Church Against State: How Industry Groups Lead the Religious Liberty Assault on Civil Rights, Healthcare Policy, and the Administrative State

Joanna Wuest[1] *and Briana S. Last*[2]

1 DEPARTMENT OF POLITICS, MOUNT HOLYOKE COLLEGE, SOUTH HADLEY, MA; 2 DEPARTMENT OF PSYCHOLOGY, STONY BROOK UNIVERSITY, STONY BROOK, NEW YORK

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Abstract: Industry-funded religious liberty legal groups have sought to undermine healthcare policy and law while simultaneously attacking the rights of sexual and gender minorities. Whereas past scholarship has tracked religiously-affiliated healthcare providers' growing political power and attendant transformations to legal doctrine, our account emphasizes the political donors and visionaries who have leveraged religious providers and the U.S. healthcare system's delegated structure to transform social policy and bureaucratic agencies more generally.

A 2022 investigative report revealed that DonorsTrust — a fundraising operation known as the "dark money ATM" of contemporary conservative politics — had funneled millions of dollars into religious liberty legal organizations.[1] Among the recipients was the Becket Fund for Religious Liberty, an organization renowned for its litigation against LGBTQ+ rights and the Affordable Care Act's (ACA) contraceptive mandate as well as its legal support for overturning the constitutional right to an abortion.[2] In a seemingly disparate realm, the donors and political leaders that covertly dole out funding to conservative causes have sought to curtail bureaucratic regulations which constrain the healthcare industry (as well as the finance and fossil fuel industries).[3] They too have worked to limit the capacities and inclusiveness of public programs like Medicaid, Medicare, and child welfare services.[4]

A growing movement of religious liberty legal organizations has assisted religiously-affiliated healthcare providers in their efforts to reduce or withhold care from sexual and gender minorities. Increasingly, these refusals of care have been taken to the Supreme Court.[5] Whereas past scholarship has tracked religiously-affiliated healthcare providers' growing political power and their transformations to legal doctrine, our account emphasizes the political donors and legal visionaries who have leveraged religious providers in their attempts to transform government institutions more generally.[6] Accordingly, we demonstrate that the ongoing erosion of reproductive healthcare access, antidiscrimination policies in healthcare provision, and public healthcare programs themselves is attributable to the entwining of the public-private administration and provision of healthcare in the U.S. with a long sighted corporate-religious coalition that exploits its fissures.

First, the delegated nature of the U.S. healthcare system has left it vulnerable to those seeking to further privatize and fragment the provision and administration of care. Since the early-twentieth century, a variety of forces — industrialist and religious but also labor movement ones — have consistently ensured that healthcare in the U.S. has been largely adminis-

Joanna Wuest, Ph.D., *is an Assistant Professor in the Department of Politics at Mount Holyoke College in South Hadley, MA.* **Briana S. Last, Ph.D.**, *is an Inclusion, Diversity, Equity, & Access Fellow at Stony Brook University in Stony Brook, New York with their primary appointment in the clinical psychology department.*

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tered and provided by private, often religiously-affiliated actors and organizations.[7] This public-private structure has enabled insurance companies, employers, physician groups, and hospitals to exercise much authority over what care is provided and to whom. While far from determinative themselves, these path dependent conditions create the possibilities for political groups which seek to further insulate private sphere healthcare providers from government oversight.[8]

Second, the political entrepreneurs most responsible for these efforts at insulation and avoidance are a group of industrialists, the most active and visionary of which include the Koch, Olin, Scaife, Bradley, and DeVos families as well as deregulatory lobbying groups like the American Legislative Exchange Council.[9] These business leaders span industries but share a common goal of deregulation and limiting public oversight. For example, leaders in the Koch network like Americans for Prosperity (AFP) and the Center to Protect Patient Rights (now American Encore), the American Future Fund, the Club for Growth, and FreedomWorks have worked for over a decade to undermine and repeal the ACA as well as to prevent federal drug price regulation.[10]

Far from unique to the present moment, similarly situated industrial groups in the 1930s laid the foundation for today's conflicts by ensuring that the U.S. administrative, welfare, and healthcare landscape was delegated to private parties.[11] In recent years, these groups have funded attacks on federal government agencies such as the Department of Health and Human Services (HHS) as well as the Environmental Protection Agency (EPA), the Occupational Safety and Health Administration (OSHA), and the Securities and Exchange Commission (SEC) by highly constricting how bureaucrats implement policies. Notably, these "free market," "libertarian" interest groups often "capture" agencies to govern on their behalf as well as direct public funding toward private aims in a similar manner to how former President Donald Trump's administration repurposed rather than "deconstructed" the federal bureaucracy.[12]

To accomplish their ultimate aims, industry coalitions have historically courted and funded groups of social conservatives and Christian traditionalists.[13] In the mid-twentieth century, this involved enlisting Christian organizations into the Cold War fight against "godless communism."[14] Today, the Koch network and the Bradley Foundation fund religious legal organizations like the Alliance Defending Freedom (ADF) and the Becket Fund, the two of which now appear almost annually before the Supreme Court.[15]

In all, our schema accounts for the iterative cycle of corporate-religious coalition-building and governance. In doing so, it reveals how these path dependent policy feedbacks have contributed to the erosion of government's regulatory capacity, the growth of the healthcare industry's power, and the curbing of the rights of gender and sexual minorities. Drawing from studies of the U.S. healthcare system's fragmented, public-private nature and the political interests of well-funded conservative organizations that exploit it, this study offers a holistic picture of what we call a politics of "church against state."

