change. While litigation was utilized by a few groups already in the late 19th century, it was the civil rights movement[21] of the early 20th century that pioneered the strategic approach which would not only be adopted by other liberal movements in the mid-century, but later also by various conservative groups, including the Evangelicals. Hence, the Evangelicals' turn to litigation can only be properly understood in light of the liberals' use of litigation: not only did they adopt a strategy worked out by liberal groups and proven to be efficient, but many of the social changes which the

[20] As my inquiry is limited to federal courts, I will not include the various state court systems or their distinct constitutions in this presentation.

[21] I here refer to the social movement that aimed at ending racial segregation and discrimination in the USA.

Evangelicals mobilized to counteract had come as a result of the liberals' litigation. The chapter will further show how the strategic use of courts, as well as related strategies, have been adopted and applied by Evangelical law firms.

The Religious Aspect of the Founding Documents

Historian Simon P. Newman (2007:581) has characterized the stunned comments in media on religion's central role in the re-election of George W. Bush (2004) as "ahistorical and flawed". Evangelical Protestantism was present and influential from the very beginning of the nation, and it is

> only comparatively recently that church and state have been separated in any meaningful or effective fashion. Until the twentieth century blasphemy remained a crime that was punished by American courts, and prayer and other religious activities were deeply embedded within the American school and educational system (Newman 2007:584-585).

What some commentators depicted as a new fusion of religion and politics in 2004 was instead, as Newman sees it, "as old as the republic itself" (Newman 2007:589,597).

God, religion and faith are highly present in several of the documents written by the founders of the American republic (see e.g. Bauszus 2009). Far from being theological documents, they nevertheless refer to 'God' and 'the Creator' as a reality. The Declaration of Independence (US 1776), drafted by Thomas Jefferson, speaks of "nature's God" and points to the 'self-evident truths' that "all men are *created* equal [and] are endowed *by their Creator* with certain unalienable Rights", which include "Life, Liberty and the pursuit of Happiness" (my italics). The role of a human government is to secure these rights. The Constitution (US 1787), on the other hand, contains no such reference to the divine or a creator. The only mention of religion is found in Article VI, which – in addition to binding *both* state and federal officials by oath to uphold the Constitution – declares that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States". In addition, an indirect trace of religion if found in Article I, §7, which excepts Sundays from the ten days given the president to return a bill presented to him by Congress, and the reference to 'the Year of our Lord 1787'.

To some, the establishment of a federal government seemed threatening. While supporters of the Constitution (the Federalists) held that the power of the new government was too limited to pose any threat to the rights of individuals or the distinct states, most of which already had their own bill of rights, opponents (the Anti-Federalists) were not convinced, and called for the protection of specific liberties (NARA 2013). Politician James Madison, known as 'the Father of the Constitution', initially saw no such need. He changed his mind, however, and in a letter to a Baptist minister he explained that it was his "sincere opinion that the Constitution ought to be revised" to include "the most satisfactory provisions for all essential rights,

particularly the rights of conscience in the fullest latitude" (quoted in Bauszus 2009:337). In Virginia, Madison had engaged in the battle against establishment of religion. Writing against 'A Bill establishing a provision for Teachers of the Christian Religion' – which he called "a dangerous abuse of power" – Madison quoted the Virginia Declaration of Rights (1776), which stated that "religion or the duty which we owe to our Creator and the manner of discharging it, can be directed only by reason and conviction, not by force or violence" (Madison 1785:§1). An authority which "can establish Christianity, in exclusion of all other Religions", Madison argued, "may establish with the same ease any particular sect of Christians, in exclusion of all other Sects" (1785:§3). As a result of this protest, the General Assembly of Virginia enacted Thomas Jefferson's bill for religious freedom, which – again with a reference to Almighty God who "hath created the mind free" – stated that

> no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burdened in his body or goods, nor shall otherwise suffer on account on his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinions in matters of religion, and that the same shall in nowise diminish, enlarge, or affect their civil capacities (Jefferson 1786).

When Madison later drafted *the Bill of Rights*, the amendments which were added to the Constitution in 1789 "in order to prevent misconstruction or abuse of its powers", the Virginian stand was echoed in the 1st Amendment's prohibition of governmental favoring of any particular religion, and its interference with people's practice of the religion of their choice:

> Congress shall *make no law respecting an establishment of religion*, or *prohibiting the free exercise thereof*; or abridging the freedom of speech, or of the press; or the right of the people peacefully to assemble, and to petition the Government for a redress of grievances (Amend.1, my italics).

This limit to federal power was later expanded to include the various state governments:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. *No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States*; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws (Amend.14 (1868), §1, my italics).

The Separation of Powers, and the Power of the Judiciary

Prior to the federal Constitution of 1787 only two states, Virginia and North Carolina, had constitutionalized an independent judicial branch (Gerber 2011:67). The rationale for the provision, as explained by Madison, was to prevent abuse of power: "The accumulation of all powers, legislative, executive and judiciary, in the same hands, whether of one, a few, or many, and whether heredity, self-appointed, or elective, may justly be pronounced the very definition of tyranny" (Madison 1788a:301). The federal Constitution assigned all *legislative*

powers to a Congress consisting of two chambers; a Senate and a House of Representatives (art.I, §1). The *executive* power was assigned to the president (art.II, §1), and the *judicial* power to "one supreme Court, and in such inferior Courts as the Congress may from time to time establish" (art.III, §1). The first Congress established three inferior judicial districts, a northern, a central, and a southern. As the nation grew, the number was expanded. Today the federal court system includes 94 *district courts*[22], staffed by 677 judges. In 1891 Congress set up an intermediate level of nine courts to reduce the burden of appeals to the Supreme Court. The now twelve *circuit courts of appeals* are staffed by 179 judges. Most cases today (>98%) begin in *state courts*, with some 34 million cases filed every year. Most, however, are resolved before they reach trial (*pretrial settlement*). Less than 10% of the cases that enter the legal system reach the appellate level, and less than 1% of these again reach *the US Supreme Court*. The chances of getting a review by the Supreme Court, in other words, are minimal (Irons 2012:7-11[23]). The Supreme Court has *original jurisdiction* (i.e. works as a trial court) in disputes between states or between a state and the federal government. It has *appellate jurisdiction* to hear cases brought to it from federal appellate courts and from state supreme courts when federal law is involved (U.S.Const., art.III, §2; Baum 1995:9-12). Thus, disputes that involve the federal Constitution – as is typically the framing of the major Evangelical causes – are fought in the federal court system.

The Founding Fathers tried to prevent abuse of power by assigning governmental powers to distinct branches[24]. In addition they provided a system of 'checks and balances', in which the branches were made dependent on each other (see Madison 1788a:308-313; 1788b:320-323): *Congress* is authorized to create *federal courts* and decide their jurisdiction. *The president* nominates *the judges*, and *the Senate* confirms them. *Congress* can impeach *the justices* and *the president*, and *the Senate* and *the House* can veto each other's bills. *The president* can veto congressional bills, but his veto may be set aside by a two-thirds majority in *Congress*. *The Supreme Court*, in turn, has the power of *judicial review*, that is, it may declare *presidential acts* and *congressional laws* unconstitutional (U.S.Const., art.I-III, VI). In the late 1700s, Anti-Federalists expressed concern that the power of judicial review would make the judiciary superior to the legislature. Defending the arrangement, Alexander Hamilton wrote that the judiciary would "always be the least dangerous to the political rights of the Constitution" since it has "neither *force*

[22] Every state has at least one federal district court, each belonging to one of the twelve regional circuits.
[23] The numbers of judges in district and appellate courts are adapted to information provided by the United States Courts, "Federal Judgeships": http://www.uscourts.gov/JudgesAndJudgeships/FederalJudgeships.aspx
[24] The idea of separating the governmental powers into three branches – a legislative, an executive, and a judicial – was inspired by the French political philosopher Charles de Secondat Montesquieu (Theobald 2006:316).

nor *will* but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments" (Hamilton 1788a:465). The Evangelicals' 'holistic' approach (see above) shows that they have recognized this dependence. Nevertheless, the Supreme Court has significant influence as policy maker – not least as a result of the Judiciary Act of 1925, which replaced most appeals with requests for *writs of certiorari*, thus allowing the Supreme Court itself to decide which cases to review and which to reject (Baum 1995:125).

Unlike presidents and congressmen, whose access to office depends on their popularity among the public, federal judges are appointed for lifetime, or till retirement, and their salaries cannot be reduced (U.S.Const., art.III, §1). Only impeachment by Congress, for reasons of "Treason, Bribery, or other high Crimes and Misdemeanors", can remove a federal judge from office (U.S.Const. art.I, §2-3; art.II, §4). The reason for these provisions was to secure the independence of the judiciary (see Hamilton 1788b:472). The number of judges in federal courts is decided by Congress (U.S.Const., art.III, §1), and the Judiciary Act of 1789 provided for six Supreme Court justices. The number has later varied, but since 1869 there has been nine (Baum 1995:14). The Supreme Court justices are nominated by the president and confirmed – or rejected – by the Senate (U.S.Const., art.II, §2). Presidents usually appoint justices that support their party, thus pushing the court in either a conservative or a liberal direction (Irons 2012:11; Baum 1995:43). Although the decision of the individual justices in a particular case is hard to predict (Gerhardt 2008:chap.3), the ideological composition of the Court is nevertheless reflected in its decisions. For instance, the Supreme Court was most supportive of civil rights in the 1960s, when several liberal justices contributed to expanding the rights of blacks, criminal defendants, and other unprivileged groups. Since the 1970s, appointments of conservative justices by Republican presidents have gradually made the Court more conservative, among other things resulting in a narrow interpretation of its earlier liberal decisions (Baum 1995:25-26). While Congress may overturn Supreme Court precedents through constitutional amendments (U.S.Const., art.V), it rarely happens[25]. Neither do impeachments. The best way to remove a precedent is therefore to appoint justices who desire to overturn it (Gerhardt 2008:9). Since the late 1960s, various interest groups have been increasingly involved in the appointment of justices, utilizing the media, mobilizing the grassroots, and lobbying senators (Baum 1995:36; Vining 2011). This strategy has also been adopted by Evangelical law firms (Southworth 2008:38). However, the access to courts – physically or through letters – gives lawyers a unique chance to influence the decision of the justices by approaching them directly. Presidential ideologies and public pressure aside,

[25] So far it has happened four times: 1793 (11th Amendment), 1856 (14th A.), 1895 (16th A.), and 1970 (26th A.).

> the path of the court is charted by conversations between lawyers (judges and advocates) conducted in a language and using a terminology fashioned and conveyed through a central shared experience (law school and participation in the legal profession) (Epstein and Kobylka 1992:311).

Liberal Movements and Litigation

The 20th century saw some major changes in constitutional law doctrine. In his extensive study of the impact of identity-based social movements (IBSM)[26] on this development, Eskridge argues that "these movements have been critical to the evolution of constitutional doctrines of all sorts" (2002:2194). At the beginning of the century, US laws and social practices treated people differently according to race, sex and sexuality. Largely due to social prejudices, the political process offered few possibilities for change. The courts, on the other hand, were open, and as the groups became organized, they would litigate case after case until they achieved changes both in the interpretation of the laws and in public norms. This way of using the court system was pioneered by the civil rights movement, and followed by, among others, the women's rights movement and, with somewhat less success, the gay rights movement. The social cause lawyers who litigated on behalf of the IBSMs played an important role in the process, as did their argumentation. The litigators introduced new perspectives on old issues, and some of their arguments were adopted by the judiciary as foundation for new constitutional rules or exceptions to old rules (Eskridge 2002:2064-2068, 2194).

The civil rights lawyers, Eskridge writes, "translated the social, moral, and political goals of the movement into constitutional discourse" (2002:2072). Founded in 1909, the National Association for the Advancement of Colored People (NAACP) repeatedly challenged laws that suppressed the constitutional rights of African Americans. Most of their early cases involved criminal prosecution. In *Moore v. Dempsey* (1923), NAACP lawyers provided the Supreme Court with a detailed report of a trial in which a black defendant received death penalty from an all-white jury based on testimonies obtained by torture. This was the first in a series of cases in which the NAACP argued that the defendant's due process rights of the 14th Amendment had been violated, and the Court accepted their argument. Later, in *Norris v. Alabama* (1935), the Court reversed another death sentence, this time recognizing that the systematic exclusion of blacks from the jury violated the Equal Protection Clause of the same amendment. This decision became a useful tool for the NAACP to reverse death sentences for blacks decided by whites-only juries in the southern states. In a similar way, the NAACP engaged in litigation for blacks' voting rights and, from the 1930s, for desegregation of schools and equal salaries and school facilities for blacks and whites. Since *Plessy v. Ferguson* (1896), where the Supreme Court upheld the consti-

[26] E.g. the civil rights movement, the women's rights movement, and the gay rights movement.

tutionality of state laws requiring racial segregation in public facilities, the doctrine of 'separate but equal' had been standard norm (*precedent*) in US law. Not until the NAACP brought five school cases – together known as *Brown v. Board of Education* (1954) – to the Supreme Court, was the old precedent overturned. In court, the civil rights lawyers argued that the original purpose of the 14th Amendment was to eliminate race distinctions, including segregation in public schools. In addition, the lawyers pointed to negative social, psychological and political effects: the segregation laws indicated that people of color were inferior to whites; apartheid was undemocratic and a source of social unrest; besides, science showed that racial variation was benign. The NAACP arguments were by and large accepted by the Supreme Court, which somewhat surprisingly ruled unanimously that race-based segregation in public schools violated the Constitution (Eskridge 2002:1A).

Brown represents a good illustration of Hamilton's remark that the judiciary is dependent on "the aid of the executive arm even for the efficacy of its judgments" (1788a:465) – and thus the need for a 'holistic' approach to bring about major social changes. The case also demonstrates how the legal rules laid down in Supreme Court opinions are of greater importance than the outcome for the parties involved, as well as how the Court may function as a policy maker. Despite the Supreme Court's ruling in *Brown*, desegregation made little progress in the southern states until Congress in 1964 passed the Civil Rights Act, which opened up for federal law suits and denial of federal funds to institutions that practiced racial discrimination. In addition, the Voting Rights Act of 1965 contributed to racial equality as it forced local politicians to pay attention to black voters (Baum 1995:229-232, 253). Congressional acts and, above all, the threat of sanctions were necessary to give the Supreme Court's ruling practical effects. The Court's opinion was nevertheless essential to create a political climate that would influence public opinion, as well as the actions of the other governmental branches.

Eskridge also looks at the arguments applied by the opponents of the civil rights movement to limit their achievements. Prior to World War II, opponents of desegregation based their arguments on natural law philosophy[27]. Racial diversity, they declared, was malignant and a threat to the white race's purity. Later, opponents took a pragmatic approach, claiming that desegregation was unnecessary, impractical, and counterproductive. Both types of argument, however, were linked to the Constitution: the federal orders of desegregation interfered with the autonomy of the states, made the judiciary superior to the popularly elected legislature, and hampered the rights of whites, e.g. their rights not to associate with blacks or experience 'reversed discrimination'

[27] I.e. a belief in universal laws, inherent in nature and independent of laws enacted by a government.

(Eskridge 2002:1A3). Such battle between conflicting constitutional rights resembles the debate of the place of religion in society. In a secular, pluralistic state, Habermas remarks, "[t]he conflicting parties themselves must reach agreement on the precarious delimitations between a *positive freedom* to practice one's own religion and the *negative freedom* to remain spared of the religious practices of the others" (2005:13). While courts could be seen as one way to reach agreement, it seems more likely that it is because of the lack of such agreement that Evangelicals have turned to litigation.

Conservatives and Litigation

Early studies on interest group litigation concluded that groups utilized litigation when they are disadvantaged in traditional political forums, i.e. they turn to the courts because they lack access to the legislative and executive branches (den Dulk 2006:199; Epstein 1985:9). The late 1960s and early 1970s saw a massive rise of liberal public interest law firms, counting more than 70 by the mid-1970s. Recognizing the success of earlier groups, like the NAACP and the ACLU, the new firms tried to copy their tactics (Epstein 1985:119-120). A similar conservative mobilization began in the early 1970s, but the big waves of new conservative law firms came in the 1980s and 1990s – primarily as a response to the perceived threat from liberal organizations (Southworth 2008:10,28-30). However, there were also a few conservative interest groups that made use of litigation prior to the civil rights movement. In the late 19th century, corporate interest groups turned to the courts because they failed to achieve their goals. Like the liberals, they were *politically* disadvantaged (Baum 1995:209; Epstein 1985:147). According to Epstein, the situation was different for the conservative groups that arose in the late 20th century. Many of these groups had political influence, but they saw themselves as "disadvantaged in the *judicial* arena" (1985:147). They simply could no longer ignore the role that courts played in various interest conflicts. Epstein concludes her study of conservatives and litigation by suggesting that "a wide range of groups regularly resort to the judicial arena because they view the courts as just another political battlefield, which they must enter to fight for their goals" (1985:148).

The first Evangelical organization engaged in litigation was the Center for Law and Religious Freedom, established in 1975 with a focus on 1st Amendment issues. The main concern of the earliest Evangelical law firms was to protect religious private schools from government interference. From the mid-1980s they would increasingly engage in other fields, like abortion, gay rights, family values, and religious expressions in public places and, not least, in public schools (Southworth 2008:16; Hacker 2005:2). Like their non-religious conservative counterparts,

the early Evangelical firms – small in size, poorly funded, and run 'sacrificially' by volunteers and a few staff lawyers – failed to achieve the success of the liberal groups. Things improved, however, when they specialized, advanced their strategies, and received enough money to employ competent full-time litigators (Southworth 2008:26).

While being careful not to generalize, we could say that at least some of the most influential Evangelical law firms arose, not as independent projects inspired by Christian values, but as part of the Evangelical movement that emerged to pursue Ockenga's strategy of 'infiltration' (see chapter 1). Scheingold and Sarat has stressed the importance of distinguishing between Christian cause lawyers who defend religious values as a matter of personal conscience, and "the legal arm of the evangelical political movement" who view their cause lawyering as a religious call (2004:113-114). The strategy of the latter is both *defensive*, i.e. to protect certain religious freedoms, and *offensive*, i.e. to change society. Even though they are generally skeptical to civil rights – because these rights are secular and individualistic – the Evangelical cause lawyers nevertheless utilize them as a means to reach their goal: to make the values of the Judeo-Christian tradition a state responsibility, and to conform society to their interpretation of the Bible (Scheingold and Sarat 2004:105-117).

The Holistic Approach of Evangelical Law Firms

The Evangelical law firms are engaged in more than just litigation, and their strategies target other fields than just the courts. As was illustrated by *Brown* (see above), the success of the liberal litigators was partly a result of Congress and the Supreme Court working in tandem. Interviewing conservative cause lawyers, Law Professor Ann Southworth found that these lawyers were fully aware that use of litigation alone was not sufficient to achieve their goals. This was particularly true for the Evangelical lawyers, who "believed that law could protect religious expression and discourage immoral conduct, but doubted that it could significantly advance their larger goal of transforming culture" (Southworth 2008:156). Aware that processes outside the court also influence litigation outcomes, the law firms employ a variety of complementary strategies (Southworth 2008:167). Their strategic repertoire can be classified as either *in court strategies*, targeting the formal public sphere of courts, or *outside court strategies*, which target both the formal and the informal public spheres (e.g. the legislature and the general public).

The *in court strategies* include *test case selection* (sponsorship) and *amicus curiae briefs* (third-party intervention), both aiming at removing or building precedents. The test case strategy was pioneered by the NAACP (see above), and means that a law firm sponsors a case or a serial of cases with sympathetic facts (i.e. likely to be won). This gives the law firm an ownership which

allows it to control the course of the litigation (Brown 2002:49). The Scopes Trial mentioned in chapter 1 is a well-known example of a test case. Here John T. Scopes volunteered to be arrested so that the ACLU could challenge the constitutionality of the new Tennessee anti-evolution act. However, because the court of appeals reversed the decision of the trial court, this case never reached the Supreme Court, and the constitutionality of the ban remained unaddressed (Gatewood 1969:331-341). The test case strategy has been widely applied by various interest groups, like feminists, gays, consumers, and environmentalists (Levitsky 2006:145).

To follow a case all the way to the Supreme Court is expensive. A cheaper alternative, although still costly, is to file an *amicus brief*, which is a letter to the court written by a third-party. This solution allows parties that are not directly involved in a case to present their arguments to the court. The judiciary seldom rejects amicus briefs, and the strategy has been the one most frequently employed by religious conservatives (Brown 2002:52-54).

Regardless of strategy – case sponsor or amicus – the goal of the law firms is to convince the court to 'buy' their arguments. Not unlike how the civil rights lawyers and their opponents invoked the Constitution to promote their causes (see above), researchers have pointed out that Evangelical litigators "use a language of rights" (Southworth 2008:163), invoke "counter-rights" (Burke quoted in Southworth 2008:35), and emphasize individual freedom (den Dulk 2006:212). The early Evangelical lawyers related their arguments to the Establishment Clause and the Free Exercise Clause of the 1st Amendment when they litigated their religious cases. In the late 1980s, they turned to the Free Speech Clause of the same amendment, a move which has brought considerable success, both in the Supreme Court and in lower federal courts (Brown 2002:58-119). According to Brown, this "coupling of the free speech clause with religious expression" has been the major contribution of Evangelicals to the Supreme Court, resulting in several precedents (2002:73). In the 1960s and 1970s, liberals induced a broad interpretation of the Free Speech Clause to protect pornographic materials. Similarly, Evangelical litigators aim at a broad interpretation of the clause, notwithstanding the benefits such interpretations have for other groups – even those with opposite viewpoints (Brown 2002:137-139).

In general, Evangelical cause lawyers spend less time on litigation than they do on activities outside the courtroom (Brown 2002:121). Their *outside court strategies* may involve coalition and network building, influencing the nomination of judges, writing books and articles, arranging conferences, drafting legislation, and advising public officials (Southworth 2008:159,183). *Raising money* is critical, not only to sponsor cases or file amicus briefs, but also to employ a specialist staff, pay for office space and equipment, and raise more funds.

Since these lawyers usually do not charge their clients, donations from supporters are imperative to their activity. The most effective way of raising money is the *direct mail technique*, which was pioneered by conservative political interest groups in the early 1980s. To convince the (potential) donors that they are worthy of their support, the firms must not only show that they are actively defending religion against enemies such as secular humanism, but also that their activities bring success – and that there is still much work to be done (Brown 2002:122-123).

Conservative lawyers, including Evangelicals, consider a *strategic use of media* to be a central part of their job. Several of the lawyers interviewed by Southworth said that they sought to overcome the liberal bias of the mainstream media (2008:161-162). Some Evangelical law firms produce their own radio and TV programs. Others have their representatives frequently interviewed by both religious and secular media. In addition, the law firms spend considerable money on *education of the public*, which includes providing their own view on legal issues to the news media, policy makers, and interested parties (Brown 2002:125-128).

The conservative law firms' lack of success in the 1970s was analyzed in the *Horowitz report* (1980). The report suggested that the conservative groups needed to establish ties with law schools and recruit elite lawyers and law students – like the liberals had done. However, the religious conservative groups still draw most of their lawyers from less elite schools. More fruitfully, some Evangelicals have established their own law schools, or offer training to interested lawyers and students in other ways (Southworth 2008:19-21,33). Their ambitions can be illustrated by a statement made by Jerry Falwell regarding his own Liberty University Law School: "[W]e plan to turn out conservative lawyers the same way Harvard turns out liberals" (quoted in Hacker 2005:1). Both Liberty University and Pat Robertson's Regent University have been quality approved by the American Bar Association (ABA 2014a). To be sure, the lawyers engaged in Evangelical law firms like Robertson's ACLJ, are professionals.

Using Litigation and Rights to Fight Back

When the Evangelicals entered the political arena in the 1970s and 80s to influence the legislative and executive branches of government, it was not a matter of course that they would also target the judiciary. They did, however, and they did so in a time when litigation had become widely recognized as a way to influence laws and societal development. The Evangelicals joined the wave of conservative law firms established to counteract the political, social, and economic influence of liberals. We could perhaps say with Epstein that they saw the courts as "just another political battlefield, which they must enter to fight for their goals" (1985:148). On

the other hand, as research has pointed out, the impact of Evangelicals on the political arena in the 1980s was limited (see chapter 1). We could therefore ask whether they, despite their increased visibility in politics, instead should be seen as 'disadvantaged', like the early liberal movements. The classifications aside, what seems clear is that Evangelicals perceived litigation as necessary. The liberal turn of society – much of which was a result of liberal groups' strategic use of courts – seemed to force religion to a marginalized position in society, perhaps best exemplified by the ban on prayer and Bible reading in public schools. Prominent figures, like Francis Schaeffer, portrayed laws and courts as 'vehicles' to force the secular humanistic worldview upon the entire population (see chapter 1). Further, it was presented as a 'religious duty' to defend Christian traditions and values, and thus prevent the corruption of society. Put short, the Evangelicals turned to litigation in order to 'fight back'[28].

