

Shaping Religion: The Limits of Transformative Liberalism

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Introduction: The Question of Incongruence

How should the liberal state respond to individuals and groups whose religious beliefs or practices (seemingly) do not cohere with liberal egalitarian norms and principles? There are two points of agreement here among liberal theorists.

First, toleration of religious diversity is at the heart of liberalism. A core conviction of liberal political theory is that agents ought to be free to form, revise, and pursue a conception of the good. The capacity to do this is one of the two fundamental moral powers within John Rawls's political conception of the person, and is central to the ideal of autonomy celebrated by comprehensive liberals.¹ Further, individuals exercising this capacity under conditions of freedom will come to hold a variety of different, and indeed incompatible, conceptions of the good, including diverse religious conceptions. Respect for citizens' use of their moral powers therefore requires tolerance of a wide range of religious beliefs and practices. Thus, freedom of religion—in both its internal dimension as freedom of belief and its external dimension as freedom of religious expression, worship, and association—is a basic liberal right.

Second, religion cannot be an excuse for grave injustice or direct violations of fundamental rights. No one should be permitted to murder, assault, or enslave others. Such conduct being religiously motivated does not exempt it from coercive prevention or punishment.

This common ground leaves a large space of difficult cases: those in which individuals engage in practices grounded in their religious beliefs that (arguably) run counter to liberal egalitarian norms, but cannot (uncontroversially) be said to violate fundamental rights. Here are some examples.

First, individuals might structure their domestic lives on the basis of religious beliefs that diverge from liberal egalitarian principles. For example, a couple might arrange their home life based on traditional gender norms, according to which wives ought to be primary caregivers for children, while husbands have primary responsibility for earning an income to support the family.

¹ See Rawls (2005, 19, 103–4); Raz (1986, 369–78).

Second, the internal organisation of some religious groups deviates from liberal egalitarian norms. Religious groups can be hierarchical. Some have discriminatory leadership policies. For example, only men can be priests within the Catholic Church, and its hierarchical nature means that this can be changed only by papal decision, even if a majority of Catholics personally endorsed female priesthood.²

Third, some religious groups have discriminatory membership policies. For example, they might only admit members who share their doctrinal and ethical beliefs, and thus exclude those whose behaviour they consider immoral, and expel individuals who deviate from the religion's teaching.³

Fourth, some religious service-providers wish to refrain from providing their services in certain contexts, in order to avoid expressing support for certain lifestyles or behaviour. This includes Catholic adoption agencies that refuse to place children with gay couples and the infamous 'gay cake' cases.⁴

Fifth, some religious requirements with regard to dress or other features of one's (public) appearance might be in tension with liberal egalitarian norms, for example due to reflecting patriarchal norms. The most familiar example here is the controversy over the Islamic veil.⁵

Finally, there are various cases involving children. These include traditional religious practices such as circumcision, questions about the transmission of non-liberal norms, and parents wishing to withdraw their children from public education, or certain lessons, due to religiously-grounded objections to its content.⁶

These cases vary widely, but all involve the kind of tensions and conflicts that I am interested in. They all raise the question of how far the state should tolerate or accommodate religious practices⁷ that are *incongruent* with liberal egal-

² According to a 2015 Pew Survey, 59% of American Catholics believe the Church ought to allow women to become priests. See Pew Research Centre (2015, 73–5). A 2014 poll of 12,000 Catholics from 12 countries put this figure at 64% for Europe, and 45% worldwide. See Univision (2014, 10–11).

³ For a legal case of this kind, see *Christian Legal Society v. Martinez* 561 U.S. 661 (2011).

⁴ In Northern Ireland, Ashers bakery refused to make a cake with the slogan "support gay marriage". The bakery was found guilty of unlawful discrimination based on sexual orientation by the Northern Irish courts. This ruling was overturned by the UK Supreme Court, on the grounds that the bakers' objections were to the message on the cake, not to the customer himself. See *Lee v. Ashers Baking Company Ltd and others* [2018] UKSC 49. In the USA, in *Matterpiece Cakeshop v. Colorado Civil Rights Commission* 584 U.S. ____ (2018), a bakery refused to make a cake for a same-sex wedding. The US Supreme Court ruled in the bakery's favour, but on very narrow grounds regarding the way that this specific case was handled by the Colorado Civil Rights Commission.

⁵ For a helpful overview of policies toward the veil across Europe, see BBC News (2018).

⁶ The most famous legal cases of this kind are *Wisconsin v. Yoder* 406 U.S. 205 (1972) and *Mozert v. Hawkins* 827 F.2d 1058 (6th Cir. 1987).

⁷ By 'religious practices' I simply mean practices grounded in religious beliefs.

itarian norms and principles. The answer to this is likely to vary between the cases I have mentioned, given their variety.⁸ I will not directly address or provide judgments on each case. Instead, in the next section I will identify three kinds of response that a liberal theorist might offer. Providing this conceptual framework is one of aims of this chapter. The other aim is to critically assess an increasingly popular response: ‘transformative liberalism’. I will argue that our use of this response should be much more limited than its advocates propose.

Responses to Incongruence

This section will sketch three possible responses to incongruence. But some terminological and conceptual clarifications are required first. Thus far I have used the term ‘liberal egalitarian norms and principles’ fairly vaguely, and I will continue to do so. There are many accounts of liberal egalitarianism, which I want largely to remain neutral between. Suffice to say that I have in mind a substantive form of liberal egalitarianism, based on values of equality, freedom, and fairness, rather than a thinner, more libertarian, view. The relevant norms and principles thus include non-discrimination, democracy, gender equality, and so on.

I use the term ‘incongruence’ broadly to refer to any practice that is in tension or conflict with liberal egalitarian norms, in the sense that it fails to reflect or apply those norms. While it is not only religious individuals or groups who engage in such practices, I will focus exclusive on those cases here: cases where the incongruent practice is endorsed on the basis of religious beliefs and values. To the extent that religious beliefs entail such practices, we might say that those beliefs are themselves incongruent; holding those beliefs leads one to endorse and engage in actions that diverge from liberal egalitarian norms.