Importantly, these legal organizations *use* extant religious social service & healthcare providers (which may or may not have sincere religious beliefs against LGBTQ+ rights and reproductive health practices) to advance a broader deregulatory agenda. Other industry-backed groups like the Federalist Society and the Judicial Crisis Network have worked with leaders in the Republican Party to shift the judiciary rightward.[16] Scholars of the "judicialization" of politics and the rise of a "juristocracy" at home and abroad have demonstrated how conflicts over policy have increasingly played out in the courts.[17] In an era of unprecedented congressional gridlock, court capture has been crucial for governing.[18] While the conservative legal movement forms a composite of disparate rights issues, its effect has been to undo the regulatory state *and* civil rights protections simultaneously.[19]

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The paper proceeds with a section on the history and institutional vulnerabilities of the public-private American healthcare system. We turn then to a description of the industry-funded religious liberty coalition and then introduce four case studies which flesh out these organizations' political interests, legal approaches, and impacts. These case studies include legal challenges to: 1) the ACA's implementation; 2) HHS and other agencies' authority to govern; 3) the nonpartisan civil service; and 4) state and federal COVID-19 public health policies. Throughout, we demonstrate how religious liberty legal organizations pursue legal cases that simultaneously erode civil rights and the administrative state. We focus especially on how these groups have adopted a politics of *anti-administrativism*, a term legal scholar Gillian Metzger coined to describe attacks on the bureaucracy which extend back to the New Deal era.[21] We expound our own term, *religious anti-administrativism*, to describe religious liberty-themed litigation that serves similarly deregulatory ends. Notably, we understand religious anti-administrativism to be a tactic, one which religious liberty legal organizations and conservative judges are apt to use as long as the approach engenders deregulatory outcomes or otherwise reorients the bureaucracy to serve private interests. The conclusion underscores that this politics of church against state is fundamentally driven by political visionaries who exploit both religious dissent and the public-private contours of the U.S. healthcare system in pursuit of profiteering.

The Public-Private U.S. Healthcare System and Its Vulnerabilities

The patchwork public-private nature of the American healthcare system not only creates openings for further privatization and fragmentation but it is itself an outcome of political contestation. The U.S. has consistently delegated responsibility of social provisions like healthcare to non-state actors — often employers, third-party insurers, and charitable organizations (funded through tax-deductible donations, wealthy donors, and public dollars).[22] Throughout the twentieth century when peer countries were constructing universal health insurance programs, the U.S. context was shaped by coalitions of pharmaceutical companies, health insurers, hospital networks, and organizations of medical professionals (namely, the American Medical Association) which defeated national health insurance proposals.[23]

As such, private institutions like hospitals and employer-sponsored health insurance plans–many of which have religious affiliations–have increasingly dominated the provision of care. In the Gilded Age, the Supreme Court allowed D.C. to fund the construction of new Catholic charity-owned hospital buildings; the Court surmised that there was no risk of indoctrination and that the interest in serving the poor excused this church-state intermingling.[24] This pattern persisted despite attempts by New Deal politicians to make the payment and provision of healthcare more public and centralized.[25] The Hill-Burton Construction Act of 1946, for instance, allowed federal funds to be channeled to religious-affiliated hospitals.[26]

Corporate interests later shaped Medicare and Medicaid by ensuring that private third-party organizations would administer public funds and provide expanded (often means-tested) care.[27] The 1965 amendments to the Social Security Act which established Medicare and Medicaid not only expanded the federal government's role in healthcare, but also enforced anti-discriminatory principles in service provision.[28] Nevertheless, these programs entrenched the role of private actors in healthcare, dashing the hopes of many of Medicare's architects who saw the program as a path to universal health insurance.[29] In subsequent decades, the pharmaceutical and managed care industries leveraged the delegated nature of the U.S.'s public health insurance programs to further privatize and subject them to market forces.[30]

As the government increasingly relied on private contractors to administer and provide public services, the New Deal era's (uneven) commitment to the public welfare state waned in favor of a "third way" embrace of both religious and market-based alternatives. As one part of the Clinton administration's 1996 welfare reform law, the federal government embraced the concept of "charitable choice," which allowed "pervasively sectarian" institutions including houses of worship themselves to distribute social services.[31] These programs range from child welfare to health support to substance use services.[32] Charitable choice was part of a broader package of reforms pushed by Clinton and the pro-business Democratic Leadership Council faction of the party, which combined its historic cuts in federal welfare spending with tax policies that further incentivized private philanthropy.[33] Importantly, churches and charities were still forbidden from discriminating in their distribution of social services, though the George W. Bush administration

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did enable faith-based providers to hire exclusively their own co-religious members.[34] Later, the Donald Trump administration reversed an older rule that required private providers to help locate a secular or alternative faith-based provider if they could not provide a service for religious reasons.[35] While Republican presidential administrations have been responsible for undercutting such antidiscrimination principles, Presidents Barack Obama and Joseph Biden adopted public-private charitable choice programs in their own administrations.[36]

The highly delegated nature of the ACA has also contributed to the religious provision (and withholding) of care. Despite charges from ACA opponents that it imposed a centrally-planned system, the law was actually based upon–and thus perpetuated–the overwhelmingly privatized American healthcare system, which has made it vulnerable to contestation by the employers, providers, and healthcare institutions that find certain mandated care protections and antidiscrimination provisions anathema.[37] In part spurred by the ACA, health systems have consolidated in recent decades, which in turn has led to religious hospitals imposing care restrictions on a greater share of providers.[38] As Elizabeth Sepper has noted, facilities that briefly pass into a Catholic network's ownership can actually bind those hospitals from providing care opposed to Catholic social teachings in perpetuity.[39] Today, one in six beds are in Catholic hospital networks that routinely refuse to perform certain reproductive and gender-affirming care procedures.[40] While states like Washington have sought to protect abortion rights by blocking hospital mergers that would restrict care, many states operate hospitals that enforce religious doctrine to the detriment of minority rights and the separation of church and state alike.[41]