In the 1980s, the success rate of the right-based social movements declined as they became more defensive. According to Epstein and Kobylka, the liberals were often defeated in court because they failed to change their arguments when their earlier victories came under threat (1992:307-311). However, in recent years these groups have found an alternative way to challenge domestic policies in international laws and human rights (McCann and Dudas 2006:54-55). The willingness of some Supreme Court justices to let their constitutional interpretation be informed by international law[29] has generated strong criticism by some Evangelicals. Others have embraced the possibility found in international laws to defend their causes abroad, now using the language of human rights (Southworth 2008:174). After all – as pointed out by Nichols, he himself an Evangelical – Evangelicals *need* human rights, especially the right to speak freely, so that they can fulfill their call to evangelize the world (2008-2009:630). The ACLJ, which is the law firm examined in this study, frequently invokes both constitutional and international rights. Like many other conservative Christian law firms (see ADF 2014), it places great emphasis on freedom, liberty, and universal rights, at least in its arguments.

[28] The expression is borrowed from the ACLJ, which uses it to describe their own activity (see e.g. Sekulow 2013; ACLJ Petition 2013).

[29] The Supreme Court has used international law – directly or as an interpretive tool – to resolve major legal issues since its establishment in 1798 (Sloss, Ramsey and Dodge 2011:2). In the civil rights era, the Court's use of international law was minimal. It increased, however, from the late 1980s (Flaherty 2011:442).

3 The American Center for Law and Justice

> I was sitting in my study […] when the phone rang. It was Jay Sekulow, chief counsel of the American Center for Law and Justice, calling to tell me that the first 1993 case concerning student-initiated graduation prayer had been litigated and that we had won a resounding victory. This was one tangible bit of good news that the excesses of liberalism in America may be coming to an end.
>
> Pat Robertson, *The Turning Tide: The Fall of Liberalism and the Rise of Common Sense* (1993:9)

The American Center for Law and Justice (ACLJ) is one of the most influential law firms in the United States, with affiliates literally around the globe (ACLJ 2012e). Founded by Evangelical Pat Robertson in 1990, the law firm offers legal assistance in its chosen field of specialization: American constitutional law, European Union law, and human rights law (ACLJ 2012c). In America, its main focus is on the freedoms of speech, assembly and religious exercise laid down in the 1st Amendment of the Constitution (ACLJ 2012a). The law firm engages in a variety of issues, such as national security, human life, marriage, judicial nominations, pornography, and patriotic expressions like the National Motto and the Pledge of Allegiance (ACLJ 2012b). The organization does not charge its clients, but says it depends "upon God and the resources He provides through the time, talent, and gifts of people who share our concerns and desire to protect our religious and constitutional freedoms" (ACLJ 2012c). The ACLJ litigates in state and federal courts across the US, and has a special focus on the US Supreme Court (ACLJ 2012d). This chapter will present the history and the scope of the ACLJ, beginning with its founder, Pat Robertson. Perhaps best known in the political world for his run for presidency in 1988, Robertson serves as a good illustration of the holistic Evangelical approach, which in his case involves broadcasting, publications, fund raising, lobbying, education, and law firms. Although my inquiry focuses on the ACLJ, the fact that these 'means' enforce each other should stand as a backdrop. I will also spend some time on Jay Sekulow, who since 1992 has been the ACLJ's Chief Counsel. Sekulow's rhetorical and litigation skills leave no doubt that he has played a major role for the law firm's development and success. The chapter then continues by describing the law firm's key issues, stated goals, and main strategies. After a brief presentation of its international engagement, I will close with a short discussion of where the ACLJ fits into the wider landscape of society, using the model of the two public spheres drawn up in the introductory chapter.

Pat Robertson – the Founder

When Jerry Falwell and his allies organized the Moral Majority in 1979, Pat Robertson was not invited. According to Martin (1996:258), the main reason was theological: Robertson was a charismatic and exercised 'spiritual gifts', such as speaking in tongues, healing, and prophe-

sying. Like Falwell, many Evangelicals were skeptical to these kinds of religious expressions (see also Woodberry and Smith 1998:29). Nevertheless, when it comes to political engagement, Robertson has become one of the most prominent Evangelicals. The ACLJ is only one of his many enterprises – and should be considered a *part* of a greater whole.

The son of a conservative Democrat congressman from Virginia, Robertson had a good education at Washington and Lee. Despite his Baptist background – his grandfather was a preacher – he had no real interest in religion until the mid-1950s, when he had finished his studies at Yale Law School. He and his Catholic wife started to attend an Evangelical church, he had a "born-again" experience, and in 1961 he was ordained a Southern Baptist minister. By then, Robertson had received a Master of Divinity degree at New York Theological Seminary[30]. While attending the seminary, he was introduced to Pentecostalism and spiritual gifts, and he embraced it (Harrell 1988:23-57). Robertson pioneered Christian media by establishing the Christian Broadcasting Network (CBN) in 1960, airing its first TV program in 1961 and on radio since 1969. Financially the project was saved by *The 700 Club*, a daily TV show with telephone calls from viewers, prayer requests, and donations. By 1975, the CBN estimated that the program had some 65 million potential viewers. The same year, *The 700 Club* was aired abroad for the first time. In subsequent years the CBN expanded both nationally[31] and internationally, not least thanks to the successful fund raising programs (Harrell 1988:69-94).

When it came to politics, Robertson was long ambivalent. The 1980s, however, became a politically intense decade. In 1981, he established the Freedom Council to fight for "the rights of believers, and to teach evangelical Christians, primarily, but also Orthodox, Jews and Roman Catholics, how they could be effective in the political process" (Robertson quoted in Martin 1996:259). When Robertson – in accordance with 'God's plan'[32] – ran for presidency in 1988, the Freedom Council played a major role in mobilizing his supporters, financed primarily through the CBN. Catching many by surprise, Robertson won some minor states, but lost the Republican candidacy to George H. W. Bush (Martin 1996:260-292). To follow up and broaden the successful grassroots network developed during the campaign, Robertson established the Christian Coalition in 1989 (Martin 1996:299-302). This was a non-denominational lobby group,

[30] This seminary was one of the new schools founded around the turn of the century in response to the liberal shift in many of the older schools.
[31] Robertson's CBN Cable Network (renamed CBN Family Channel in 1988), was bought by media magnate Rupert Murdoch – a supporter of Robertson in his 1988 run for presidency – in 1997 on condition that it would continue to air *The 700 Club* (Fabrikant 1997). The network is now owned by Disney, and it still airs Robertson's *The 700 club* (see http://abcfamily.go.com/schedule).
[32] According to Robertson, God's plan was "for his people to take dominion" (quoted in Martin 1996:268).

which in addition to Evangelicals also included Catholics, Mormons, black conservative Protestants, and conservative Jews (Woodberry and Smith 1998:46).

Robertson founded his first law firm, the National Legal Foundation, in 1985, but due to a split, he left the firm in 1988 (Martin 2008:347). The effects of his initiative can still be felt, though, as the Foundation has continued to litigate for 'religious freedom' (NLF 2012). By the mid-1980s, Robertson had obviously discovered that litigation was an efficient strategic tool. In addition, he was concerned about the effect on society from the liberals' use of this tool. In a book published in 1986, he complained that the ACLU had suppressed the rights of the majority by pressing forth the rights of a minority. Among the harmful effects of their litigation, he pointed to the teaching of evolution and the ban on prayer and Bible reading in public schools (1986:190-195). Robertson, in other words, followed the same argument as Falwell and his companions when they established the Moral Majority in 1979: the Christian majority in America had been silent long enough (Marquand and Nettler, 2000:80). Later, Robertson wrote about his reasons for establishing yet another law firm, the ACLJ:

> I founded the American Center for Law and Justice in 1990 to fulfill my heart cry over the sorry state of religious freedom in our land. Before then, believers had been terrorized by the American Civil Liberties Union, which had set as its mission the destruction, under the guise of "liberty", of every public expression of faith in America (Robertson 1993:125).

The ACLJ's strategy was to expose the ACLU as "an advocate of crime, pornography, atheism, and socialism" (Robertson 1993:126). In a time when the ACLJ had already experienced its first wins at the Supreme Court, Robertson seemed optimistic. Recognizing that the project of changing the judicial system was enormous, he still seemed to see it within reach: "With the wind of virtue, the strong will of the people, and the reassurance that our case is just, we shall prevail. The wind is at our back, and the tide is turning" (Robertson 1993:127).

Jay Sekulow – the Leader

The most prominent spokesman of the ACLJ is its Chief Counsel, Jay Sekulow, a respected lawyer of Jewish background. At the age of 18, he became a Messianic Jew thanks to the activity of a group called Jews for Jesus[33]. Twelve years later he defended the same group in his first Supreme Court case, *Board of Airport Commissioners of Los Angeles v. Jews for Jesus* (1987). Here the Court agreed with Sekulow that the Airport's ban on distribution of religious material was unconstitutional (Brown 2002:37-38). Since then, Sekulow has argued eleven cases before the Supreme Court, some of which have set precedent (ACLJ 2012f) (see attachment 1). The

[33] A group of Messianic Jews focusing on converting Jews. Sekulow became a member of the Jews for Jesus' board of directors, and in 1986 he became their General Legal Counsel (Sekulow 2005).

ACLJ web page informs that Sekulow has been recognized by various magazines as one of the top lawyers in the United States, and the Time Magazine has identified him as one of the "25 most influential Evangelicals in America" (ACLJ 2012f).

Hired by Robertson in 1992, Sekulow has championed a free speech defense for religious expression in public places. He has defended various religious groups, including Jews, Hare Krishnas and Scientologists (Hacker 2005:19). This somewhat tolerant approach has been criticized by some Evangelicals, but Sekulow explains his position as a natural consequence of his strategy of arguing these cases as questions of *free speech*. "I often surprise some of my Christian friends on issues like flag burning," he said in an interview. "If you can't burn it, the liberty behind it is meaningless" (Hacker 2005:19). Sekulow began using the free speech strategy when he represented Jews for Jesus at the Supreme Court in 1987. In those days, Evangelical lawyers typically centered their arguments on the Free Exercise Clause (see chapter 2). As these arguments bore little fruit, Sekulow saw a need for a different approach to religious literature distribution cases. At the Supreme Court he based his whole argument on the Free Speech Clause, hardly mentioning religion at all, and the Court unanimously accepted his argument (Sekulow YouTube 2011a). A few years later, in *McConnell v. FEC* (2002), Sekulow defended the right of 17 year old students to make contributions to political campaigns. In a video presentation he says: "All nine justices again agreed with my free speech argument. … It showed that a strategy on free speech could work, no matter whether it was religious speech, political speech... It worked!" (Sekulow Youtube 2011b:min.03:03-03:51). Sekulow promotes a liberal understanding of rights, and sees it as part of the ACLJ's responsibility to educate conservative Christian leaders on how to approach the courts (Hacker 2005:24). As litigator he has been accused of being rude and aggressive. "The Supreme Court was used to Christian lawyers being meek, mild, and manageable," he has stated. "I'm reasonable fanatic" (quoted in Hacker 2005:19).

The Staff

Robertson's approach has been in line with what Schaeffer described as cobelligerency ('co-fight'). His enterprises not only demonstrate the shared values existing among various conservative (Judeo-)Christian groups, but have also established an arena on which these groups can work together to pursue their common goals. Robertson's desire to cooperate with all Christians who share his concerns is reflected in his choice of Keith Fournier, a Roman Catholic lawyer, as the ACLJ's first Executive Director. A champion of Evangelical-Catholic cooperation, Fournier described himself as "an evangelical Catholic Christian" in his first book, *Evangelical Catholicism*, published one year before he began his work at the ACLJ (1990:11). His main

project was to fight abortion, and he had entered law school in order to overturn the landmark abortion case, *Roe v. Wade* (1973), "the infamous decision which opened the door to the Culture of death" (Fournier 2010). Like Sekulow, Fournier ascribed the ACLJ an important role in the battle for traditional values. His choice of words is instructive: "I see the litigation efforts of groups like the ACLJ as the sword. They help us fend off the social marauders, those who are stripping away the remnants of civilization, suppressing people of faith, and substituting a new culture in the United States" (quoted in Brown 2002: 39). Fournier left the ACLJ in 1997 after he had been ordained a deacon (Fournier 2010).

The ACLJ asserts that its attorneys are "some of the foremost legal experts on freedom of speech, religious freedom, and human rights law in the world" (ACLJ 2012h). In 2004, the ACLJ had 44 full-time attorneys across the nation, 100 support staff, and a budget of more than $30 million per year (Hacker 2005:28)[34]. Its present eleven senior attorneys include both Catholics and Protestants. Two of them – like Sekulow – are former students at Regent University, an institution established by Pat Robertson[35] in 1977 under the name CBN University. The CBN University gradually expanded, and opened its School of Law in 1986, one year after Robertson established his first law firm[36]. The university's new name from 1990 – *Regent*[37] – illustrates its goal, which is also found its motto: "Christian Leadership to Change the World". From having 70 students in 1978, Regent now has more than 5500 (Regent Uni. 2013a). The School of Law boasts of "more than 2,700 alumni practicing law in 47 states and overseas, distinguishing themselves as judges and judicial clerks, partners and associates in law firms, mayors and legislators, and in positions with government agencies and public interest organizations" (Regent Uni. 2013l). As a Distinguished Professor of Law, Sekulow teaches courses in Supreme Court history and constitutional law (Sekulow's Blog 2013). Other ACLJ attorneys also teach at Regent, and various practical programs work to establish ties between students and the ACLJ (Regent Uni. 2013i; 2013b).

The close cooperation between Regent University and the ACLJ opens a way for the ACLJ to 'shape' future lawyers[38], be it values, legal interpretations, or experiences. This can be illustrated by the second most prominent figure in the ACLJ, Jordan Sekulow, son of Jay

[34] I have not succeeded in finding more recent data on this.
[35] Robertson is still central to the Regent leadership, being its Chancellor and Chief Executive Officer (Regent Uni. 2013j). Together with him in the Board of Trustees are, among others, Jay Sekulow and Robertson's wife, Dede (Regent Uni. 2013k).
[36] Regent University now consists of seven graduate schools, all of which offer "fully accredited master's and doctoral degrees": Business and Leadership; Communication and the Arts; Divinity; Education; Government; Law; and Psychology and Counseling (Regent Uni. 2013h)
[37] The name refers to a king's *regent*, "one who represents a king in his absence". The king in question is Christ, who is to be represented "in whatever sphere of life [one] may be called to serve Him" (Regent Uni. 2014a).
[38] Several former Regent students have worked for the ACLJ (see e.g. *In Brief* #4; CEJS 2014; Alumni Association 2013)

Sekulow[39]. A former graduate at Regent's School of Law, Jordan Sekulow is now Executive Director of the ACLJ. On his way, he has gained experience with the other governmental branches, for instance as an internee under Attorney General John Ashcroft; as National Youth Director for George W. Bush's 2004 campaign; and in 2008 as a consultant to Mitt Romney. As the ACLJ Executive Director he "oversees much of the ACLJ's international work, engaging with government officials and international leaders on human rights issues around the world" (ACLJ 2012i). In addition, he is made visible as a representative for the ACLJ through the media, e.g. as a guest commentator in national TV news programs (ACLJ 2012u).

Key Issues, Goals and Strategies

The goal of the ACLJ is to ensure that certain religious and political values and interests are protected by law. The ACLJ frequently refers to key words like *freedom* and *liberty*, which it describes as "universal, God-given and inalienable rights that must be protected" (ACLJ 2012c; 2012q). The law firm engages in a variety of fields, presenting its main issues as: holidays, church/state, churches and organizations, education, equal access, free speech, health care, international human rights, federal judiciary, military rights, national security, pornography, prayer, pro-life, and workplace (ACLJ 2012j). Analyzing the ACLJ's litigation participation from Sekulow's first case in 1987 till 2004, political scientist Hans J. Hacker found that its main efforts have been directed towards three areas: state/church issues related to schools; state/church issues related to public places; and pro-life protesting. Of the ACLJ's 193 litigation involvements in the period, more than half concerned state/church issues. In the mid-1990s, abortion cases were the most frequently argued (2005:40-42).

According to Hacker, the ACLJ does not work to overthrow secular society. Instead its aim is to safeguard the voice of religion in the social discourse (Hacker 2005:36-37,147). By presenting the Christian voice as one among many in a pluralist society, the ACLJ seems to have left the rhetorical strategy of depicting conservative Christian claims as "majoritarian politics", as was the choice of Falwell for his Moral Majority, and Robertson in his 1986 book (see above). Instead, the ACLJ argues its causes by presenting Christians as a "protected minority", and by using civil rights-era rhetoric (Hacker 2005:37). While the actual size of the Evangelical movement is debated – much depending on how you measure it (see Hackett and Lindsay 2008) – the ACLJ nevertheless sees it as its job to ensure that the church can fulfill its gospel mission in the world. One strategy it employs to achieve this goal, is to make the

[39] To avoid confusion, I refer to Jordan Sekulow by his full name. When writing Sekulow, I mean Jay Sekulow.

Christian worldview "accepted in the marketplace of ideas as a legitimate expression" (Sekulow quoted in Hacker 2005:27).

According to Sekulow, "it is ultimately the courts which decide the scope of religious liberties in America" (quoted in Hacker 2005:26). The composition of the federal courts therefore receives much attention from the ACLJ, which engages in debates and seeks to influence the nomination processes[40]. Just as Schaeffer did some 35 years ago, the ACLJ accuses liberal judges for turning their personal political agenda into a legislative project, thus being responsible for "many of the ills that plague our society" (ACLJ 2012k). To put pressure on the Senate in the confirmation process, the ACLJ urges its supporters to call Senators to inform them about their opinions, and to encourage their friends, associates and church members to do the same. To help them on the way, the ACLJ provides information about where they can find the Senators' phone numbers (ACLJ 2012k). On the ACLJ web pages one can also find analyses of the judicial nominees, as well as updates about the process and the result – and perhaps a salute of gratitude, as in the case of a liberal judge nominated by president Obama for a federal appellate court, but eventually rejected by the Senate: "Thanks to all of you who picked up the phone and called your Senator, urging the defeat of this nomination" (Sekulow 2011a). This is one example of how the ACLJ may play a central role in the organizing of pressure groups.

In addition to sponsoring cases, the ACLJ actively tries to influence the courts' decisions through amicus briefs. The law firm claims to have "one of the most effective amicus brief programs in the nation" (ACLJ 2012d).

> We file amicus briefs before the Court on behalf of Members of Congress and hundreds of thousands of American citizens each year. Our amicus briefs have been cited in numerous Supreme Court and lower court opinions as our practice continues to shape and influence the legal landscape on behalf of the values and principles held by our members. (ACLJ 2012d)

In his analysis of the ACLJ's litigation participation from 1987-2004, Hacker found that the law firm's activity reflected its goal of shaping policy at a national level. Its main efforts were clearly directed towards federal courts (179 of its 193 litigation involvements[41]). In most cases (124 of 193) the ACLJ participated as case sponsor (client representation in court). Twelve of these were Supreme Court cases, and 103 took place in lower federal courts. In addition, the ACLJ filed 56 amicus briefs, including 31 to the Supreme Court. The predominance of the amicus strategy – i.e. to join

[40] The ACLJ assertedly played a major role in the confirmation process of two new conservative Supreme Court justices: the new Chief Justice, John Roberts (2005), and Justice Samuel Alito (2006) (*In Brief* #4:3-4. See also Sekulow 2006).

[41] The numbers refers to participations, not cases (i.e. one case may involve participation in more than one court).

others' cases – at Supreme Court level is related to the difficulties of getting a case all the way to the Court (see chapter 2). The ACLJ may also contribute with counsels to one of the involved parties or cover parts of the costs. Most disputes that are brought to the ACLJ, however, are settled by letters or phone calls – not seldom with the threat of a law suit (Hacker 2005:25, 40-43).

The ACLJ frequently utilizes the media to promote its views. Sekulow runs a daily national call-in radio program, *Jay Sekulow Live!*, which is also streamed live on the ACLJ web site. In addition, he hosts a weekly TV program, *ACLJ This Week*, and is – like his son Jordan – frequently seen on national TV news programs, like CNN, CBN, and FOX news (ACLJ 2012f; 2012i; 2012m; Fox News Archive). The ACLJ sends out regular newsletters (e-mails) with updates on current issues[42] and pleas for financial support, sometimes announcing that "[g]enerous donors have agreed to match every online gift. Give today and double your impact" (ACLJ newsletter 07/03/13). It starts petitions – for instance against 'the ObamaCare sponsoring of abortion-pills', which by 04/10/14 had some 165.370 online signatures (ACLJ 2012l) – and is visible on Twitter and Facebook, with more than 36.200 followers and 537.230 likes (04/10/14). The ACLJ also attempts to educate the public through more traditional means, like letters, articles, booklets, and other publications (see e.g. ACLJ 2012n).

Interaction with the Other Branches of Government

Pursuing its goal of ensuring legal protection of conservative values and interests, the ACLJ does not only direct its efforts towards the judiciary. Through its Governmental Affairs Office in Washington D.C.[43] it also interacts with the legislative and executive branches. The office is headed by Nathanael Bennett, who was linked up with the White House in 2000/01 by serving on the Transition Team of President George W. Bush (ACLJ 2012g). The ACLJ lawyers participate in the drafting of laws and act as consultants on political issues (Hacker 2005:29). For instance, Sekulow helped drafting the Defense of Marriage Act (DOMA), which was signed into law by President Bill Clinton in 1996 (Hacker 2005:39). The purpose of the DOMA was to "define and protect the institution of marriage". The act allowed states to reject other states' recognition of same-sex couples as 'married' – that is, the act recognized the states as autonomous in this question. Further, the DOMA defined the federal use of "marriage" as a legal union between one man and one woman, and "spouse" as a person of the opposite sex

[42] The ACLJ newsletters – each usually sent out twice – contain short reminders of issues in need of support, such as the pro-life battle, the threat of Sharia laws, an imprisoned American pastor in Iran, attacks on public religious symbols, or President Obama's support for the Muslim Brotherhood.
[43] According to Hacker (2005:29), Sekulow established the office when Bush became president in 2001.

(DOMA 1996). In 2013, the Supreme Court ruled that these definitions were unconstitutional as they deprived homosexual couples of federal marriage benefits (USA.gov 2013).

In light of the ACLJ's rhetorical emphasis on freedom and liberty, it may come as a surprise that Sekulow drafted the USA PATRIOT Act (see Hacker 2005:29). "I worked hard on the PATRIOT Act during the aftermath of 9/11, so, I support the PATRIOT Act," he recently said in a comment on Fox News (2013:min.02:30-40). The Act, which was designed "to deter and punish terrorist acts in the United States and around the world, to enhance law enforcement investigatory tools, and for other purposes"[44], was signed into law by President George W. Bush in October 2001, less than two months after the 9/11 attacks. As Bush's Attorney General from 2001 to 2005, John Ashcroft played a leading role in enforcing the act. When he resigned in 2005, Ashcroft became Distinguished Professor of Law and of Government[45] at Robertson's Regent University, a position he still holds[46] (Regent Uni. 2013c). While liberal groups has criticized the USA PATRIOT Act for taking away the 'checks on law enforcement' and for threatening basic civil rights and freedoms (see e.g. ACLU pdf), Ashcroft, as well as Regent, has repeatedly defended the act as both necessary and successful (see e.g. Ashcroft 2003; CNN 2003; Regent Uni. 2013c; 2013f). As Professor of Law, Ashcroft teaches a course on civil liberties and national security at the university's International Law & Human Rights program, a summer course held in Strasbourg, France (Regent Uni. 2013d, 2013e). More than just formally related to Regent, Ashcroft is a firm supporter of its ideology. In a promotion video on YouTube titled *Equipping Leaders to Change the World: Regent University*, Ashcroft appears as one of the main spokesmen, stating that "God has not given us the spirit of fear, but of power – authority; of love – compassion; and of a sound mind – rationality" (Regent YouTube 2009a:min.00:54-01:05). The video closes with his somewhat ambitious words: "Individuals who have had the opportunity to pursue truth at Regent will be so well equipped and so sufficiently endowed with purpose that they'll change the world into which they go" (Regent YouTube 2009a:min.02:28-02:40). The USA PATRIOT Act has demonstrated that this is more than just a poetic expression.

[44] The quote is taken from the Act's introduction, which is a short description of its purpose. Among other things, the Act allowed investigators to fight terrorism with tools that have earlier been used against organized crime and drug trafficking (e.g. wiretapping), and increased penalties for terrorism and engagement in conspiracies (DOJ 2014).
[45] Ashcroft teaches at the School of Law and at the School of Government. His fields of expertise are listed as 'constitutional law and Supreme Court' and 'terrorism and homeland security' (Regent Uni. 2013c; 2013g).
[46] The relationship between Regent and Ashcroft dates back at least to 1993, when the University gave him an honorary doctorate of humane letters (Regent Uni. 2013c).

International Engagement

A major reason for the ACLJ's international engagement is the use of international laws by some Supreme Court justices to interpret the US Constitution, and their reference to international court decisions in their opinions. The ACLJ strongly opposes this trend.

> We need to continue to pressure these justices, but they're appointed for life. (...) Nominating the right justices to the courts is essential. As I said, we've got offices in Europe; if that's going to be the trend, we're going to be there fighting it out in Europe as well (ACLJ 2012s; see also Hacker 2005:33).