To be clear, a practice being incongruent does not mean that liberal egalitarians must believe that it ought to be legally regulated. For example, Rawls holds that his principles of justice only apply to the basic structure, and not to private associations. Unequal relationships outside the basic structure are permitted. Nonetheless, we can say that such relationships are incongruent because they involve the internal life and organisation of families or associations failing to mirror or instantiate the norms and principles applied to public institutions.

⁸ For example, one obvious difference involves the levels of consent given by the parties engaged in, or affected by, the practices.

Not all liberal egalitarians are so sanguine about such incongruence. Indeed, the three views that I will presently sketch disagree over the existence, nature, and scope of ‘incongruence rights’: rights to engage in incongruent practices.⁹ Incongruence rights are claim-rights: rights with correlative duties held by others, particularly the state, to permit, and to refrain from interfering with, a practice. Incongruence rights are part of more general, largely content-independent, claim-rights of expression, religion, and association, which provide a protected sphere of autonomy in which we are able to pursue our chosen conduct free from others’ interference.¹⁰ Some of the conduct within this sphere of autonomy can be wrongful, such that we lack Hohfeldian liberty-rights, or moral permissions, with respect to it. We have a moral duty not to act in this way, but that duty is one that others are not permitted to enforce—hence the claim-right. Not all incongruence is necessarily wrongful, however. Individuals and groups might be morally permitted to deviate in various ways from liberal egalitarian norms within their home and associational lives. Indeed, one might argue that part of the point of liberal egalitarian laws and norms is to protect and permit individuals and groups to structure their private lives based on a variety of different norms. Individuals and groups are morally permitted to act in various ways that it would be impermissible for the state or public institutions to act.¹¹ Nonetheless, I refer to all deviations from liberal egalitarian norms as cases of incongruence, and use the term ‘non-liberal groups’ to refer to those exhibiting incongruence.¹² If a group has a claim-right to engage in such a practice then this is an incongruence right. The dispute between the three views I will now sketch concerns these rights.

The first response denies the existence of incongruence rights in a particular case. Liberal egalitarian principles should thus be coercively imposed. Individuals’ and groups’ protected sphere of autonomy does not include the claim-right to engage in this particular conduct—conduct that is patriarchal, discriminatory, harmful to children, or violative of others’ dignity—and thus it ought to be prohibited.

A view that offered this response to *every* example of non-liberal religion would deny that there are *any* incongruence rights. This does not amount to a denial of the existence of rights of freedom of expression, religion, or associa-

⁹ While her topic is different to mine (she is discussing freedom of intimate association), my conceptual analysis in this paragraph draws on that in Brownlee (2015).

¹⁰ ‘Incongruence rights’ are therefore not a separate category of rights for non-liberal groups. ‘Incongruence rights’ is a label used to refer to cases where general liberal rights enjoyed by everyone are used to engage in an incongruent practice, and the general right includes the right to engage in that practice. This specific right to engage in that practice is the incongruence right.

¹¹ For example, Garnett (2012, 194–227) argues that certain kinds of discrimination are not wrongful, even though they would be wrongful if the state practised them.

¹² I use this term rather than ‘illiberal’ because ‘illiberal’ might imply a negative judgment, whereas ‘non-liberal’ is more neutral.

tion. But it says that those rights are thoroughly constrained by liberal egalitarian norms, such that they are rights only to act in ways that cohere with those norms. Few theorists would hold such a view.¹³ Indeed, it is not clear that a theory could remain a *liberal* theory while holding that even decisions solely involving consenting individuals, such as the internal structure of the home, must display full congruence with liberal egalitarian norms.¹⁴

Nonetheless, some theorists would apply this approach to many cases. Some have argued that the Catholic Church should not be permitted to maintain its male-only priesthood (e.g. Conly 2016, 34–5), various European countries have banned the burqa and niqab in public places,¹⁵ and many theorists hold that service-providers should not be permitted to withhold services on religious grounds. This approach embodies what Nancy Rosenblum (1998a, 36–41; 1998b; 2010) has labelled ‘the logic of congruence’: individuals and groups are required to conform to liberal egalitarian public norms in their practices and conduct. It is “imperative that the internal life and organization of associations mirror liberal democratic principles and practices” (Rosenblum 1998a, 36).

I think that this approach is usually mistaken. The value of freedom of religion is weighty enough to justify toleration of various incongruent practices. In other words, the scope of freedom of religion should not be defined as extending only as far as avoiding any kind of conflict with (other) liberal egalitarian principles. Such conflicts should be acknowledged, and incongruent conduct should often be permitted. We should often recognise incongruence rights. This is most clearly the case when it comes to groups’ internal structures. Groups should have extensive—although not unlimited—autonomy to decide their own membership policies and internal structures of leadership, organisation, hierarchy, and so on.¹⁶ Matters are of course more complicated when groups are providing outward-focused services, but even here there are liberal grounds for permitting religious groups to provide these services on their own terms, at least within certain limits.

These comments point to the second response: granting incongruence rights. The most expansive version of this approach would hold that all religious practices that do not violate fundamental rights should be immune from state

¹³ Levy (2015, 51, fn. 15) cites Russell Hardin as someone who might endorse this view.

¹⁴ Of course, there is scope for disagreement about what policies are required in order to ensure that consent is adequately informed or autonomous.

¹⁵ Further, in *S.A.S. v. France* [2014] ECHR 695, France’s prohibition of the concealment of one’s face in public places was ruled by the Grand Chamber of the European Court of Human Rights (ECtHR) not to violate Articles 8 (right to privacy) and 9 (right to religious freedom) of the European Convention on Human Rights.

¹⁶ For discussion of how ECtHR has balanced such claims against other European Convention rights, see Leigh (2012). I develop some of my own views on these matters in Billingham (2019); Billingham (working paper b).

intervention, no matter how far they might deviate from liberal egalitarian norms.

Of course, part of the disagreement between these two approaches concerns the scope of fundamental rights themselves. For example, theorists disagree about whether rights against facing various kinds of discrimination are fundamental rights that must never be violated and whether children's right to bodily integrity includes a right against circumcision. The distance between the first and second approaches will be small if one adopts a very capacious understanding of fundamental rights, which rules out much of the conduct I have mentioned as violative of those rights, and thus not within the sphere of incongruence rights on either approach. But most understandings of fundamental rights will leave many cases where the two approaches diverge.

