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With Gay Adoption Decision, Will the Supreme Court Erode the Regulatory State?

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On the surface, *Fulton v. Philadelphia* poses a question about religious conscience—but its proponents hope it will enable conservatives to pick and choose which laws they have to follow.

LGBTQ+ Americans appear to owe a lot to the Supreme Court lately. Despite fifty years of right-wing legal training, conservative foundation building, and huge influxes of donor cash, the federal judiciary has for the past two decades rather consistently delivered on queer rights. From same sex marriage to Title VII employment protection rights—even the right to be intimate without the police knocking at the bedroom door—the Court has found cause to side with gay and trans advocates. It has done so despite simultaneously **fulfilling** an otherwise anti-state corporate agenda that has **curtailed** Medicaid expansion, decimated labor and voting rights, imperiled the work of regulatory bodies, and opened elections to a flood of near unlimited corporate spending.

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This summer, however, conservative adversaries of LGBTQ+ rights and enemies of the welfare state alike may finally get their way. That is, the entire conservative coalition might score a victory if the Supreme Court rules in favor of a Catholic foster and adoption agency in *Fulton v. City of Philadelphia*. Such a decision could give religious social service providers a blanket First Amendment pass to avoid state and city regulatory efforts—including those which prohibit discrimination on the basis of sexual orientation and gender identity.

At the center of *Fulton v. City of Philadelphia* is a contested contract. In 2018 city officials learned that one of Philadelphia's major adoption and foster care service contractors, Catholic Social Services (CSS), refused to certify otherwise qualified, married same-sex couples (and unwed heterosexual couples, for that matter) as suitable caregivers. That refusal, Philadelphia claimed, **violated** its Fair Practices Ordinance, which forbids such discriminatory denials of service. In riposte, CSS has argued that the city's subsequent canceling of its contract constituted an unconstitutional blow against its First Amendment religious free exercise and free speech rights. After **serving** Philadelphia's poor and needy for over two centuries, CSS maintains that it has been shunned for upholding Catholic doctrine and for refusing to engage in "compelled" speech that would affirm the moral legitimacy of same-sex marriage.

It is certainly true that the *Fulton* case is an attempt by the religious right to erode the newly won civil rights of queer people. CSS is represented by the Becket Fund for Religious Liberty, a nonprofit which specializes in framing far-right causes as matters of religious liberty—perhaps

most famously with *Burwell v. Hobby Lobby* (2014), in which the Court ruled that companies can refuse reproductive health care to employees on religious grounds. The Becket Fund has played an outsize role in making religious liberty–themed cases a perennial feature of the Court's docket. But it is just one in an expansive coalition of Christian litigations firms and conservative foundations that has also pursued an **anti-transgender rights agenda** in the form of bathroom bills and sports restrictions.

CSS wishes to place the city's basic functioning at the whim of every contractor's religious preferences, undermining the ability of government to actually govern.

But *Fulton* poses dangers that extend far beyond LGBTQ+ rights. For example, the unwed heterosexual couples that CSS also discriminates against are **likely** to be poor or working class. And in an ongoing **related case**, an evangelical Christian agency has sued for the right to deny service to Jewish and Catholic parents. A ruling in favor of CSS, therefore, could grant private organizations a broad right to discriminate, all while working as agents of the state operating with taxpayer funds.

Faced with the choice of abiding by the city's antidiscrimination ordinance or having its contract canceled, CSS insists that religious social service contractors are being treated unfairly, and has asked in particular that the Court overturn its 1990 **ruling** in *Employment Division v. Smith*. That case, in which the Court denied Native American Church adherents a religious exemption to ritualistically consume peyote, set a relatively high bar for what counts as an unconstitutional abrogation of religious free exercise. *Smith* holds that a law is constitutional if it was neutral toward a religious entity when passed and generally applicable beyond that entity.