The ACLJ claims to reach across more than 35 countries (ACLJ 2012o). It has opened affiliate offices in France (1997), Russia (1998), Israel (2009), Pakistan (2009), Kenya (2010), Zimbabwe (2010), and South Korea[47] (2011) (ACLJ 2012b). Like many Evangelicals, the ACLJ is a firm supporter of Israel. It works in Congress, at the UN, and with Israeli officials through its Jerusalem office to defend the Jewish nation (ACLJ 2012p). Recently, a team from the European office, headed by Sekulow, successfully defended Israel before the International Criminal Court against charges of war crime brought by Palestinian authorities (Clark 2012a).

The European Centre for Law and Justice (ECLJ) is the ACLJ's most important affiliate. With offices in Strasbourg, the ECLJ is strategically located in the city where we find the seat of the Council of Europe and the European Court of Human Rights[48]. The ECLJ by and large follows the same goals and strategies as its American counterpart. It describes itself as a "Christian-inspired organisation" which bases its action on "the spiritual and moral values which are the common heritage of European peoples and the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy" – a direct quote from the preamble of the Statute of the Council of Europe. The ECLJ says it has a special focus on "the protection of religious freedoms and the dignity of the person", and it directs its main efforts towards the European Court of Human Rights, the Council of Europe, the European Parliament, the Organization for Security and Cooperation in Europe, and the United Nations (ECLJ 2013a). The ECLJ was founded by Jay Sekulow, who is also its Chief Counsel, and Thomas P. Monaghan, an ACLJ Senior Counsel who has worked with Sekulow since 1986, and now oversees the ECLJ (ACLJ 2012g). Like the ACLJ, the ECLJ is staffed with both Protestant and Catholic lawyers (Rossoporpora 2014). Grégor Puppinck, a former teacher of human rights, international law and constitutional law at the University of Haute-Alsace School of Law, is the ECLJ Director General (ECLJ 2013a; OSA 2012). In 2007, the ECLJ was granted Special Consultative Status with the United Nations. This has opened a way for participation in bodies

[47] The ACLJ also partners with Handong International Law School in South Korea (Sekulow 2011b).
[48] The Court supervises the enforcement of the European Convention of Human Rights (i.e. individuals' rights).

like the Human Rights Council, the General Assembly, and the International Criminal Court. One major activity of the ECLJ at the Human Rights Council is to produce regular reports on the status of religious freedom in various UN member states. It has promoted the cause of persecuted Christians in Muslim countries, and has argued against Islamic anti-blasphemy laws (ECLJ 2013b; Barrans 2011). The ECLJ's main representative at the UN is Nathanael Bennett, who is also the director of the ACLJ's Governmental Affairs Office in Washington D.C. (ACLJ 2012r). At the first glance, then, the ACLJ may seem distant from the lobbying at the UN, since this is part of the ECLJ's activity. It is nevertheless the same person involved, thus linking the law firm's efforts towards the UN with its efforts towards the US government in Washington.

The Two Faces – a 'Mediator' and a 'Gateway'

In the introductory chapter, I drew up a model based on Habermas' ideas of the role of religion in the political public sphere, i.e. how religion may contribute to the forming of public opinion and will (2005:12-15). This model distinguishes between two types of public spheres: a *formal* (i.e. the political debate at the institutional level of parliaments, courts, and administrations), and an *informal* (i.e. the political debate in society at large). As we have seen in this chapter, the ACLJ clearly seeks to influence the opinion and will of both spheres. According to Rawls, whose ethics of citizenship works as a starting point for Habermas' discussion, religious arguments are not legitimate reasons in the public sphere. Habermas, on the other hand, opens for the use of religious arguments in the informal public sphere, but sets as a condition that these must be translated into a neutral (i.e. secular) language in order to enter the formal public sphere, e.g. a court. This model serves well to illustrate how the ACLJ works in the field of litigation, as well as its position within the American society.

As a non-governmental organization, the ACLJ belongs to the informal public sphere. However, as a professional law firm it also interacts directly with various governmental institutions, for instance when it tries to convince a court to adopt its arguments as a basis for a ruling, or when it participates in the drafting of a new act. In other words, to promote their causes, the ACLJ contributes to the political debates of both public spheres. This twofold role can be illustrated by the image of Janus[49], the Roman god with the two faces (see attachment 2). The two faces of Janus points in opposite directions. For the sake of visualization, we can imagine that one of the faces is directed towards the informal public sphere, while the other points towards the formal public sphere. The arguments, coming from either the one mouth or

[49] I want to stress that it is the *image* of Janus that is used for my illustration, not the god himself, his status as a god, or the myths concerning him.

the other, will thus be aimed at their specific sphere. An important point is that these arguments may be similar, or they may differ. The formal public sphere, however, will reject certain types of arguments, namely those that cannot be accepted by the whole society as legitimate justifications for a law or a ruling. This places certain restrictions on the face that is directed towards the governmental institutions. We can, like Habermas, think of it as a filter (2005:15). The other face, though, has no such restrictions. In theory, it could follow the scheme of Rawls and omit religious arguments altogether. However, in the case of the ACLJ this is not really an option. The face that is directed towards the informal public sphere needs religious arguments, not only to catch the attention and gain the support of Evangelicals and other conservative Christians in the US, but also to influence their opinion; why they ought to support a certain cause, or how they could most effectively take action. Put short, the ACLJ needs to speak in both directions because it targets both directions[50].

Janus was associated with passageways, bridges and doors (Morford and Lenardon 2009:665). This aspect of the two-faced god may serve to illustrate how the ACLJ works as a 'gateway' for religious arguments, or perhaps more precise, for religious *causes* to enter into governmental institutions in the form of neutral, secular arguments. The ACLJ can thus be said to function as a 'mediator' between the Evangelical movement and the formal public sphere, e.g. that of a secular court. The key to understand the ACLJ's role – and its influence – is found in the fact that governmental institutions *need* secular arguments to formulate and justify their decisions (comp. Habermas 2005:13). Regardless of what the decision is about, it must be legitimated in a neutral language. Hence, when the ACLJ gives its contribution of arguments to the courts, what it often provides is a secular justification for a religious cause – which the court can choose to adopt (because of its neutral language), if it concurs. In the subsequent chapters I will explore how the ACLJ translates its religious and moral causes into a neutral language, and how these arguments are received by (per definition) secular courts. I will look at two of the fields in which the ACLJ is most heavily engaged: the fight against abortion, and the protection of public religious expressions (church/state issues).

[50] To be sure, I do not say that the ACLJ does not use secular arguments when it addresses the informal public sphere. It most certainly does – on its web page, in its publications, or when interviewed by the press. My point, however, is that the law firm also needs religious arguments in order to speak a language that religious people understand. This is similar to how many leading American politicians use a religious language in their campaigns to attract certain voter groups (see chapter 1). The ACLJ may for instance employ a language that is directly religious when it presents its former victories in court, as can be illustrated by a statement made by Sekulow in an official ACLJ video on YouTube. Commenting on the Supreme Court decision in *Board of Educations v. Mergens* (1990), the ACLJ leader says: "It wasn't just a little victory. It was eight justices out of nine. What does that say? God answers the prayer of his people" (Sekulow, YouTube 2011:min.02:34-02:43).

4 Defending the Rights of the Unborn

> The issue of abortion is not one divided along religious lines. And it has nothing to do with the separation of church and state. Certainly it is not by any means uniquely the Roman Catholic issue that the pro-abortionists pretend. The right of people to exercise their view of life and death to those who represent them in the democratic process, and to be heard in the courts, rests only on their being citizens and on being human beings. Abortion is not only a religious issue. It is a human issue.
>
> Francis Schaeffer, *Whatever Happened to the Human Race?* (1979:min.35:23-36:00)

In the early 19th century, abortion was rather uncommon in the USA. This changed, however, in the mid-century, with abortion numbers peaking in the 1860s and 1870s (Sauer 1974:53-54). From 1850 to 1880 – parallel to the increase in abortion rates – most states adopted laws that made abortion a crime. In addition, the federal Comstock Act of 1873 banned the distribution, mailing, and import of contraception and abortion articles. In some states these regulations were made even stricter. Largely due to the efforts of the women's rights movement – litigation being one of their main tools – the 1950s and 1960s saw an increasing liberalization of the 19th century state laws on women's reproductive health. By 1970, four states had legalized abortion, while another twelve had made their laws more liberal (Eskridge 2002:2117-2123). The early resistance against the efforts to reform and repeal the abortion laws was predominantly Roman Catholic (Epstein 1985:94-95). As we saw in chapter 1, it was not until the late 1970s that abortion became a major Evangelical issue[51]. The mobilization of Evangelicals into pro-life politics and action en masse was largely a result of books, films, and appeals made by leading figures, like Graham, Schaeffer and Koop (Martin 1996:156,239). Today the issue of abortion is prominent as a matter of faith, and the anti-abortionists frequently invoke the constitutional right to religious liberty in support of their claims.

In this chapter, I will look at arguments presented by the ACLJ and its European affiliate, the ECLJ, in and outside courts concerning abortion. Since the law firms' activity – as well as the Evangelical mobilization and engagement in general – can only be properly understood in light of the historical development, I will first give an overview of the history of

[51] This development can be illustrated by the Southern Baptist Convention's resolutions on abortion. In 1971, a clear majority supported a resolution which encouraged SBC members to "work for legislation that will allow the possibility of abortion under such conditions as rape, incest, (…) severe fetal deformity, and (…) likelihood of damage to the emotional, mental, and physical health of the mother" (SBC 1971). The 1974 resolution confirmed this "middle stand", while later resolutions increasingly emphasized the Christians' duty to work for legislation and a constitutional amendment prohibiting abortion, the only exception being "to save the physical life of the mother" (SBC 1982). In the 1980s, the resolutions begin to include medical and biblical references to life beginning at conception, the disastrous effects of abortion on society, the high number of innocent, unborn babies murdered daily, and, from the 1990s, opposition to taxpayer funding of this misdeed. Abortion is described as a "national sin" (SBC 1984), and later – like Communism in the mid-20th century (see chapter 1) – a reason for God's judgment (SBC 1996). In 2003 the SBC renounced the 1971 and 1974 resolutions, blaming its former leaders for blindly adopting the unbiblical pro-choice agenda (SBC 2003; 2013).

abortion in US law, including the most important Supreme Court cases, before I briefly present the ACLJ's involvement in the issue. A European case, *A, B and C v. Ireland*, serves to illustrate the law firm's international engagement. The chapter's main focus will be on the controversy about the Affordable Care Act ('ObamaCare') and the so-called 'abortion pill'. After a short presentation of the most central arguments used by the ACLJ in the informal public sphere, I will take a closer look at their argumentation in one federal court case, *Korte v. U.S. Department of Health and Human Services*. This case was chosen for two reasons: First, it represents a current controversy in the US in which the ACLJ has taken a leading role. Second, it is one of seven similar ACLJ cases involving the issue, and perhaps the one that is mentioned most frequently by the ACLJ itself, thus making its documents readily available online. The 'abortion-pill' controversy will here be used to show how the ACLJ relates to the Evangelical movement and its causes in three important ways.

Abortion in US Law and Courts

When Schaeffer in his *Christian Manifesto* complained about how the American society had replaced God's principles with a secular humanist worldview, he referred to a 1973 abortion case, *Roe v. Wade*, as the clearest illustration of the resulting relativism of law (1981:48). *Roe* was a landmark decision in which the Supreme Court ruled that a 19th-century Texas law, which prohibited all abortions except to save the life of the mother, was unconstitutional. The Court held that the law deprived women of their 14th Amendment due process liberty[52] to control their body and to terminate pregnancy in the first trimester (Eskridge 2002:2124). One hundred years after the federal Comstock Act (1873) banned trade and circulation of abortion devices and other 'immoral articles', abortion was no longer considered a crime, but – with some limitations – a constitutional right. The Supreme Court's decision had implications for abortion laws in all 50 states. In view of these abrupt changes, it is perhaps not so difficult to understand the sense of relativism experienced by Schaeffer and other Evangelicals. The way to *Roe*, however, was a long one. Failing to influence the legislature, and inspired by the civil rights movement, the women's right movements turned to the courts in an effort to abolish the Comstock Act and the various state bans on abortion (Eskridge 2002:2120).

The development that led to the changes in US abortion laws began with a gradual acceptance of contraceptives. In 1916, Margaret Sanger, a prominent spokesperson for the cause, opened the first birth control clinic in the US. She was soon sentenced to jail together

[52] The 14th Amendment guarantees all federal privileges and immunities to all US citizens, and declares that no state shall "deprive any person of life, liberty or property, without due process of law" (see also chapter 2).

with her sister for violating a New York ban on distributing articles of indecent and immoral use. The Supreme Court declined to review her appeal as the issue in those days was not considered a federal question. The state court nevertheless held that the New York law allowed physicians to prescribe contraceptives to treat disease. In the 1930s, as a result of several state and federal court rulings, contraceptives were increasingly recognized as means to promote health and save lives. By 1940, there were birth control clinics receiving public funds in 36 states, while another ten states allowed privately run clinics. Then, in *Griswold v. Connecticut* (1965), the Supreme Court decided that married couples have a constitutional right to family planning and agreed sexual intercourse without governmental interference. In *Eisenstadt v. Baird* (1972) this right was broadened to include unmarried couples, thus underlining that the right belonged to each individual regardless of marital status (Eskridge 2002:2118-2122).

The influence of *Griswold* reached further than the use of contraceptives. Various lower courts interpreted the Supreme Court ruling to protect even the right of single women to terminate pregnancy. Such broad interpretations implied that the states' abortion laws were against the Constitution. In 1973, the Supreme Court agreed to review two such cases, *Roe* (see above) and *Doe v. Bolton*, the latter involving a recent Georgia law allowing abortion on certain conditions when approved by a hospital staff committee. The very moment the Supreme Court declared these state laws unconstitutional, a woman's right to choose whether to continue or terminate pregnancy was established as a citizen right protected by the Constitution[53]. The ruling did not, however, settle the controversy between pro-abortionists and the growing pro-life[54] movement. The following decades both Catholics[55] and Evangelicals lobbied Congress, mobilized their members to vote for conservative political candidates, and addressed the courts in an effort to overturn *Roe*, or at least to influence the judges to give it a narrow interpretation. Like the pro-abortionists, the opponents of abortion employed constitutional arguments, claiming that the legislature – not the judiciary – should decide such sensitive questions; that morality and family issues were not under federal, but local (i.e. state and family) authority; and that the abortion-protecting rules suppressed the rights of fetuses and parents. In *Maher v. Roe* (1977) the Supreme Court held that women, despite their right to abortion, were not entitled to have it paid for by the state. Although new justices appointed by President Reagan made the court more conservative in the 1980s, the anti-abortionists still failed to overrule *Roe*. Then, in *Webster v. Reproductive Health Services*

[53] As in *Griswold*, the Supreme Court opinion in *Roe* held that the Texas law was a violation of the Due Process Clause of the 14th Amendment (*Roe v. Wade*, Opinion, 1973). See footnote 52.
[54] A name used by the anti-abortionists to emphasize that their fight is for right of the 'unborn baby' to live.
[55] An example of the Catholic engagement to fight abortion is found in the effective lobbying activity of the U.S. Conference of Catholic Bishops in Congress (see Basset 2011).

(1989) and *Planned Parenthood v. Casey* (1992), the Supreme Court acknowledged the states' interest in protecting (potential) life, and opened for certain regulations as long as these did not place a substantial obstacle in the path of a woman seeking abortion of a fetus incapable of surviving outside the womb. Acceptable regulations could be the requirement of as a woman's informed written consent or parental consent for minors (Eskridge 2002:2123-2151; Epstein and Kobylka 1992:283).

Both pro- and anti-abortionists have put pressure on Congress to pass laws that directly or indirectly protect and promote their cause. Compared to the high number of bills on abortion that have been proposed, relatively few have become law. A search for "abortion" in the Library of Congress gave 1642 hits from 1973 till present[56]. The number of proposed bills increased noticeably from the mid-1990s and has remained high. Proposals typically include restrictions on the legal performance of abortion and on its funding. The bills that have become law reflect the various interests that are involved in the abortion battle. Shortly after *Roe*, Congress extended the Public Health Service Act of 1944 to protect health care workers performing or assisting lawful abortions, as well as those who due to religious or moral convictions refuse to participate in such procedures. In 1978, an amendment to the Civil Rights Act (1964) exempted employers from paying health insurance benefits for abortions, except when the mother's life and health are endangered. The 1980s saw the rise of some more aggressive pro-life groups, like Pro-Life Action League (1980) and Operation Rescue (1986), typically blocking entrances to abortion clinics, protesting, and trying to persuade women not to enter. After being sued by the National Organization for Women, their activities were prohibited by court injunctions across the nation. In return, the pro-life protesters claimed that the injunctions violated their 1st Amendment freedom of speech. In *Madsen v. Woman's Health Center* (1994) members of Operation Rescue – supported by an ACLJ amicus brief – challenged the injunctions which prohibited their activities outside a Florida clinic. The Supreme Court upheld a 36 foot buffer zone outside the clinic, but invalidated restrictions that were too broad, thus underlining that the injunctions should not restrict speech more than was necessary to protect significant governmental interests (Eskridge 2002:2155-2156). About one month before this ruling, Congress passed the Freedom of Access to Clinic Entrances Act, which interestingly enough combines the protection of a woman's right to enter an abortion clinic (and to obtain an abortion), with the protection of a person's right to enter a place of religious worship to exercise his or her religious freedom. The

[56] The search (conducted 01/07/14) covered bills, laws, amendments and resolutions. The number of registers bills was 1301, peaking with 118 in 1995/1996. The number of laws was 156. A large number of the laws (and bills) only indirectly involve abortion. Typical is the prohibition of use of a certain fund for abortion.

act made it clear, however, that it did not prohibit peaceful demonstrations, picketing, and similar expressive conducts outside any of these facilities. In the Born-Alive Infants Protection Act of 2002, Congress defined the federal use of the words "person," "human being," "child," and "individual" to include every human infant born alive, also when as a result of abortion. The following year it banned 'partial-birth abortions', defined as late term abortion procedures in which the fetus is partially taken out of the womb and killed. The citizen rights of the unborn child was further strengthened by the Unborn Victims of Violence Act (2004), which made bodily injury to an unborn child or its death due to violence, a separate criminal offense. In addition, several laws indirectly restrict abortion by prohibiting the use of certain funds for abortion, including for population planning and health programs, both nationally and internationally. The establishment of these laws shows that Evangelicals, and their cobelligerents, indeed are capable of influencing societal development through the making of new laws.

The ACLJ's Involvement in Abortion Cases

Looking at Evangelical participation in Supreme Court cases from 1971-2000, Krishnan and den Dulk found that Evangelical groups have filed amicus briefs in every abortion case since 1989, and sponsored several of them, the ACLJ being one of the most active (2002: 249). In the mid-1990s, the ACLJ's agenda was dominated by abortion protestation cases, and for the most part the law firm participated as a sponsor. To comparison, it has been involved in few abortion rights cases, and then always as an amicus (Hacker 2005:41-43).

The dominance of abortion protestation cases in the 1990s was related to the increasing civil disobedience activities of certain Catholic and Evangelical groups, such as Operation Rescue (see above). To limit their activity, pro-abortionists filed several lawsuits, some of which went all the way to the Supreme Court. In his first Supreme Court abortion case, *Bray v. Alexandria Women's Health Clinic* (1993), Sekulow represented pro-life protesters who had been sued by abortion clinics for violating the Ku Klux Klan Act of 1871. The Supreme Court ruled in favor of the anti-abortionists as the law was aimed at class-based discrimination and could therefore not be applied. In two other Supreme Court cases, *Schenck v. Pro-Choice Network of Western New York* (1997) and *Hill v. Colorado* (2000), Sekulow again defended the free speech rights of pro-life activists outside abortion clinics, this time with mixed results. Commenting on *Schenck*, Hacker (2005) makes an interesting remark regarding Sekulow's way of litigating. While challenging injunctions that prohibited activists from gathering outside clinics ('fixed buffer zones') and around cars, patients, and employees ('floating buffer zones'), Sekulow nevertheless showed respect for previous Court rulings which had acknowledged a

right to abortion. He was, to use Hackers words, "willing to play by the rules of the court" in order to keep the door open for Christian protesters to perform their message (Hacker 2005:152). In *Schenck*, the ACLJ won a partial victory as the Supreme Court held that only the 'fixed buffer zones' were constitutional, while the 'floating buffer zones' violated the protesters' free speech rights. Later Sekulow represented Operation Rescue in a case that reached the Supreme Court twice (2003, 2006), again ruled in favor of the protesters.

In recent years the ACLJ has engaged in an economic strategy which it refers to as its "fight to defund the abortion industry and save the lives of countless unborn babies" (Clark 2012b). Various states have passed laws that prevent abortion clinics from receiving funds from 'taxpayer money'. Planned Parenthood, an organization whose roots go back to the clinic opened by Sanger in 1916, has responded with lawsuits[57]. The ACLJ has filed amicus briefs in several of these cases in support of the states (Clark 2012b, see also Weber 2013a). The ACLJ has also been engaged more directly in the making of restrictive state abortion laws. For instance, ACLJ Senior Litigation Counsel Walter M. Weber[58] drafted the Ohio Heartbeat Bill[59] together with a Catholic professor of law. Both defended a similar heartbeat bill – prohibiting abortion after the heart of the fetus has begun to beat – at a state legislative hearing in Kansas in March 2013 (Weber 2013b).

A leading European abortion case, *A, B and C v. Ireland* (2010), may serve as an illustration of the law firm's international engagement, in this instance through its European affiliate, the ECLJ. In 2005, three Irish female residents (A, B and C) challenged Irish abortion laws at the European Court of Human Rights (ECtHR). All women had become pregnant unintentionally, had an abortion performed in England, and had needed medical follow-up when they returned to Ireland. In addition, applicant C had recently been treated for a rare type of cancer, and had – not knowing she was pregnant – gone through some tests contraindicated during pregnancy. All women claimed that the criminalization of abortion posed a threat to their physical and mental health, as well as violated their rights in the European Convention on Human Rights (ECHR). The case was transferred directly to the Grand

[57] See e.g. http://pdfserver.amlaw.com/tx/planned_parenthood_complaint.pdf

[58] The cooperation between Catholics and Evangelicals on the issue can be further illustrated by how Weber, prior to joining the ACLJ staff, worked for the Catholic League for Religious and Civil Rights (ACLJ 2013g).

[59] The bill states that women who consider having an abortion, first must be informed whether the fetus has a heartbeat – the constitutionality of which is defended by a state's right to require an informed consent (established in *Casey*) – and that a fetus with a heartbeat is protected from being killed by an elective abortion (The Facts on H.B. 125). In May 2013, a federal district court placed preliminary injunctions on the then two months old Arkansas' Human Heartbeat Protection Act, which banned abortions after 12 weeks of pregnancy, except in cases of rape, incest, and threat to the mother's life. A month later, a slightly younger, but stricter ban from North Dakota was declared unconstitutional by another district court (Eckholm 2013).

Chamber of the ECtHR, with hearings in December 2009. Representing an Irish Member of the European Parliament, the ECLJ filed two amicus briefs[60], offering its support to the Irish government. In its brief, the law firm placed emphasis on Ireland's national sovereignty and its duty to protect the life of its inhabitants, including those not yet born. It also sought to show that neither international law nor the ECHR contain a 'right' to abortion. In December 2010, the Grand Chamber ruled that only applicant C's rights of the ECHR had been violated. The Court unanimously held that Ireland had failed to establish functional procedures that could determine if a woman had a right to abortion, a right which according to the ECtHR did exist in the Irish constitution when the mother's life was at stake (*A, B and C*, §264). Not surprisingly, both pro-abortionists and pro-life groups have published comments on the case, placing emphasis on the parts of the ruling which best support their cause[61]. On their web page, the ECLJ applauds the ECtHR for recognizing the "right to live for the unborn", for accepting Irish sovereignty, and for denying that there is a right to abortion in the ECHR. However, it strongly rejects the Court's claim that the Irish constitution allows for "lawful abortions", fearing that such interpretations will *force* Ireland to recognize a right to abortion (ECLJ 2010). In a Communication to the Committee of Ministers[62] at its Human Rights meeting in September 2012, the ECLJ gives its view of how to interpret the *A, B and C* judgment. While describing itself in the amicus brief to the ECtHR as "dedicated to the protection of the sanctity of human life", the ECLJ here presents itself as an organization "dedicated to the promotion and protection of human rights" – perhaps in an effort to make its interpretations seem more disinterested. In the Communication, the ECLJ explains why the ruling in *A, B and C* does not require that the Irish government liberalizes its abortion law: since abortion was not found to be a human right, it would be beyond the powers of the ECtHR to make such demands; the *only* change Ireland had to make, was to establish provisions for situations similar to that of applicant C. However, "Ireland is not required to make sure that abortion would be available to applicant C, but only to clarify its regulation in one sense or the other", for instance through medical guidelines (ECLJ 2012). In this way the ECLJ provides the Irish (and other) government(s) some legally based arguments for interpreting the ECtHR decision

[60] One of the briefs were filed together with another American Evangelical law firm, the Alliance Defense Fund (acting on behalf of the Family Research Council, a pro-life organization in Washington), and the Society for the Protection of Unborn Children (a British interreligious pro-life organization).
[61] This statement is based on a random web search for the case, and a reading through of a sample of comments.
[62] The executive body of the Council of Europe, consisting of the member states' Ministers of Foreign Affairs. The Committee supervises the execution of the ECtHR judgments (Council of Europe 2013).

as narrowly as possible, in this instance with hardly any practical implications at all[63]. This example shows how the law firm not only targets the court in order to influence its decision, but also the parties involved in interpreting and implementing the decision.