Industry-Funded Religious Liberty Legal Organizations in Healthcare Law and Policy

Industry-funded religious liberty legal organizations have worked alongside individual religious employers, physician associations, and Republican Party lawmakers to undermine the ACA protections for gender and sexual minorities, to constrict the authority of the HHS, and to restrict COVID-19 public health measures. Among the organizations which pursue these challenges most frequently is the Becket Fund, which was founded in 1994 by Kevin Hasson, an attorney who had previously worked in the Reagan administration's Office of Legal Counsel at the Department of Justice (under then-Deputy Assistant Attorney General Samuel Alito).[42] Becket ostensibly litigates on behalf of *all* religious believers. It has represented Seventh Day Adventist members who have been denied time off from work for their sabbath as well as Muslim and Sikh prison inmates who have been denied requests to grow beards.[43]

Becket's most significant litigation, however, has enabled socially conservative Christian businesses, schools, and social service providers to discriminate against minority groups (sometimes even religious minorities) while avoiding government oversight. Its victories have made it easier for religiously-affiliated schools to fire sick or disabled schoolteachers who would have otherwise been protected by the Americans with Disabilities Act or the Age Discrimination in Employment Act of 1967.[44] Under the "ministerial exception," lay teachers in religious schools are denied antidiscrimination protections (an exemption formerly reserved for a house of worship's discretion in hiring and firing clergy). Becket has also defended publicly-funded, private faith-based social service contractors — which make up a large share of the child welfare system — seeking a religious right to discriminate against serving LGBTQ+ clients.[45] Regarding oversight, Becket and many other industry-backed religious groups like the ADF and the American Center for Law and Justice have worked to keep church-affiliated hospitals exempt from federal pension plan regulations.[46] Lastly, Becket has expanded "pervasively sectarian" institutions' access to public funding. This includes churches that are already less constrained by antidiscrimination policies (even more so than faith-based nonprofits) and which tend to spend fewer resources on "eligible services" than traditional social service providers.[47]

What is lost in debates over whether Becket promotes "Christian theocracy" is the more consequential question of *who benefits* most from its work. A look at Becket's donors and political ties reveals that, no matter its claims to religious ecumenism, Becket most faithfully serves corporate interests. For one, Becket is a registered member of the State Policy Network, an association of dozens of right-wing policy groups.[48] Becket is so entwined with anti-administrative forces that it recently hired an accountant to share with the author of *Is Administrative Law Unlawful?,* Philip Hamburger's New Civil Liberties Alliance.[49] While this is only suggestive of some degree of entanglement between religious liberty and anti-administrativist attorneys and intellectual leaders, the groups' shared donor circle is even more indicative of a shared mission. Becket has received millions of dollars from donors including the Bradley Foundation, the Koch Family Foundation, DonorsTrust, the Donor Capital Fund (a sister organization of DonorsTrust for groups

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managing over $1 million), and the Atlas Network (an oil-backed consortium of policy groups that promote neoliberal economic policies in Latin America and an anti-climate change agenda at home).[50]

Religious Anti-Administrativism and the ACA Contraceptive Mandate Cases

Since its beginnings, the ACA has been challenged by conservative donors and Republican Party politicians, religious liberty legal organizations, and religious healthcare providers. The interests here are myriad: donors like the Kochs and GOP leaders seek to replace the law with less generous market-based alternatives such as individual healthcare savings accounts.[51] Others like the individual business owners and physicians who refuse to provide care such as abortions or hysterectomies for trans men are at least sometimes motivated by sincerely held religious beliefs. Nevertheless, the following cases discussed here are advanced primarily by donors and their litigation groups which use religious liberty claims to limit the government's power to determine what care providers must make available.[52]

Becket has been at the helm of several high-profile cases, which have pitted opponents of abortion, sexual and gender minorities' rights, and gender-affirming healthcare against various ACA provisions. Accordingly, the legal cases explored in this section — some of which are ongoing — have been pursued by Becket and similar groups which have either taken donations from corporate funders or have been trained by and clerked for judges in the Federalist Society network.[53] Many of the ACA legal challenges ought to be read in the context of the U.S. healthcare system's path dependent features and the contemporary religious-corporate coalition that aims to exploit them. Though Becket's immediate concerns have been to restrict certain controversial healthcare regimens, it has taken aim at the administrative state more broadly.

Becket's litigation on behalf of Hobby Lobby against the ACA is best known for expanding the scope of the federal Religious Freedom Restoration Act (RFRA), a law which requires the federal government to meet an even higher standard of religious free exercise protections than the First Amendment affords.[54] In *Burwell v Hobby Lobby*, Hobby Lobby Stores sued HHS over the ACA's contraceptive mandate. While churches and faith-based non-profits were already exempt from the ACA's provisions, Hobby Lobby claimed that because they were a "closely held" for-profit corporation (one Christian family is its majority stakeholder), RFRA protected them from providing services they opposed on religious grounds. The Supreme Court agreed that HHS had "substantially burdened" Hobby Lobby's religious liberty rights. *Hobby Lobby* is just one example of how the Court has refashioned civil liberties in a neo-*Lochnerian* mode, one which privileges corporate rights over individual or minoritarian ones while inscribing a deregulatory, pro-market orientation back into legal doctrine.[55]

An underemphasized nature of Becket's ACA litigation has been its direct engagement with the sorts of administrative law arguments that are typically employed by those like coal companies protesting the EPA.[56] That is, religious liberty groups adopt doctrines of anti-administrativism, an approach to administrative law with roots in anti-New Deal industrial leaders' constitutional opposition to the emergent bureaucratic state as well as the Administrative Procedure Act (APA) of 1946.[57] The APA was the product of a longstanding fight between New Deal advocates of federal executive power and conservative opponents, among whom were industry coalitions like the National Manufacturers Association (NAM).[58] While less conservative than rival bills like the failed Walter-Logan bill which President Roosevelt vetoed in 1940, the APA augmented the judiciary's role in determining the lawfulness of agency regulations. Section 706 in particular reads that "court[s] shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action."[59]