The third response, which is something of a middle way, is 'transformative liberalism'.¹⁷ This approach involves permitting a practice, on grounds of religious freedom, but also using the state's non-coercive powers to push groups toward congruence. While the state should not prohibit, or otherwise coercively prevent, the practice, it should use tools such as literal speech (by officials and representatives), symbolic speech (e.g. statues and road names), and funding and subsidy (or their withdrawal) to promulgate liberal egalitarian norms and principles, oppose practices that conflict with those norms and principles, and encourage religious individuals and groups to reform their incongruent practices and beliefs. In other words, transformative liberalism acknowledges incongruence rights, but denies that such rights necessarily prevent the state from publicly criticising the incongruent conduct and imposing pressure upon it. It is a response focused on the kinds of interference that incongruence rights do and do not protect against.

For example, the state might make congruence a requirement for charitable or tax-exempt status. Groups might be permitted to discriminate in their membership or leadership decisions, but only at the cost of no longer being eligible for tax exemptions. Similarly, Catholic adoption agencies might be permitted to only place children with heterosexual couples, but would not be eligible for public funding or participation in public adoption programs. State officials might permit the Islamic veil, but also speak out against it, explaining why they consider it incompatible with equality. While I will not say much about these in this paper, states can also promote liberal egalitarian principles using 'positive' transformative policies, such as civic education and various kinds of symbolic expression—public memorials, statues, street names, and

¹⁷ My use of this term is based on Macedo (1998). Brettschneider (2012, 1–21) presents his transformative liberal view as a middle way between 'militant democracy' and minimal liberalism, which enables liberal democracies to avoid both of two dystopias: the 'invasive state' and the 'hateful society'.

national holidays that celebrate figures or events that reflect ideals and principles that the state wishes to promulgate.

As with the other approaches, one might endorse transformative policies with regard to some cases of incongruence but not others. Transformative liberals endorse those policies in cases where they deem a practice to conflict with liberal egalitarian norms to a sufficient extent to justify the state exerting pressure toward congruence, but not to violate fundamental rights in a way that would justify prohibition. There is thus an incongruence right to engage in the practice, but a right that does not protect against non-coercive forms of state interference. When such policies are deemed appropriate will depend on one's view of the scope both of fundamental rights and of (relatively) benign forms of incongruence where even non-coercive state interference is unjustified.

Transformative liberalism has become increasingly popular (for example, see Cohen (2012); Corbin (2012); Balint (2017, 37)). One reason for this is that theorists have developed increasingly demanding accounts of relational and civic equality, and thus become more attentive to various kinds of exclusion, discrimination, and inequality within civil society. At the same time, liberals maintain a scepticism of coercive state power and belief in an expansive private sphere and individual rights—including incongruence rights. They are thus wary of using the state's coercive power to force people to conform with liberal egalitarian norms. Yet a lack of conformity threatens to perpetuate social inequality and cause dignitary harms. From this perspective, both the first and second approaches will often look inadequate. Transformative liberalism appears an attractive third option, combining the liberties granted by the second approach with the public approbation and state action involved in the first. The transformative state actively promotes liberal egalitarian norms and principles, and opposes beliefs and practices that conflict with them, while still give wide scope for personal, including religious, freedom.

Despite these attractions, I believe that our enthusiasm for transformative liberalism should be tempered, and our endorsement severely constrained. Those who endorse the first approach will see transformative liberalism as failing to do enough to prevent discriminatory, inegalitarian, or non-democratic practices. My argument comes from the other direction. The normative limits on the state's authority should lead us to reject expansive versions of transformative liberalism.

Of course, the most plausible liberal theory will likely contain examples of all three responses. It will deny the existence of incongruence rights that would permit citizens to violate fundamental rights, but admit some range of incongruence rights, some but not all of which include protection against trans-

formative policies. My basic claim is that incongruence rights usually protect individuals and groups against even non-coercive, transformative, state interference. While transformative policies are appropriate in some cases, their use should be much more limited than transformative liberals propose. Liberal rights generally include the freedom to make use of those rights based on one's own values and commitments without being penalised by the state. For example, if (as I believe) freedom of association includes the right to form groups that discriminate in certain ways in their membership or leadership decisions then groups that do so should not face additional burdens or pressures from the state than those whose internal structures are congruent with liberal egalitarian norms. This means, for example, that tax exemptions should be available to both kinds of group on the same terms. The state should thus not use the threat of removing tax exemptions as a way of pressuring such groups to liberalise—even if this threat is non-coercive.¹⁸

The rest of this chapter defends this view. First I will argue that several possible motivations for transformative liberalism are mistaken, such that the view must rest on a direct claim that the state is obligated to promote congruence. I will then argue that we often have strong reasons to resist this claim, given the force of the official approbation involved in transformative policies, the contestable judgments required in deciding when to endorse such policies, and the proper limits on the state's authority.

Mistaken Transformative Liberal Motivations

This section argues that three possible motivations for transformative liberalism are mistaken. The first is believing that transformative policies are necessary in order to avoid the protection of incongruence rights implying endorsement of the protected individual or group. This is clearly a mistake when applied to the mere protection of liberal rights of free expression, association, and religion. Liberal states protect these rights for all, and do not thereby express endorsement of the way that citizens make use of those rights. As Rosenblum (1998b, 90) writes, “freedom of association is no stamp of public approval of the internal life of an association in a liberal democracy.”

Less obviously, tax-exempt status also does not imply endorsement of its recipients—or at least endorsement of their beliefs, values, or practices. Tax-exempt status is granted to organisations that do not function for profit and seek to advance the interests (as they see them) of some group or category of people, beyond those who work for the organisation. While the justification for such status is disputed, all plausible justifications hold that it is granted

¹⁸ I argue that (contra Brettschneider) such threats are in fact coercive in Billingham (working paper a). I set this issue aside here.

based on groups' nature or purpose, not their practices or beliefs. It is thus not a mark of state approval for, or granted in order to advance, the latter. We can see this by briefly reviewing four common justifications.

First, some hold that non-profit organisations simply do not belong within the tax base. The purposes of corporate income taxation, such as indirectly taxing shareholders' income and regulating managers, do not apply to non-profits (Herzig and Brunson 2017, especially 1134–37). Such organisations do not pay dividends and are regulated in other ways, so their nature and structure make them inappropriate targets for such taxation. Tax-exempt status is thus a baseline situation for these groups, not a sign of government approval.