It may surprise many readers to learn that it was Justice Antonin Scalia who decided *Smith*. Indeed, when *Smith* was first decided, it was *liberals*—such as President Bill Clinton and the American Civil Liberties Union—who decried the decision as undercutting protections for practitioners of minority religions. Prior to *Smith*, free exercise jurisprudence occasionally provided exemptions for those minorities, allowing Jehovah's Witnesses to refrain from **pledging allegiance** in the classroom and Amish Mennonite families **to remove** their children from school before the state-mandated age.

Conservatives today have embraced this **pre-*Smith* case law**, albeit largely **to serve the interests** of mainstream religious organizations—particularly massive nonprofits and even organizations not previously understood as religious, such as flush corporations like Hobby Lobby. The Supreme Court's conservative majority has **endorsed** this pro-exemption, anti-regulatory approach in several recent cases that pit COVID-19 public health measures against religious groups. In other words, *Smith* is under fire, but not exactly for the benefit of downtrodden religious minorities. Recall that the sister case in *Fulton* features a Protestant agency that wishes to discriminate against Jews and Catholics.

CSS and its legal team have attempted to gut the *Smith* precedent in at least two ways. First, CSS has argued that a mere antidiscrimination ordinance is neither neutral nor generally applicable. It claims that it was targeted by the city unduly and that the law is not general because Philadelphia makes provisions—what CSS lawyers dishonestly call "exemptions"—for children to be placed with families of the same ethnicity. This is ultimately a **false equivalence**: there are no agencies in Philadelphia that *only* cater to clients of a certain ethnicity or which would refuse outright to place children in homes of a different ethnicity.

Second, CSS has offered what appears to be a minor technical way to resolve the case, but which might nonetheless warp *Smith* beyond recognition. Whereas the city has claimed **managerial authority** over its contractors as it does its employees, CSS's lawyers posit that the agency is a mere collaborator with the city government rather than its de facto appendage—a licensee rather than a contractor. If the Court grants that the city is simply *licensing* CSS's services to ensure that children find suitable homes rather than acting *through* the agency, this perversely privileges the rights of the welfare providers over the rights of the children and families they serve. Not only would this infringe upon citizens' rights; it would place the city's basic functioning at the whim of every contractor's religious preferences. In effect, this so-called technicality could fundamentally undermine the ability of government to actually govern.

In an additional maneuver to evade direct regulation, CSS has **argued** that the agency is akin to a private school that receives public funds. That itself is a frightening prospect, as religious schools have in recent years broadened their right to discriminate against their sick and disabled employees. Catholic schools now have much of the same discretion to hire and fire their teachers as parishes have in selecting their clergy. In last summer's *Our Lady of Guadalupe School v. Morrissey-Berru* and cases like it, the Court **held** that religious schools have the right to terminate teachers for essentially any reason—including ones that would ordinarily be illegal, like firing a teacher for undergoing cancer treatment or for having **narcolepsy**.

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CSS's most radical argument is that the *Smith* precedent sets the bar far too low. It wants to shift the burden onto the government to prove that neutral policies that apply to everyone equally—such as antidiscrimination ordinances—do not in any way curtail religious freedom. If the government could not meet this high threshold of proof, it would be forced to provide an exemption.

These exemptions could quickly undercut social welfare programs that have come **to rely** on faith-based agencies to carry out their work. City, state, and local governments today **contract out** some $1 trillion annually to private companies, many of which are religiously affiliated. As the American Civil Liberties Union has **warned**, those seeking services at publicly funded homeless shelters, food banks, hospitals, disaster relief agencies, and other faith-based humanitarian organizations could be denied care. In cities and states where religious providers now predominate, exemptions would significantly weaken the state's ability to regulate an array of public services.

Either by poking holes in *Smith* or jettisoning it completely, a Court ruling sympathetic to CSS would have enormous ramifications for minority rights and the **functioning of governmen**t more generally. The *Fulton* case thus threatens to transform what's left of this hollowed-out social service landscape into its conservative caricature—opaque, dysfunctional, and defined by arbitrary authority—all to the benefit of opponents of the welfare state, religious and not.

