

A Progressive Case for Accommodating Religious Conservatives

*(Draft: For Lacerating Criticisms and Distorted Tweet Citations Only)*

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Introduction: On October 6, 2017, as I worked on this paper, the administration of President Donald J. Trump took two actions that both addressed my themes and complicated my arguments. Announcing that “we will not allow people of faith to be targeted, bullied or silenced anymore,” Attorney General Jeff Sessions—refusing to be silenced by the targeted bullying he had recently received from his President--instructed all federal agencies and prosecutors to argue in court that employers, workers, and organizations can claim broad exemptions from nondiscrimination laws on the basis of their rights under the Religious Freedom Restoration Act of 1993, if not indeed their constitutional rights to the free exercise of their religious beliefs. Simultaneously, the Department of Health and Human Services issued new rules rolling back the Obamacare requirement for employers to include birth control coverage in the health insurance plans they provided their employees.<sup>1</sup> Exemptions are now allowed for all whose “religious beliefs,” and also all whose non-religious “moral convictions,” oppose some or all forms of contraception.<sup>2</sup> During the 2016 campaign, many observers of American politics, including at times Donald Trump himself, were surprised by the strong support that the thrice-married, foul-mouthed, and openly sexually promiscuous, if not indeed sexually harassing Trump received from church-going evangelicals in

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<sup>1</sup> Robert Pear, Rebecca R. Ruiz, and Laurie Goldstein, “Trump Administration Rolls Back Birth Control Mandate,” *New York Times*, October 7, 2017, A1.

<sup>2</sup> Internal Revenue Service, Department of Treasury, and Health and Human Services, “Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act,” <https://s3.amazonaws.com/public-inspection.federalregister.gov/2017-21852.pdf>, October 7, 2017.

the 2016 campaign. But now, this key constituency in what is commonly deemed Trump's "populist" base was receiving at least a partial reward.

My paper then (and still!) in progress argues that the surge of conservative populism in the United States and elsewhere that has propelled insurgent leaders like Trump has in fact been fueled in part by policies and practices expressing excessive liberal disrespect, if not necessarily bullying or silencing, for religious traditionalists, along with economic concerns; and that both to do justice and to rebuild support for progressive political agendas, commitments to pluralism and diversity should be understood to include presumptions in *favor* of accommodations for conservative religious beliefs, along with all other claims of conscience--if those accommodations can be granted without defeating compelling state interests. That is a big "if." The Trump administration's actions dramatize the great dangers of this argument: that it will be used to license forms of discrimination and denials of public and private services that will verge on religious establishment, in effect making all other persons second-class citizens in comparison with religious traditionalists. Here I will seek to show why that need not be the case in theory and law. But I do not wish to deny, indeed I wish to stress, that it will take progressive political action, not just theorizing, to make sure that these unjust consequences do not transpire in practice.

Some Theoretical and Historical Background. It remains beyond dispute that in the second half of the 20<sup>th</sup> century, John Rawls was the most influential political philosopher in the Anglo-American world—which is, to be sure, not the same as THE world. His thought articulated the great moral impact of those versions of the modern civil rights movements that opposed all forms of racial, ethnic, religious and gender discrimination: the denizens who inhabited his "original position" behind a "veil of ignorance" deliberated on principles of justice without knowing which

if any of these identities they possessed.<sup>3</sup> In Rawls' famed thought experiment, these anonymous persons focused on justice, because Rawls presumed they would conceive of themselves as having such diverse views of the human good that no agreement could be reached on that highest of all norms. Over time he came to emphasize that in liberal or at least "decent" regimes, participants in public life should primarily seek to persuade each other by appealing to shared standards of "public reason," not religious faiths.<sup>4</sup> These arguments suggested to many influenced by Rawls that government officials should never act exclusively on the basis of religious beliefs, and that generally it was wise to minimize the prominence of religious arguments in political discourse.

The primary focus of Rawlsian public discourse and Rawls' theory of justice was instead on the distribution of material resources, and his "difference principle" was generally held compatible with welfare state liberalism of the Great Society variety, though Rawls confined himself largely to "ideal theory" and did not endorse many particular policies or institutions. To many religious conservatives, Rawls' theory seemed all too consistent with what they saw as modern policies and practices of liberal secularism that marginalized or even assaulted traditional religiosity in favor of a crass materialism.<sup>5</sup> Within the ranks of self-professed liberals, critics including me also questioned how far it was really possible to give priority to principles of right while remaining broadly neutral on the question of the good life, and how far it was really desirable to seek to limit robust debates over views of the human good, including religious views, in political discourse.<sup>6</sup> Andrew Koppelman argued that liberal values actually require liberal states

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<sup>3</sup> John Rawls, *A Theory of Justice* (Cambridge, UK: Cambridge University Press, 1971).