Second, an argument for tax exemptions for religious groups in particular is that they reinforce the separation between church and state, by avoiding regulatory processes involved in taxation (Berg 2009, 186; *Walz v. Tax Commission of New York*, 674–5). Here, then, the argument turns on groups' religious nature and a doctrine of separation.

Third, some argue that tax exemptions are justified as a way for the state to support and facilitate an active, pluralistic, civil society. According to Jeff Spinner-Halev (2011, 778), “a vibrant democracy has a wide variety of charitable and volunteer organizations within it”, which increase trust among citizens, give a diverse range of choices, allow citizens to choose to support different causes and charities, and ensure important sites of dissent. Tax-exempt status is a way for the state to encourage this kind of “rich associational life” (Spinner-Halev 2011, 778). Again, this justification does not imply endorsement of all of groups' practices or values. Its advocates hold that decisions about tax exemptions should not be based on ideological constraints, but should be consciously pluralistic, making exemptions available to groups with a diversity of viewpoints (Inazu 2015, 608, 611). In Justice Brennan's words, “each group contributes to the diversity of association, viewpoint, and enterprise essential to a vigorous, pluralistic society” (*Walz v. Tax Commission of New York*, 689 (Brennan J concurring)).

A final argument for tax exemptions is that they are a means by which the state encourages charitable activity that benefits the public, and increases the public benefits produced.¹⁹ Exemptions from income taxes leave charities with more resources with which to pursue their purposes, while charitable donations being tax deductible encourages individuals to donate. This justifi-

¹⁹ This justification seems to lie behind UK charity law. The Charities Act 2006 lists thirteen categories of eligible charitable purposes (including advancing religion) and requires charities to function for public benefit.

cation does involve some kind of state approval for charities' activities.²⁰ But the approval is for the organisation's charitable purpose or mission, not for every aspect of its beliefs, values, or practices. The state can judge an organisation to be charitable without thereby endorsing its internal organisation, membership decisions, values, or even all of the means by which it advances its charitable purpose.

Tax exemptions therefore do not involve endorsement. Things are obviously somewhat different when it comes to direct government funding. Here, the state is providing money to a group in order to fulfil a task or project, so its agency is more directly implicated in groups' actions. Nonetheless, funding is provided in order to achieve a *particular* task, without necessarily implying endorsement of everything the funded group stands for. There is space for groups to fulfil the relevant task without displaying full congruence, since funding need not imply endorsement for the incongruence.²¹

Overall, then, arguments for transformative liberalism that claim they are needed in order for the state to avoid endorsing incongruent practices fail.²²

The second mistaken motivation for transformative liberalism is the assumption that congruence is necessary if individuals are to be good democratic citizens. Rosenblum (1998b, 88) notes that advocates of congruence often assume that "social habits and moral dispositions cultivated and expressed in voluntary associations are carried over willy-nilly to public life," such that non-liberal practices within civil society will produce (endorsement of) non-liberal political practices or policies. But moral psychology is more complex than this. Groups whose internal lives and practices do not conform to democratic principles do not necessarily cultivate beliefs and practices that undermine democracy. Similarly, groups that discriminate within their membership or leadership policies do not necessarily foster support for discrimination, or any form of second-class citizenship, within political life. People can "discriminate discriminately" (Rosenblum 1998b, 89; see also Rosenblum 1998a, 47–50). Individuals can believe that certain kinds of people should not be permitted as members or leaders within their religious group while none-

²⁰ It also raises questions regarding the definition of 'charitable purposes' and the compatibility of this approach with liberal neutrality. See Martin (2012).

²¹ I think this can be true even if the state funds an organisation whose service-provision is (from the state's perspective) incomplete—such as adoption agencies who will not place children with gay couples. Even this need not imply endorsement for the incongruence itself, especially since the state will also ensure that all who have the right to the service have access to it, via alternative providers. To be clear, I am not claiming that such funding is justifiable, merely that the objection to it should not be endorsement-based. Clearly more argument would be needed to properly defend even this claim.

²² An implication of this is that Brettschneider's (2012, 43–5) complicity-based argument fails, since his understanding of complicity appeals to (the appearance of) endorsement of incongruence.

theless supporting equality of citizenship and access to political influence. Catholics who endorse male-only priesthood do not thereby commit themselves to endorsing male-only political representation, less-than-equal opportunity for women in public life, or rejecting female leadership in all domains. “Prized democratic dispositions do not have to be cultivated or exhibited everywhere to be practiced in political life.” Indeed, “incongruent groups do often cultivate democratic dispositions indirectly and do shape members who are also good citizens” (Rosenblum 2010, 392).

Even if transformative liberalism cannot rest on concerns with state endorsement of incongruence or the creation of bad citizens, one might argue that it is justified simply due to reducing the occurrence of wrongful uses of incongruence rights. Some versions of this argument involve a third mistake that liberals should be sensitive to: the impulse to call upon the state to resolve all social problems or wrongs. Liberals have always been sceptical of state power and prized individual rights of dissent. Yet contemporary liberals are often quick to turn to the state’s actions as the means by which wrongs should be prevented and society reshaped. There are certainly good reasons for this; the modern state has brought much positive change and contains great potential for advancing justice. Nonetheless, it is not the solution to everything. Some issues—and even some wrongs—are beyond its capacity and authority. When we consider how religious or cultural groups might be reformed, there are many reasons to favour change that originates from within over change that is imposed, or even pressured, by the state. Ironically, religious groups themselves have often learned these lessons better than transformative liberals. Many such groups recognise the limits of politics to confront things they consider immoral, and believe that much immorality should not be subject to state interference.²³ Liberals should be willing to admit this too.