Though the cynical use of religious liberty may appear to be a recent phenomenon, its origins extend back to the 1970s. Evangelical schools and their allies within the fledgling religious right frequently claimed a First Amendment right to racially discriminate. Bob Jones University, for

instance, **argued** that the free exercise clause allowed it to deny enrollment to unmarried black students and—after failing on that front—to prevent interracial dating.

After many losses before the Supreme Court and in the court of public opinion—even the Reagan administration reluctantly revoked Bob Jones's tax-exempt status—the religious right emptied its legal strategy of its most overtly discriminatory content. While those such as the Moral Majority's Jerry Falwell bellowed publicly about how the United States was a Christian nation, the movement's attorneys began to portray themselves as pluralists—just one interest group among many seeking a seat at the table. Religious right leaders turned away from contentious pro-segregation litigation and began to frame their **constitutional demands** in terms of "equal access" to pots of money, including for education and social welfare.

For over a decade now, right-wing crusaders have been picking legal fights that—when stripped of their ostensibly pluralist tone—look an awful lot like those in the Bob Jones University cases. In a slew of state laws and litigation that would grant everyone from religious bakers to county clerks the right to discriminate against same-sex couples, conservatives stirred up a conflict over "competing rights." That is, just as the law protects a gay couple's right to wed, so too should it protect religious dissenters who believe homosexuality is sinful.

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In 2014 and 2015, **fifteen** GOP-dominated statehouses strove to pass or strengthen existing religious freedom restoration acts—more simply **"RFRAs"**—in retaliation against same-sex marriage reforms. Though RFRAs have a complicated past—in 1993 the ACLU and President Bill Clinton supported a national version to counteract the *Smith* decision—their modern variants are bald attempts to curb LGBTQ+ rights. In addition to championing RFRAs, some states have worked to preemptively **codify** a religious right to discriminate against gay adoptive and foster parents.

At the national level, the Trump administration **expanded** federal funding for religious social service providers while **simultaneously enhancing** their ability to discriminate against the populations for which they provide. Congressional Republicans too have sought to undercut queer rights through religious liberty **legislation** that would **hinder** the federal government's power to enforce nascent LGBTQ+ rights against nonprofit contractors and private businesses that object to serving or selling to queer people. Since losing the House in 2018, the GOP has rallied against the Democratic Party–led effort to pass the **pro-LGBTQ+ Equality Act** through either **outright opposition** or **compromise legislation** like the Fairness for All Act, which would bake in a plethora of religious rights exemptions.

Even the Supreme Court's seemingly unbridled backing of LGBTQ+ rights has actually been fraught with conditions that may pave the way toward extensive exemptions. Three years after proclaiming a constitutional right to same-sex marriage, Justice Anthony Kennedy penned the majority **opinion** in *Masterpiece Cakeshop*. There, the justice suggested that religious dissenters may merit exemptions to antidiscrimination laws. Kennedy and the conservative majority expressed more than a little sympathy for Jack Phillips, a Colorado-based cake artisan whose Christian faith compelled him to refuse queer customers looking for custom-baked wedding desserts.

And the Court's 2020 landmark **decision** in *Bostock v. Clayton County*—which ruled that Title VII guarantees employment protection for queer and trans people—came with a warning from its author, Justice Neil Gorsuch: religious liberty rights may often trump federal antidiscrimination protections for gay and trans employees. Now that Trump-appointee Justice Amy Coney Barrett has **replaced** the late Ruth Bader Ginsburg—who was perhaps the most reliable dissenter in these matters—religious liberty will likely triumph over other constitutional rights with which it now competes.