<sup>4</sup> John Rawls, *The Law of Peoples* (Cambridge, MA: Harvard University Press, 1993), 132-138.

<sup>5</sup> See e.g. Richard John Neuhaus, *The Naked Public Square: Religion and Democracy in America* (Grand Rapids, MI: William B. Eerdmans Publishing Company, 1984).

<sup>6</sup> See e.g. Joseph Raz, *The Morality of Freedom* (Oxford UK: Oxford University Press, 1979); Rogers M. Smith, *Liberalism and American Constitutional Law* (Cambridge, MA: Harvard

to pursue a largely non-coercive but pervasive antidiscrimination project of cultural transformation, so that people would come to abandon racist, sexist, and religiously intolerant beliefs.<sup>7</sup>

But the most influential critiques of Rawls' conception of justice came from outside liberal ranks. Perhaps most prominently, Iris Marion Young argued that justice required recognizing that many social groups, including non-white racial and ethnic groups, women, non-heterosexuals, immigrants, indigenous peoples, the disabled, religious minorities and more, were oppressed by other groups with a narrow range of privileged identities. Hence achieving meaningful social and political equality often required giving disadvantaged groups special organizational and representation rights and powers and sometimes honoring claims to reparations.<sup>8</sup> Young's view of justice both expressed and reinforced much in the ethos of the movements for multicultural policies and institutions in many countries in the last two decades of the 20<sup>th</sup> century. Those movements generally celebrated immigration and immigrants. And though Young herself belong to left traditions sharply critical of American and global capitalism, many multicultural advocates came over time to form what at first seemed "strange bedfellow" alliances with large, often multinational corporations. Those businesses benefited from both skilled and cheap immigrant labor, and they also gained from the expanded employee and customer pools they obtained through their new "diversity offices." Hence multiculturalism and many forms of economic globalization favored by both Rawlsian liberals and many economic neoliberals proved to go, if not quite in lockstep, at

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University Press, 1985); William A. Galston, *Liberal Diversity: Goods, Virtues, and Diversity in the Liberal State* (New York: Cambridge University Press, 1991).

<sup>7</sup> Andrew Koppelman, *Antidiscrimination Law & Social Equality* (New Haven: Yale University Press, 1996).

<sup>8</sup> E.g. Iris Marion Young, *Justice and the Politics of Difference* (Princeton, NJ: Princeton University Press, 1990).

least on some common policy paths favored by most of the world’s intellectual, political, economic and social elites.<sup>9</sup>

But in the eyes of many religious conservatives, both Rawlsian-style liberalism and Young-style multiculturalism championed principles and policies that generally treated traditional religious groups as opponents of “public reason” who should be pushed toward private life, at best, and as contributors to systems of racial, ethnic, gender and sexual oppression at worst. It has now become common to argue that multicultural “identity politics” policies and many forms of economic globalization, including international trade agreements, labor immigration, new transnational regulatory institutions, and policies conferring privileges on multinational corporations, have been twin sources of cultural and economic anxieties and resentments that have ignited conservative populist movements in many lands, with traditionalist religious groups prominent in their leadership and their membership ranks. Often religious conservatives are among the most fiercely alienated against what they perceive as the condescension and disdain of current elites, in part because--however unlikely many of their other beliefs may be—traditionalist believers are not wrong to feel they are often disdained.

Responding to Conservative Religious Populism. One liberal response to the rise of conservative populist movements, including Trump, has been to seek to abandon “identity politics” and return to something like New Deal or Great Society liberalism.<sup>10</sup> But I have long argued that to endure, political communities and institutions cannot appeal solely to agreement on abstract political principles in Rawlsian fashion, or even to the economic and political benefits of

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<sup>9</sup> Desmond S. King and Rogers M. Smith, *Still a House Divided: Race and Politics in Obama’s America* (Princeton, NJ: Princeton University Press, 2011), 118, 124, 236, 242, 257.