If this is right, then the justification for transformative liberalism must be that there are *particular* kinds of violations of liberal egalitarian norms—and harms arising from those violations—that do require a response from the state. The state should not seek to right all wrongs, but has a duty to promote congruence to a certain degree. For example, Corey Brettschneider argues that transformative policies are justified when aimed at practices that are incompatible with the basic liberal ideal of ‘free and equal citizenship’, and the norms and principles that it generates. Citizens and associations whose practices violate this ideal can rightly be opposed by the state using its expressive capacities, while other forms of incongruence should remain unopposed. Al-

²³ For example, many Christian theologians argue that Christianity ‘desacralises’ politics, revealing limits on what can be achieved through earthly political authority. Hollenbach (2002, 55) writes that Christians “are required by their faith to reject any attempt to achieve the full common good, as it is understood theologically, by political means.” See also Ferguson (1998, 158); Insole (2004, 59); Meilaender (2003).

ternatively, a transformative liberal might focus on specific practices that they believe *will* undermine vital civic virtues or democratic dispositions, even taking Rosenblum's arguments on board. The next section argues that there are good reasons to limit even these transformative aspirations.

Against Transformation

The central reason for opposing transformation is to place appropriate limits on the state's authority, in particular its power to shape civil society. Liberals have long been concerned with restricting the power of the state in this domain—partly due to general scepticism about extensive state power and partly due to the particular role that civil society groups play as ‘mediating institutions’ between individuals and the state, which provide both a check on state power and a central location for individual flourishing. Transformative liberalism expands the state’s power over civil society, by permitting (or requiring) it to oppose groups it deems insufficiently liberal and place pressure on them to reform.

Some reasons for wariness here come from the risk of abuse of power. Officials might conflate opposition to their policies with opposition to liberal egalitarian ideals, and direct transformative pressures at political opponents rather than non-liberal groups (Calabresi 2014; Herzig and Brunson 2017, 159).²⁴ Transformative liberalism might encourage what Robin West (2014, 1037–9) calls the ‘hypocritical state’, which uses engagement in transformation as cover for its own failures to live up to standards of equality and fairness.

Even setting these considerations aside, we must recognise the *force* of transformative policies. They involve the state declaring a particular practice, and the beliefs underlying it, to be unacceptable from the perspective of the political community—one that merits official public opposition. The state, speaking in the name of political community, expresses disapprobation toward the practice. While the practice is tolerated, it is also officially declared to be incompatible with good citizenship. In this sense, it is publicly presented as beyond the pale. The strength of this message of official public condemnation gives strong reason for caution.

Of course, transformative liberals would argue that we *should* condemn sexism, homophobia, and other illiberal viewpoints. Those who reject norms of gender equality and non-discrimination should be opposed. The question, however, is whether the *state*, specifically, ought to engage in this opposition. If we accept incongruence rights in relation to a particular practice, based on

²⁴ For a recent real-life case, see Goldfarb and Tumulty (2013).

our commitment to freedom of expression, religion, and association (as transformative liberals do) then we should be wary of drawing upon the state's authority to declare that practice to nonetheless be beyond the pale. We should not require individuals or groups to be thoroughgoing liberal egalitarians throughout their public and private lives in order to be citizens in good standing, and this includes not directing the weight of state condemnation against most incongruence. Freedom to engage in incongruent practices, and to hold incongruent beliefs, should include being treated equally to congruent individuals and groups by the state. This is an important part of the liberal concern for limiting state power and permitting individuals to form and act upon their own beliefs, even when they are not fully aligned with liberal egalitarian public norms.

Some transformative liberals accept this argument in general, but hold that a particular class of practices, and the beliefs underlying them, should be officially publicly condemned, due to opposing liberal democracy's most fundamental ideals. Brettschneider offers the most fully developed such view. As I mentioned above, he endorses extensive incongruence rights, but argues that they should not extend so far as freedom from state opposition in cases of conflicts with free and equal citizenship (FEC), the core ideal of liberal democracy. "Beliefs and practices that conflict with the ideal of free and equal citizenship can be of public concern, and should be changed to make them compatible with democratic values" (Brettschneider 2012, 24). The state should use its expressive capacities in order to promote this change, and thus "should intentionally seek to transform some religious beliefs [and practices] that are at odds with the underlying values of democracy" (Brettschneider 2012, 99).

The ideal of FEC can be defined in various ways. A minimal conception would focus on accepting that all citizens have an equal public standing that entitles them to a range of basic rights—including both liberal freedoms and political rights. One rejects this ideal if one denies some citizens' basic moral worth, entitlement to vote, freedom of expression, etc., or endorses state discrimination against those citizens. Some do reject this ideal; indeed, there is growing concern about the rise of far-right groups that do so. Most incongruent groups do not reject this minimal conception, however. Very few conservative or non-liberal religious groups believe that some citizens should be denied basic liberal and political rights or treated as inferior by the state.

The ideal can be thickened in various ways. Most relevant here, one might view certain inegalitarian or discriminatory practices within voluntary associations or individuals' private lives to be incompatible with supporting FEC. Perhaps endorsing traditional gender roles within the home, denying group

membership to those who reject a conservative sexual morality, or holding that only men can be priests constitute denials of the equal public standing of women or gay citizens.

The thickest conception of FEC would conflict with all incongruence, since any failure to apply liberal egalitarians norms to one's private and associational life would be seen as a denial of all citizens' status as free and equal. All liberal justice is ultimately grounded in the idea of fair cooperation among free and equals, and arguments for particular policies invariably involve claims about the demands of freedom and equality. So it is not surprising that one could hold that all forms of incongruence constitute violations of FEC.²⁵

Transformative liberals do not tend to adopt the maximally thick conception. Brettschneider (2012, 135) argues that the Catholic Church's policy of male-only priesthood does not deny women's equal citizenship, in the light of the Church's general attitude toward women in public life and restriction of egalitarianism to the specific role of priest. But Brettschneider also does not adopt the minimal conception. He argues that groups denying membership based on a conservative sexual morality should face transformative policies, and hints at this for groups that oppose same-sex marriage (Brettschneider 2012, 134–7, 117–20).

The judgments involved in specifying a conception of FEC, and determining whether particular examples of incongruence conflict with it, are often complicated and controversial, for (at least) two reasons,²⁶ which provide considerations against transformative liberalism.