Today, corporate-funded litigation organizations and their allies on the federal bench have attempted to further enhance judicial power over the bureaucracy, often by arguing for increasingly conservative interpretations of the APA.[60] In *Hobby Lobby*, Becket posited that HHS had violated the APA in requiring employers to include certain Food and Drug Administration (FDA)-approved contraceptive pharmaceuticals in their health insurance plans per the ACA's provisions regarding preventive services.[61] Two of the four APA-themed arguments took issue with HHS's "decision not to exempt Plaintiffs and similar religious individuals from the Mandate [which] runs counter to the evidence submitted by religious individuals during the comment period."[62] Pitting the FDA and HHS regulations against their own religiously-inspired, fringe medical beliefs that contraceptives like Plan B and intrauterine devices induce an abortion, Becket characterized HHS's dismissal as "arbitrary and capricious."[63] Based on its own understanding of these so-called abortifacients, Becket argued that the regulation violated RFRA as well as the Weldon Amendment's and ACA's restrictions on federal funds for abortion care.[64]

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Following the district court's initial ruling, Becket discarded its administrative arguments in favor of religious liberty ones. While RFRA took the center-stage before the Supreme Court, the Eagle Forum Education & Legal Defense Fund — an organization that emerged from Phyllis Schlafly's 1970s campaign against the Equal Rights Amendment and which has recently received funding from the Bradley and Olin foundations — encouraged the justices to resuscitate the nondelegation doctrine.[65] The nondelegation doctrine was a novel interpretation of the separation of powers crafted by critics of the New Deal. Nondelegation holds that the modern federal bureaucracy is an unconstitutional delegation of legislative authority to the executive branch. Notably, the doctrine does not describe a consensus opinion among the Framers nor does it describe a pattern of decision-making ever sustained by the Supreme Court.[66] The banking and manufacturing industry-led American Liberty League briefly adopted the nondelegation theory to thwart New Deal regulations and social welfare programs. Though the Court only seriously entertained nondelegation in one 1935 case, the doctrine has been recently refashioned by Republican Party elected officials and jurists.[67] In an unrelated 2019 case, Becket would endorse this notion that "Strict nondelegation is needed to protect free exercise rights."[68]

Since *Hobby Lobby v. Burwell*, challenges to the ACA's constitutionality have consistently featured a blend of religious liberty appeals and anti-administrativism. To appease religious concerns, the Obama administration had allowed nonprofits (and, after *Hobby Lobby*, many for-profits) an accommodation from the contraceptive requirements; dissenting employers needed only to file an exemption form, which would prompt the federal government to provide contraceptive care to the organizations' employees. In *Zubik v. Burwell* (2016), Becket joined arms with religious colleges, charity organizations, and other nonprofits seeking to further undermine HHS's preventive care regulations.[69] On behalf of Little Sisters of the Poor Home for the Aged (a multi-state operation with hundreds of lay employees), Becket argued that the mere act of filing for an exemption from the contraceptive mandate made religious dissenters complicit in the very care that they morally opposed.[70] Little Sisters of the Poor argued that, because the exemption form led the federal government to provide the services which they found objectionable, even this compromise was a violation of religious liberty.

Whereas Becket's appeal was designed to build on its previous RFRA victory in *Hobby Lobby*, groups like the Eagle Forum challenged the exemption workaround as just another violation of the nondelegation doctrine.[71] In its own brief, the Cato Institute took things much further, positing both that HHS lacked the authority to "regulate religion" and that the department had violated another tenet of anti-administrativism — the major questions doctrine.[72] Attorneys for Cato argued that the federal bureaucracy had promulgated an "expansive construction" of the ACA, and that it lacked the relevant "expertise" to make such healthcare policy decisions in the first instance.[73] The major questions doctrine has quickly become one of –if not *the*–most effective doctrinal tools to dismantle agency regulations.[74] It holds that an agency action is unlawful if it touches on matters of "vast economic and political significance" unless Congress has explicitly empowered the bureaucracy to do so. Today's major questions doctrine has its roots in the case *FDA v. Brown & Williamson Tobacco Corp* (2000), in which the Court struck down the FDA's regulations concerning cigarettes and smokeless tobacco per the Federal Food, Drug, and Cosmetic Act's language on "drugs" and "devices."[75]

The major questions doctrine was given new life in 2015 when the Court held that, because an Internal Revenue Service tax credit program for ACA healthcare exchanges touched on major questions, the Court could not defer to the agency's interpretation of the ACA.[76] The effect of the major questions doctrine is to hamstring government regulation over important political economic matters. Soon Cato was not alone in applying the major questions doctrine to such cases. Three years later, Becket found that the major questions doctrine encourages a "strict construction of laws potentially infringing core private rights in the context of nondelegation concerns."[77] Ergo, a broadly anti-administrativist approach best safeguards religious liberty.