A victory for CSS in *Fulton* threatens to continue inverting the roles of oppressor and victim in these conflicts. CSS has portrayed Philadelphia as having unjustly retaliated against its religious beliefs. The inversion of what constitutes unlawful animus is striking given that the principle is commonly associated with the 1996 **case** *Romer v. Evans*. There, the Court struck down a Colorado state constitutional amendment that—in barring the state and municipalities from passing antidiscrimination laws—had treated gays and lesbians with such animus.

Two decades later in *Masterpiece Cakeshop*, Justice Kennedy flipped the analysis of animus from his majority opinion in *Romer*, this time chastising the Colorado state officials who had treated Jack Phillips with contempt during his initial civil rights commission hearing. Queer people and their defenders, it seems, could be just as indefensibly draconian as their oppressors. Given that same-sex couples are **likely** to experience some form of vendor discrimination while planning their wedding day, what may appear like a balancing act here is in fact a tipping of the scales.

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How is it that religious organizations have so fundamentally transformed the U.S. contemporary legal landscape? Since the dawn of the New Deal, Christian organizations and captains of industry discovered a nexus where their interests converged. Whereas powerful industrialists have retaliated against labor law and corporate regulation, Christian groups have stoked fears about a godless communist horizon.

As corporate donors began to coordinate with—and even bankroll—entrepreneurial ministers, a Christian libertarian front took form and was enlisted in the broader political campaign to erode the regulatory and welfare state. In the 1930s the new corporate lobbies that formed to combat the New Deal quickly made Christian allies. Religious leaders such as Billy Graham and Reverend James W. Fifield, Jr., found common cause with industrialists in the National Association of Manufacturers and with the U.S. Chamber of Commerce. Together they set to union-busting and did everything in their power to counter what Fifield **called** "the totalitarian trends of the New Deal."

Though those early efforts were unable to combat many of the Roosevelt administration's sweeping reforms, over the ensuing decades corporate donors—including oil barons in the Koch and Olin families, beer brewing heir Joseph Coors, marketing maven Richard DeVos, and aluminum-spooned Richard Mellon Scaife—wielded their tremendous wealth and power to fund **a growing conservative movement.** Often in coalition with religious groups, these businessmen poured millions into conservative think tanks, legal networks, and academic programs to combat government regulation. Compared to more traditional pro-business think

tanks (such as the American Enterprise Institute) which were wary of appearing partisan, this new crop was more aggressive in their lobbying, infiltration of academia, and legal strategies.

On the eve of the Reagan Revolution, the **familiar shape** of the modern corporate–social conservative coalition took form. The **Coors-funded** Heritage Foundation paved the way, combining the message from corporate attorney and future Supreme Court justice Lewis F. Powell, Jr.'s **apocalyptic memo**, "Attack on American Free Enterprise System," with religious fears about creeping secularism and homosexuality's threat to family values. This was in many ways a political extension of the Coors Corporation's **internal management style**, which combined a fierce anti-unionism with corporate policies that instilled Christian values (employees were, among other things, required to "prove" their heterosexuality with a lie-detector test). Senate leaders such as Jesse Helms, social movement celebrities such as the Moral Majority's Falwell, and eventually Reagan himself remade the Republican Party in this coalitional mold.

Within a couple decades, the return on investment was clear. The religious right scored legislative victories, including the 1984 **Equal Access Act**, and Supreme Court **rulings** that expanded federal and state funds for religious nonprofits and schools. In fact, social conservatives benefited enormously from the **Federalist Society's** work in training a new generation of litigators, scholars, and judges that would wed religious liberty jurisprudence with anti-regulatory doctrine.

Today, even as corporate lobbies and wealthy libertarian ideologues have endeavored to break away from the most erratic groups and figures associated with the modern religious right, they have persisted in allying with such forces when conditions are amenable to their broader aims. As astute chronicler of the Koch brothers, Lee Fang, has **remarked**, "social initiatives are more often a Trojan horse for imposing their radical economic views." Though David Koch, for example, **publicly expressed** his support for marriage equality, over the past few decades, he and his brother hitched their wagons to religious organizations because these groups could advance the billionaires' neoliberal economic agenda.