First, there are often plausible arguments on both sides concerning whether a practice conflicts with FEC. Take a group that requires members to endorse central aspects of its religious views, including a conservative sexual morality, such that it denies (or rescinds) membership to those who engage in sexual activity outside of heterosexual marriage. Brettschneider (2012, 117–20) argues that this constitutes a denial of the equal status of gay citizens, since it bars them from membership based on an unchosen aspect of their identity. But one might argue that the group is discriminating based on individuals' beliefs and practices, not their status or identity. Membership is not denied simply on the basis of being gay, but of endorsing or engaging in homosexual conduct—and any other sexual practices outside of heterosexual marriage (Garnett 2012, 219–21). Michael McConnell (2000, 472) argues that “it is not invidiously discriminatory for a private association committed to certain be-

²⁵ This means that endorsing a ‘political’, as opposed to ‘comprehensive’, conception of transformative liberalism, as Brettschneider (2012, 30–37) does, does not necessarily prevent a thoroughgoing transformative program.

²⁶ Similar questions apply to the characterisation of ‘fundamental liberal values’ offered in Ekeli (2012).

iefs and values to limit itself to persons who share those beliefs and values.” Of course, this would be invidious if the beliefs in question themselves denied the basic moral status or civic equality of the excluded. But this does not seem true in this case. The group here might violate a thick conception of FEC, but plausibly does not violate a thin one. This kind of contentious line-drawing is inherent in determining whether a belief or practice conflicts with whatever conception of FEC one adopts as the basis for transformative policies.

Transformative liberals might argue that the state regularly makes complicated and contentious judgments, in all policy areas. It often must act in the face of reasonable disagreement. For example, reasonable disagreement about distributive justice does not mean that the state lacks the authority to implement Rawls’s difference principle. The criticism here thus cannot simply be that the state can never make controversial judgments or engage in reasonably disputable actions. But there is something importantly distinct about the message of transformative liberal policies. They declare a belief or practice to be beyond the pale—incompatible with society’s fundamental values. The state can implement the difference principle without declaring that utilitarianism is an unacceptable position, or that its advocates are not decent citizens. Transformative liberal policies make precisely this statement; they involve official disapprobation. This is why they raise a special normative concern, and why the contestable nature of the judgments involved is important. Good-willed people committed to core liberal democratic ideals, including the minimal conception of FEC, can disagree about cases like male-only priesthood and the exclusion of individuals who reject conservative sexual morality. This should give us pause before calling upon the state to officially declare such practices inconsistent with fundamental liberal democratic ideals.

Further, the state cannot avoid acting in the domain of distributive justice—it must enact some kind of tax and spend policy. But it often can generally avoid making the judgments and statements involved in transformative policies. This would not be true if protecting liberal rights expressed endorsement for how those rights are used, or granting tax-exempt status expressed endorsement for a group’s beliefs and practices. But since this is not the case (as I argued above), the message behind transformative liberal policies can usually be avoided. We often have good reason to avoid it, given the force of that message and the contestable nature of the judgments involved.

Second, matters are further complicated when the relevant practice is grounded in theological doctrines. As Kevin Vallier (2016, 13–16) notes, this is the case for many religious practices that are potential transformative targets. They are rooted in theological conceptions of personal identity, natural

law, God's creative ordering, the role of intentions in moral evaluation, the nature of salvation, the authority and interpretation of tradition, Scriptural hermeneutics, and so on. Judging the compatibility of a practice with FEC requires understanding its meaning, which unavoidably requires evaluation of theological material. For example, whether the exclusion of those violating a conservative sexual morality constitutes a denial of their equal status partly depends on the group's theological understanding of sexual identity, the distinction between status and behaviour, and the grounding of the relevant sexual morality. Similarly, whether the burqa is an affront to women's equal citizenship partly depends on its meaning within Islam. Transformative liberalism thus requires the state to make judgments that involve a kind of substantive theological interpretation and adjudication for which it is ill-equipped and that make the state an arbiter of religious beliefs and activities in a way that runs against the liberal commitment to freedom of religion. It asks the state to adjudicate on the meaning of theologically-embedded practices at the bar of liberal egalitarian ideals—including making judgments that contradict groups' own understanding of its theological and political morality. Liberals have good reason to reject this expansion of the state's interpretative authority.

A transformative liberal might argue that the state cannot avoid some adjudication of theologically-grounded claims. If discrimination in hiring on religious grounds is permissible for religious organisations—as in UK law (Equality Act 2010, Schedule 9, paras 2–3)—then courts have to decide whether a particular decision was made for genuine religious reasons. Similarly, some examination of religious beliefs is required when decisions are made about whether exemptions should be granted, for example under Article 9 of the European Convention of Human Rights.²⁷ Even in these contexts, however, courts seek to avoid substantive theological adjudication, and distinguish the question of what parties' religious beliefs and practices are from the question of their validity or acceptability. These are difficult lines to draw, of course. But transformative liberalism is different in kind. It directly requires the kinds of adjudication that courts have tried to avoid: interpreting the meaning of religious doctrines and proclaiming upon their acceptability in the light of liberal egalitarian ideals. Again, reasons of both state ability and authority speak against this.

As a final critical point, we should also note the potentially far-reaching consequences of transformative liberalism. Groups with beliefs and practices that are in some way incongruent with liberal egalitarian norms include many organisations that provide important charitable services, often within poor and

²⁷ For an argument concerning how such judgments should be made, see Billingham (2017). The USA's Religious Freedom Restoration Act (1993) also requires such judgments.

marginalised communities. Under transformative liberalism, they face the threat of losing tax-exempt status and access to public funding. Some might be forced to shut down. Individual citizens can also face large costs. Brettschneider argues that the state should fire individuals whose viewpoints oppose FEC. The cost of exercising incongruence rights might be losing one's job. While incongruence rights are still formally recognised, the costs imposed upon their exercise can be extensive, limiting the substantive freedom to hold and act upon incongruent beliefs.²⁸

Three clarifications regarding my view of incongruence rights are required here.

First, I have implicitly endorsed transformative liberal policies in relation to violations of the minimal conception of FEC. For example, speech that directly denies that some citizens should enjoy equal status or be granted fundamental rights should face official public disapprobation. Much speech in this category would be legally prohibited hate speech in most European jurisdictions. But not all actions violating the minimal conception should be legally prohibited, and this makes room for transformative policies. For example, a neo-Nazi rally should be permitted, but state officials ought to speak out against it, condemning it as representing ideas that contravene the most fundamental liberal democratic principles.