The Affordable Care Act and the Fight against the 'Abortion-Pill'

One of the greatest controversies related to abortion in the USA today involves the Affordable Care Act (ACA) of 2010, also known as ObamaCare. The ACA enforces a major reform in health insurance. The purpose of the act is to reduce the number of uninsured, increase the quality of health insurances, protect people from abusive practices, and preserve already well-functioning arrangements (whitehouse.gov). The act requires that everyone who can afford a health insurance must have coverage within March 31st, 2014 or pay a tax penalty (*the individual mandate*). Such coverage may be obtained through a public insurance program (e.g. Medicare or Medicaid), a state marketplace insurance (private companies), or an employer sponsored plan. People with low income and members of certain religious sects with religious objections to insurance are exempted from paying the fee (HealthCare.gov 2014a). A similar penalty (*the employer mandate*) must be paid by large businesses[64] that do not provide their employees a qualified health insurance[65]. The reform has been highly controversial. In *National Federation of Independent Business v. Sebelius* (2012)[66] the Supreme Court declared that the individual mandate is constitutional since the penalty is considered a tax, and it is within the authority of Congress to regulate taxes. At the same time the Court held another part of the reform – the expansion of a social health care program for low-income people (Medicaid) – unconstitutional, thus making it possible for states to opt out of the program. It is, however, the employer mandate that has provoked anti-abortionists the most.

The ACA neither prohibits nor requires that a qualified insurance plan covers abortion, but leaves that decision to the various state authorities. The law itself specifies that nothing in it is intended to overrule a state's ban on funding abortions or any of its procedural requirements, such as parental consent for minors (ACA, Sec.1303). According to the pro-abortion Guttmacher Institute (2014), several states have already enacted laws that in various ways restrict the abortion coverage of available insurance plans. Whether a woman will have her abortion covered or not,

[63] However, in July 2013 Ireland did pass a new law, the Protection of Life During Pregnancy Act, permitting abortion when there is a real threat to the mother's life, including from suicide. This happened after a woman died from pregnancy complications after being denied an abortion which could have saved her (BBC 2014).
[64] Businesses with at least 50 full-time employees (i.e. employees working at least 30 hours per week).
[65] Companies that do not offer a *qualified* insurance plan must pay a daily fee of §100 per employee, while a failure to provide *any* plan will result in an annual penalty of $2000 per employee (the first 30 excluded).
[66] In this case the ACLJ filed an amicus brief together with 117 Members of Congress, asserting that the individual mandate of the ACA was unconstitutional, and calling for the whole act to be invalidated.

and under what conditions (e.g. life, rape, incest), consequently varies from state to state. The ACA does, however, require that a qualified insurance plan covers contraceptives. This includes barrier methods, hormonal methods, implanted devices, and emergency contraception ('the morning-after pill'), as well as sterilization procedures and counseling (HealthCare.gov 2014c). Traditionally, most Evangelicals have been supportive of contraceptives (Barrick 2010). However, because many believe that life begins at conception, the coverage of emergency contraception has become a major problem – especially since the law *obligates* employers to provide a qualified insurance plan to their employees, thus placing them at risk of actually 'funding an abortion'[67]. Based on public feedback, the Obama administration released some final rules in June 2013 which exempt employers of religious organizations (i.e. houses of worship) from covering contraceptives in the health plans of their employees who share the same beliefs. A similar exemption is made for non-profit religious organizations (e.g. hospitals and higher education) that object to contraceptives on religious grounds, but in these cases female employees will receive separate contraception coverage[68] (HHS.gov 2013; Federal Register 2013).

Both Catholics and Evangelicals have turned to the courts in order to stop the enforcement of the ACA's contraception mandate. On May 21st, 2012 – about one month before the Supreme Court ruled on the constitutionality of the individual mandate – 43 Catholic groups, including several important dioceses and universities, filed 12 federal lawsuits against the Obama administration. The petitioners claimed that the ACA violated their constitutionally protected religious freedom since abortion, contraception and sterilization are contrary to Catholic teaching. The lawsuits immediately gained support among Evangelicals (Fox News 2012; Leclaire 2012). In all 12 cases the ACLJ filed amicus briefs together with 79 Members of Congress, urging the federal courts to accept the lawsuits (White 2012a). While these suits were filed by religious organizations, a similar 'wave' of lawsuits was about to rise from private, secular businesses whose holders found the contraception mandate incompatible with their religious beliefs[69]. The first of these cases was filed by the ACLJ in March 2012 on behalf of a Catholic business owner who desired to run his business in accordance with his faith. The contraception mandate put him in a dilemma: either comply with the mandate's requirements, and thus violate his faith, or pay "ruinous fines that would have a crippling

[67] Already in 1994 the Southern Baptist Convention passed a resolution against President Clinton's order to make the 'French abortion pill' available in the US. The SBC joined other pro-life organizations in a boycott of the drug companies as the pill would make abortion more accessible and more frequent (SBC 1994).
[68] Even though such institutions do not have to *pay* for it, the coverage is still part of the insurance plan, and the institution must sign a form that authorizes the insurance company to provide the contraceptive coverage.
[69] According to the Becket Fund, one of the law firms arguing these cases, 45 non-profit and 46 for-profit lawsuits have been brought against the employer mandate, most of which have resulted in injunctions (2013).

impact on [the company's] ability to survive economically" (*O'Brien v. U.S. Department of Health and Human Services*, Complaint 2012:7). The lawsuit was dismissed by the district court, while the appellate court ordered preliminary injunctions, delaying the implementation of the mandate while the case proceeded in court. The ACLJ has since filed federal lawsuits on behalf of six other private businesses – five run by Catholics and one run by Evangelicals – gaining similar injunctions in all (Surtees 2013). One of these cases, *Korte*, will be presented below. All in all, the ACLJ has filed 15 amicus briefs in support of other challenges against the ACA's contraception mandate (ACLJ 2013a). Due to conflicting rulings by the lower courts, the Supreme Court recently agreed to review two such cases, involving one Evangelical and one Mennonite business[70]. A major question to be resolve is whether a private business has the same religious rights as an individual. If the Court finds this to be the case, employers who object to birth control on religious grounds must be exempted from the employer mandate, just as individuals are from the individual mandate.

The ACLJ's Arguments against the ACA in the Informal Public Sphere

It is an aim of this inquiry to examine how Evangelical lawyers – here represented by the ACLJ – translate their religious and moral causes into a language which may increase their chances of success in a secular court. Recalling the image of Janus, the two-faced god, the inquiry seeks to show how the ACLJ may work as a 'mediator' between the Evangelical movement and governmental institutions; a 'gateway' through which the movement's religious and moral causes may enter the formal public sphere. Before I look at the ACLJ's argumentation in *Korte*, I will give a short summary of the most central arguments against the ACA that the law firm presents in the informal public sphere, and point to two kinds of relationship between these arguments and the Evangelical cause as a whole.

Preferably using the name ObamaCare, which seems to have more negative associations than the 'Affordable Care Act' (CNN 2013), the ACLJ has described the ACA as "the greatest expansion of abortion since *Roe v. Wade*" (Clark 2012). While supportive of the pro-life Catholic view, the law firm primarily focuses on emergency contraception (the morning-after pill), which is constantly referred to as the 'abortion-pill'. There are particularly three themes that seem to dominate the law firm's arguments in the informal public sphere. First, and most frequently, the reform is described as an unprecedented and severe assault from the

[70] The cases involved two private business run by Southern Baptists (Hobby Lobby) and Mennonites (Conestoga Woods). The ACLJ has filed amicus briefs in support of both companies (ACLJ 2013b). Oral hearings were held in March 2014, and the Court's ruling is expected in June 2014.

Obama administration on religious liberty and on the Constitution: by forcing Americans to pay for 'life-ending abortion pills' under penalty of law, the 'abortion pill mandate' violates their conscience and their 1st Amendment free exercise of religion rights. Second, ObamaCare is depicted as a 'massive pro-abortion tax increase' since taxpayer money assertedly is used to expand the access to abortion. Third, though not so common, the reform is described as a dangerous threat to and a radical assault on the Judeo-Christian values that are essential parts of America's history and heritage. In addition, the ACLJ complains that the reform is not working, that it is harmful to America, and that it contradicts the will of the majority of Americans. The ACLJ says it is committed to stop ObamaCare, and it considers litigation an effective tool to do so.

The arguments presented by the ACLJ in the informal public sphere have a two-sided relationship with the Evangelical cause of fighting abortion. In chapter 3, I suggested that the ACLJ needs religious arguments in order to target a certain audience in the informal public sphere. By this I do not mean that it has to use theological arguments, such as Bible quotes. The ACLJ does not present its arguments to an empty room. There is an already established system of meanings to which the words and arguments relate. As for the now vigorous Evangelical pro-life involvement, a central part of this system was created by the call to common action presented by Schaeffer, Koop and other prominent leaders from the 1970s, as well as the specific call to Christian lawyers to do their duty and fight abortion through the courts (see chapter 1). We should here call to mind Geertz's remark on how a culture, as a system of symbols, works as a context for understanding behaviors (1973:14). I will return to this point in chapter 6, but suffice it here to say that in order to be properly understood, the ACLJ's anti-ACA arguments must be viewed in light of the Evangelical cause as a whole. On the other hand, the ACLJ also contributes to shaping this contextual framework (see attachment 3). By depicting the contraception mandate as a religious liberty issue, the law firm contributes to the creation of a public opinion that abortion – or more precise, the pro-life stance – indeed is a religious question. Its arguments clearly appeal to the target audience, underlining that fighting abortion is an important part of the Evangelical movement's religious and moral commitment. Moreover, the ACLJ's description of the situation as a severe governmental assault on the American constitution, religious liberty, and the long-standing Judeo-Christian values of the nation, creates a picture that Christianity is under attack, and that this development – as well as the government – must be changed in order to save the nation's moral health and future.

***Korte v. U.S. Department of Health and Human Services*[71] – the Contraception Mandate**

In an effort to influence the opinion of the formal public sphere, the ACLJ filed its second lawsuit against the ACA contraception mandate in October 2012. The law firm here represented three clients: Cyril and Jane Korte (husband/wife), and their family-owned company, Korte & Luitjohan Contractors, Inc. (K&L). With about 90 full-time employees, the K&L is defined as a 'large business' and hence obligated to comply with the mandate. Most of their employees were covered by separate insurance plans through their unions, and the Kortes desired to offer the remaining 20 a plan that was consistent with their Catholic faith and the company's ethical guidelines. Established thirteen days before the suit was filed, the guidelines[72] stated that the K&L "cannot arrange for, pay for, provide, facilitate, or otherwise support employee health plan coverage for contraceptives, sterilization, abortion, or related education and counseling" as these services, according to their faith, were considered "gravely sinful" and "immoral" (K&L Ethical Guidelines 2012). The Kortes thus faced a similar dilemma as the business owner in *O'Brien* (see above): either to comply with the mandate and violate their faith and values, or pay 'ruinous fines and penalties' – in this case an annual penalty of almost $730,000. In August 2012, the Kortes discovered that their current insurance plan covered contraception, sterilization, and abortion. Now they desired to implement a plan that excluded these services. This had to be done before January 1, 2013, which was the annual renewal date of the K&L's group health plan.

The plaintiffs argued that the contraception mandate violated the Religious Freedom Restoration Act (RFRA) of 1993, the Free Exercise, Establishment, and Free Speech Clauses of the 1st Amendment, and the procedures for rulemaking established by the Administrative Procedure Act of 2006. With exception of the Establishment Clause claim, which is only found in one other lawsuit (*Griesedeick*), the allegations are identical to those of the other suits filed by the ACLJ[73]. Based on the RFRA and the Free Exercise Clause claims, plaintiffs also requested a

[71] The analysis of the arguments in *Korte* is based on the following documents filed by the ACLJ: Complaint (10/09/12), Motion for a Preliminary Injunction (10/10/12), Motion for Partial Summary Judgment (10/10/12), Emergency Motion for Injunction Pending Appeal (12/18/12), Opening Brief (01/28/13), and Reply Brief (03/15/13). These represent all documents filed by the ACLJ in the *Korte* case, except the appeal to the circuit court, which I was not able to find online. In addition the presentation includes the district court's Order and Memorandum (12/14/12), and the appellate court's Order (12/28/12) and Opinion (11/08/13).

[72] The state of Illinois (where the suit took place) exempts health care payers (such as the plaintiffs) from paying for, or arranging the payment of, any health care service that violates their conscience as *documented in their ethical guidelines*. The ACLJ frequently refers to the K&L's ethical guidelines, but nowhere does it mention that these were made less than two weeks before the complaint was filed. This is, however, mentioned by the district court as a "palpable inconsistency" in their claim that the mandate substantially burdens their religious beliefs.

[73] The other suits of the ACLJ are (filing date in parentheses): *O'Brien* (03/15/12), *Griesedeick* (10/19/12), *Gilardi* (01/24/13), *Lindsay* (02/14/13), *Bick Holdings* (03/13/13), and *Hart Electric* (03/26/13). All suits were filed before July 2013, when the implementation of the employer mandate in was delayed until 2015 (see HealthCare.gov 2014b).

preliminary injunction barring the enforcement of the mandate against them while they examined how to obtain an insurance plan consistent with their faith and the company's ethical guidelines. For the district court to grant such an injunction, they had to demonstrate a likelihood of success on the merits (i.e. that they would probably win the case); that without the injunction, they were likely to suffer irreparable harm which would not be outweighed by the harm to defendants (the government) if the injunction was granted; and that an injunction served the public interest. Consequently, this was what the ACLJ was trying to do. The district court nevertheless dismissed the request, concluding that plaintiffs failed to show a reasonable likelihood of success on the merits.

The RFRA, which was enacted in 1993 to strengthen religious freedom, played a central role in *Korte*. This act prohibits federal laws that "substantially burden" the religious exercise of a person, even if the burden "results from a rule of general applicability" – as is the case with the ACA contraception mandate. The only exception is when the law is "the least restrictive means" to further a "compelling governmental interest" (RFRA, Sec.3, a-b). According to the district judge who dismissed the Kortes' request, the ACA contraception mandate did not impose a substantial burden on their free exercise of religion. Rather, it would most likely be found to be a "neutral law of general applicability that only incidentally burdens Plaintiffs' religious exercise" (*Korte*, Memorandum and Order 2012:16). The order was appealed. In late December 2012, the situation turned around as the appellate court granted plaintiffs' emergency request for injunctions while the case proceeded, finding that the contraception mandate, because it was coercive, imposed a substantial burden on their religious exercise (*Korte*, Order 2012:5-6). In November 2013, the court ruled that all plaintiffs – both the business owners and their company – were qualified[74] to challenge the mandate, and that the government had not justified the burden imposed on their religious exercise according to the RFRA requirements of 'compelling governmental interest' and 'least restrictive means'. Because plaintiffs were "very likely to succeed and the balance of harms favors protecting [their] religious-liberty rights", the appellate court reversed and remanded the case to the district court with instruction to enter preliminary injunctions (*Korte*, Opinion 2013:4).

The ACLJ's Argumentation in *Korte*

Unlike its outside court arguments, the ACLJ does not use the term 'abortion pill' in any of its documents to the court. While the federal directions refer to the morning-after pill as a 'contra-

[74] In an article released three days after the ruling, the ACLJ described the decision as "significant", as it was the first appellate court to decide that "both the owners and their company have religious liberty rights that are burdened by the Mandate" (White 2012b).

ceptive', the ACLJ prefer describing it as an 'abortion-inducing drug' and 'abortifacient'. Although the Catholic Kortes, unlike most Evangelicals, also consider contraceptives and sterilization as contrary to their faith ('immoral'), the main emphasis in the briefs is on abortion. The documents do not discuss whether abortion is right or wrong, whether it is a question of taking life or not, or whether it is to be considered a part of religion. The only 'hint' to any of these questions is the factual description of the Kortes' belief that "actions intended to terminate an innocent human life by abortion are gravely sinful" (*Korte*, Complaint 2012:5). The reference to emergency contraceptives as 'abortion' should be considered natural in light of a world view that sees life to begin at the moment of conception (see above). However, the question of definition and choice of words may also have bigger implications. In *Hobby Lobby v. Sebelius*, the Evangelical case that was heard by the Supreme Court in March 2014, the challenge was only against 'abortion-causing drugs and devices' (or 'abortion-causing contraceptive devices and pregnancy-termination drugs') and related services (*Hobby Lobby*, Complaint 2012:2,14-15). If the Supreme Court rules in favor of the Evangelical holder and his business, the Court will indirectly define the drugs and devices in question as 'abortion'. Following the logic of litigation and the language of law, a possible next step could be challenges to remove these drugs and devices from the ACA mandate and leave it to the individual states' authority. Such rulings could form a basis for other challenges, and so the battle may continue.

Another remark regarding definitions is that the ACLJ does not use the word 'secular' when it refers to the Kortes' company, the K&L. While both the government and the courts describe the K&L as a secular, for-profit business or corporation, the ACLJ simply call it a '(for-profit) corporation or company', or occasionally a 'for-profit employer'. The 'for-profit' prefix marks a distinction from non-profit corporations, which work for educational, charitable, religious, or similar purposes. However, the ACLJ does not accept a dichotomy that contrasts 'for-profit/secular' to 'non-profit/religious'. Instead, the law firm tries to convince the court that a for-profit company run by religious people is no less religious than its non-profit counterparts. The ACLJ claims that the Government operates with a too narrow definition of 'religious employers' when it only exempts non-profit religious organizations from the mandate. Hence the mandate is not neutral, but discriminates between organizations. There are also other reasons, the ACLJ points out, for why the ACA mandate is unfair. Most attention is given to the fact that many 'secular' businesses (e.g. those with less than 50 employers) do not have to comply with it – regardless of their view on contraceptives. Such arbitrary, but 'intentional, massive underinclusiveness' shows, the law firm argues, that the RFRA's demand of a

compelling governmental interest in order to place a substantial burden on someone's religious exercise, has not been fulfilled.

In addition to disagreements on how to define the morning-after pill (abortion or contraception?) and the Kortes' for-profit company (religious or secular?), there is one more important definition battle fought in this case. The RFRA offers protection against federal laws which substantially burdens "a person's exercise of religion". The question, then, is whether 'person' here also refer to corporations. Already in 1886, the Supreme Court decided that corporations are protected as 'persons' under the 14th Amendment (*Bellotti* 1978:434). Moreover, in *First National Bank v. Bellotti* (1978), the Supreme Court decided that corporations can exercise political speech (e.g. by distributing ideas and information), and therefore are protected by the 1st Amendment. However, according to the federal government, a corporation cannot exercise religion and is therefore not covered by the RFRA. Although somewhat dubious, the district court agreed: the K&L was not a person, and the company could only *reflect* the Kortes' religious beliefs as there was a 'corporate veil' between the company and its holders. Addressing the appellate court, the ACLJ places more weight on showing that corporations are indeed legal persons under the RFRA, and thus entitled to protection of their religious exercise. To show that corporations can exercise religion just as much as they can exercise political speech, the ACLJ mentions various ways in which companies – regardless of their profit status – can engage in religious acts, e.g. tithing, donating money to charities, and acting or speaking in accordance with a certain faith. Further, to dismiss the 'corporate veil' and show that a for-profit business is not separate from a religious holders' faith, the ACLJ quotes the Pontifical Council for Justice and Peace as it describes business work as a Christian calling, and a 'divided life' as a failure to live up to God's call (*Korte,* Reply Brief 2012:10). This is the only instance where theology or religious authorities are brought into the arguments. The appellate court here agreed with the ACLJ, and ruled that the Government, through the mandate, placed a substantial burden even on the religious exercise of the K&L.

Like others who have filed law suits because of the contraception mandate, the Kortes do not want to pay for, facilitate, or support the services covered by the mandate. The Government, however, claims that a funding provider does not facilitate the funded conduct when it involves independent personal choices, e.g. that a female employer must herself choose to use the birth control services provided by her health insurance. The ACLJ counters this by drawing a comparison with how the Government itself acts, e.g. when federal funding programs exclude activities which the Government does not want to facilitate. Often such exclusions have even

involved abortion. In a similar way funding providers of an insurance plans – like the Kortes – may want to avoid promoting behaviors they finds immoral.

One of the most interesting parts of the arguments that the ACLJ presents to the court is what seems to be a break with own principles. Arguing hypothetically, the ACLJ points out that even if the ACA mandate really was used to further a 'compelling governmental interest', the Government had still failed to fulfil the RFRA demand that the applied mean should be the 'least restrictive'. If the Government desired to promote health and equality through free access to contraceptive services, there would, according to the ACLJ, be 'a myriad of ways' it could do so without coercing plaintiffs to violate their faith. As examples the ACLJ mentions (1) tax deductions or credits for the purchase of contraceptive services; (2) providing it for free through existing federal programs (e.g. Medicaid); (3) compensation from the Government; and (4) mandating pharmaceutical companies to provide contraceptives to pharmacies, doctor's offices, and health clinics free of charge. However, in view of campaigns and statements made by the ACLJ in the informal public sphere – e.g. its war to defund Planned Parenthood; its attack on the Obama administration; and its opposition to the use of taxpayer money to fund abortion (ACLJ Petition 2012a; 2012b; Clark 2012c) – it is not very likely that the law firm would leave such interventions undisturbed, should the Government ever apply them. However, in the logic of litigation and the language of law such considerations are irrelevant. In the courtroom it is the issue in question and the arguments brought forth that matter.

One final remark could be made regarding the ACLJ's arguments in *Korte*. To recall the words of Hacker, the ACLJ "play[s] by the rules of the court" (2005:152). They argue their cause with references to laws, cases, and court rulings (preferably those that support their stand), and shows respect for previous decisions. The advantage of this approach is obvious. In his book, *The Power of Precedent*, law professor Michael J. Gerhardt discusses why Supreme Court justices show respect to precedents in general, while it at the same time is impossible to predict which precedent the Court may weaken or overturn. One explanation is found in what Gerhardt calls 'the golden rule of precedents', which says that you shall treat other precedents as you would like your own – and your favorites – to be treated. The strength of this golden rule, Gerhard claims, can be illustrated by *Roe v. Wade*: despite the appointment of several conservative justices, the decision has not yet been overturned (2008:3,199-201). The ACLJ plays by a similar rule. By showing respect for previous court decisions, including those that are not in accordance with its own view, the ACLJ contributes to create an environment which, in the long run, may pay off with a similar respect to its own favored decisions.

A 'Gateway' for the Pro-Life Cause

The aim of the ACLJ is to ensure that the causes of the Evangelical movement – such as the pro-life issue – are protected by law (see chapter 3). As long as the society at large does not support these causes or the religious arguments used to justify them, and as long as there is a similar opposition within the governmental institutions, these institutions cannot accept the causes of the Evangelical movement unless they are presented to them in a neutral, secular language. Only then can the government make political decisions (e.g. laws, court rulings, decrees, etc.) that are favorable to these causes. As shown above, the ACLJ – in its very function of being a professional law firm – works as a 'mediator' and 'gateway' to carry out this necessary translation (see attachment 3). Of course, the use of a neutral language alone is not enough to win a case. The whole framing of the legal arguments is important for the outcome, as Epstein and Kobylka found in their study of liberal movements and forces that condition legal change (1992:311). The initiative to translate, however, should be seen as the necessary 'first step'.

Arguing against the ACA contraception mandate in *Korte*, the ACLJ presents its cause primarily with references to the legal framework, trying to convince the court to adopt its interpretation of it. Religious arguments are only sparsely introduced in order to strengthen the claim that this is a matter of religious exercise suppression. While the ACLJ avoids its favorite informal term ('abortion-pill'), it nevertheless maintains a terminology which conveys the Evangelical understanding that emergency contraception is in fact abortion. The law firm's arguments reflects the crucial role of definitions (e.g. of 'person') for how the court may apply the legal framework in question. Moreover, the ACLJ's insistence that for-profit corporations run by religious people are just as religious as non-profit corporations, makes perfect sense in light of Habermas' remark that "many religious citizens do not have good reasons to undertake an artificial division between secular and religious within their own minds" (2005:14). However, the court cannot make a ruling based on, let's say the Pontifical Council's statement that such a 'divided life' is a failure to live up to God's call (see above). The role of the ACLJ as a 'mediator' and its choice of arguments are therefore imperative, not only for the outcome of the particular case, but also for the wider impact such rulings may have on the rest of society.