<sup>10</sup> See e.g. Mark Lilla, “The End of Identity Liberalism,” *New York Times*, November 20, 2016, SR1.

membership, as in recent (and incomplete) depictions of these earlier forms of American liberalism. To get through inevitable hard times, communities must be sustained by “stories of peoplehood” that include themes asserting the moral worth of those political memberships.<sup>11</sup>

Even so, I have always been acutely aware that such moral “stories of peoplehood” can easily become tales of the inherent superiority of a favored few, in ways that justify exploitative hierarchies at home and rapacious imperialism abroad. Those worries have become all the more severe as exclusionary, authoritarian forms of nationalism, often claiming to be populist, have become major players in the politics of so many lands, emphatically including the United States. One answer is to reject nationalism altogether, in favor of different forms of political peoplehood, perhaps highly democratic localistic ones, perhaps cosmopolitan ones, perhaps a range of federated forms. Those may be desirable long-range directions to pursue, but I fear they cannot compete effectively at present with their resurgent nationalist rivals. So I have recently suggested that five steps are needed to develop progressive movements that can counter such populism nationalisms. These steps are:

1. The development, out of each nations’ particular traditions, of “stories of peoplehood” that articulate normatively desirable national identities and purposes;
2. The recognition that, insofar as these stories incorporate commitments to human rights as checks on chauvinistic impulses, policies must work to ensure that persons have resources that make their possession of those rights meaningful, not merely formal;

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<sup>11</sup> See e.g. *Stories of Peoplehood: The Politics and Morals of Political Memberships* (New York: Cambridge University Press, 2003); *Political Peoplehood: The Roles of Values, Interests, and Identities* (Chicago: University of Chicago Press, 2015).

3. Acceptance that policies that can work to include and assist all members of a pluralist nation must often treat different groups differently, and that political communities must continually decide which differentiations serve those goals and which inflict unjust inequalities;
4. The propagation of a civic ethos that supports narratives of egalitarian inclusiveness by prompting citizens and nations to think not only of how they can avoid harm to others, but how they can realize their goals in ways that do most to assist others;
5. The creation and implementation of policies that express these national commitments. Those policies must promote *both* economic welfare and cultural recognition for all. They should include some accommodations, exemptions, and aid for those drawn to exclusionary nationalism because they feel their cultural and economic interests are being disregarded or assaulted, including for conservative religious groups—without acquiescing in exclusionary or subordinating practices.

In regard to pursuing the first and second tasks, I have suggested elsewhere that progressives in the United States should elaborate a modern version of the view of the anti-slavery constitutionalists, which I believe to have been encoded in the post-Civil War amendments, that the U.S. Constitution is best seen as part of a long-term national political project to promote meaningful enjoyment of the basic rights in the Declaration of Independence for all people, of all colors, everywhere.<sup>12</sup> Here I want to focus on tasks three through five, and to do so by arguing for

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<sup>12</sup> “America’s Case of Mistaken Identity,” *Boston Review*, online June 12, 2017, <http://bostonreview.net/politics/rogers-m-smith-americas-case-mistaken-identity><http://bostonreview.net/politics/rogers-m-smith-americas-case-mistaken-identity>; and other things that will be out eventually.

what I take to be progressive standards that should guide primarily legislative but also judicial responses to requests for special religious exemptions and accommodations.

Accepting the Inevitability of Differentiated Citizenships. Iris Young deserves lasting credit for putting the issue of normatively justifiable differentiated citizenships on the agenda of modern political theory, early in the period when it was emerging as a contentious theme in modern politics largely due to the rise of racial and gender affirmative action. Her overwhelming emphasis, however, was on the need to accept differentiated citizenship rights as means of combatting oppression. I believed then and now that she was far more right than wrong in that regard; but research on 20<sup>th</sup> century American citizenship laws has led me to a related but distinct argument. I have contended that in reality, citizenship laws in the U.S. and every other society have always been and always will be extensively differentiated, for a variety of reasons, good and bad—sometimes to oppress, sometimes to resist oppression, but also simply to accommodate on a roughly equal basis the highly distinct needs and aspirations that different groups and individuals within political communities have. I have suggested that the struggles against second-class forms of racialized and gendered citizenship in the first two-thirds of the 20<sup>th</sup> century brought the understanding of equal citizenship as uniformity, as possession of an identical bundle of basic rights and duties, to the fore—but that while this ideal propelled redress of some all too traditional forms of oppression, it left intact many other forms of differentiated citizenship resulting from foreign birth and naturalization; age; federalism; religious preferences; sexual preferences; territorial residency; indigenous identities; dual nationalities; corporate status; and many other factors.<sup>13</sup> Consequently, I have contended that it is a central, ongoing task for modern democratic

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<sup>13</sup> See e.g. Rogers M. Smith, “Equality and Differentiated Citizenship: A Modern Democratic Dilemma in Tocquevillian Perspective,” in *Anxieties of Democracy: Tocquevillian Reflections on*



societies, and so for modern democratic theory, *not* to seek to end all differentiated citizenships, but instead to make judgments about what sorts of differentiation advance the goal of achieving meaningful civic equality for all and which instead hinder that endeavor.