President Donald Trump's 2016 election and subsequent revision of the contraceptive rule prompted a reversal in those championing and challenging agency action. Shortly after HHS rescinded the contraceptive mandate, Pennsylvania and New Jersey sued the administration for sidestepping the APA's required notice-and-comment period.[78] Once again, Becket represented the Little Sisters of the Poor before the Supreme Court in a challenge to both the Obama administration's accommodation regulation (Justice Scalia's untimely death prolonged judicial deliberation over the Obama administration rule contested in *Zubik*) and the state-led efforts to undo Trump's much broader exemption scheme which had accommodated the group.[79] Becket argued that RFRA and the First Amendment were bulwarks against a "sprawling

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administrative state," and that the Trump administration's reforms were premised on its own duty to alleviate preexisting undue burdens on free exercise.[80] In a joint *amici* brief in *Little Sisters of the Poor v. Pennsylvania* (2020), Cato and the newly-formed socially conservative Jewish Coalition for Religious Liberty added that the Obama administration's original accommodations were themselves unlawful, noting that any scheme of exempting some entities and not others was a violation of the major questions doctrine.[81]

In a win for Becket and its allies, Justice Clarence Thomas observed that the ACA authorizes HHS to make exemptions to the contraceptive mandate, and that it was appropriate for HHS to consider RFRA in doing so.[82] The result is that the federal bureaucracy now has considerable latitude to act on *behalf* of religious rights claims, and that the right-leaning Supreme Court can step in to limit administrative authority whenever it threatens the interests of the corporate-religious coalition.

In litigation against both HHS and Department of Education (ED) antidiscrimination policies, religious liberty legal organizations have spearheaded attacks on longstanding doctrines which direct courts to afford agencies some discretion in governance. By targeting judicial deference doctrines, these organizations have aligned their litigation with hospital trade associations (as well as the fossil fuel industry and other large industries) which seek to limit agency oversight.

Additional Religious Attacks on Judicial Deference to Agencies

In litigation against both HHS and Department of Education (ED) antidiscrimination policies, religious liberty legal organizations have spearheaded attacks on longstanding doctrines which direct courts to afford agencies some discretion in governance. By targeting judicial deference doctrines, these organizations have aligned their litigation with hospital trade associations (as well as the fossil fuel industry and other large industries) which seek to limit agency oversight. For instance, in 2022 the American Hospital Association, with help from business advocacy groups, asked the Court to limit Medicare's power to adjust drug reimbursement rates by way of overturning one of its landmark deference doctrines.[83] This section examines how religious groups and industry associations have jointly pursued a strategy to do away with judicial deference doctrines that have historically allowed agencies to use policy expertise to implement and update necessarily vague congressional statutes. Such attacks on deference have been to the detriment of both antidiscrimination policies for sexual and gender minorities as well as patient care.

The historical route toward this weaponization of deference has been circuitous but instructive to map. By the 1970s, the federal judiciary was populated by a number of liberal judges and justices who used Section 706 of the APA to compel agencies to regulate *even more*; the judiciary often cited its own commitments to the rights of relatively powerless minority groups as justification for pollution regulations in blighted neighborhoods, for example.[84] Ironically, when the Supreme Court first articulated its modern standards of deference to agencies, the increasingly conservative Court actually did so to permit the Reagan administration to *undermine* agencies' own regulatory power.[85] Jurists like Justice Scalia once defended judicial deference. Things changed once the Obama administration was forced to navigate congressional gridlock by governing through the federal bureaucracy. Conservatives thus developed a distaste for judicial deference standards like *Chevron* (deference to agency interpretations of ambiguous federal statutes that pertain to their authority and prerogatives) and *Auer* (deference to agency interpretations of their own rules).[86]

As for *Chevron*, Becket joined a coalition targeting HHS's implementation of the ACA's Section 1557 that requires federally-funded healthcare programs to adhere to certain antidiscrimination principles. In the 2016 case *Franciscan Alliance v. Burwell*, a Texas-led coalition of various Republican state attorneys general along with religiously-affiliated hospitals and Christian medical professional associations charged the Obama administration with violating both RFRA and the APA.[87] Becket joined this effort on behalf of the Christian Medical & Dental Associations, Fran-

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ciscan Alliance, and Specialty Physicians of Illinois.[88] Together, they challenged HHS's interpretation of the ACA's language regarding "on the basis of sex" to encompass both "gender identity" and "termination of pregnancy," which would require providers to offer gender-affirming care and reproductive healthcare; the challengers posited that this reinterpretation was a breach of *Chevron* deference on the grounds that "sex" unambiguously refers to a biological binary (i.e., male and female). The healthcare providers' demands were met when the Trump administration rescinded the antidiscrimination rule in 2020 while simultaneously importing an even higher standard of RFRA protections.[89]

Also in 2016, this same group of corporate-religious organizations used another case on the meaning of sex and transgender rights to erode both judicial deference and civil rights.[90] *Gloucester v. Gavin Grimm* concerned ED's interpretation of existing agency regulations relating to Title IX of the Education Amendments Act of 1972.[91] The central question was whether the Acting Deputy Assistant Secretary for Policy in the Department's Office for Civil Rights (OCR) overstepped in interpreting "sex" as "gender identity." In opposing that policy's implication for expansive trans bathroom rights in public schools, Gloucester County School Board sued, challenging ED's authority to interpret the meaning of "sex" so capaciously. This triggered a debate over the legitimacy of the *Auer* deference standard, thereby threatening to permanently limit the authority of federal agencies to interpret their own rules.[92]

Gloucester attracted the attention of nearly every top litigator and legal organization in the conservative legal movement. Writing in the *National Review*, Justice Scalia's former clerk and then-president of the "Judeo-Christian" Ethics and Public Policy Center Edward Whelan summed up the movement's mood: "Seldom has a more brazen and aggressive bureaucratic misreading of federal law encountered a more craven and confused judicial reception."[93] In 2016, Gloucester County School Board's case was appealed to the Supreme Court by four prominent conservative attorneys who had recently fought marriage equality (and a few who have since 2020 been on the frontier of right-wing electoral reforms).[94] Among those counsel on the brief were S. Kyle Duncan, who had just opposed marriage equality in *Obergefell v. Hodges* (2015) and Jonathan Mitchell, who has since become infamous for architecting Texas's SB8 anti-abortion law and sits on the New Civil Liberties Alliance's board of advisors.[95] Others included D. John Sauer, a former Justice Scalia law clerk and protégé of then-Attorney General of Missouri Josh Hawley, and Gene Schaerr, who had previously defended Utah's ban on marriage equality.[96] This team of superstar conservative attorneys put their position pithily: "This Case Is An Excellent Vehicle For Resolving Both The Divisions Over *Auer* And The Proper Interpretation Of Title IX And Its Regulation."[97]