5 Separation of Church and State v. Judeo-Christian Tradition

> The *Lautsi* case has a unique importance – that of symbolism. The case is symbolic because it questions not only the legitimacy of the visible presence of Christ in the schools of Rome, but also in the whole of Europe. Thus, *Lautsi* is a symbol of the current conflict regarding the future of Europe's religious and cultural identity.
>
> Grégor Puppinck, "*Lautsi v. Italy*. An Alliance against Secularism" (2010)

While James Madison – the 'Father of the Constitution' – and many of the other founders of the American republic held religious world views themselves, they nevertheless championed a strict separation of church and state. This was not only to avoid religious suppression and intolerance, but also to prevent the corruption of religion (Martin 1996:373; see also Madison 1785:§3,7). When Madison warned against the Virginian bill to provide economic support for 'teachers of the Christian religion' (see chapter 2), he drew a comparison with the European Inquisition. So far America had offered protection to people from various nations and religions who had fled oppression. The bill was, as Madison saw it, nothing but a new "signal of persecution". It differed from the Inquisition only in degree: while this type of legislation would be a "first step", the Inquisition was "the last in the career of intolerance" (Madison 1785:§9). The religious neutrality of the Constitution was intentional, albeit not without controversy. Some argued that the 'only true God' should be acknowledged in the founding documents. Yet, despite the general respect for the divine, any such reference was omitted (Martin 1996:375). The Constitution was nevertheless embedded in a culture dominated by Protestant Christianity (Bauszus 2009:354; Newman 2007:585). Consequently, it was in interplay with this culture it unfolded. When the French politician and historian Alexis de Tocqueville wrote about his visit to America in the 1830s, he expressed his astonishment that two elements which so often had been impossible to combine – "the spirit of religion and the spirit of freedom" – in America were "incorporated into each other, forming a marvelous combination" (quoted in Bauszus 2009:342).

This chapter looks at issues that concern the relationship between church (religion) and state (political government). At the center of current debates stands the 1st Amendment which states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof". While some see in this a strict separation, a provision for a purely secular state which shall neither aid nor hamper religion, others believe that the state both can and should support the church (Martin 1996:370). The latter side frequently relates its arguments to the nation's cultural heritage, which in this context refers to the Judeo-Christian tradition. The chapter begins with a historic overview of some of the most important laws and court cases involving the relationship between church and state. This presentation will not only work as a contextual

background for the legal cases that I examine, but will also contribute to a better understanding of why the Evangelical movement went political, and why it turned to litigation. My main focus will be on *public religious expressions*, as opposed to private religious expressions in the public sphere. Evangelical cause lawyers seek to protect both kinds of expressions, but the former has a greater impact on the society; the expressions of public institutions, like schools and governments, may have direct consequences for the lives of non-religious citizens and citizens of other faiths. After a brief presentation of the ACLJ's involvement in church/state cases, I will look at the law firm's arguments in favor of public religious expressions presented in the informal public sphere. I then turn to the law firm's argumentation in the formal public sphere, where I examine one American and one European case. In *Pleasant Grove v. Summum*, the ACLJ represented a Utah city before the US Supreme Court, defending its right to display a Ten Commandments monument in a public park while rejecting a similar monument from a new religious group. This case was chosen because it revolved around an argument which brings in an interesting perspective to the church/state debate, namely *governmental speech*. In the European case, *Lautsi v. Italy*, the ECLJ participated as amicus curiae, defending the display of crucifixes in Italian public schools. This case is particularly interesting as it clearly demonstrates the potency of a cobelligerent approach, as well as highlights the role of Evangelical law firms as providers of arguments.

Public Religious Expressions in US Law and Courts

While the American Constitution gave no privilege to any particular religion, the American culture did. State laws criminalizing blasphemy and Sunday sacrilege endured well into the 20th century, and were, if ever challenged, upheld by the courts (Gruber and Hungerman 2008:834; Martin 1996:378; Post 1988:315-316). From the very beginning of the Republic, leading politicians frequently referred to God and interpreted events in light of a Protestant Christian worldview (Bauszus 2009:353-355; Newman 2007:591-592). Some governors and presidents proclaimed days of fasting, prayer and thanksgiving. Others rejected such measures as not the government's business (Martin 1996:377; Greninger 1979:4-5). The role of religion in US history can therefore be seen as a 'tension' between the constitutional principle of separating church and state, and the strong cultural influence of Protestant Christianity. Perhaps somewhat surprising, the 1st Amendment was not considered binding to the individual states until the Supreme Court in *Cantwell v. Connecticut* (1940) decided it was. Prior to this, the provision was thought only to protect against *federal* assaults (Martin 1996:378; Andersen 1940:151). This resulted in great variation between the states, something which can perhaps best be illustrated by examples from the field of

education. This has been one of the most controversial fields when it comes to church/state related issues, and it has been highly central for the Evangelical engagement in politics and litigation.

In the early American republic, education of children was increasingly seen as a key tool for a healthy state, and publicly funded schools became more and more common. These schools would teach Christian ethics in a nonsectarian way, and – without comments – use the Bible for reading (Maniloff 1994:219-221). The introduction of Bible reading may be related to the widespread use and ownership of the English King James Bible among Protestants, as well as a lack of other textbooks in the early 19th century (T.V.K. 1927:431). However, as the reading was often linked with prayer and singing, it was difficult to separate it from the Protestant tradition. It seems nevertheless to have caused little controversy until the mid-19th century[75]. The first lawsuit against the practice was raised in 1854 by a Catholic who had been expelled from school because he refused to read the Protestant Bible, something which his faith did not allow him. The following decades, several similar lawsuits were filed against Bible reading, recital of the Lord's Prayer, and the singing of hymns in public schools. Some state courts approved the practices provided they did not go beyond 'lip service'. Others found them to be violations of their state constitution, which prohibited sectarian instructions in public schools and compelled worship. Analyzing these decisions in 1927, T.V.K. found that the divergence between the states was related to their different view on the Bible. The states that approved the practice did not consider the King James Bible a 'sectarian book', while the states that struck it down held the opposite view (T.V.K. 1927:431-434).

The development that eventually led to the ban on Bible reading and prayer in public schools began with another compulsory school practice which, although not religious in itself, still caused problems to religious minorities: the salute to the national flag while citing the Pledge of Allegiance. In its original version from 1892, the Pledge of Allegiance went: "I pledge allegiance to my Flag and the Republic for which it stands, one nation, indivisible, with liberty and justice for all." In 1923, "my flag" was replaced by "the flag of the United States". It was not until 1954 that Congress, urged by President Eisenhower, added the words "under God", making it a pledge to "one nation under God" (Publications.USA.gov). Several years before this final addition, the US Supreme Court reviewed a case which involved the expulsion of two Jehovah's Witness children from school because they had refused to salute the flag on religious grounds. The Court

[75] Some Protestants felt this education was 'too godless'. Presbyterians tried to establish their own schools from 1840-70, but with little success. The first successful private schools were Catholic. As the immigration of Catholics increased, church authorities urged each parish to establish denominational schools as an alternative to the 'Protestant' public schools. However, not until 1884 was every parish obligated to do so, and Catholic parents were told to send their children to these parochial schools (Rossi and Rossi 1961:302).

ruled that the government had a right to compel students to participate in such ceremonies, also when conscience scruples were involved (*Minersville School District v. Gobitis* 1940). Three years later the Court overruled that decision, now upholding the citizens' right to abstain from practices that offend the teaching of their religion or force their conscience. Then, in *Everson v. the Board of Education of Ewing Township* (1947), a case involving economic compensation to parents whose children travelled by public buses to parochial schools, the Supreme Court for the first time drew a clear line between church and state in light of the 1st Amendment's Establishment Clause: neither the federal Government nor the states could set up a church, pass laws that would aid a religion, or use tax-payer money to support religious activities and institutions. This in turn laid the foundation for the 1962 Supreme Court ban of institutionally sponsored prayer in public schools (*Engel v. Vitale*), and, the following year, a similar ban on Bible reading (*Abington v. Schempp*) (Martin 1996:379-381). Despite the bans, many schools continued the practices. Other schools went to the opposite extreme and prohibited even private religious expressions (den Dulk and Pickerill 2003:429). As we saw in chapter 1, these developments worked as an impetus to mobilize Evangelicals into politics. With time it also brought them to the courts.

If a top-down perspective (i.e. a focus on the government's role) can be said to have pushed religion out of public schools, a down-up perspective (i.e. a focus on the individuals' rights) can be said to have brought it back. My contention is that this reversal would probably not have happened without the professional Evangelical engagement in litigation. The first major victory came in *Widmar v. Vincent* (1981), a case which involved a group of students who wanted to borrow a room on campus for Bible study. Here the Supreme Court held that public colleges could not exclude religious groups from facilities which were available to other student organizations. Again we find an example of how the judiciary and the legislature often work in tandem: a few years after the ruling, Congress passed the Equal Access Act (1984), which forbade public high schools from banning student meetings on school grounds based on the religious, political, or philosophical speech at the meeting – provided the activity was voluntary, initiated by students, and not sponsored by the school or the government. This act was the first significant legislation for which Evangelicals had worked in cooperation with both religious and secular groups, including the liberal ACLU (den Dulk 2006:210; den Dulk and Pickerill 2003:430-431). After *Widmar*, Evangelical cause lawyers have successfully coupled the Free Speech Clause with religious expressions on several occasions. In lower federal courts they have frequently litigated for equal access to school facilities, recognition of religious school clubs, and removal of restrictions on students' distribution of religious literature (Brown

2002:73,117). The constitutionality of the Equal Access Act was upheld by the Supreme Court in *Board of Education v. Mergens* (1990), when it ruled in favor of a group of students who wanted to establish a Bible club at their high school. In *Lamb's Chapel v. Center Moriches Union Free School district* (1993), the right to access public school facilities was expanded to give religious community groups the same rights as non-religious community groups to use the facilities after school. Then, in *Rosenberger v. University of Virginia* (1995), Evangelical lawyers won a major victory as the Court ruled that a state university cannot deny funds to religious student publications when it funds other student publications, since all forms of speech have to be promoted equally. In addition to preserving religious activities in public schools, these court decisions have strengthened the idea of 'religion as speech' (den Dulk and Pickerill 2003:431-433; Brown 2002:63-74). However, when 'religion as speech' later was evaluated in a case involving student initiated prayers on a school's public address system prior to football games (*Santa Fe v. Doe*, 2000), the Supreme Court struck down the practice as unconstitutional (Brown 2002:75).

While religious expressions became restricted in the field of education from the 1960s, public prayer has endured and remained visible in the field of politics. In the 18th century, days of fasting and prayer were common both in Great Britain and the English colonies in North America. After the establishment of the American republic, presidents have regularly announced such days (Callahan 2006:396-397; Epstein 1996: 2115-2116; Greninger 1979:4-5; Fifiels 1977:865). Such arrangements can therefore be seen as part of the American tradition. As President Lincoln did during the Civil War (Newman 2007:591), turning to God has often been a resort in turbulent times. For instance, in response to a request from the Federal Council of Churches, President Wilson declared October 4th, 1914 a national day of prayer for peace in Europe (Bryan 1914). Similarly, President Roosevelt led the nation in prayer when allied troops invaded Europe on June 6, 1944 (Cady 2008:194). When Evangelist Billy Graham, invited by a bipartisan group of congressmen, conducted his service on the Capitol steps in 1952 (see chapter 1), he urged Congress to call on President Truman to proclaim a national day of prayer. The following day a resolution was introduced[76], and since 1952 the President has been bound by law to announce a 'National Day of Prayer' every year (Epstein 1996:2115-2118). In 1988, under President Reagan, the day was fixed to the first Thursday in May (Gupta-Carlson 2003).

[76] The resolution aimed at bringing Catholics, Protestants, and Jews together in prayer (Epstein 1996:2116).

While leading founders, like Jefferson and Madison, carefully avoided any confusion of church and state in their political decisions, they still attended the regular Sunday services that were held in the old House of Representatives until 1857. These services were considered acceptable, however, because they involved preachers from various Protestant denominations, and from 1826 also Catholic priests (Library of Congress 2014). On March 21st, 2010 the first Sunday service in 130 years was conducted in the old House chamber, attended by members of Congress from both sides (Forbes 2010; CPCF 2010). A forerunner to this more visible joining of prayer and politics can be found in the prayer breakfast groups arranged by Methodist minister Abraham Vereide for government workers from the 1940s. In 1953, President Eisenhower was persuaded by Vereide, Graham, and congressmen to attend the gathering, and since then every president has done so. The now annual National Prayer Breakfast has brought many leading Evangelicals together with top politicians (Lindsay 2006:391; Martin 1996:40-41). Although prayers in the political realm often have been nonsectarian, opponents have filed lawsuits based on the idea of church/state separation, yet with little success[77].

Another contested field involving the relationship between church and state is the public display of religious symbols. With the 1960s' school prayer and Bible reading cases, and the later *Lemon v. Kurtzman* (1971), the Supreme Court developed a three-pronged test ('the Lemon test') which a statute or practice must pass in order to not violate the Establishment Clause: (1) its purpose must be secular; (2) it must not advance or inhibit religion; (3) it must not promote an excessive government entanglement with religion (Kritzer and Richards 2003:829). However, deciding the limits for public use of religious symbols is still a complicated matter, and lower courts often reach opposite conclusions. In 1991, two Illinois cities were sued because their municipal seals contained the Latin cross, which was perceived a sectarian symbol. Applying 'the Lemon test', the district court found only one of the seals to violate the Establishment Clause. In the other, the religious message of the cross had been 'neutralized' by other symbols and did therefore not endorse Christianity. The appellate court, on the other hand, ruled that both seals represented unconstitutional endorsements of a particular religious faith (*Harvard Law Review* 1991:591-593; *Harris v. City of Zion* 1991:§59). In *Lynch v. Donnelly* (1984) the Supreme Court reversed the decision of another appellate court, and ruled with a 5-4 majority that a city in Rhode

[77] In 2008 The Freedom From Religion Foundation challenged the National Day of Prayer. The district court found the arrangement unconstitutional, but its decision was reversed (CBS 2011). In November 2013, the Supreme Court heard another public prayer case, *Town of Greece v. Galloway*. The question here is whether the appellate court erred when it ruled that a municipal legislature violated the Establishment Clause by allowing volunteer private citizens to open town board meetings with a prayer. Although citizens from any religion may participate, the prayers have been predominantly Christian (ABA 2014b). The Court's decision is expected in June 2014, and will have major implications for whether and how a government may endorse religion.

Island could sponsor a Christmas display which included a nativity scene along with Santa Claus and Christmas trees, since the meaning of Christmas holiday symbols have become more secular. In *County of Allegheny v. ACLU* (1989), however, the Supreme Court held that the County violated the Establishment Clause by allowing a local Catholic group to display a nativity scene in the courthouse. The display of a large Chanukah menorah by a Jewish group next to a Christmas tree outside the City Hall, on the other hand, was constitutionally legitimate[78] (Seidman 1991:211-212). These examples illustrate the complexity of issues involving public religious expressions, and show that what is regarded as legitimate to a large extent depends on definitions. This problem will be further elaborated by the two religious symbol cases – *Pleasant Grove* and *Lautsi* – presented below.

The ACLJ's Involvement in Church/State Cases

The ACLJ has been eagerly engaged in church/state cases involving both schools and public places. Most frequently it has participated as a case sponsor, although the activity as amicus curiae has also been high, especially at the Supreme Court level (Hacker 2005:41-50; ACLJ 2012d). The ACLJ played a leading role in the process that brought religious expressions back in public schools after the 1960s' ban on prayer and Bible reading. A champion of the freedom of speech argument, Sekulow successfully argued the two equal access cases (*Mergens* and *Lamb's Chapel*) before the Supreme Court, and the ACLJ participated as amicus in *Rosenberger* (see above). Sekulow also argued the less successful *Santa Fe* case before the Court, defending the constitutionality of student led prayers at high school sporting events.

While school cases were important in the 1990s, and still are (see e.g. Heil 2013; 2012; Weber 2012), other types of public religious expressions have received much attention the recent decade. The ACLJ has filed several amicus briefs to the Supreme Court defending the phrase "under God" in the Pledge of Allegiance, and the public display of religious symbols, such as the Ten Commandments and Latin crosses (ACLJ 2012d; Clark 2011). The law firm has shown a similar concern to protect the National Day of Prayer (Sekulow 2011c), religion in the military (Clark 2013), holiday expressions (Sekulow 2008b), and the national motto, "In God We Trust". The motto first appeared on two-cent coins in 1864, after a congressional act from 1862 expressed a desired to declare that the nation's strength and safety was found in God. In 1956, Congress passed a law which made it the national motto of the United States (US Dep. of the Treasury

[78] In *County of Allegheny* the Court based its decision on 'the endorsement test' from *Lynch*. This test evaluates 'endorsement' and 'neutrality' in light of the physical context of the symbol. In *Lynch* the nativity scene was surrounded by other non-Christian Christmas symbols. This was not the case with the nativity scene in *County of Allegheny*, and the court found the display to be an unconstitutional endorsement of Christianity (Seidman 1991:212).

2011). In recent years, atheist groups and secular humanists have filed lawsuits against the phrase on national currency. The ACLJ has participated as amicus curiae in some of these cases, representing itself, the American Catholic Lawyers Organization, and members of Congress. A main argument is that the motto does not violate the 1st Amendment, but rather "reflects the historical fact that this nation was founded upon a belief in God" (*Newdow v. Congress*, ACLJ amicus brief 2013:4). This kind of argument is typically employed by the defenders of public religious expressions, and it promotes the notion of a certain national identity. This is the core of the Evangelical fight – the idea that the USA has always been and still is a Christian nation.

The ACLJ's Arguments for Public Religious Expressions in the Informal Public Sphere

In chapter 4, I suggested that the ACLJ's arguments against the ACA can only be properly understood in light of the Evangelical cause as a whole, and that these arguments in turn contribute to the shaping of this cause (see also attachment 3). The same goes for the law firm's arguments in support of public religious expressions. Now, a fight against abortion and the defense of public religious expressions may seem to have little in common – except that they are causes fought by the same group of people. However, the arguments used to present them are contributing to the creation of the same picture. Recently, the ACLJ filed an amicus brief supporting a city's practice of opening town board meetings with a prayer (*Town of Greece v. Galloway*). The law firm's reference to this case as an "assault on public prayer at the Supreme Court" (Weber 2013c) creates a similar picture of religion being under attack as we saw in its anti-ACA arguments. Moreover, such arguments work to highlight the important mission of the ACLJ: as a Christian law firm it plays a central role in defending religion, and perhaps even saving its position in society. This is also reflected in the requests for prayer – a call for human and divine support – for the lawyers as they do their work (Sekulow 2008a).

When defending and promoting public religious expressions in the informal public sphere, the ACLJ puts much weight on the place of Christianity in American society throughout history. The law firm frequently describes public religious expressions – such as the Pledge of Allegiance, a statue of Jesus, or the Latin cross – not only as *parts* of, but also as *symbols* of America's history and heritage. Consequently, attacks on these symbols are regarded as attacks on the nation's history and the heritage. While the heritage referred to no doubt is the Judeo-Christian, the ACLJ preferably speaks about 'religion' in general terms. In this way it avoids being 'sectarian', something that could make its arguments rather useless since 'sectarianism' has been one of the earliest tests to determine whether a public religious expression is constitutional or not (see above). The ACLJ also places a major emphasis on

rights, both *individual* (i.e. the citizens' rights to religious liberty, freedom of expression, equal access, etc.), and *collective* (i.e. the nation's right to acknowledge God in its history and culture). Both types of rights are used to defend and promote public religious expressions. The ACLJ asserts that religious expressions – e.g. a voluntary citing of the Pledge of Allegiance – do not violate the Establishment Clause, regardless of whether it is done by a student, a government employee, or a private citizen. Hence there is no constitutional need to abandon the practices, as the strict separationists would claim.

The ACLJ also approaches public religious expressions in a pragmatic way, describing both verbal expressions (e.g. prayer) and physical expressions (e.g. the cross) as powerful symbols of hope and comfort. We should here recall Turner's characterization of symbols as 'multivocal, manipulable, and ambiguous'. This 'multivocality' enables different groups and individuals to relate to the same symbol in various ways. Hence, Turner writes, "[o]therwise hostile groups may form coalitions in political fields by emphasizing different ['meanings'] of the same ['outward form']" (1975:155). This is not only a description of what often takes place in debates involving public religious expressions; it is also a point used strategically by the ACLJ in its argumentation – as will be shown by the *Pleasant Grove* case. However, the Evangelical cause does not prosper from stripping a symbol of its religious meanings. Doing this may perhaps bring victory in a court, but in order to form a notion of a certain national identity, the symbols must convey a certain message. To illustrate: a cross on a building is meaningless if it does not convey the message that it is a Christian building. The same could be said about a (assertedly) Christian nation. In my model, I show this by Geertz' description of culture as "socially established structures of meaning", where the meaning is public and shared (1973:12). A shared understanding of the meaning is, in other words, necessary for the successful communication of a message. This will be further illustrated by the *Lautsi* case.

Pleasant Grove v. Summum – the Public Display of a Ten Commandments Monument

From the mid-1950s, the organization Fraternal Order of Eagles (FOE)[79] distributed thousands of Ten Commandments monuments across the United States. The aim was to combat juvenile crime, and the FOE hoped the display would inspire "the youth to live law-abiding and productive lives" (*Van Orden*, FOE amicus brief 2005:4). Based on the Establishment Clause, several lawsuits have since been filed against these and similar displays. In 1980, the Supreme Court for the first time

[79] The FOE was established in 1898 under the name of "The Order of Good Things". The order has worked to establish Mother's Day, social security programs, and the "Jobs after 40" program. Seven presidents (T. R. Roosevelt, Harding, F. D. Roosevelt, Truman, Kennedy, Carter and Reagan) have had their membership in the order, which now has more than 800.000 members internationally (FOE 2014).

reviewed a Ten Commandment case, *Stone v. Graham*. Here the Court ruled that a Kentucky statute violated the Establishment Clause when it required that a copy of the Ten Commandments be displayed in all public classrooms. According to the Court, the display did not serve educational functions, but promoted certain religious views. Twenty-five years later, the Court again delivered an opinion on the public display of the Ten Commandments. With a 5-4 majority, the Court in *McCreary County v. ACLU* (2005) upheld a lower court's decision that the exhibition of the Ten Commandments in the courthouses of two Kentucky counties was unconstitutional. However, in *Van Orden v. Perry*, which was reviewed simultaneously, the Court concluded that a granite plate with the Ten Commandments placed outside the Texas State Capitol was constitutional (Howe 2008:443-445,448). With a 5-4 majority, the Court held that the monument, which had been donated to Texas by the FOE in 1961, did not endorse Christianity and Judaism. The granite plate was surrounded by other memorials of historical people and events in Texas, and although the Ten Commandments undeniably conveyed a religious message, the plate primarily had the secular purpose of acknowledging the Ten Commandments role in America's history and heritage. The Court here referred to the widespread practice of such acknowledgements across the nation; even the Supreme Court building itself contains several depictions of the Ten Commandments (*Van Orden*, 2005:9). To justify that this ruling contradicted its ruling in *Stone*, the Court explained that the plate was "a far more *passive* use of those texts than was the case in *Stone*, where the text confronted elementary school students every day" (*Van Orden*, 2005:12, my italics). These decisions throw an interesting light on the European *Lautsi* case (see below).

The ACLJ participated in both *McCreary* and *Van Orden* as amicus curiae (ACLJ 2012d). In 2009, Jay Sekulow got the chance to argue a Ten Commandments case before the Supreme Court. In *Pleasant Grove v. Summum* the ACLJ represented Pleasant Grove, a Utah city, which had been sued by a small religious group called Summum[80] because it refused to put up their monument, the Seven Aphorisms[81], in a public park. Founded by Mormons in 1850, Pleasant Grove had dedicated the Pioneer Park to the history of the people. The park contained 15 permanent displays, many of which had been donated by private groups or individuals, e.g. the city's first fire station, a 9/11 monument, and a Ten Commandments monument – the latter donated to the city by the FOE in 1971. In 2003 and 2005, Summum requested permission to erect a similar stone monument containing its Seven Aphorisms, or Principles, beside the FOE

[80] Founded after an alleged alien encounter in 1975, Summum has its pyramid shaped headquarter in Salt Lake City. It describes itself as an ancient philosophy, and practices rites of mummification and meditation (Summum 2014b).
[81] Summum philosophy is based on the seven principles of psychokinesis, correspondence, vibration, opposition, rhythm, cause and effect, and gender (Summum 2014c). On its web page the Summum displays a graphic image of its Aphorism monument beside a stone monument with the Ten Commandments (Summum 2014d).

monument. The group believes that the Aphorisms ('the higher law') were given to Moses before he received the Ten Commandments ('the lower law'), but were destroyed because the Israelites were not ready to receive them. Summum now believed the time had come to share what it had found (Summum 2014a; Mears 2008). When Pleasant Grove denied the request, the group filed a law suit, claiming that the city violated their 1st Amendment free speech rights. The district court ruled in favor of Pleasant Grove, but the decision was reversed by the appellate court, which agreed with Summum that the Ten Commandments monument represented the FOE's private speech, and that the case therefore concerned private speech in a public forum that had been opened for the display of permanent monuments. The appellate court held that Pleasant Grove – on free speech grounds – could not deny Summum to erect its monument, and ordered the city to accept the display.

When the Supreme Court agreed to review the case in 2008, its importance increased since the Court's decision would have implications across the nation. The question to decide was whether the Free Speech Clause gave private groups a right to place permanent monuments in a city park where other donated monuments had been erected. If the Supreme Court upheld the appellate court's decision, federal, state and local governments would either have to accept the erection of *any* monument wherever they had already put up a similar gift – even when these contradicted each other – or to ban such displays altogether, something that would lead to the forced removal of thousands of monuments nationwide.