The answers as to what forms of differentiated citizenship are desirable are rarely if ever be incontestable; and the answers must change as social, economic, and political contexts change. Auto workers in Flint, Michigan did not need special regionally targeted programs providing opportunities for work in public infrastructure construction projects, alternate energy production, or retraining and relocation programs in the 1950s, when the American auto industry dominated world markets. But today those investments, providing opportunities for citizens in some regions not available in all, might well be part of insuring former auto workers are included in the nation's quest to secure that all in America have meaningful chances for life, liberty, and the pursuit of happiness. Conversely, Catholics were an oppressed minority deserving accommodations in public education policies in the 1840s, when Protestants in Philadelphia demanded that Protestant Bibles be used in public schools and rioted violently against Catholics who objected. Most Catholics in the U.S. have much less claim to be oppressed today, so their claims for accommodations have less weight, even if some might still be compelling.

Both these examples show that hard questions of appropriately differentiated policies are ones to which we *can* find answers, based on good empirical evidence of current social, economic, and political conditions and practices and good studies of what the likely consequences of different policy options are. And if we can, my argument is that we should. By differentially structuring public policies and institutions, and hence differentially structuring the rights and duties of

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*India and the United States*, ed. Partha Chatterjee and Ira Katznelson (New Delhi: Oxford University Press, 2012), 85-118.

citizenship, we can and should find ways to make sure that persons with substantially different physical and mental abilities and disabilities; greatly different ages, either very young or very old; different national origins; different material resources and obstacles to advancement, often due to past and present practices of racial, ethnic, and gender, but also regional and economic sector discrimination; different sexual identities; different cultural traditions; and different religious beliefs, all have access to the distinct kinds of economic, political, and social opportunities they need if they are to have a chance to flourish on a roughly equal basis with most if not all of their fellow citizens. We must get past thinking that any and all differentiations in civic rights and duties means a departure from equal citizenship, and instead focus on deciding which forms of differentiated citizenship actually help us to achieve more equal citizenships in our current contexts.

A Modified Millian Civic Ethos. I have also contended that to decide those difficult issues well, Americans as well as other citizens of modern nations that aspire to be democratic need to develop a new civic ethos. This ethos must encourage all to pursue, among the diverse forms of happiness they may seek individually and as a nation, those that are most valuable to others as well as to themselves—in part because those choices do most to permit and sometimes assist others in pursuing *their* distinctive forms of happiness.<sup>14</sup> Many modern political societies professing liberal democratic principles have primarily defined the justice they seek to establish in terms of the harm principle of John Stuart Mill, which contended that “the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.”<sup>15</sup> Modern Millians often wisely fear that these “harms” will be defined in terms of the

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<sup>14</sup> For elaboration see Smith, *Political Peoplehood*, 197-199, 202-205.

<sup>15</sup> John Stuart Mill, *On Liberty*, ed. David Spitz (New York: W.W. Norton, 1975, orig. 1859).

ethnocentric definitions of “civilized communities” that Mill himself often endorsed.

Consequently, they adapt Mill’s harm principle along lines like those of the 19<sup>th</sup> century American philosopher Ralph Waldo Emerson. Today it is more customary to suggest that each person is entitled to the maximum amount of “self-defined” freedom and self-realization possible, consistent with the self-defined freedom and self-realization of others—rather than invoking the standards of “civilized communities.” This principle is seen as consistent with granting to all “equality of concern and respect” while remaining broadly neutral on views of the human good, in recognition of the capacities for moral agency that ground human dignity.<sup>16</sup>

But this turn to protection of “self-defined” freedoms raises the danger that persons pursuing different forms of self-realization will clash far more than they cooperate. That is why a new civic ethos is needed—and possible. In the diverse America of the 21<sup>st</sup> century, we have come to recognize ourselves as complex, multiply constituted beings, who might seek satisfying forms of self-realization in many ways—ways that, while they would provide roughly equal satisfaction for us, might have very different consequences for others. It is right and good for us to feel obliged to take those consequences into account, individually and collectively. So, I have suggested that Americans, and members of other societies, should adopt a further modified Millian maxim as both a personal and a civic ethos.