The school board was joined by supportive industry-funded groups who filed *amicus* briefs calling for an overhaul of *Auer* while simultaneously condemning ED's threat to withhold education dollars from noncompliant school districts. The Cato Institute filed a brief authored by critics of the administrative state including Jonathan H. Adler, Richard A. Epstein, and Michael W. McConnell, which called for the complete overhaul of *Auer* deference.[98] Cato's brief charged *Auer* with incentivizing agencies to promulgate purposefully vague regulations so that they might "change their interpretations on a dime" whenever it behooved them.[99] Likewise, the Pacific Legal Foundation–a firm founded in the 1970s to oppose environmental policies–argued that limiting *Auer* in this case would be a stepping stone toward reining it in entirely.[100]

In its brief, the Wisconsin Institute for Law & Liberty (WILL) similarly condemned *Auer* while also deeming ED's regulation as an instance of coercive federalism akin to the Medicaid expansion program which the Supreme Court had partially struck down four years prior.[101] Like Cato, WILL and its counsel of record Mario Loyola had no policy position on trans bathroom reforms.[102] Instead, they sought to hinder the federal bureaucracy's ability to regulate, especially climate policy. Loyola, for instance, was an early critic of the Obama administration EPA's Clean Power Plan, which had become their quintessential example of bureaucracy-run-amok.[103]

Just as striking as those industry-funded briefs opposing ED's gender identity policy were the religious groups which filed briefs condemning *Auer* deference. Again, the Becket Fund's ability to thread anti-administrativism with religious liberty stands out. In a joint *amicus* brief with the General Conference of the Seventh-Day Adventists, Becket attorneys framed the regulation as just one instance of federal bureaucrats "skirting" and subverting the legislative process.[104] In various media statements, the ADF's Matthew Sharp asserted that the "Obama administration cannot unilaterally disregard and redefine federal law to accomplish its political agenda of forcing girls to share locker rooms and showers with boys," especially given the failure to engage in a proper public notice and comment process.[105] Still others ranging from televangelist Pat Robertson's National Legal Foundation, the Eagle

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Forum, and the Family Research Council accused ED of undermining federalism and the legislative process while propping up its own authority.[106]

Serving as counsel for Robert P. George's National Organization for Marriage & his own Center for Constitutional Jurisprudence (CCJ), John Eastman asserted that "It is time for *Auer* to be overruled."[107] Eastman's and George's collaboration here represents in miniature the corporate-religious convergence. Most famous for organizing over one-hundred national Christian leaders under the banner of the 2009 Manhattan Declaration, George has long been an intellectual architect of a Christian traditionalist movement against marriage equality, abortion, and trans rights.[108] Eastman is a former clerk of Justice Clarence Thomas and has since directed the CCJ in matters concerning the nondelegation doctrine.[109] Eastman most infamously intervened in the 2020 presidential election, aiming to initiate a constitutional coup on behalf of President Trump and the anti-administrativism which his Supreme Court appointees have nurtured.[110]

Though the push to overturn *Auer* was ironically doomed by Trump's election and Education Secretary Betsy DeVos's rescinding of the gender identity regulation, anti-administrativist positions have become more widespread since. While the Court failed in *Kisor v. Wilkie* (2019) to overturn *Auer*, it did begin to place some additional limits on such deference; similarly, the Court balked on striking down *Chevron* in 2022, though it did limit Medicare's power to adjust drug reimbursement rates on behalf of the American Hospital Association.[111] Instead of overturning *Chevron* outright (which it may still do on Becket's and others' request in 2024), the Court may instead let deference simply atrophy until it is effectively dead.[112]

The Future of Healthcare Regulation and the Civil Service

In ongoing litigation against the ACA's implementation, a team including anti-abortion and anti-labor union legal strategist Jonathan Mitchell, former Trump White House staffer Stephen Miller, and a Republican-aligned business management firm have put both religious liberty and anti-administrativist arguments to work.[113] Specifically, they take odds with HHS's interpretation of the ACA's preventive-care coverage provision to include contraceptive pharmaceuticals, STD screenings, and pre-exposure prophylaxis (PrEP) drugs that prevent the contraction of HIV, a provision which covers more than 150 million privately insured Americans.[114] As for the religious liberty challenge, Mitchell has contended that two religious for-profit business owners — Kelley Orthodontics and Braidwood Management — have sincere religious objections to "abortifacient" contraception drugs and those like PrEP, which might "encourage or facilitate homosexual behavior."[115] The business owners claim that the HHS regulation would substantially burden their First Amendment rights and RFRA by "subsidizing lifestyles that violate their religious beliefs."[116]

On the anti-administrativist front, Mitchell relies on now standard-fare arguments. Invoking the nondelegation doctrine, Mitchell contends that HHS supplied no "intelligible principle" that would guide its discretion in making its regulations.[117] This is despite the fact that HHS's Preventive Services Task Force (PSTF) has been statutorily empowered to create regulations based on "the scientific evidence related to the effectiveness, appropriateness, and cost-effectiveness of clinical preventive services."[118]