The ACLJ's Argumentation in *Pleasant Grove*[82]

The ALJC represented Pleasant Grove all the way to the Supreme Court. In its briefs to the Supreme Court, the law firm seeks to demonstrate why the appellate court erred in its analysis. The panel's first and major mistake was to confuse government speech and private speech. It is, in other words, yet another question of definitions, this time of a city's action when it accepts one monument, while rejecting another. According to the ACLJ, a privately donated monument does not remain private speech when a government accepts it and chooses to display it. The government expresses its opinion through the process of selection and the control that follows the ownership. The government is free to do whatever it wishes with the object which it now owns, and if the government chooses to display it, it does so in order to convey a message. The display is thus an act of government speech. In response to Summum's claim that a government must adopt or

[82] The analysis of the ACLJ's arguments in *Pleasant Grove* is based on the law firm's Opening Brief (06/16/08) and Reply Brief (09/15/08) to the Supreme Court. These are compared to the rationale behind the Supreme Court's decision explained in the Court's Opinion (02/25/09).

embrace the original message – e.g. the inscribed text – in order to control the speech, the ACLJ uses parallels to show why this is not the case. For instance, a sculptor may wish to express a certain message in his work, while the owner may display it to convey a totally different idea. The display consequently represents the new owner's speech, which was also the case for Pleasant Grove. While the FOE desired to erect the monument to inspire young people to live law-abiding lives, Pleasant Grove had included it in the park as a reminder of the city's Mormon pioneer heritage and its role in shaping the city's identity. The 'history and heritage' argument, so frequently used in the informal public sphere to defend public religious expressions, is here adapted to the local situation in question, disconnected from the fact that the FOE spread thousands of these monuments across the nation in a time when juvenile crime seemed to be everywhere. In their amicus brief in *Van Orden* (2005), the FOE too invoked the 'history and heritage' argument when they explained that their intention had been "to acknowledge the ten commandments' historical impact on the development of Western legal tradition and, through reminding the public of this historical fact, inspiring the youth to live law-abiding and productive lives" (*Van Orden*, FOE amicus brief 2005:4). Nevertheless, in *Pleasant Grove* it is the history of the geographic locality that counts, not the history of the monument itself.

In its briefs, the ACLJ reminds the Supreme Court that monuments have been a common form of government speech for thousands of years. Through selecting and displaying certain monuments, American governments at all levels have *spoken* to express a particular viewpoint. The government's freedom of speech, the ACLJ recalls, has already been acknowledged by the Court, and this freedom is not reduced when the government lets a private party deliver the message. The donation of a complete monument is hence not a problem. Rather, it is an advantage since most governments cannot afford creating public art themselves. When a government chooses to speak through a privately donated monument, this does not create a public forum for private speech through similar monuments, as Summum claims. Public parks, like the Pioneer Park, are traditional public forums for personal speech activities, like talking, carrying signs, and handing out leaflets. Summum members are as free as anyone else to engage in such activities in the park, and the city has therefore not violated their free speech rights. However, while these activities are temporary, putting up a permanent monument represents a greater invasion on government property. While any group is free to erect a monument on its own property, it cannot demand that a city erects its monument on city property. The result of such a practice would be 'a practical nightmare' – a situation which the ACLJ illustrates with some rather alarming examples: a government that accepts a monument praising a war hero, must also accept a monument

ridiculing the same hero; or if it accepts a 9/11 monument, it also have to include an Al-Qaeda monument praising the terrorists; or – perhaps most eloquently – since the federal government accepted the Statue of Liberty as a gift from France in 1877, the principle laid down by the appellate court implies that it now is obligated to accept a Statue of Tyranny as well. While this pragmatic argument alone may seem to provide the Supreme Court a compelling reason to reverse the appellate decision, the ACLJ's main legal argument is that this whole issue is a matter of government speech. The government's free speech is only limited by the Establishment Clause, but since Summum based its challenge solely on the Free Speech Clause, this does not need to be addressed.

The Supreme Court agreed with practically all of the ACLJ's arguments, and included most of them in its Opinion, albeit in a slightly different form (e.g. the Statue of Tyranny became the Statue of Autocracy). The Court held the action of Pleasant Grove to be a form of government speech, and hence not subject to the Free Speech Clause. The appellate court's decision was therefore reversed (*Pleasant Grove*, 2005:18).

Lautsi v. Italy[83] – Crucifixes in Italian Classrooms

In European eyes it may seem somewhat surprising that an Evangelical law firm engages so eagerly and emotionally in a case involving crucifixes in Italian public schools. However, in light of the decades-long tradition of cooperation between Evangelicals and Catholics in politics and litigation in the USA, this is no real sensation. In line with Schaeffer's idea of 'cobelligerency' (see chapter 1), such cooperation has been part of a conservative Christian strategy since the late 1970s. What took place in Europe in *Lautsi v. Italy* should therefore be seen as a reflection, or perhaps better, as an extension of what has long taken place in North-America. The ACLJ's European affiliate, the ECLJ, entered the *Lautsi* case as amicus curiae when the case went from the Chamber of the European Court of Human Rights (ECtHR)[84] to its Grand Chamber in 2010. While it is difficult to evaluate the total impact of the ECLJ's involvement, much indicates that it had great influence on the final outcome.

The *Lautsi* case began in 2002, when Mr. Lautsi questioned the presence of crucifixes in the classrooms of the public school his two boys attended. The obligation to display crucifixes in Italian state schools had its roots back in the mid-19th century, when Catholicism was recognized as the only religion of the state. Gradually falling into disuse, the practice was revived during the

[83] The analysis of the ECLJ 's arguments in *Lautsi* is based on its amicus brief to the Grand Chamber (06/01/10). Other documents included here are the decisions of the Chamber (11/03/09) and Grand Chamber (03/18/11).
[84] The ECtHR has two court levels: a lower Chamber, and a Grand Chamber whose decisions are final.

Fascist era when the government, describing the neglect as "an attack on the dominant religion of the State", announced that all schools should display a crucifix along with a portrait of the King, "the two sacred symbols of faith and national consciousness" (the Ministry of Education's circular no.68, 1922, quoted in *Lautsi* 2009:§19). While the Lateran Pacts of 1929 confirmed Catholicism as the nation's official religion, the Italian Constitution of 1948 declared that the state and the Catholic Church were independent and sovereign in their respective spheres, and that all religious creeds were equal before the law. In 1984, a new agreement on the relationship between Church and State declared that the Lateran Pacts' statement on Catholicism as Italy's state religion was no longer in force. Then, in 2000, an Italian court ruled that the display of crucifixes in polling stations violated the principle of secularism and state neutrality found in the Italian Constitution. However, when the Lautsis tried their case a few years later, their application was dismissed on grounds that the Fascist era regulations were still in force, and that the crucifix was an important symbol if Italy's history, culture, identity and values – the latter including liberty, equality, religious toleration, and the secular nature of the state. This decision was confirmed by the appellate court, while the Constitutional Court declined to evaluate the issue since it involved regulations, not laws (*Lautsi*, 2010:§11-23).

The ECtHR received the application from Ms. Lautsi in 2006. On behalf of herself and her two sons, Ms. Lautsi claimed that the display of crucifixes in public schools violated their rights laid down in the European Convention on Human Rights (ECHR). According to plaintiff, this gave the Catholic Church a privileged position and interfered with her and her sons' freedom of thought, conscience and religion (Art.9), discriminated non-Catholics (Art.14), and suppressed her right as a parent to raise her children in conformity with her own secularistic conviction (Art.2 of Protocol No.1). The Italian government defended the practice in line with the decisions of its domestic courts, claiming that the cross had other connotations than the religious. Indeed, it was a symbol of the humanist and democratic values that everyone appreciates, including – interestingly enough – freedom of choice, the primacy of the individual over the group, and the separation of politics from religion. According to the government, the crucifix display was therefore perfectly in harmony with the principle of secularism found in the Italian Constitution, and it represented no threat to religious minorities. Since the symbol was closely linked to Italian culture and history, the government argued, the question should fall within the national margin of appreciation. The Chamber, however, dismissed the government's 'multivocal' argument, finding the crucifix to be a religious symbol, likely to be associated with Catholicism. As part of the school environment, it would have an impact on young pupils, and it was not in line with the state's "duty to uphold

confessional neutrality" in compulsory public education. Similar to the US Supreme Court in *Stone* (see above), the Chamber therefore concluded that the Lautsis' rights had been violated (*Lautsi*, 2009:§50-58).

The Chamber's decision caused a storm of reactions from both political and religious actors as it was perceived to threaten not only the dominant religion of Italy, but also the religious identity of Europe itself. While Catholic-Evangelical cooperation had long been common in the USA, the Orthodox tradition now joined the alliance. Most prominent was the Russian Orthodox Church, which itself had assumed a dominant position in society after the fall of Communism (Annicchino 2011:216-217). A number of non-governmental organizations, as well as ten Central and Eastern European states[85], participated as amici curiae when the case reached the Grand Chamber of the ECtHR in 2010. Their interventions show a clear pattern: while the Christian organizations and the intervening states – themselves being predominantly Catholic or Orthodox – argued in favor of Italy, the humanist and human rights monitor groups supported the decision of the Chamber (*Lautsi*, 2011:§47-55). Two months before the oral hearing, the ECLJ arranged a seminar called *Religious Symbols in the Public Space* together with the Permanent Representation of Italy to the Council of Europe and the Italian National Research Council. Among the speakers were ECLJ director Grégor Puppinck and Professor Joseph Weiler, the latter representing eight intervening states[86] at the hearing. According to Weiler, Italy had already "raised the white flag of surrender" by reducing the crucifix to a cultural symbol (Weiler 2010:36). But the seminary was a fruitful provider of legal arguments. Hence, when arguing before the Grand Chamber, the Italian government placed far more emphasis on national history, culture and tradition, and the place of the crucifix, as well as Catholicism, within them. A seemingly new argument – somewhat contradictory to its 'humanist/democratic value' argument presented to the Chamber (see above) – was that the rights of the individual (or family culture) should not suppress the rights of the community (the national tradition/ culture). While difficult to evaluate, this may have been a contribution from the ECLJ (see below). In addition, Italy argued that the Chamber had confused 'neutrality' and 'secularism', thus favoring atheism and rationalist agnosticism over religion. The Grand Chamber accepted many of the arguments of Italy and its amici. It reversed the Chamber's decision, and left the question of crucifix display to the national margin of appreciation.

[85] Armenia, Bulgaria, Cyprus, Russia, Greece, Lithuania, Malta, Monaco, Romania, and San Marino.
[86] Armenia, Bulgaria, Cyprus, Russia, Greece, Lithuania, Malta, and San Marino.

The *L'Osservatore Romano* Article and the ECLJ's Argumentation in *Lautsi*

The ECLJ's arguments in *Lautsi* is perhaps best understood in light of an article written by ECLJ director Puppinck for the Vatican newspaper *L'Osservatore Romano*, published about one month after the Grand Chamber hearing. With the eloquent title "*Lautsi v. Italy*. An Alliance against Secularism", Puppinck tries to show what the battle is all about: "the future of Europe's religious and cultural identity". On one side of this identity struggle, he explains, are those who desire a Europe that is "faithful to its true identity and historical roots", i.e. its Christian identity, history and heritage. On the other side are those who champion a completely secularized Europe, which according to Puppinck is nothing else but a "de-Christianization of European culture and society". The *Lautsi* case is emblematic of this battle because it involves a symbol of Christ, and thus challenges "the *visible* presence of Christ" in the whole of Europe (my italics). The problem with the Chamber's decision, Puppinck continues, is that it turns 'religious freedom' into a tool to move religion away "from the public sphere to the private life of people as *individuals* (i.e. religious 'privatization')". But the court should not let individual rights infringe the rights of the society as a whole. All states have an identity, he argues, and this collective identity also has a religious dimension, which is formed and displayed by social habits (e.g. public holidays and names) and visible symbols (e.g. crucifixes and public monuments). A supranational body like the ECtHR has no right to change a nation's religious identity. Echoing the fear that mobilized American Evangelicals into politics in the 1960s, Puppinck states: "If religion is removed from society, faith will be removed from the hearts of future generations" (Puppinck 2010). In other words, there is a fear that a removal of public religious expressions will cause a break in the transfer of the religious memory, to use Davie's term (2000), which in turn will lead to religious decline in society.

The ECLJ filed is amicus brief in *Lautsi* jointly with 79 Members of the European Parliament. In its brief, the ECLJ treats the crucifix as a religious symbol, but argues that its privileged position in the Italian public sphere is justified by the fact that Catholicism is the nation's majority religion. The brief concentrates on two main arguments, one to convince the judges that the crucifix display has done no harm to anyone, the other to convince them that the Chamber's decision to ban such displays is harmful and unjust. As for the first, the ECLJ emphasize that the crucifix is a *passive* symbol. Its presence in public classrooms has not forced anyone to act against their conviction or prevented anyone from acting in accordance with their conviction. Further, the display does not qualify as indoctrination or misplaced proselytizing. Hence, it has violated neither the children's freedom of conscience nor the parents' rights to have

them brought up in accordance with their conviction. The other main argument targets the Chamber's assertion that the state has a duty of confessional neutrality in compulsory public education. By excluding religious symbols from public schools, the Chamber has created a *new* obligation of total secularization of the educational environment, the ECLJ argues; the Chamber has no legal foundation for this action. Instead, it represents a political approach – an echo from Puppinck's article – and it was based on this erroneous doctrine that the Chamber ended up with its erroneous conclusion. Even though church and state are two distinct spheres, the ECLJ continues, this does not imply that they must be separated. Rather, the state must be neutral and impartial in its relations with religious organizations and believers, not in its own identity – an argument that may resemble the idea of governmental speech from *Pleasant Grove*. Hence, if the state desires to privilege the majority religion, it may do so, the ECLJ argues, especially if it furthers the common good. The brief closes with a reference to how the Council of Europe itself – not very unlike Italy's cultural argument to the Chamber – claims to be founded on the spiritual and moral values that are the common heritage of the European people, and from which the basic principles of all democracies have developed. Thus, rather than making a direct statement on the Christian identity of Europe itself, the law firm uses the statements and acts of other European political institutions to perform its message.

One Cause, Many Arguments

The various cases that have been presented in this chapter show how difficult it is for the courts to decide issues that involve public religious expressions. Different courts may draw opposite conclusions in the same case or in similar cases. This inconsistency can in part be explained by the 'multivocality' of symbols. Different judges may 'see' different meanings when observing the same symbol, and the arguments presented before them are aimed at guiding their understanding in one direction or the other. Here *Pleasant Grove* makes a good example. While the Ten Commandments no doubt communicate a religious message, the ACLJ depicted the monument in Pioneer Park as a symbol of the city's history and identity. The law firm's commitment to fight privatization of religion leaves little doubt that it sought to protect the monument precisely because it was a religious symbol – it is unlikely that a similar concern would be shown if it was another symbol of the city's heritage, e.g. its first fire station, that was 'under attack'. However, the ACLJ's argument here should not be seen as a contrast to the ECLJ's clear stand that the crucifix really is a religious symbol (thus wiping away the main argument of the Italian government before the Chamber). In *Pleasant Grove*, the 'history and heritage' argument served to build up under another argument which turned out to be decisive for the

Supreme Court's decision, namely governmental speech. While the Establishment Clause would make it difficult for a court to accept religious speech from a government, a message about history and heritage represents a legitimate justification to all citizens. In *Lautsi* the situation was different. Here the idea of a governmental speech was disadvantageous – as can be illustrated by the Chamber's understanding of the situation when it wrote that "[t]he presence of the crucifix may easily be interpreted by pupils of all ages as a religious sign, and they will feel that they have been brought up in a school environment marked by a particular religion" (*Lautsi*, 2009:§57). To counteract the claim that the Italian government was sending out a religious message, the ECLJ and its cobelligerents emphasized that the crucifix was a passive symbol – not very unlike the Ten Commandments granite plate outside the Texas State Capitol in *Van Orden* (2005), which ironically enough was tolerated because it was 'far more passive' than the Ten Commandments display in public classrooms in Kentucky (*Stone,* 1980). With the crucifix presented as a passive symbol – a notion which was "of importance" for the Grand Chamber's ruling (*Lautsi,* 2011:§72) – there was no need to 'camouflage' its religious meaning. The religious meaning of the crucifix could therefore be used to promote the underlying cause – the idea of a certain European identity.

Pleasant Grove and *Lautsi* give a good illustration of what may at a first glance seem to be an inconsistency in argumentation. However, these seemingly conflicting arguments make perfect sense in light of the fact that they all serve the same cause. This highlights an important aspect of the law firm's role as a 'mediator' between the Evangelical movement and the formal public sphere: Any cause – be it the pro-life fight, the defense of a religious expression, or immigration politics – can be translated in various ways. As professionals, the Evangelical lawyers are able to adapt their arguments to the particular situation – as has been demonstrated by the cases presented in this chapter. This is of course not unique for the Evangelical law firms. Any group that uses litigation to influence society must adapt its arguments in order to succeed in court (see e.g. Eskridge 2002; Epstein and Kobylka 1992). To be properly understood, then, the arguments of the Evangelical law firms must be viewed in light of a greater framework: the Evangelical cause as a whole. This will be the focus of the next chapter.

6 Religious Freedom and a National Identity

> My goal with Regent is to see it... not rival Harvard and Yale, but to rival Oxford and Sorbonne of the Middle Ages. It's a school that can impact the whole of society.
>
> Pat Robertson (Regent YouTube 2009b:min.02:19-02:30)

Evangelical law firms in general place much weight on freedom, liberty and rights, as can be illustrated by firm names like Center for Law and Religious Freedom (1975), Alliance Defending Freedom (1993), and Liberty Institute (1997). Explaining its mission, the ACLJ informs that it is "dedicated to the concept that freedom and liberty are universal, God-given and inalienable rights that must be protected" (ACLJ 2012c) – a description resembling the famous words of the Declaration of Independence (see below). However, this focus on rights is by no means unique to the Evangelical law firms. Other groups invoke their rights in a similar way – as we saw with the civil rights movement in chapter 2, or the women's rights movement in chapter 4. Opponents of gun control invoke their 2nd Amendment right to bear arms; proponents of stricter criminal laws point to the rights of the victims; opponents of unionism champion the right to work, and so on (Southworth 2008:163). The frequent Evangelical references to freedom, liberty and rights cannot be seen isolated from the larger context. On the one hand, the use of such language of rights could be considered part of a modern trend with deep roots in American history and culture. According to law professor Scott Gerber, "the essential political premise of the American Founding is that government exists to secure natural rights" (1993:230). The presumed existence of such rights is reflected in the Declaration of Independence's claim "that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, [and] that among these are Life, Liberty and the pursuit of Happiness". If a government fails to protect these rights "it is the Right of the People to alter or to abolish it, and to institute a new Government" (1776). After World War II, international bodies have recognized the existence of universal rights, e.g. as expressed in the Universal Declaration of Human Rights (1949) and the European Convention of Human Rights (1953). This global focus on rights makes it difficult to promote or protect any interest without using a language of rights. On the other hand, the Evangelical use of such language can also be seen in relation to the movement's turn to litigation (see chapter 2). Not only did Evangelicals feel that liberals threatened their values and former privileges in the society. The strategy of the liberal groups was a lesson in itself – it worked.

With both conservative and liberal groups invoking the same rights, it is a painstaking task to determine precisely what these rights mean in practical life, not least when religion is involved. The question raised in the *Lautsi* case is illustrative: Did the display of crucifixes in public class-

rooms violate the human rights of the Lautsis? According to the Chamber, it did; according to the Grand Chamber, it did not (see chapter 5). While it is beyond the scope of this inquiry to discuss what a human right is, or how the laws should be interpreted, this chapter sets out to examine what the ACLJ means when it talks about freedom, liberty and (human) rights. The aim of the chapter is to achieve a better understanding of the law firm's translation of arguments, as well as to explore the actual and potential consequences of a religious group's strategic use of litigation compared to other social or political movements. The chapter begins with a discussion of the rationale of translation, focusing on the role of professionalism, the courts' need for secular arguments, and the different demand for translation in today's society compared with the time of the founders. To create a framework for my discussion of consequences, I use three texts touching upon religious freedom, its safeguards and its threats. Because of the centrality of the American Founding in the argumentation of the Evangelical Movement and its law firms, I will first summarize some thoughts presented by James Madison – the 'Father of the Constitution' and the author of the Bill of Rights – in an article from 1788. I will then relate this to two discourses delivered by Presbyterian pastor Charles Beecher in 1846, as these touch upon what may be considered a foreshadowing of the development that has been described so far in my inquiry. Although the messages of Madison and Beecher belong to a certain historical context, I find their reasoning highly relevant for my discussion. The third text is a joint Evangelical-Catholic document from 1994, *Evangelicals and Catholics Together: The Christian Mission in the Third Millennium.* This text is used to illustrate what I have called 'the Evangelical cause as a whole', that is, the overall cause of the Evangelical movement[87], and the larger system of meanings to which the ACLJ's arguments relate. The law firm's goals and arguments are based upon a certain understanding of the American constitutional order, and I will show how this understanding is used as a means to form a public opinion on a certain national identity.

The Rationale for Translation

The provisions of the US Constitution aimed at securing an independent judicial branch. While presidents and congressmen have to relate and respond to the will of the people, the federal judges are responsible only to the Constitution (see chapter 2). Addressing the court in a language of law is thence both natural and necessary. As Epstein and Kobylka writes,

> the path of the court is charted by conversations between lawyers (judges and advocates) conducted in a language and using a terminology fashioned and conveyed through a central shared experience (law school and participation in the legal profession) (Epstein and Kobylka 1992:311).

[87] I do not say that every person self-identified or classified by researchers as 'Evangelicals' necessarily supports this cause. What I describe is the cause, or aim of the *politically active part* of the Evangelical movement.

The ability of Evangelical law firms to access the formal public sphere of courts lies precisely in their being professional law firms. In his book on public religion in the modern world, Casanova describes the differentiation of secular spheres from religious institutions and norms as one of the main structural characteristics of the modern world. This process has resulted in autonomous systems of state, economy, science, education, law, etc. Religion too has become one such independent system, coexisting with others (Casanova 1994:212). Consequently, the Evangelical movement – as a religious movement – has in itself no authority to influence the courts. The Evangelical law firms, on the other hand, may access them either physically (at oral hearings) or through their briefs. In both instances, the key to influence is found in their argumentation. The professional lawyers know the language, the laws, and the 'rules of the game'. By making the correct moves, they may impact on the outcome of a case – as has been demonstrated by some of the cases presented in this study.

In previous chapters, I have described the role of Evangelical law firms – exemplified by the ACLJ – as a 'mediator' between the Evangelical movement and the governmental institutions, and a 'gateway' through which the movement's religious and moral causes may enter the formal public sphere. This translation of causes into neutral or secular arguments functions not only to present the cases in a language that a (per definition) secular court can understand. More important, it provides the court with legitimate justifications for its ruling – should it be in favor of the Evangelical cause. As mentioned above, it is a difficult task for courts to decide precisely what a certain right means in practical life. The way that a court perceives a specific issue, as well as the court's ideological composition, will influence its decision. After all, judges are only humans, and they can be influenced by arguments both in and outside the courtroom (see e.g. Baum 1995: 151-153). But even if they sympathize with the Evangelical cause, they nevertheless *need* neutral reasons to justify their decision. This can be illustrated by the *Lautsi* case. In a separate concurring opinion, Grand Chamber judge Bonello expresses a passionate and strong disagreement with the Chamber's ban on the crucifix display, and his arguments by and large follow the key points of Puppinck's *L'Osservatore Romano* article. Judge Bonello, himself a Maltese, places much weight on the crucifix as passive, but important religious, historical and cultural symbol. He criticizes the Chamber for denying "European heritage value to an emblem recognized over the centuries by millions of Europeans as a timeless symbol of redemption through universal love" (Bonello 2011:§4.2) – a description approaching the border of theology. His opinion, though, is dominated by the 'history and heritage' argument. Since Christian institutions for centuries were responsible for providing education, the crucifix is a natural part of the school environment (2011:§1.3), "a

voiceless testimonial of a historical symbol" and "part of the European heritage" (2011:§3.3). Removing it, as well as attempting to separate state and church, is "none of this Court's business" (2011:§2.4). Rather, it is "aggressive espousal of agnosticism or of secularism – and consequently anything but neutral" (2011:§2.10). Bonello thus seems to support the idea that Europe has a specific Christian identity. Like the Evangelical lawyers, he seems to fear that the removal of visible religious symbols may disrupt the transfer of the religious memory:

> A court of human rights cannot allow itself to suffer from historical Alzheimer's. It has no right to disregard the cultural continuum of a nation's flow through time … A European court should not be called upon to bankrupt centuries of European tradition. No court, certainly not this Court, should rob the Italians of part of their cultural personality (Bonello 2011:1.1-1.2).

Judges, then, may indeed have personal opinions. But for a court to justify its decisions in a pluralistic society, the reasons must be neutral. Providing such reasons is perhaps the most important function of the Evangelical law firms.