This Reagan-era conservative coalition has proven incredibly durable. It continues to draw from an evangelical voting bloc for its electoral purposes while allowing corporate leaders to call many of the policy shots.

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Given the long view of the interests involved, the *Fulton* case is best understood as a vehicle through which the most traditional among Christian conservatives—and the most narrowly economically-minded among political libertarians—stand to benefit. While CSS is not itself a shadow Koch operation, its attorneys work for one. The Becket Fund, which represents CSS, has been **funded** by the Kochs and the Bradley Foundation, a conservative charity that **funded** both Governor Scott Walker, who decimated Wisconsin's public-sector unions, and **Charles A. Murray** of *The Bell Curve* (1994) infamy. In *Fulton* and **cases like it**, corporate backers have found a way to use the interests of genuinely religious traditionalists to further erode the welfare and regulatory state.

Indeed, an **amicus brief** filed by the Koch-funded Americans for Prosperity (AFP) Foundation reveals the oil barons' broader political aims to degrade the state. Framed around the writing of French aristocrat and political theorist Alexis de Tocqueville, the AFP brief describes voluntary associations as the foundation of a truly free and democratic society. In AFP's view, religious organizations ought to play a central role in the provision of social services as a bulwark against government overreach.

In describing its vision of a voluntary society, the AFP cites the anti–public-sector union decision *Janus v. AFSCME* as an exemplar of how our judicial system should favor individual rights of association over government intrusion. The state that the AFP describes as encroaching, Orwellian, and tyrannical would, of course, be the very same state bankrolling CSS if it wins the case. But for the Kochs and their ilk, there is no apparent contradiction. Funneling taxpayer money into the hands of private entities immune from public scrutiny is their métier.

Whatever the specific ruling might be in *Fulton*, a win for religious liberty advocates would likely accelerate the decades-long project to restructure and hollow out the already minimal U.S. welfare state. This corporate onslaught has helped make the **U.S. welfare state considerably less generous** than those of comparably wealthy industrialized nations. According to **2019 statistics** from the OECD, the United States spends 18.7 percent of its GDP on public social spending, whereas countries like France and Finland spend around 30 percent.

The U.S. welfare state has always been structured quite differently than its more generous social democratic peers, but this more privatized structure has only intensified in the past few decades. Since the advent of industrial capitalism, corporate interests have ensured that the U.S. government would have to consistently rely on private (often religious) assistance. As a result, the United States heavily depends upon private third-parties (often nonprofit organizations or for-profit companies) to administer and deliver services.

For example, most industrialized nations offer some version of **national public health insurance**, whereas U.S. public health insurance schemes (Medicare, Medicaid, CHIP, and the Affordable Care Act) are either direct public subsidies to insurance companies or require private companies to administer public funds. Though the case of health care is perhaps the most well-known, social services writ large (including, importantly, child welfare services) are also largely privatized and increasingly **administered by private companies** whose decisions are determined by their executive boards.

As soon as *Fulton* first hit the courts in 2018, **Walter Olson** of the libertarian Cato Institute launched his campaign for foster care and adoption service vouchers. Advertised as a bipartisan solution to a mess made by his own donors, Olson's vouchers would balance the ostensibly competing rights of religious organizations and LGBTQ+ groups through direct consumer subsidies. In lieu of public oversight and administration, consumer-citizens could choose to patronize whichever nonprofit sprung up to serve them. Though the government would have essentially no authority to prevent any one agency from discriminating, the rational market would presumably ensure that any demand that could be met would inevitably find a supplier.