From there, the suit turns to two of the most radically anti-administrative arguments levied against the ACA yet.[119] First, Mitchell cites the Court's recent reinterpretations of Article II's Appointments Clause, which have been championed by Cato and the Chamber of Commerce, and which were endorsed in September 2022 and March 2023 rulings by Judge Reed O'Connor of the District Court for the Northern District of Texas (Judge O'Connor also endorsed the RFRA claim in this case).[120] Citing *Lucia v. Securities and Exchange Commission* (2018), which declared that SEC administrative law judges are no mere employees but instead officers who must be appointed, Mitchell cast those members of PSTF, the Advisory Committee on Immunization Practices, and the Health Resources and Services Administration as similarly unconstitutionally situated.[121] That is, Mitchell contends that the HHS professional civil service could not "unilaterally determine the preventive care that private insurers must cover" precisely because such decisions must be made by presidentially-appointed officers.[122]

This highly technical debate over the meaning of "officers" shrouds the broader aim here: to shift the job categories of potentially *thousands* of civil servants into the category of (partisan) appointed officers. The Court in *Lucia* and Mitchell in his litigation both cite Jennifer Mascott, a former Department of Justice attorney in the Trump administration, who has argued that the "historical meaning of 'officer' likely would extend to thousands of officials not currently appointed as Article II 'officers,' such as tax collectors, disaster relief officials, federal inspectors, customs officials, and administrative judges."[123] In response to Mitchell's reliance on *Lucia*, HHS has noted that such members serve as independent experts, and there-

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fore lack a "continuing and formalized relationship of employment with the United States government."[124] This case pushes the frontier of *Lucia* even further. It may create another opportunity to satisfy corporate groups like the Pacific Legal Foundation, which has urged the Court to clarify — and thus to expand — the definition of "principal officers."[125]

These Appointments Clause cases ought to be read as a total assault on the administrative state as well as the public sector unions which represent many of its employees. Mitchell's litigation shares a lineage with President Trump's executive order in October 2020, which (if it had been implemented) would have moved many career civil service workers into a new category ("Schedule F"), thereby removing them from their collective bargaining units and making them into at-will employees subject to partisan control.[126] It also accords with a broader strategy formulated by the Heritage Foundation and adopted by dozens of conservative legal movement organizations to facilitate a quick and total remaking of the federal bureaucracy upon their expected presidential victory in 2024.[127] The consequence would be to undo much of the 1883 Pendleton Act and other means by which the crony party machine model of bureaucratic governance was replaced by a more professionalized, nonpartisan one.[128] Ridding the administrative state of career civil servants would enable a Republican administration (buttressed by a sympathetic Supreme Court) to make unfettered policy changes.

Second, the Mitchell team's strategy builds on the 5-4 decision in *Seila Law LLC v. Consumer Financial Protection Bureau* (2020), which was driven by opponents of federal regulations on industry.[129] Established through the 2010 Dodd–Frank Wall Street Reform and Consumer Protection Act in response to the 2008 financial crisis, the Consumer Financial Protection Bureau's (CFPB) aim was to curb the unbridled power of the financial industry. The Court found that the CFPB's structure violated the Vesting Clause by making its single director removable only for reasons of "inefficiency, neglect of duty, or malfeasance in office."[130] As Justice Elena Kagan noted in her dissent, the decision "wipes out a feature of that agency its creators thought fundamental to its mission — a measure of independence from political pressure."[131] Indeed, as soon as Trump took office, he appointed Mick Mulvaney as head of the CFPB, who had in his prior congressional campaigns received over $63,000 in financial contributions from payday lenders. In his first actions as director, Mulvaney canceled an Obama era investigation of a lender who had previously been one of Mulvaney's campaign contributors.[132] Subsequent industry litigation invoking *Seila* has attempted to nullify the Federal Housing Finance Agency's work to stabilize the housing market after the 2008 crash.[133] Lastly, the Fifth Circuit Court of Appeals cited *Seila* in its 2022 holding that the SEC's primary mechanism for enforcing securities law is unconstitutional.[134]

Throughout challenges to state and federal COVID-19 public health policies, industry-funded religious liberty legal organizations have invoked the First Amendment, RFRA, and anti-administrativist doctrines. First, just as Becket has used the free exercise clause and RFRA to undermine the ACA, it has also used these tools to simultaneously erode government administrative authority and the civil rights of sexual and gender minorities.

In Mitchell's case, the relevant HHS officials have been charged with wielding a "unilateral authority" that is insulated from presidential influence and, therefore, violates the Vesting Clause.[135] HHS has termed the argument "absurd" given that a wide range of non-agency actors including nongovernmental organizations as well as state and foreign governments are frequently asked to provide guidance in crafting regulations.[136] Just as in the case of *Lucia*, some corporate interests are hoping that *Seila's* holding will soon be expanded.[137]

Religious Liberty, Public Health, and Social Services

Throughout challenges to state and federal COVID-19 public health policies, industry-funded religious liberty legal organizations have invoked the First Amendment, RFRA, and anti-administrativist doctrines. First, just as Becket has used the free exercise clause and RFRA to undermine the ACA, it has also used these tools to simultaneously erode government

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administrative authority and the civil rights of sexual and gender minorities.

At the state level, Becket and others challenged a 2020 California bureaucratic rule prohibiting in-home gatherings of more than three households. In the shadow docket case *Tandon v. Newsom* (2021), Federalist Society attorney Ryan J. Walsh successfully sued California for violating the free exercise rights of worshippers seeking to flout the public health measure.[138] Becket was a lone outlier in filing a brief in *Tandon*, supporting Walsh's case.[139] Again, this litigation was advanced by and ultimately served industry interests. Walsh had previously defended Wisconsin's right-to-work law while serving as the state's Chief Deputy Solicitor General.[140] Outside of the courts, concurrent efforts led by Koch network groups spread COVID-19 misinformation in hopes to end *all* lockdown restrictions, both to benefit their short-term bottom-lines as well as to undermine public health authority more generally.[141]