That modified maxim is “the *best* uses of their powers by communities and individuals are those that aid others, without doing harm to themselves.” Both to meet our own needs and goals and to do what is just and good for our fellow citizens in the 21<sup>st</sup> century, we need to focus not only on preventing harm to others. To be sure, concerns to combat harms, including disabling forms of

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<sup>16</sup> See e.g. Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1978, orig. 1977), 182.

discrimination and subordination, must remain central; and what constitutes “harm” will always be contested. But we can still strive to exercise our freedoms, individually and as a nation, in ways that benefit others, *not* just ourselves. Doing so means we should recognize that it is right and good at times to support giving accommodations and exemptions to others, because doing so will work no real harm to ourselves, while we enable those persons to pursue happiness, as they define it, more successfully, and in ways that are more practically equal to our own opportunities.

Exemptions, Accommodations, and Burdens of Proof. This view of justice leads to my culminating proposal in this paper: legislators and executives devising public policies, and courts adjudicating them, should apply this modified Millian maxim when responding to the claims of the wide range of advocates for special exemptions and accommodations—including linguistic, cultural, ethnic and racial minorities, economically disadvantaged groups and sectors, the disabled, women, LGBTQ persons and groups, children, the elderly, territorial residents, indigenous peoples, and more—emphatically *including* traditionalist, conservative religious groups. Rather than regarding any differential treatment as suspect, as is often the case now, American lawmakers and courts should reverse the burden of proof. They should only reject the claims of groups to special accommodations when they have a strong empirical basis to believe that those denials are necessary to achieve compelling governmental purposes. And those purposes must be more than simple hostility to the groups in question, even if the groups themselves are hostile to otherwise widely embraced core commitments to democracy and human rights. Exemptions should be rejected only if granting them would enable groups to engage in conduct that poses systematic material barriers to the realization of those commitments for others. As Andrew Koppelman, a long time champion of LGBTQ rights who might be expected to oppose all accommodations for religious conservatives has argued, “Antidiscrimination law is an intervention that aims at systemic

effects in society, dismantling longstanding structures of dominance and subordination.”<sup>17</sup> When bans on religious conduct are not actually necessary to achieve such dismantling, Koppelman rightly contends, it is appropriate “to treat religion—understood at such an abstract level as to ignore all doctrinal differences—as a good, and to accommodate it where possible.”<sup>18</sup>

This placing of the public thumb on the scales of religious accommodation gives pause to some conservatives who fear the loss of unifying shared cultural values; moderates devoted to the uniform “rule of law”; and many progressives who fear that powerful groups will win accommodations that only heighten American inequalities. These fears cannot be lightly dismissed. In response, I have contended that, especially after the passage of the Fourteenth Amendment and its equal protection clause, there is no justification for according religious believers special treatment that is not accorded to secular moral commitments.<sup>19</sup> Hence if legislators and courts are deciding on whether to provide an exemption from certain public duties to those with conscientious objections against it, they must provide those exemptions to *all* who assert moral *or* religious conscientious objections, unless they have clear and convincing evidence that the claims of conscience are fraudulent. And I have stressed that if we expand the scope of those who can claim conscientious objections to public policies in this way, then we may *frequently* find that denials of demands for special rights and accommodations are justified by compelling state interests. Once accommodations are provided to any *one* group, they must be provided to *all* groups who similarly claim those accommodations are vital to their pursuits of

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<sup>17</sup> Andrew M. Koppelman, “Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law,” 88 *Southern California Law Review* 639 (2015).

<sup>18</sup> *Ibid.* 626.

<sup>19</sup> Rogers M. Smith, “‘Equal’ Treatment? A Liberal Separationist View,” in *Equal Treatment of Religion in a Pluralistic Society*, ed. Stephen V. Monsma and J. Christopher Soper (Grand Rapids, MI: William B. Eerdmans Publishing, 1998).

happiness. But the more groups who receive exemptions, the more likely it is that the exemptions will be so extensive as to defeat the efficacy of laws that protect rights and/or are of compelling public benefit in other ways. (And if the laws do not protect rights or are not of compelling public benefit in other ways, it does not seem so concerning that they may fail).

To use a metaphor that anticipates a controversy I will address in a moment, I have long thought rather complacently that this position allows us to have our cake and eat it too: we can say religious liberties are fundamental freedoms in a preferred position, but often still conclude that accommodations to them would be too damaging to equally fundamental rights and interests to be permitted. But the Trump administration's actions on October 6<sup>th</sup> disrupted this complacency. Going beyond what most involved in the issue had been considering, they actually ordered a version of just what I am recommending. They extended rights to conscientious exemption from requirements to provide health insurance that includes contraceptive coverage to secular moralists as well as religious believers.<sup>20</sup> Does my argument push us to affirm this Trump initiative?