Second, I have focused on ‘negative’ transformative policies—condemnatory state speech, tax exemptions being revoked, etc. As I noted above, the state can also enact ‘positive’ transformative policies, such as symbolic expression. Some of these policies raise distinct normative concerns, such as that their influence on citizens is subliminal or manipulative (Tsai 2016). But assuming that they can be legitimate, I think that they too ought to be based on the minimal conception of FEC. While I lack space to defend this view, it is based on similar considerations as those discussed above.

Finally, we should note the difference between official state speech—speech by officials or representatives uttered in the name of the state—and representative speech—all other speech by politicians and representatives.²⁹ The latter need not be as constrained as the former. Even if transformative policies undertaken through official state speech should be limited to the minimal conception of FEC, representative speech can go much further in articulating a thick conception and criticising beliefs or practices that the representative considers incompatible with that conception. Politicians are free to oppose

²⁸ For further critique of the implications of Brettschneider’s view, see Billingham (working paper a).

²⁹ Chaplin (2012, 330–7) uses this distinction in the context of debates over public reason.

forms of incongruence that those speaking in the name of the state should not express public disapprobation toward.

Conclusion

Opposing transformative liberalism carries risk. Incongruent voluntary associations might cause various kinds of harms, and might shape citizens in ways that lead them to support less just outcomes, or vote against laws that instantiate a full understanding of FEC. But we must live with this risk, for the sake of liberal values themselves. In this sense, liberal democracy is always a risk. Citizens might vote for unjust laws or politicians who are unfit for office. And liberalism requires that we grant freedoms that could lead to the rejection of liberalism. The fate of the liberal democratic state ultimately rests on the conduct of individuals and groups who are to a significant extent outside of its control—not simply for practical capacity-based reasons, but for normative reasons provided by liberalism itself.

Those alert to incongruence and sceptical of civil society might be resistant to this; hence the attraction of transformative liberalism. Entrusting citizens' moral formation to a civil society containing racist, sexist, and homophobic groups might seem unacceptably risky.

But we must be careful not to contrast a non-ideal picture of civil society with an idealised state. The state itself has great potential for abuse of power. Liberals limit it partly for this reason. If we fear corrupt civil society then we have just as much, if not more, reason to fear the corruption of the state.

Further, even within ideal theory, there are important reasons to limit the state's transformative authority and resist the expansive kind of transformative liberalism that has become increasingly popular, as we have seen. This does involve placing some trust and hope in civil society. Liberalism demands that we do this—just as we do for the state itself. But this is not wishful thinking or blind faith. We have good reason to hope that protections of liberal rights will themselves lead citizens to form an allegiance to liberal institutions, as all enjoy the benefits of living in a free society.

We should also note that non-liberal groups within liberal societies will always face some, usually fairly strong, pressure to reform. This includes the pressure that comes from liberal egalitarian law itself. Those who oppose same-sex marriage or endorse male-only priesthood already know they are outside of

the mainstream. It also includes pressure within civil society, from citizens who engage non-liberals in dialogue or debate.³⁰

Nonetheless, a critic might claim that transformative policies are particularly necessary *now*, at a time when liberal democracy appears less stable and far-right and anti-system parties and movements are making headway. My reply to this is twofold. First, my view permits transformative policies targeted at those who clearly reject even the most fundamental liberal democratic ideals, embodied in the minimal conception of FEC. There are question of effectiveness here. As West (2016, 1036–7) notes, those who find the liberal state hateful are likely to have their views reinforced by state attempts to persuade them of liberalism. But there are no principled objections to public officials speaking out against neo-Nazis or reaffirming first-class citizenship for all. Second, the current situation actually *strengthens* the reasons against extending transformative policies beyond the minimal conception. Policies based on a thicker conception would portray a greater variety of beliefs and practices as incompatible with liberal democracy, which risks marginalising many who consider themselves genuine supporters of liberal democracy. If individuals who defend liberal rights and endorse all citizens' equal status are publicly portrayed as holding religious (or other) views that fall outside the bounds of acceptable pluralism then they will likely feel alienated, and could become disillusioned with the liberal democratic political project. Christian law professor Stephen Carter rejects transformative liberalism on grounds of freedom of religion and the importance of dissent and difference within democracy. I think he is largely right about these deontological limits on the state's legitimate authority to shape religion. But he also comments that “liberal theorists seem to believe that deep faith commitments pose serious threats to the order they are trying to create. I hope they are wrong. If they are right, then the order is not worth preserving” (Carter 2001, 43). The present moment gives us reason against expansive transformative policies precisely because the kind of renewal of liberal democracy that we need cannot be achieved by alienating citizens like Carter. So there are also powerful instrumental reasons against transformative liberalism.

References

³⁰ For arguments that citizens have *duties* to seek to persuade certain non-liberal compatriots of liberal egalitarian values, see Clayton and Stevens (2014); Badano and Nuti (2018).

- Badano, Gabriele, and Alasia Nuti. 2018. “Under Pressure: Political Liberalism, the Rise of Unreasonableness, and the Complexity of Containment.” *The Journal of Political Philosophy* 26(2): 145–68.
- Balint, Peter. 2017. *Respecting Toleration: Traditional Liberalism and Contemporary Diversity*. New York, NY: Oxford University Press.
- BBC News. 2018. “The Islamic Veil Across Europe.” May 31, 2018. <http://www.bbc.co.uk/news/world-europe-13038095>.
- Berg, Thomas C. 2009. “Religious Organizational Freedom and Conditions on Government Benefits.” *Georgetown Journal of Law and Public Policy* 7(1): 165–215.
- Billingham, Paul. 2017. “How Should Claims for Religious Exemptions be Weighed?” *Oxford Journal of Law and Religion* 6(1): 1–23.
- Billingham, Paul. 2019. “Exemptions for Religious Groups and the Problem of Internal Dissent.” In *Religious Beliefs and Conscientious Exemptions in a Liberal State*, edited by John Adenitire. Hart Publishing.
- Billingham, Paul. Working paper a. “State Speech as a Response to Hate Speech: Assessing ‘Transformative Liberalism’”.
- Billingham, Paul. Working paper b. “The Scope of Religious Group Autonomy: Varieties of Judicial Examination of Church Employment Decisions.”
- Brettschneider, Corey. 2012. *When the State Speaks, What Should It Say?: How Democracies Can Protect Expression and Promote Equality*. Princeton, NJ: Princeton University Press.
- Brownlee, Kimberley. 2015. “Freedom of Association: It’s Not What You Think.” *Oxford Journal of Legal Studies* 35(2): 267–82.
- Calabresi, Steven G. 2014. “Freedom of Expression and the Golden Mean.” *Brooklyn Law Review* 79(3): 1005–14.
- Carter, Stephen L. 2001. “Liberal Hegemony and Religious Resistance: An Essay on Legal Theory.” In *Christian Perspectives on Legal Thought*, edited by Michael W. McConnell, Robert F. Cochran, and Angela C. Carmella, 25–53. New Haven: Yale University Press.
- Chaplin, Jonathan. 2012. “Law, Religion and Public Reasoning.” *Oxford Journal of Law and Religion* 1(2): 319–37.