One final remark should be made regarding the rationale for translation, this time in a historical perspective. James Madison, Thomas Jefferson and other founders of the American republic showed great concern for the protection of an individual's conscience and religion of choice, something which is reflected in their writings. Madison, as we saw in chapter 5, feared that state support for 'teachers of the Christian religion' would eventually lead to religious persecution, as had been the case in Europe for centuries. The Virginia Act for Establishing Religious Freedom, drafted by Jefferson in 1779, enacted that no one should in any way be compelled to support a religion or be prevented from following his/her own conviction. However, the justification of these and other political decisions – such as the Declaration of Independence – were often made in religious terms. Madison referred to "the duty that we owe to our Creator" and "the Supreme Lawgiver of the Universe" (1785:§1,15), and Jefferson stated that "Almighty God hath created the mind free", and that any coercion would lead to "hypocrisy and meanness", and be a "departure from the plan of the Holy Author of our religion" (1786). Calling to mind the dominant position of Protestant Christianity in the 18th and early 19th century American society, such religious justifications[88] would still be accessible to most citizens. In chapter 5, we saw that the question of 'sectarianism' was used as one of the earliest tests to evaluate the constitutionality of religious expressions. Not always easy to determine – as can be illustrated by the various court rulings on the reading of the King James Bible in public schools – this test nevertheless worked as a guideline, for instance when teaching of Christian ethics was incorporated in public school curricula (Maniloff 1994:221), or when leading founders, like Madison and Jefferson, attended

[88] The religious terms used in the documents conform with both deism and theistic Christianity.

the Sunday services held by various Protestant (and Catholic) preachers in the old House of Representatives (Library of Congress 2014). In the 19th century, the religious composition of the United States changed as Catholic immigration increased sharply from the 1820s (Maniloff 1994: 221). Towards the end of the century, higher criticism and Darwinism offered alternative world-views, challenging many Protestant denominations both from within and from outside (see chapter 1). In 1965, old immigration restrictions were removed, and immigrants from the whole world brought with them new religions and worldviews. These changes in citizen composition brought a different need for justification of political decisions. While any group may contribute to the public debate, translation of religious reasons is necessary for governmental institution to include them in their decisions. A law or a court ruling must be presented and justified in a language that is equally accessible to all members of the current society. Hence, when the ACLJ and other Evangelical law firms translate the causes of the Evangelical movement into a neutral (secular) language, they respond to a need which was not present at the time of the founders.

Plurality as a Safeguard of Freedoms and Rights

Although contemporary voices called for the acknowledgement of the 'only true God' in the American constitution, the founders intentionally omitted any such reference to the divine (see chapter 5). This choice should stand as a backdrop as I now turn to examine the consequences of the strategic use of litigation by a religious group to promote its goals and protect its interests. To create a frame for my discussion, I will first present James Madison's notion of plurality as a safeguard of freedoms and rights, and Charles Beecher's discourses on creeds as a 'test'.

In 1787-88, supporters of the federal Constitution published a series of articles and essays, known as the Federalist Papers, to promote its ratification. In one of these articles, James Madison sets out to explain the principles and structure of the new federal government; how the separation of powers and a system of 'checks and balances' will prevent usurpation. While it is necessary to guard a society against oppression by its rulers, Madison also points to the importance of protecting one part of the society against the injustice of another, the most vulnerable being the minority: "If a majority be united by a common interest, the rights of the minority will be insecure" (1788b:323). According to Madison, there are only two ways to prevent such 'evil'. One method is to adopt a government that is independent from society, like a hereditary or self-appointed authority, but this leaves no more than a "precarious security" to any part of the society. The other method, which Madison finds exemplified in the United States, is for the society to include "so many separate descriptions of citizens as will render an unjust combination of a majority of the whole very improbable, if not impracticable" (1788b:324). The

existence of many parts, interests and classes of citizens makes a majority threat little likely to harm the rights of an individual or a minority, Madison claims. He then points to two sets of rights that are secured this way in the American republic: *civil rights*, which are protected by a "multiplicity of interests", and *religious rights*, which are secured by the existence of a "multiplicity of sects" (1788b:324). In other words, the existence of multiple denominations and interests is thought to work as a safeguard against religious suppression and injustice. Plurality, from this perspective, is desirable for the health of the nation, and, not least, for the freedoms and rights of the individual. If a stronger faction of society is able to unite and oppress the weaker, Madison continues, the government has failed to fulfill its purpose, which is to secure justice for all. However, since the American republic consists of so many interests, parties and sects, he thinks it is unlikely that such a coalition will take place "on any other principle than those of justice and the general good" (1788b:325).

In 1846, about half a century after Madison published his article, Presbyterian pastor Charles Beecher delivered two discourses at the Second Presbyterian Church in Fort Wayne, Indiana. This took place six months before British and American leaders of various Protestant denominations gathered in London to establish a global Evangelical Alliance[89]. In the discourses, later published as *The Bible, a Sufficient Creed*, Beecher expresses concern about this attempt to unite, and about the tendency of Protestant churches to form creeds and use these as 'tests' for church membership and ministry qualification. Although Beecher does not refer to Madison, he seems to share his view that plurality in thinking is both natural and healthy. A unity created through creeds, on the other hand, is artificial and dangerous. With illustrative examples Beecher tries to show why it is impossible to create an absolute unity of belief, even on so-called 'fundamental truths':

> You might as well attempt to compel seven men, with seven glasses, each with a particular hue of the rainbow, to see all things of the same color, on pain of excommunication, as to compel all minds, of ten thousand diverse mental optics, to behold all things of one catholic, leading hue (Beecher 1846:9-10).

Beecher describes the idea of "a Church, with an absolute union of opinion" as a "walking nightmare", and points to the dangers of "testing Church-fellowship by opinion" (1846:10). To Beecher, this is not just a theoretical danger, but a historical fact, testified by centuries of religious intolerance and persecution in Europe. The root of this persecution, he claims, was found in the establishment of Christian creeds from the 4th century, based on the idea that "[t]ruth is one – therefore true believers cannot differ". But, Beecher objects, they *do* differ. The creeds were made to keep out deviating, or heretic views, which always represent the opinions of the minority.

[89] This project partly failed, however, due to disagreement over slavery (see chapter 1).

Through their focus on creeds, he argues, contemporary Protestants were repeating history in order to keep their denominations "pure" (1846:32-33).

Beecher also criticizes the education of Protestant ministers for furthering a narrow mind and a fear of independent thinking. Most students go directly from the family to college, and then to the theological seminary, without learning to know the world outside. The only society they know, Beecher asserts, is the religious society, and the norms of this society demand that they in order to be licensed as preachers – something on which their whole living depends – must subscribe to the creed of that denomination. Comparing such creeds with handcuffs, Beecher claims that the "liberty of opinion" in the theological seminaries is "a mere form" as the student only gets to choose what kind of denominational handcuffs to wear. "During the whole course of seven years' study, the Protestant candidate for the ministry sees before him an authorized statement, spiked down and stereotyped, of what he *must* find in the Bible, or be martyred" (1846:41). This is not freedom, he concludes.

To be sure, Beecher is not against religion or religious education. His main tenet is that the Bible in itself is a sufficient creed for guiding the faith and life of all Christians, and that a substitution with any other creed represents a step towards apostasy. He warns that creeds – the presentation of one understanding of the Bible as *the* system of doctrines contained in it, required to be accepted by all – undermine the Bible, and when used as a 'test' they may eventually lead to religious intolerance and persecution, as in Medieval Europe (Beecher 1846:4,23,28-33). "Was not this the way things went with Rome? Are we not living her life over again? And what do we see just ahead? Another General Council! A World's Convention! Evangelical Alliance and Universal Creed!" (Beecher 1846:44). In other words, what Beecher fears is that the drive towards unity among his contemporary Protestants will to wipe out the plurality which Madison described as a 'security' for civil and religious rights.

From Madison's praise of pluralism in the late 18th century, and Beecher's concern about its decrease in the 1840s, we may take one step further to Habermas' normative description of the liberal state. According to Habermas, it is a duty of the liberal state to protect all religious beliefs and ways of life. Accordingly, the state cannot expect its religious citizens to justify their political statements independent of their convictions and worldviews (2005:14). However, if religious arguments are allowed into the formal public sphere, governmental authority may become an agent for the religious majority.

> [M]ajority rule turns into repression if the majority, in the course of democratic opinion and will formation, refuses to offer those publicly accessible justifications which the losing minority, be it secular or of a different faith, must be able to follow and valuate by its own standards (Habermas 2005:15).

While Madison found oppression by a majority unlikely due to the 'multiplicity' of interests and denominations in the American society, Beecher pointed to the increasing cooperation and desire for unity among various Protestant denominations in the mid-19th century, and warned that the attempts to create an 'absolute unity of belief' could result in repression of deviating beliefs – as had been the case in the early history of the Christian church:

> For the delegates, little by little, transformed themselves into legislators, and avowed that Christ had given them power to make laws of faith and practice for the people. Things went on gradually until A.D. 325 when the first general council was called and the first general creed was made (…) Three hundred and eighteen Bishops fully settled the doctrines taught in the Bible, banished Arius to Syria, and compelled his followers to subscribe (Beecher 1846:31).

Beecher's discourses throw a curious light on the ACLJ's goal of protecting religious and moral interests by national laws; on the desire of Regent University to educate Christian leaders, not just for denominational affairs, but to "change the world"; and on former Attorney General John Ashcroft's statement that "God has not given us the spirit of fear, but of power – authority…" (see chapter 3). As behaviors, words, and symbols can only be understood in their own context, these and similar statements must be seen in light of their context. I will now describe this context before I return to the thoughts of Madison and Beecher in my discussion of consequences.

Contending Together for a Nation under God

In previous chapters, I have argued that the ACLJ's arguments must be viewed in light of the Evangelical cause as a whole in order to be properly understood. This, I would say, goes for the arguments presented in both the informal public sphere and the formal public sphere. In my model, I showed that the arguments for a certain cause may be similar in both spheres (see attachment 2). This means that they are both 'translated arguments', since translation is a requirement for entry into the formal public sphere. I also showed that the arguments may differ between the two spheres, and pointed to the law firms' need for religious arguments in the informal public sphere in order to target a certain audience, as well as to contribute to the shaping of the cause in question (see attachment 3). I now turn to the larger contextual framework of Evangelical causes in an attempt to create a better understanding of what the ACLJ lawyers mean when they speak about for instance freedom, liberty, and (human) rights[90]. I refer to this contextual framework as 'the Evangelical cause as a whole' to emphasize that this could be seen as the overall cause, or main objective of the Evangelical movement. The arguments presented by the ACLJ both arise from and contribute to the construction of this frame-

[90] My aim is not to give a complete picture, but rather to shed some light upon the phenomenon of Evangelical law firms and their argumentations. All quotes in my text are taken from the document in question.

work of meanings. To illustrate and explain the Evangelical cause as a whole, I will introduce a joint Evangelical-Catholic document from 1994, *Evangelicals and Catholics Together: The Christian Mission in the Third Millennium*. This document was the result of two years of informal conversations between leading American Evangelicals and Catholics. In addition to the 15 participants in these meetings, the document was signed in endorsement by another 24 prominent leaders and scholars. The document is particularly interesting for my inquiry for two reasons. First, it illustrates the strategy of cobelligerency, which is a central part of the Evangelical approach. Second, it was endorsed by two leaders who also have received attention in my study: Pat Robertson, as leader of Regent University, and Keith Fournier, in his role as Executive Director of the ACLJ.

Evangelicals and Catholics Together is not an official statement on behalf of the respective communities, but expresses the desire of prominent figures for greater unity and cooperation. The document focuses on the Christian faith and mission, and emphasizes the need for a visible unity. Acknowledging that there are some major theological differences between the communities, the document includes an overview of doctrines which they affirm together – somewhat similar to a creed. At the same time, the document condemns the practice of 'stealing sheep' from one another's fold; Catholics and Evangelicals should instead cooperate in their mission and concentrate on the non-Christian world. Most interesting, however, is the section called "We Contend Together". This section describes the responsibilities of the "one church of Christ", and is introduced by an announcement that the communities are "bound together in contending against all that opposes Christ and his cause". The document thus exemplifies Schaeffer's strategy of religious cobelligerency – cooperation between parties that do not agree on "all sorts of vital issues", but are "on the same side in a fight for some specific issue of public justice" (quoted in Strange 2005). Before I present the 'issues of public justice' that are outlined in the document, I will dwell a little on the motivations for this common fight. In addition to evangelization and the nurturing of believers, the Christian responsibility is said to encompass the entire society: "Christians individually and the church corporately also have a responsibility for the right ordering of civil society." To recapitulate, it was a similar call to fulfill one's public responsibilities that mobilized the Evangelical lawyers in the 1980s (see chapter 1). While the document denies that Christians have power to build the Kingdom of God on earth, it nevertheless shows that the goal is to turn the societal development in a certain direction, guided by a certain set of values and principles: "Together we contend for the truth that politics, law, and culture must be secured by moral truth." It is in this 'moral truth' we find the clue to understand what the ACLJ mean by freedom, liberty, and rights.

The social agenda of the document is legitimized by references to the Founding Fathers and the constitutional order[91]. In the document, the US constitutional order is defined as "most essentially a moral experiment". Assertedly in line with the founders, the document claims that "only a virtuous people can be free and just, and that virtue is secured by religion". In light of the document's focus on Christian unity and the cause and mission of the 'one church of Christ', it is clear that 'religion' here implies Christianity, or more precisely, the version of it that is outlined in the document. While the American society has drifted away from this moral experiment, the signers of the document state that they will fight together to restore it and put religion back to the place it belongs. To elaborate this, they explain that they "contend together for religious freedom", which is "the source and shield of all human freedoms", as well as "a product of religious faith". What is here meant by 'religious freedom' is the visibility of religion in society, i.e. the inclusion of religion in the public sphere:

> We strongly affirm the separation of church and state, and just as strongly protest the distortion of that principle to mean the separation of religion from public life. We are deeply concerned by the courts' narrowing of the protections provided by the "free exercise" provision of the First Amendment and by an obsession with "no establishment" that stifles the necessary role of religion in American life.

The document describes religion as a social necessity and characterizes arguments against public religious expressions as a break with the constitutional order and an "assault upon the most elementary principles of democratic governance". The document then goes on to present the various issues which are considered part of the Christians' public responsibility: to ban abortion, euthanasia, and population control; to protect parental rights and the traditional family; to combat pornography, and violence and obscenity in the entertainment industry; and to support a free economy. Among the means to secure these various interests are mentioned laws and social policies, as well as boycotts and consumer actions. Published a few years after Sekulow had won two important school cases at the Supreme Court (*Mergens* 1990, and *Lamb's Chapel* 1993), the document ascribes an important role to public schools in transmitting "to coming generations our cultural heritage, which is inseparable from the formative influence of religion, especially Judaism and Christianity" – i.e. the transfer of a religious memory.

After expressing a desire to cooperate with anyone interested in promoting the "common good" (as it is defined in the document), the section closes by stating that, "[w]e are determined to assume our full share of responsibility for this 'one nation under God', believing it to be a nation under the judgment, mercy, and providential care of the Lord of the nations to whom

[91] In addition to the written document (the Constitution), a *constitutional order* includes legal theories, norms, customs and interpretations. It has to do with how the Constitution functions in a society.

alone we render unqualified allegiance". This brings to mind the words of Pat Robertson when he praised the increasing cooperation and political engagement of Evangelical Christians in the mid-1980s: "When they pledge their allegiance to 'one nation, under God', they really mean it" (1986:299). In short, the Evangelical cause as a whole – i.e. the overall aim of the Evangelical movement – is to bring politics, laws, and culture in line with a Christianity that is based on agreement on certain theological doctrines and conservative social issues. In 1994, the ACLJ, through its Executive Director and its founder, declared that it would assume its 'full share of responsibility' to achieve this goal.

Forming a Public Opinion on Identity

According to Habermas, the public opinion[92] in a democracy functions to criticize and control the government, usually informally, but in periods of election also formally (1974:49). In order to pressure courts and other governmental institutions to make decisions in accordance with a particular cause, it is greatly beneficial, and sometimes even necessary for an interest group to influence the opinion of the general public (see e.g. Casillas, Enns and Wohlfarth 2011:46; Giles, Blackstone and Vining 2008:303; Baum 1995:151-153). The arguments presented by the ACLJ in the informal public sphere contribute to the creation of a public opinion, for instance on the abortion issue (see chapter 4). I will now look at how the law firm works to form a public opinion on a national identity through the promotion of a certain understanding of the US constitutional order and the founding of the American republic.

The Founding Fathers established an order in which the Constitution and federal laws were to be the supreme laws of the federation, binding to all states (U.S.Const., art.VI). The general acceptance of this principle makes constitutional arguments a legitimate justification for political decisions. Consequently, the interpretation of the Constitution has received much attention from various interest groups, which champion their own understandings of its provisions. The right to decide what the Constitution means, however, belongs to the courts. One method preferred by some judges, lawyers and commenters, is to search for the *original intent*, i.e. to read the text the way they think the founders intended it to be understood (Powell 1985:886). This is a method favored by the ACLJ, as can be exemplified by frequent references to the founders, and statements such as:

> [C]hurch/state separation was never meant to exclude religious expression from public life. The Founding Fathers never intended to prevent anyone from saying the Pledge of Allegiance in a public school or other public arenas simply because it has the phrase "...one nation under God." (…) Many of these cases concern a general misunderstanding of the law (ACLJ 2012t; See also Surtees 2014).

[92] The public opinion is formed in the public sphere, and presupposes an informed public, i.e. that information about the state and its policy is available to the public (Habermas 1974:49-50).

As I illustrated by the image of Janus in chapter 3, the ACLJ works in two directions (see attachment 2). On the one hand it tries to influence the opinions of courts directly, guiding the constitutional interpretations of the judges in the desired direction. On the other, it addresses the general population, trying to shape a public opinion on a certain national identity.

In *Evangelicals and Catholics Together*, we saw that the notion of the USA as a Christian nation was interwoven with a certain understanding of the US Constitution. The document asserts that the founders embedded a specific Christian moral code in the constitutional order of the nation, and that this code forms the basis of all human freedoms. The motive for the establishment of the American republic has been much debated, but according to Gerber, the USA was not founded to cultivate virtues[93], as the idea of a Christian moral code would imply. The purpose of the founders, Gerber argues, was to secure natural rights, a project that was highly influenced by liberal thinkers, such as John Locke (Gerber 1993:229-231). To be sure, *Evangelicals and Catholics Together* does not deny that the Constitution secures rights, but these rights are seen as byproducts of the main intention, which is "most essentially a moral experiment", based on and protected by Christianity. 'Religious freedom' is portrayed as an unrestricted unfolding of religion in society, always present and visible in public life through verbal and physical expressions. Attempts to limit these expressions are perceived as attacks on religious freedom. In chapter 4 and 5, I showed that both the ACLJ's arguments against the ACA's contraception mandate and its arguments in favor of public religious expressions contribute to creating a picture of Christianity being under attack. Regardless of whether they explicitly mention a Christian constitutional moral code or national identity, the arguments nevertheless relate to this larger system of meanings, which they also reinforce and contribute to shape.

In *Evangelicals and Catholics Together*, privatization of religion is depicted as a severe deviation from the original intent of the founders. Religion is a necessary part of public life, the argument goes, and every restriction to it equals a limitation of the religious freedom. The defense of religious symbols in public life, however, does not only rely on this understanding of religious freedom. The visibility of symbols in itself plays a central role in the forming of public opinion. This is eloquently illustrated by ECLJ Director General Puppinck's *L'Osservatore Romano* article:

> The *Lautsi* case has a unique importance – that of symbolism. The case is symbolic because it questions not only the legitimacy of the visible presence of Christ in the schools of Rome, but also in the whole of

[93] The idea that the Revolution was motivated by the cultivation of virtue has been the interpretation of republican revisionists from the 1960s. According to the revisionists, the Revolution was not based on "a philosophical concern for protecting private rights, [but on] a widely shared commitment to sacrificing private interest for the public good" (Gerber 1993:209; See also Kramnick 1982:630,664).

> Europe. Thus, *Lautsi* is a symbol of the current conflict regarding the future of Europe's religious and cultural identity (Puppinck 2010).

Although Puppinck's article refers specifically to the European context, the principle is the same as in the American debate: religious symbols, buildings and artefacts may function as constant reminders in the cultural landscape, sending out a message about a certain history and identity. Just as the Statue of Liberty may communicate that you have now come to 'the Land of the Free', religious symbols may convey the message that you have now come to a religious place. That was how the ECtHR Chamber saw the presence of crucifixes in Italian classrooms: the display could make pupils feel that they were brought up in an environment marked by a particular religion (see chapter 5). Recalling the 'multivocality' of symbols, however, it stands to reason that not everyone will interpret a particular symbol in this way. But a religious message is a possibility, and for the Evangelical cause this is also desirable. The more public and shared the (religious) meaning of a symbol is, the greater the possibility that it will function as an identity marker. The perhaps strongest message on identity, however, comes from what is done with such symbols – from what is communicated by allowing a public display of religious symbols; by allowing just one such symbol; by removing them; or by making them illegal.

As carriers of meaning, symbols play an important role in the transfer of a religious memory to future generations. If the meaning is lost, the transfer will be disrupted or the message disturbed. To illustrate, if the religious meaning of the Ten Commandments was lost, the stone monument in Pleasant Grove could still be a historically interesting object (similar to the ruins of an unknown Greek temple), but it would be of no more use for the Evangelical cause than the city's first fire station. Through its arguments, the ACLJ may conserve or modulate the meaning of a symbol, and thus the message it communicates. This way the law firm can bring attention to the religious significance of a symbol, or to a specific religious message embedded in it, as can be illustrated by the ECLJ's depiction of the crucifix as a symbol of the presence of Christ and a Christian national identity. Consequently, such arguments also contribute to the shaping of the religious memory of a nation. The depiction of the US constitutional order as a moral experiment based on Christian values and ideas is a major contribution in this regard. When presented by a professional law firm like the ACLJ, this interpretation gains legitimacy from the public recognition of these lawyers as professionals – educated, experienced, and familiar with laws, legal history, and the language of law. This professionalism also creates a possibility – a 'gateway' – for the same ideas to pass from the informal public sphere to the formal public sphere of courts and political institutions. In short, through its interpretation of the constitutional order of the nation, the ACLJ may influence political decision directly – should the governmental institutions accept its

version – and indirectly, through pressure from public opinion. It falls outside the scope of this inquiry to evaluate the effects of the law firm's arguments in this regard, but such influence should be recognized as a possibility.

The Mantle of Religion

The material presented in this study shows that Evangelical law firms, exemplified by the ACLJ, do have influence on governmental institutions. In some instances this influence has had major consequences for the American society in general, as well as for the policy of other countries. We need only to think of the right of American students to establish bible study groups or pray together on public school ground; the presence of religious monuments in the cultural landscape; abortion and marriage regulations; the display of crucifixes in Italian class rooms; and, perhaps even more impressive, the USA PATRIOT Act. While an influence is clear, it is far more difficult to make predictions about future developments. I still want to make some comments on the potential consequences of the use of courts to further a religious agenda.

Commenting on religious freedom and democratic will formation, Habermas points to the need for conflicting parties to reach agreement on the demarcation between positive freedoms (to practice one's own religion) and negative freedoms (from the religion of others). The reasons for what is tolerated or not, must be such that all sides can accept them. Moreover, in a democracy, equal political participation allows all citizens to feel that they are also authors of the laws which are to regulate their own behavior and that of others (Habermas 2005:13). Consequently, it would be unfair to exclude any group of people from participating in the public sphere, thereby preventing them from giving their contribution to the making of an agreement, forming the public will. By its very definition, the public sphere is a social realm to which all citizens are guaranteed access (Habermas 1974:49). It follows that the Evangelical movement, like any other group, has a 'right' to present its arguments and engage to promote its causes and interests. According to Hacker, who based his study largely on interviews with leading lawyers, the ACLJ does not work to overthrow the secular society, but to ensure conservative Christians "a place at the table" (2005:36) – or, we could say, a voice in the public sphere. I do not intend to question the sincerity of this approach. However, in light of the above discussion on the US constitutional order, we could ask if the law firm's predominant concern really is to secure access to the public sphere for the Evangelical movement, or if it is to 'capture' the public sphere altogether. The ACLJ is part of a larger project – a project that is fundamentally religious – which works 'holistically' to introduce legislation on a variety of social and political issues, some of which involve matters of personal conscience.

The idea that a Christian 'moral code' is embedded in the constitutional order is closely related to the 'history and heritage' argument, which is frequently applied by the ACLJ and many of its cobelligerents. One could even argue that the 'history and heritage' argument is a natural part of this understanding of the constitutional order. I suggest, however, that both are translations of the idea of a Christian national identity – an idea which is a contemporary construction of how the society and national policy ought to be. One reason for my statement is that the arguments presented by the proponents of a Christian national identity are *selective* – as can be demonstrated by contrasting them with Madison's rather negative historical arguments against such close relations between religion and government. Madison's position can be illustrated by his arguments against the provision of state support for 'teachers of the Christian religion'. A bill to provide economic support for religious teachers may in itself seem harmless, or, at worst, like a bad spending of money. To Madison, however, it was "a signal of persecution". His arguments reveal a different view on having one religion or sect as the dominant force in society than what we see in *Evangelicals and Catholics Together*. With references to history, Madison argues that such arrangements are harmful in a double sense. On the one hand, they corrupt religion itself:

> Because experience witnesseth that ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation. During almost fifteen centuries has the legal establishment of Christianity been on trial. What have been its fruits? More or less in all places, pride and indolence in the Clergy, ignorance and servility in the laity, in both, superstition, bigotry and persecution (Madison 1785:§7).