It might, but not necessarily. Marci Hamilton, who is chiefly a critic of many forms of religious accommodation, has argued against the federal Religious Freedom Restoration Act of 1993 (now supplemented by more than 20 state Religious Freedom Restoration Acts) because she insists that it is generally better for religious accommodations from public laws and policies to be decided by elected officials than by courts, and that they should do so only after ascertaining “(1) the laws to be affected; (2) who is seeking to avoid their obligations under the law and for what practice; (3) who would be harmed by the proposed accommodation; and (4) the views of experts

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<sup>20</sup> See sources at n. 1.

in the field and the public.”<sup>21</sup> She objects strongly to RFRA because she believes they prompt courts to grant religious accommodations without any rigorous review of the evidence of the impact of granting those exemptions.

In this she may well be wrong: both published research and empirical studies of adjudication of the national and state RFRA by my students indicate that they have not increased the success rate in courts for religious liberty claims and may sometimes be counterproductive.<sup>22</sup> Nonetheless, I agree strongly with her that legislatures, and secondarily elected executives, must take primary responsibility for making the difficult judgments about whether accommodations contribute to or detract from meaningful civic equality, and must do so through thorough review of the best available evidence. Legislative bodies and executive officials have greater capacities than courts to tap both relevant expertise and public opinion when estimating the consequences of granting exemptions. Judicial review of resulting accommodations, or refusals to grant accommodations, should employ strict scrutiny; but courts should chiefly aim at determining if elected officials have made their decisions based on careful analysis of solid empirical evidence about the likely impacts of those accommodations, as well as what litigation reveals about the

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<sup>21</sup> Marci A. Hamilton, “The Case for Evidence-Based Free Exercise Accommodation: Why the Religious Freedom Restoration Act is Bad Public Policy,” *Harvard Law & Policy Review* 9(1): 130 (2015).

<sup>22</sup> See e.g. Christopher C. Lund, “Religious Liberty After Gonzales: A Look at State RFRA,” *San Diego Law Review* 55: 477-491 (2010); Sean Foley, “A Shield, Not a Sword: The Strict Scrutiny Standard of Judicial Review in the Religious Freedom Restoration Act and the Religious Land Use and Institutionalized Persons Act,” Senior Essay, University of Pennsylvania, 2016; Taylor Becker, “The Impact of State Religious Freedom Restoration Acts: A Failure to Increase Protections for Religious Freedom Claimants.” Senior Essay, University of Pennsylvania, 2017. Both senior essays on file with author.

consequences of the accommodations once they have been implemented (since policies as applied can prove very different from their original intent).

What would a policy of adopting this burden of proof for legislatures, expressive of the modified Millian concern to insure that we are helping some groups when we can do so without imposing significant harms on ourselves or on other groups, mean for current controversies over religious accommodations?

Health Insurance Coverage Exemptions. Full disclosure: I have previously suggested that under the approach I am advocating, the Supreme Court's decision in the *Hobby Lobby* case might have been correct. There the majority held (at least on one reading) that closely held private corporations can claim religiously-based exemptions from the Obamacare requirement that they provide health insurance covering a wide variety of contraceptives. I indicated the rectitude of the ruling depended on the magnitude of the employees affected by it, and, even more importantly, on whether they had alternative low- or no-cost access to coverage for contraceptives.<sup>23</sup> The Trump administration's abandonment of the requirement for such coverage has mooted that question.

The pertinent question now is whether the new rules announced by Trump officials on October 6<sup>th</sup> meet the standard I am proposing, with its call for rigorous evidence-based consideration by enacting officials of the likely consequences of any and all religious and conscientious exemptions they adopt. The answer is clearly no. The Trump administration's spokespersons acknowledged that they "do not have sufficient data to determine the actual effects of these rules" on the ability of female employees to obtain contraceptives nationwide.<sup>24</sup> The

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<sup>23</sup> *Political Peoplehood*, 214-215.

<sup>24</sup> "Trump Administration Rolls Back Birth Control Mandate," n. 1.



Supreme Court has declared access to contraceptives to be a dimension of the constitutionally fundamental right of privacy, and though this right does not create a positive duty for either the government or private parties to pay for contraceptives, any policy that creates great burdens on access to contraceptives is suspect at best. So the empirical question of whether these exemptions, now made available to secular as well as religious objectors to birth control, will impose major burdens on women seeking sexual and reproductive freedoms should have been far more thoroughly assessed before the adoption of any new rules.