- Clayton, Matthew, and David Stevens. 2014. "When God Commands Disobedience: Political Liberalism and Unreasonable Religions." *Res Publica* 20(1): 65–84.
- Cohen, Jean L. 2012. "The Politics and Risks of the New Legal Pluralism in the Domain of Intimacy." *International Journal of Constitutional Law* 10(2): 380–97.
- Conly, Sarah. 2016. "In Defense of the (Somewhat More) Invasive State." *Philosophy & Public Issues (New Series)* 6(1): 25–37.
- Corbin, Caroline Mala. 2012. "Expanding the *Bob Jones* Compromise." In *Legal Responses to Religious Practices in the United States: Accommodation and Its Limits*, edited by Austin Sarat, 123–67. Cambridge: Cambridge University Press.
- Ekeli, Kristian Skagen. 2012. "Liberalism and Permissible Suppression of Il-liberal Ideas." *Inquiry* 55(2): 171–93.
- Fergusson, David. 1998. *Community, Liberalism and Christian Ethics*. Cambridge: Cambridge University Press.
- Garnett, Richard W. 2012. "Religious Freedom and the Nondiscrimination Norm." In *Legal Responses to Religious Practices in the United States: Accommodation and Its Limits*, edited by Austin Sarat, 194–227. Cambridge: Cambridge University Press.
- Goldfarb, Zachary A. and Karen Tumulty. 2013. "IRS Admits Targeting Conservatives for Tax Scrutiny in 2012 Election." *The Washington Post*, May 10, 2013. https://www.washingtonpost.com/business/economy/irs-admits-targetingconservatives-for-tax-scrutiny-in-2012-election/2013/05/10/3b6a0ada-b987-11e2-92f3-f291801936b8_story.html.
- Herzig, David J., and Samuel D. Brunson. 2017. "Let Prophets Be (Non) Profits." *Wake Forest Law Review* 52(2): 1111–61.
- Hollenbach, David. 2002. *The Common Good and Christian Ethics*. Cambridge: Cambridge University Press.
- Inazu, John D. 2015. "A Confident Pluralism." *Southern California Law Review* 88(3): 587–617.
- Insole, Christopher J. 2004. *The Politics of Human Frailty: A Theological Defence of Political Liberalism*. London: SCM Press.
- Leigh, Ian. 2012. "Balancing Religious Autonomy and Other Human Rights under the European Convention." *Oxford Journal of Law and Religion* 1(1): 109–25.

- Macedo, Stephen. 1998. "Transformative Constitutionalism and the Case of Religion: Defending the Moderate Hegemony of Liberalism." *Political Theory* 26(1): 56–80.
- Martin, Nick. 2012. "Liberal Neutrality and Charitable Purposes." *Political Studies* 60(4): 936–52.
- McConnell, Michael W. 2000. "The New Establishmentarianism." *Chicago-Kent Law Review* 75(2):453–75.
- Meilaender, Peter C. 2003. "The Problem of Having Only One City: An Augustinian Response to Rawls." *Faith and Philosophy* 20(2): 170–88.
- Pew Research Center. 2015. "U.S. Catholics Open to Non-Traditional Families." Sept. 2, 2015. Available at <http://assets.pewresearch.org/wp-content/uploads/sites/11/2015/09/Catholics-and-Family-Life-09-01-2015.pdf>.
- Rawls, John. 2005. *Political Liberalism*. Expanded edition. New York: Columbia University Press.
- Raz, Joseph. 1986. *The Morality of Freedom*. Oxford: Clarendon Press.
- Rosenblum, Nancy L. 1998a. *Membership and Morals: The Personal Uses of Pluralism in America*. Princeton, NJ: Princeton University Press.
- Rosenblum, Nancy L. 1998b. "Compelled Association: Public Standing, Self-Respect, and the Dynamic of Exclusion." In *Freedom of Association*, edited by Amy Gutmann, 75–108. Princeton, NJ: Princeton University Press.
- Rosenblum, Nancy L. 2010. "Faith in America: Political Theory's Logic of Autonomy and Logic of Congruence". In *Religion and Democracy in the United States: Danger or Opportunity?*, edited by Alan Wolfe and Ira Katznelson, 382–410. Princeton, NJ: Princeton University Press.
- Spinner-Halev, Jeff. 2011. "A Restrained View of Transformation." *Political Theory* 39(6): 777–84.
- Tsai, George. 2016. "The Morality of State Symbolic Power." *Social Theory and Practice* 42(2): 318–42.
- Univision. 2014. "Global Survey of Roman Catholics." Available at <https://maryofmagdala-mke.org/documents/Vatican%20questionnaire%20results%20202.2014.pdf>.
- Vallier, Kevin. 2016. "Religious Freedom and the Reasons for Rights." *Philosophy & Public Issues (New Series)* 6(1): 9–24.

West, Robin. 2014. “Liberty, Equality, and State Responsibilities.” *Brooklyn Law Review* 79(3): 1031–45.

Legal cases cited

Walz v. Tax Commission of New York 397 U.S. 664 (1970).

Wisconsin v. Yoder 406 U.S. 205 (1972).

Mozert v. Hawkins 827 F.2d 1058 (6th Cir. 1987).

Christian Legal Society v. Martinez 561 U.S. 661 (2011).

S.A.S. v. France [2014] ECHR 695.

Masterpiece Cakeshop v. Colorado Civil Rights Commission 584 U.S. ____ (2018).

Lee v. Ashers Baking Company Ltd and others [2018] UKSC 49.