It is hard to overstate the impact of *Tandon* on the future of public health regulations.[142] While California's restriction applied equally to secular and religious meetings, the Court ruled that the lack of equal strictures on gatherings in commercial spaces constituted a free exercise clause violation.[143] Prior to 2021, no federal court had ever granted a religious liberty exemption to a vaccine mandate.[144] Now, federal courts are far more likely to see any use of bureaucratic discretion in evaluating an exemption as constituting a free exercise clause violation.[145] After *Tandon*, federal judges have begun to rule in favor of religiously-motivated vaccine objectors.[146]

As for the antidiscrimination connection, *Tandon* was litigated on very similar grounds to Becket's then-ongoing case in support of a faith-based social service contractor seeking to discriminate against queer would-be foster and adoptive parents. In *Fulton v. City of Philadelphia* (2021), Becket represented Catholic Social Services (CSS) in its challenge to Philadelphia's decision not to renew its contract with CSS to provide foster and adoptive care services.[147] The religious social service providers in *Fulton* are themselves products of the public-private U.S. social welfare state and its path dependencies, given that child welfare has historically been provided through a fragmented array of local and state institutions (many of which are reliant upon private contractors).[148]

In *Fulton*, Chief Justice John Roberts wrote that Philadelphia had indeed violated the free exercise rights of CSS. The city did so by not granting an exemption even though its standard contract with foster care and adoption providers includes a provision that gives officials discretion over potential exemptions to its nondiscrimination rule. Although Philadelphia had never in its history granted such an exemption, its contract gave the Department of Human Services the discretion to do so. Given that mechanism's existence, the fact that the city *could* have granted CSS an exemption meant that *not* doing so constituted a free exercise clause violation. As critics have noted, public-private contracts are by their nature individualized; they inherently require pragmatic determinations and discretion.[149] Routine bureaucratic decisions can now be effectively charged as discriminatory on religious liberty grounds.[150] The upshot of *Fulton* is that even laws providing for secular exemptions must now favor religious ones as well. This is a radical departure from an older standard.[151] Previous case law generally upheld those government policies (e.g., public health regulations) which were "neutral and generally applicable" (i.e., not a mere pretext for religious discrimination).[152] *Fulton* and *Tandon* flipped that logic, forcing the government to prove that it had not violated religious liberty.

Lowering the threshold for religious exemptions could have an enormous impact on the regulation of social services, which are often reliant on faith-based agencies.[153] In a brief filed in support of Philadelphia, a group of mayors and other officials from over 166 cities, towns, and counties representing over 53 million Americans warned that a ruling in favor of CSS would "affect every aspect of public services offered through public-private partnerships."[154] Additionally, the American Civil Liberties Union cautioned that *Fulton* could allow publicly funded homeless shelters, food banks, hospitals, disaster relief agencies, and other faith-based humanitarian organizations to discriminate in the name of religion.[155] As evidence, *Fulton* has been cited by a federal district court judge siding with a faith-based women's shelter in Anchorage, Alaska, which had invoked its Christian beliefs to bar trans women from its facilities (notably, the ADF represented the shelter).[156] In those geographies where religious social service providers are the most prevalent distributors of state-funded care, exemptions could severely limit who can rely on social welfare.

Lastly, the industry-funded ADF invoked religious liberty in efforts to quash OSHA's COVID-19 vaccination-or-testing mandate.[157] The business case against the OSHA regulation was relatively straightforward. In a 2022 shadow docket case, the Supreme Court cited the major questions doctrine to rule in favor of the National Federation of Independent Businesses against an agency rule requiring vaccine-or-testing policies for companies with at least 100 employees.[158]

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In a concurrent case representing Republican Party-controlled states such as Florida and Missouri as well as religious schools, colleges, and seminaries, the ADF combined its usual First Amendment and RFRA arguments with the major questions doctrine.[159] Ostensibly a religious organization, the ADF emphasized its opposition to "government overreach" and the mandate's effects on small businesses, often eschewing any mention of its religious concerns.[160]

This religious anti-administrativism is ultimately the culmination of a half-century of political developments. As free market ideologues like Paul Weyrich founded organizations like the Heritage Foundation with money from manufacturing industry leaders, the nascent Religious Right of the 1970s too sought to harness religious liberty's deregulatory potential.[161] The televangelist Jerry Falwell was in many ways Weyrich's creation. As the Moral Majority took off, Falwell used his fame to support far-right Republican Party candidates while spouting the message that regulatory bodies such as OSHA were enemies of a free Christian people.[162] While this project has had its share of setbacks along the way, this corporate-religious alliance has become steadily entrenched in the Republican Party.[163]

Conclusion: Culture War and Public Control

The combined insights from our political economic and legal analyses reveal how attacks on sexual and gender minority rights today are driven by a corporate money-fueled movement masquerading as a religious liberty one. This politics of "church against state" is not driven by the organic protest of Christian traditionalists, though they are useful agents for this agenda. Instead, it has been funded and directed by industrialists whose core ambition is not only to limit government healthcare regulations and services, but also to end social welfare and regulation as we have come to know them.

Fragmented citizenship for those caught in the crosshairs extends from the fragmented nature of many U.S. social welfare and regulatory institutions. As our political developmental approach shows, government itself has been repeatedly undermined *through* its delegated nature. Industrialists have leveraged the incentives of private-sector providers and contractors to expand their own autonomy through further privatization and deregulation; in the process, they have both shrunk state capacity to offer services in total while also reducing the scope of who is included in the *demos* that are served. The ultimate aim is to hollow out the state entirely. To accomplish this, the corporate-religious coalition has resuscitated New Deal era oppositions to the federal bureaucracy, both by using existing strictures in administrative law as well as by reciting erroneous historical accounts to justify new ones.

The merger of attacks on civil rights, social welfare, and the administrative state bolsters the political-economic power of industry leaders. In the name of liberty, public control of public institutions shifts from citizens to corporations. A promise to end bureaucracy's alleged arbitrary rule masks a grab for power.

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