This move is consistent with Cato's efforts to dismantle the regulatory state. Indeed, it is the same model it promoted for schools. After its benefactors starved public schools of much-needed tax revenue for decades, Cato helped pitch **vouchers** as a "choice" for parents and children to escape their decayed educational systems. But Cato's everyone-wins adoption voucher solution

ignores the reality that the model wouldn't help queer or unmarried couples living in areas where faith-based organizations are the exclusive providers. And when the voucher model inevitably fails to serve the needs of LGBTQ+ families, they would have **already lost the opportunity to mobilize** around shared experiences and to demand more or different services from the state. Vouchers therefore foster an anti-statist ideology wherein public services are perceived to be the barrier to social problems, not their remedy.

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Even if this looming threat to voucherize child welfare takes some time to materialize, a right-wing victory in *Fulton* would still be quite the win given the Supreme Court's recent decisions that grant wealthy nonprofits and for-profit businesses the same religious rights afforded to individual believers.

Just as *Citizens United* conferred free speech rights to corporations, enabling them to spend unlimited political contributions, so too the Court has granted free exercise rights to a multimillionaire employer, enabling it to deny reproductive health coverage to its employees. In its 2014 *Burwell v. Hobby Lobby* decision, the Court ruled that **"closely held"** corporations—that is, private companies with a limited number of shareholders—could claim this constitutional right. Despite Hobby Lobby's 5.3 billion annual revenue and its 43,000 employees, the for-profit craft supplies giant and **many others** like it (some scholars think that 90 percent of U.S. companies fit this **description**) were granted what may soon become a general right to discriminate.

We do not have to imagine how far restrictions in social services could go if publicly funded religious agencies are granted the same rights that are wielded by those like the massive **Catholic hospital care networks** that now control much of the U.S. health care market. Recent reports suggest that **one in six hospital beds** are located in institutions that—by virtue of their control by a larger Catholic health care entity—refuse to perform certain reproductive care procedures. Some of the implications border on the absurd. For **example**, a large secular hospital in the Chicago suburbs, which briefly passed into the hands of a Catholic conglomerate before being sold to a secular for-profit, is now contractually bound to Catholic social teachings in perpetuity.

For this reason, free exercise expert Elizabeth Sepper has **urged** Court watchers to see what ties together *Citizens United* and *Hobby Lobby*. These reinterpretations of the First Amendment mark a return to a **Gilded Age** judicial philosophy. In the realm of free speech, as Amy Kapczynski has **argued**, the Roberts Court has done far more than open the floodgates to unlimited corporate election spending. It has also sided with **pharmaceutical companies** selling physicians' prescribing data or marketing drugs without providers' consent and sided against **labor unions** collecting member dues. In speech and religion cases, the Court has been actively reshaping constitutional rights that in the twentieth century came to protect individuals—for example, the right to picket a government building or to refrain from pledging allegiance to the flag—into just another tool for economic elites.

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In all, a win for the right in *Fulton* would not only roll back newly won and expanded LGBTQ+ rights. It also has the potential to further erode our meager regulatory and welfare state—securing a victory for those who seek to pilfer the public coffers and place wealth back into the hands of private entities. For faith-based groups, this means ensuring unfettered access to taxpayer dollars; for their corporate chums, this means ensuring that social services remain privatized, fractured, and degraded. Even amidst the rise of **"compassionate capitalists"** in Silicon Valley and the Chamber of Commerce—who **buy good will** (and good press) by boycotting states that enact anti-LGBTQ+ policy—there are plenty of other highly organized and long-sighted industry leaders who find discrimination tolerable and even useful for their anti-statist agenda.

The specific issue at hand here is minority rights, but the bigger fight is about democracy itself. The equal rights ordinance at the center of the *Fulton* case not only protects minority rights, but was passed by the people's representatives in city government. Hard-fought civil rights legislation stands to be undone with the aid of antidemocratic lobbies whose mission is to pad their wallets, not provide public goods. As public wealth and power transfers upward, voters will continue to lose oversight of institutions that are intended to provide for the general welfare.