Because it was not, it is currently uncertain whether alternative sources of publicly provided health insurance may yet mean that these exemptions do not in fact significantly or systematically hinder women's reproductive choices. In light of the Trump administration's repeated cuts in various kinds of public funding for health insurance, there is certainly cause for great concern.<sup>25</sup> Even progressives open to accommodations for religious conservatives therefore must insist that courts look closely at the processes by which the new rules were enacted, including the failure to collect necessary evidence of the impacts of the broad new exemptions; and courts should stay the implementation of these exemptions until and unless evidence is provided showing that they are not adding new and undue burdens to women's reproductive freedoms.

The Cake Cases. The Supreme Court is currently considering one of a series of cases in which businesses open to the general public, and subject to general anti-discrimination laws, have refused to provide certain services to same-sex couples. *Masterpiece Cakeshop v. Colorado Civil Rights Commission* arose because Jack Phillips refused to design and bake a wedding cake for a

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<sup>25</sup> Abby Goodnough and Robert Pear, "Trump Administration Sharply Cuts Spending on Health Law Enrollment," *New York Times*, September 1, 2016, A16; Robert Pear, Maggie Haberman, and Reed Abelson, "Trump to Scrap Critical Health Care Subsidies, Hitting Obamacare Again," *New York Times*, October 13, 2017, A1.

same-sex couple, David Mullins and Charlie Craig, feeling that doing so would involve his active celebration of a same-sex marriage, in violation of his religiously-based opposition to such marriages.<sup>26</sup> As it has often done in the past, the Supreme Court appears to be choosing to focus on the free speech more than the religious free exercise aspects of Phillips' claim for exemption from providing this service. But for Phillips, his religious concerns are foremost.

Writing on a predecessor case, Koppelman argues that businesses with such concerns "should be exempted, but only if they are willing to bear the cost of publicly identifying themselves as discriminatory" in this way, as Phillips is willing to do.<sup>27</sup> Koppelman argues persuasively that there is no reason to support the belief that today, granting such exemptions would open GLBTQ Americans to the kind of massive discrimination in places of public accommodation experienced by African Americans prior to the passage of the 1964 Civil Rights Act. Much evidence suggests instead that "social attitudes toward gay people have changed so decisively that the trend appears irreversible."<sup>28</sup> And indeed, David Mullins has said "Of course we could get a cake somewhere else. This was about us being turned away from and being denied service at a business because of who we are and who we love."<sup>29</sup> Under the Trump administration, there are reasons to fear that Koppelman may prove too optimistic in his belief that public opposition against openly discriminating against gays is an irreversible trend. But at present, there is little doubt that Mullins is right: he and Craig have abundant opportunities to purchase their desired goods elsewhere, in ways that simply were not true for millions of African Americans prior

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<sup>26</sup> Adam Liptak, "Cake Is His 'Art.' So Can He Deny One to a Gay Couple?" *New York Times*, September 17, 2017, A1.

<sup>27</sup> Koppelman, *op. cit.*, 620.

<sup>28</sup> *Ibid.* 639-644.

<sup>29</sup> Liptak *op. cit.*

to the Civil Rights Act. If we focus on systemic economic harms from discrimination, there is no compelling rationale for denying Phillips his religious accommodation today.

But as Koppelman and many others rightly observe, anti-discrimination laws are also concerned with dignitary harms. It is perfectly understandable that Mullins and Craig feel profoundly disrespected and insulted at being denied service on the basis of who they are and who they love. It is even more concerning that granting a religious exemption from general requirements to deny service only on reasonable grounds may seem to place the government's imprimatur on the validity of this discrimination, and encourage others to engage in similar stigmatizing acts of discrimination.

Here we get at the heart of the difficulty in all these cases. We have to acknowledge that for his part, Phillips feels disrespected and insulted when the state tells him that his decision based on his religious faith is so unreasonable that it can be made illegal. He cannot help but experience that policy as a dismissal of, indeed an assault on, his religious beliefs, because it undeniably is. We may say, and in my distant youth I would have been quick to say, "But the state cannot be neutral here; it must side with one party or the other; and it should side with those whose beliefs really are more reasonable." Now I am both less confident about what over-educated academics like me regard as "reasonable," and more concerned about populist resentments against regulations by elites that many understandably perceive as unjust.

Like Koppelman, I am attracted to the position adopted by Douglas Laycock, perhaps the contemporary legal academy's most influential advocate of extensive, though still limited, religious accommodations. As long as those who refuse service *openly* exercise their religious liberties and free speech rights by publicly announcing that they refuse certain services to same-sex

couples, I think it most consistent both with democracy and human rights to leave it to the public to decide whether seeing these choices persuades people to adopt similar discriminatory attitudes, or instead to cease doing business with discriminatory service providers.<sup>30</sup> I am confident that in fact most of the public would not favor businesses that discriminate in this way, and that most businesses would then not discriminate. But if, instead, discrimination became so pervasive that couples like Mullins and Craig could not easily purchase a wedding cake elsewhere, then according to the view I am advocating here, this sort of religious accommodation should be made impermissible.