On the other hand, such arrangements corrupt society. "It degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority," Madison argues, pointing to the bill as a first step on the way of intolerance which centuries before had led to the European inquisition (1785:§9). Somewhat ironically, perhaps, it would seem that 'the Father of the Constitution' was far more skeptical to giving prominence to one form of Christianity than the voices which today claim that the constitutional order embraces a certain religion-based 'moral code'.

Madison's concern for society resembles Beecher's reflections on creeds in the denominational context. Similar to Madison's reasoning, Beecher argued that creeds were harmful in a double sense: they corrupted the religion, and forced the thoughts and actions of the believers in one fixed direction, likely to lead to persecution of those who would not conform. Like Madison, Beecher pointed to the history of Europe to legitimate his warnings against "testing Church-fellowship by opinion" (1846:10). While Beecher worried about the increasing cooperation and desire for unity among a limited group of Protestant Christians in the mid-1840s, the strategy of religious cobellige-

rency has since the 1970s led to a much wider cooperation, including both Catholics and Protestants, and also some Jews (see e.g. ADF 2014). Against the backdrop of Beecher's discourses (see above), a document like *Evangelicals and Catholics Together* could very well be said to function as a 'creed', since it draws a line – based on assent – between those who are united, and those who remain outside. The document reaches wider than the creeds discussed by Beecher, however, since it targets not only the denominations, but the whole of society. In light of Madison's assertion that the existence of several denominations and interests in a society is the only safeguard of religious and civil rights, the religious cobelligerency could be seen as one step on the way of intolerance, with potential of becoming a threat to minority and individual rights. We should here recall the argument of ECLJ Director General Puppinck in his *L'Osservatore Romano* article that individual rights should not infringe the rights of the society as a whole – in this context, the right of the society to have a certain religious identity (see chapter 5). Both Puppinck's article and *Evangelicals and Catholics Together* promote the view that the dominant role of Christianity in a society is an important contribution to the 'common good'. Thus the liberal focus of the founders' project to secure natural rights seems to have been replaced by a structure of meanings which undermines those very same rights, substituting its cautions to avoid religious repression with a conservative religious and sociopolitical 'creed'.

The concern expressed by Madison and Beecher has also been shared by some US Supreme Court justices in recent years. In *McCreary County v. ACLU* (2005), the Court ruled with a 5-4 majority that the Ten Commandments display in two Kentucky courthouses was a violation of the Establishment Clause. In a concurring opinion, justice Sandra Day O'Connor referred to the radical idea embodied in the 1st Amendment that "[f]ree people are entitled to free and diverse thoughts, which government ought neither to constrain nor to direct" (2005:1). Pointing to the founder's principle that religion is a matter of personal conscience, she wrote:

> Voluntary religious belief and expression may be as threatened when government takes the mantle of religion upon itself as when government directly interferes with private religious practices. When the government associates one set of religious beliefs with the state and identifies nonadherents as outsiders, it encroaches upon the individual's decision about whether and how to worship (O'Connor 2005:3).

Not all Supreme Court justices agreed to this stand, however. In *Van Orden v. Perry* (2005), which was reviewed simultaneously, the vote of one justice tipped the Court to approve with a 5-4 majority a Ten Commandments granite plate outside the Texas state capitol (Howe 2008:444). The margins are small, in other words, but the consequences can be great. The arguments presented by the Evangelical law firms may persuade uncertain judges, or give sympathizers a legitimate reason for making decisions which in turn may to strengthen the overall cause of the Evangelical movement, the idea of a conservative Christian national identity.

7 Summary and Conclusion

The purpose of this inquiry has been to throw light on the phenomenon of American Evangelical law firms and their influence on societal development in the United States and internationally. To accomplish this, I have examined the strategies and arguments of one influential law firm, the American Center for Law and Justice, and mapped its role and position in relation to the Evangelical movement, society at large, and governmental institutions. In 1994, Casanova concluded that Evangelicals, who by then had become clearly visible in American politics, only represented a "well-organized, vociferous minority" which had neither the power nor the number to pose any threat to the free exercise of religion (1994:161,159). It has been an aim of this inquiry to examine whether litigation has provided the Evangelical movement with a strategic tool which gives it such power, and to highlight the role of the law firms' arguments for this influence.

My inquiry has centered on three questions. The first focused on the method: *Why did Evangelicals turn to litigation?* The establishment of Evangelical law firms is related to the Evangelical movement's political mobilization, which slowly began in the 1940s as a reaction to the Fundamentalists' withdrawal from society and their policy of separation from those who did not agree with their fundamental beliefs. The Evangelical mobilization was driven by prominent leaders who championed a strategy of sociopolitical infiltration and cooperation with other groups on central issues. Parallel to this, the growing use of broadcasting by Evangelicals contributed to spreading their message across the nation and building up a sense of unity among the diverse groups of Evangelical Christians. The sociopolitical engagement of ordinary church members was a response to the religious call presented to them by their pastors and famous preachers. They also responded to the use of religious language by political leaders who seemed to step forward as guardians of certain core values. The frequent portrayal of these religious and political leaders together in both secular and Christian media strengthened the idea that religion and politics belonged together. An important recognition, however, was that influence on the legislative and executive branches of government was not enough to change the society. Experience showed that the US Supreme Court played a major role for many of the liberal changes that had taken place since World War II, such as the ban on prayer and Bible reading in public schools, and the liberalization of abortion laws – two issues repeatedly used as evidence that secularism was about to bring society into moral decay. The establishment of Evangelical law firms from the late 1970s onwards was thus part of a new 'holistic' approach to turn the societal development in the desired direction; a response to the call to Evangelical lawyers to fulfill their Christian duty and defend the causes of the Evangelical movement in courts; and a

mimic of the strategy which successfully had been worked out by liberal movements in preceding decades.

The second question of my inquiry brought attention to the law firms' arguments: *How do Evangelical lawyers present their causes in a (per definition) secular court?* As professionals, the Evangelical lawyers function as 'mediators' between the Evangelical movement and governmental institutions. While the Evangelical movement itself has no direct influence on the courts' decisions, the law firms may access the judges either directly at oral hearings or indirectly through their legal briefs. This way they may influence the judges' opinion on a certain issue, or perhaps more important, they provide the court with arguments that it may use to justify its rulings – should it agree with the cause. In a pluralistic liberal democratic nation like the United States, political decisions (e.g. laws or court rulings) cannot represent the world view of one particular religious group without repressing the values and ideas of other groups. The religious and moral causes of the Evangelical movement must therefore be translated into a neutral (i.e. secular) language, which is acceptable to the general public, and hence permissible for governmental institutions. As professionals, the Evangelical lawyers know the law, the legal history, and the language of law. They are competent to adapt their arguments to a particular situation and a particular court. The Evangelical law firms thus function as a 'gateway' through which the causes of the Evangelical movement may enter governmental institutions, translated into neutral arguments. The flexibility of such translation underlines one important point: what may sometimes seem to be conflicting arguments should instead be understood as various translations of the same cause. Moreover, the law firms' choice of arguments – both in and outside the courtroom – also contributes to how a specific issue is perceived by the society in general, as well as by their targeted supporters. They thus contribute to shaping the causes of the Evangelical movement.

My third question focused on consequences: *What are the consequences of this group's use of litigation as a strategy to promote its goals and protect its interests, compared to other social and political movements?* Like various liberal interest groups, the Evangelical law firms have influenced many court decisions which in turn have had major impact on various parts of the society – e.g. public schools, women's reproductive rights, and public religious expressions – both in the USA and internationally. While Casanova in 1994 claimed that the power of the Evangelical movement had been greatly exaggerated, I suggest that the establishment of professional law firms has provided the movement with a tool that may indeed influence societal development. At the time of Casanova's book, the ACLJ had just won its first Supreme Court cases, and the Evangelical law firms had only received limited attention by the media and

among scholars. The potential of Evangelical litigation was, in other words, not as visible as for instance the movement's political lobby groups.

Discussing the political project of the Evangelical movement, Casanova in 1994 dismissed the fear of some liberal groups that the movement aimed at establishing a 'Christian theocracy':

> Despite the alarmist warnings emanating from the ACLU and other countermobilized secularists that Protestant fundamentalism poses a threat to "our civil liberties", it certainly does not pose a threat to the free exercise of religion. In any case, even if they wanted to, something which is doubtful, fundamentalists certainly do not have either the power or the numbers to undermine the principles of the religious clauses of the First Amendment. Protestant fundamentalism neither wants to nor could become an established church (Casanova 1994:159).

Casanova's book, however, was published the same year as the document *Evangelicals and Catholics Together*, which I have used to illustrate what I call 'the Evangelical cause as a whole' – the notion that the USA has a certain religious identity. While the document affirms the constitutional separation of church and state, it nevertheless reveals a different understanding of the constitutional order and religious freedom than the founders themselves. Influenced by liberal thinkers, the founders set out to establish a safeguard of individual rights. The aim expressed in *Evangelicals and Catholics Together*, however, places the right of society to have a certain religious identity – legitimately visible through public religious expression – above the rights of the individual. We should here recall the words of James Madison: "If a majority be united by a common interest, the rights of the minority will be insecure." (1788b:323). While the size of the Evangelical movement is highly disputed – estimates ranging from 7 to 42% (Hackett and Lindsay 2008:449) – I would say that numbers in this regard are irrelevant. Through its 'holistic', cobelligerent approach, and not least thanks to the establishment of professional law firms, the Evangelical movement has resources that may indeed impact the whole society *through* the decisions of governmental institutions. Of course, these efforts do not exist in a vacuum; liberal forces still work to counterbalance its influence. However, at the Supreme Court level, the Evangelical lawyers only need to convince five Justices in order to bring about a decision that may have major impact across the nation. At educational institutions, like Pat Robertson's Regent University, young people are brought up to believe that it is their Christian duty to change the world by entering leading positions (Regent Uni. 2014b). While attempts to change the world through terrorism have received vastly more attention (see e.g. Young and Findley 2008), the Evangelical movement plays by the rules, i.e. by using the very system that the founders established to prevent the dominance of one group or sect over the others. While a conservative Christian dominance may not occur, such a development should nevertheless be seen as a possibility.

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Attachment 1 – ACLJ Supreme Court Cases

After his first Supreme Court case, *Board of Airport Commissioners of Los Angeles v. Jews for Jesus* (1987), Jay Sekulow – as the only ACLJ lawyer – has argued eleven cases before the Supreme Court. The following is an overview of these cases. The case descriptions are taken from the ACLJ's own web page (ACLJ 2012d). Type of case (as defined by the ACLJ) follows below the case title (e.g. *Equal Access*). ACLJ victories are marked with *.

Board of Education of Westside Community v. Mergens* (1990)

Equal access

ACLJ Chief Counsel Jay Sekulow served as lead counsel and presented the oral arguments in a case focusing on the constitutionality of the Equal Access Act involving the formation of Bible and prayer clubs on public school campuses. Sekulow successfully argued that the Equal Access Act and the Constitution required that these students receive the same privileges to form student clubs as other students on campus, regardless of the religious nature of their club. In an 8-1 decision, the high Court upheld the constitutionality of the Equal Access Act which requires public schools to allow student-initiated Bible Clubs or prayer groups equal access to meet on campus.

***United States v. Kokinda* (1990)**

1st Amendment (free speech)

ACLJ Chief Counsel Jay Sekulow served as lead counsel and presented the oral arguments in a case involving the regulation of literature distribution and fund solicitation on sidewalks in front of a post office. In a deeply divided decision, the Supreme Court held that due to its location and purpose as the only way to enter or exit the post office, that particular sidewalk was not a public forum open to unrestrained free speech activity.

Bray v. Alexandria Women's Health Clinic* (1993)

Pro-life

ACLJ Chief Counsel Jay Sekulow served as lead counsel and presented oral arguments twice in a case determining whether pro-life demonstrators could be sued under the Ku Klux Klan Act of 1871. In a 6-3 decision, the Supreme Court held that the 120-year-old anti-discrimination law did not apply to pro-life demonstrators, because for that law to apply, there must be a "class-based, invidiously discriminatory animus [underlying] the conspirators' action." The Court found that there was absolutely no evidence of animus against women, but that they

"share[d] a deep commitment to the goals of stopping the practice of abortion and reversing its legalization."

Lamb's Chapel v. Center Moriches School District* (1993)

Equal access (free speech)

ACLJ Chief Counsel Jay Sekulow served as lead counsel and presented oral arguments in a case upholding the equal access rights of religious organizations in their use of public school facilities after-hours. In a unanimous decision, the Supreme Court held that the school district's prohibition of the church's use of school facilities, solely because of the religious content of its speech, was an unconstitutional restriction on the members' free speech rights.

***Schenck v. Pro-Choice Network of Western New York* (1997)(*)**

Pro-life; 1st Amendment (free speech)

ACLJ Chief Counsel Jay Sekulow served as lead counsel and presented oral arguments before the Supreme Court in a case that focused on the constitutionality of "floating" speech-free "bubble zones" around abortion clinics. The Court agreed with Sekulow that the "floating buffer zones" were an unconstitutional restriction on the free speech rights of pro-life demonstrators.

***Hill v. Colorado* (2000)**

Pro-life; 1st Amendment (free speech)

ACLJ Chief Counsel Jay Sekulow served as lead counsel and presented oral arguments in a case centering on a Colorado law that restricted free speech activity outside abortion clinics. The Supreme Court upheld the law as constitutional time, place, and manner restrictions, noting: "Although the statute prohibits speakers from approaching unwilling listeners, it does not require a standing speaker to move away from anyone passing by. Nor does it place any restriction on the content of any message that anyone may wish to communicate to anyone else, either inside or outside the regulated areas."

***Santa Fe Independent School District v. Doe* (2000)**

Equal access; Establishment Clause

ACLJ Chief Counsel Jay Sekulow served as lead counsel and presented oral arguments in a case involving the constitutionality of student-led prayer at high school sporting events. The Supreme Court held that the Establishment Clause of the First Amendment prohibits school officials from taking affirmative steps to facilitate prayer at school functions such as school

football games. The Court found that the school district "failed to divorce itself from the religious content in the invocations." The court did conclude however that "nothing in the Constitution as interpreted by this Court prohibits any public school student from voluntarily praying at any time before, during, or after the school day."

Operation Rescue v. National Organization for Women* (2003)

The Supreme Court determined that the Racketeer Influenced and Corrupt Organizations statute (RICO) – a federal statute targeting drug dealers and organized crime – could not be used against pro-life demonstrators for their nonviolent protests. ACLJ Chief Counsel Jay Sekulow served as Counsel of Record for Operation Rescue in this case. The Supreme Court concluded that pro-life demonstrators were not racketeers engaged in extortion and that the RICO statute could not be used against them.

***Locke v. Davey* (2004)**

Free Exercise Clause

ACLJ Chief Counsel Jay Sekulow served as lead counsel and presented oral arguments in Locke v. Davey, a case involving the free exercise rights of a college student who was denied a state scholarship because he declared his major to be pastoral studies. The majority decision determined that Washington's policy prohibiting state scholarship funds from being used to assist students who pursue a degree in religious studies from a religious perspective is constitutional. However, the decision does not prohibit states from restructuring scholarship programs to permit the pursuit of a degree in devotional theology.

Operation Rescue v. National Organization for Woman* (2006)

Pro-life; 1st Amendment (free speech)

On February 28, 2006, the Supreme Court unanimously ruled in favor of pro-life demonstrators and organizations bringing an end to a nearly 20-year-old legal marathon involving a federal racketeering statute used against pro-life demonstrators. The high Court ruled that the actions of the pro-life demonstrators fell outside the scope of the federal Hobbs Act and, therefore, the federal Racketeer Influenced and Corrupt Organizations (RICO) statute - a law designed to combat drug dealers and organized crime. In its decision, the high Court ordered the lower courts to enter a ruling in favor of the pro-life demonstrators and organizations, bringing an end to a case. ACLJ Chief Counsel Jay Sekulow represented Operation Rescue and served as Counsel of Record in the case.

Pleasant Grove City v. Summum* (2009)

1st Amendment; Governmental speech

In a unanimous decision, the Supreme Court of the United States issued a landmark First Amendment ruling on February 25, 2009 clearing the way for governments to accept permanent monuments of their choosing in public parks. The decision comes in the case of Pleasant Grove City v. Summum, a critical First Amendment case in which the ACLJ represented the Utah city in a challenge to a display of the Ten Commandments in a city park. ACLJ Chief Counsel Jay Sekulow presented oral arguments to the high Court on November 12, 2008. The ACLJ asked the high Court to overturn a decision by the U.S. Court of Appeals for the Tenth Circuit that ordered Pleasant Grove City, UT, to accept and display a monument from a self-described church called "Summum" because the city displays a Ten Commandments monument donated by the Fraternal Order of Eagles. Sekulow successfully argued that the lower court ruling was flawed - a ruling that said private parties have a First Amendment right to put up the monuments of their choosing in a city park, unless the city takes away all other donated monuments - a ruling that runs counter to well-established precedent that the government has to be neutral toward private speech, but it does not have to be neutral in its own speech.

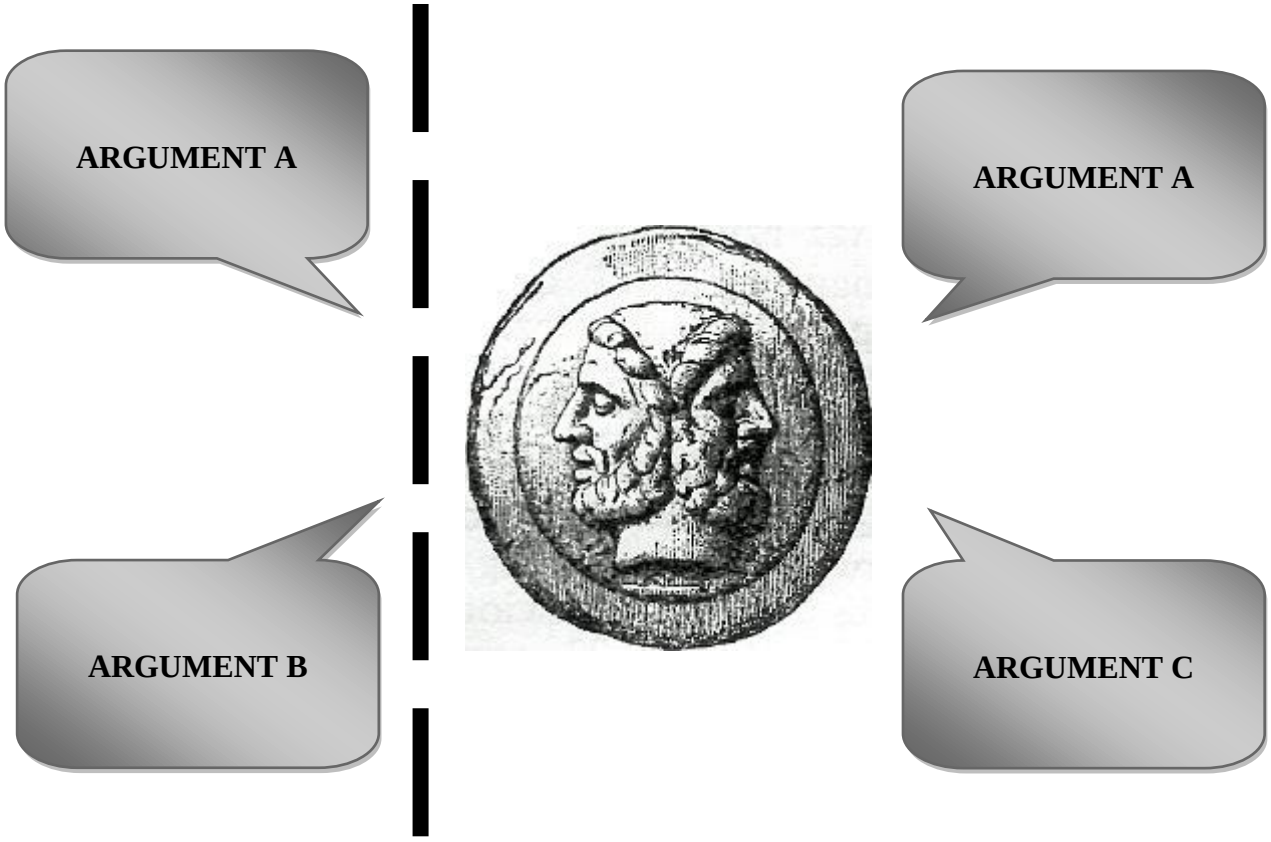
Attachment 2 – The Two Faces

The Formal Public Sphere

Governmental institutions, e.g. courts

The Informal Public Sphere

Society at large, including the Evangelical Movement



The image of Janus is here used as an illustration of the ACLJ's role and position in society. Just as the two faces point in two directions, the ACLJ aims to influence the opinion and will of both the formal public sphere and the informal public sphere. The law firm may present the same argument in both spheres (argument A), or it may present different arguments for the same cause in different spheres (argument B and C). The stippled line represents a filter: only certain arguments – i.e. those that are formulated in a neutral, secular language – are accepted in the formal public sphere. Religious arguments must therefore remain outside. The ACLJ, however, works as a 'gateway' in order for religious causes to enter into governmental institutions in an acceptable form, i.e. as translated into a non-religious, neutral argument.

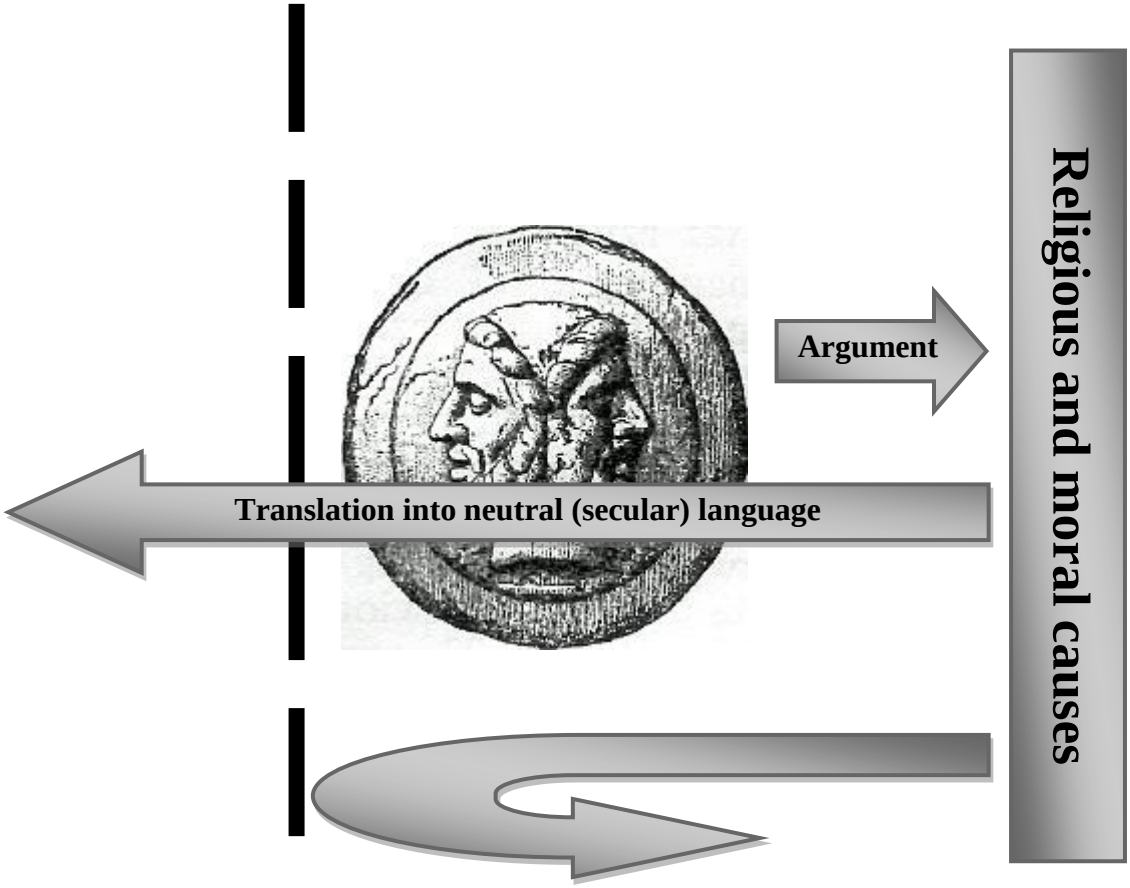
Attachment 3 – The Building and Translation of Causes

The Formal Public Sphere

Governmental institutions, e.g. courts

The Informal Public Sphere

The Evangelical movement



Building on the illustration in attachment 2, this model shows how the ACLJ relates to the causes of the Evangelical movement in three ways. First, the movement's causes form the context in which the ACLJ's arguments needs to be viewed in order to be understood (square). Second, the law firm's arguments contribute to build up the idea that certain causes (e.g. the fight to en abortion and the defense of public displays of religious monuments) are important parts of the Evangelical movement's religious and moral commitment (upper arrow). Third, the ACLJ works to translate these causes into neutral or secular arguments so that they may enter the formal public sphere of governmental institutions (middle arrow). Without such translation, the causes may not enter (bottom arrow). As long as the society at large does not accept the causes or the religious arguments used to justify them, the government cannot make political decisions (laws, court rulings, decrees, etc.) involving these causes without having arguments that are already translated into a neutral (secular) language.