Tax Exemptions. The final example of a religious accommodation I wish to consider is one that President Trump again came to advocate during his campaign and that he has since moved to enact: a repeal of the Johnson Amendment of 1954 which denies tax exemptions to non-profit organizations that endorse political candidates.<sup>31</sup> Many conservative religious believers feel it violates their rights of religious free exercise as well as their free speech rights if their preachers and congregations cannot openly favor candidates who serve Godly causes, like (again, setting any insistence on public reason aside) Donald J. Trump, without losing the tax-exempt status that is generally economically necessary for their religious institutions to survive. In a similar spirit, but with less concrete cause for concern, Senator Mike Lee of Utah in 2015 introduced a “First Amendment Defense Act,” which sought to insure that religious institutions would not lose their tax exemptions if they did not support same-sex marriage—something the IRS has not considered

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<sup>30</sup> Koppelman, *op. cit.* 646.

<sup>31</sup> See e.g. Emma Green, “Trump Wants to Make Churches the New Super-Pacs,” *The Atlantic*, August 2d, 2017, <https://www.theatlantic.com/politics/archive/2016/08/how-trump-is-trying-to-put-more-money-in-politics/493823/>.

doing, though it is true that as a result of the civil rights movement it has long denied tax exemptions to religious bodies that engage in racial discrimination.<sup>32</sup>

In response to these controversies, some have urged that it is time to eliminate tax exemptions for religious congregations and institutions of worship altogether.<sup>33</sup> The view advanced here suggests a different position. The requirement that we treat religious groups as equal to, but not superior to, secular ones suggest if we permit religious groups to endorse political candidates, we must also allow *all* tax-exempt advocacy groups to endorse candidates. We cannot grant religious traditionalists full political speech rights and tax exemptions, while denying one or the other benefit to environmentalist organizations, LGBTQ proponents, animal rights advocacy groups, immigrant lobbying bodies, world-staters, anti-nuclear groups, and other secular non-profits with political concerns that, in most if not all cases, they see as matters of moral conscience. It is likely that traditionalist religious conservatives and others in the Trump coalition and in the broader Republican Party would not welcome this broadening of political participation rights. If so, insisting on equal treatment in this regard might mean that pressures to end the Johnson Amendment would fade away. But as one who has long favored robust democratic contestation over competing views of the human good, I see no problem with permitting the endorsement of candidates while maintaining tax exemptions for all religious and non-religious non-profit organizations that in other ways are seen as contributing to the public good—so long, that is, as we sustain tax revenues sufficient to meet other needs.

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<sup>32</sup> Mark Oppenheimer, “Now’s the Time to End Tax Exemptions for Religious Institutions,” *Time*, June 28, 2015, <http://time.com/3939143/news-the-time-to-end-tax-exemptions-for-religious-institutions/>.

<sup>33</sup> *Ibid.*

In sum, if in keeping with an ethos of truly embracing pluralism, and seeking to help all groups pursue their distinct visions of the good whenever doing so does not inflict significant harms on others or on the achievement of critical public goals, we adopt presumptions in favor of religious accommodations in lawmaking and adjudicating, I think we will do what is just and good; and we will also reduce, though certainly not eliminate, the very real basis now for religiously-motivated populist resentments. Pursuing these policies would, moreover, be conducive to the flourishing of a wide variety of diverse civil associations, of the sort that many have long thought to be America's best schools for citizenship. Such associations are often great venues for developing habits and practices of working cooperatively with others for the pursuit not just of individual self-interest but of common goods. Through those pursuits, a wide range of cultural communities, from fundamentalist Christians to militantly proud deaf culture groups to persons of mixed race descent to families with transgender members and many others, may come to feel that they are truly part of the larger American political community. If these accommodations are combined with programs to address the extensive but still differentiated economic challenges of the wide variety of less advantaged Americans, many more American groups might proving willing to try to overcome their divisions and polarization, and to work together to realize a vision of America as a pluralist but united nation which seeks through its public policies to make it possible for all who reside here to pursue happiness as they see fit.

Too optimistic? Perhaps. But if today's populist conservatives want to "make America great again," progressives must offer a vision of how to make America greater yet than it ever has been. And it must be a vision in which as wide a range of Americans as possible can see that they have a secure and respected place—so that even conservative traditionalists can once again feel at home on that American range.