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## RESPONSE

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### RELIGIOUS CHOICE AND EXCLUSIONS OF RELIGION

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THOMAS C. BERG<sup>†</sup>

In response to Nelson Tebbe, *Excluding Religion*, 156 U. PA. L. REV. 1263 (2008).

*Excluding Religion*, by Nelson Tebbe,<sup>1</sup> addresses the increasingly important First Amendment question whether government programs that support or benefit private activity may exclude religious activities or institutions. The question whether such exclusions are permissible has emerged as the Supreme Court has increasingly held, most recently on school vouchers, that exclusion is not constitutionally required.<sup>2</sup> Since then, the Court has ruled, in *Locke v. Davey*,<sup>3</sup> that a state could exclude theology majors from a broadly available college-scholarship program. Tebbe generalizes *Davey*'s holding, arguing that government should have "considerable latitude to exclude religious activities and actors from its support" and "need not remain neutral toward religion in [such] programs."<sup>4</sup> The state may fund education or drug rehabilitation by private institutions but withdraw funding when those activities include religious content.

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<sup>†</sup> St. Ives Professor of Law, University of St. Thomas School of Law (Minnesota).

<sup>1</sup> Nelson Tebbe, *Excluding Religion*, 156 U. PA. L. REV. 1263 (2008).

<sup>2</sup> See *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (holding that a school-voucher program that benefits parochial schools does not violate the Establishment Clause); see also *Mitchell v. Helms*, 530 U.S. 793 (2000) (reducing restrictions on direct funding of religious institutions, thereby overruling parts of prior decisions).

<sup>3</sup> 540 U.S. 712 (2004).

<sup>4</sup> Tebbe, *supra* note 1, at 1267.

Tebbe accepts that excluding religion “may skew private incentives toward nonreligious activities and messages.”<sup>5</sup> He therefore rejects the theory, advocated by several scholars (myself included), that the Free Exercise and Establishment Clauses together require government to minimize the effect it has on the choices of private individuals and groups in matters of religion.<sup>6</sup> Instead Tebbe sees religious freedom “primarily as a right to liberty or autonomy that is not ordinarily burdened by a governmental decision to selectively deny aid in a way that disincentivizes observance.”<sup>7</sup> He enunciates several exceptions—exclusions of religion may not discriminate among sects,<sup>8</sup> extend to separate non-funded entities,<sup>9</sup> rest on animus toward religion,<sup>10</sup> discriminate by viewpoint in certain public fora,<sup>11</sup> or bar religion from traditional public fora<sup>12</sup>—but he cabins each of these fairly strictly.

In this Response, I focus on Tebbe’s assertion that government has the power to discourage citizens’ choices in religious matters by excluding religion from programs. I first look at two of Tebbe’s justifications for excluding religion—analogs to other constitutional rights and reliance on certain religion-distinctive concerns associated with the Establishment Clause—and argue that these justifications fail if the protection of religious choice against government influence is a central purpose of the Religion Clauses. I then turn to the key question whether preserving religious choice is indeed central, and I argue that it is, based on precedent, on traditions and concepts associated with the Religion Clauses, and on their counter-majoritarian nature.

#### I. THE KEY QUESTION: IS RELIGIOUS CHOICE FUNDAMENTAL?

Tebbe says that exclusions of religion are justified by two kinds of arguments. The first appears in other areas of constitutional law: government’s duty to avoid impeding a constitutionally protected activity does not imply a duty to support it, even when government supports its alternative.<sup>13</sup> Government can refuse funding “even though

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<sup>5</sup> *Id.*

<sup>6</sup> *See infra* notes 19-25 and accompanying text.

<sup>7</sup> Tebbe, *supra* note 1, at 1292.

<sup>8</sup> *Id.* at 1319-22.

<sup>9</sup> *Id.* at 1322-27.

<sup>10</sup> *Id.* at 1327-31.

<sup>11</sup> *Id.* at 1331-33.

<sup>12</sup> *Id.* at 1333-35.

<sup>13</sup> *Id.* at 1282-84.

[such] selective support may have the effect of influencing private choices.”<sup>14</sup> Thus the Court has allowed government to fund childbirth, but not abortion, because such support does not impede the abortion decision but simply “encourag[es] . . . an alternative activity consonant with legislative policy”;<sup>15</sup> government may “make a value judgment favoring childbirth over abortion” so long as it does not put an “unduly burdensome interference” on the abortion decision, or an obstacle “that was not already there” because of the woman’s indigence.<sup>16</sup> In free speech cases, too, the Court has held that government can withhold tax exemptions from charitable organizations that engage in political activities<sup>17</sup> and withhold federal subsidies for family-planning activities from being used for abortion counseling or referral.<sup>18</sup> By analogy, government can exclude religion from funding, even if that discourages people from choosing religious schools or social services and pushes them toward subsidized, and therefore cheaper, secular alternatives.

But this argument assumes that religious freedom should be treated in the same way as other constitutional rights such as abortion, when in fact different rights have different structures. For example, equal protection has a logic that, as Tebbe acknowledges, applies with full force to denials of government benefits.<sup>19</sup> And religious freedom has a different structure from abortion rights; it contains a requirement of neutrality not present in the abortion right. As Professor Laycock and I have pointed out, the state

may not express preferences about religion of the sort it expresses about abortion and childbirth. . . . Substituting religious references in the Court’s statements about abortion would make those statements plainly untrue as a matter of law. The state has no power “to make a value judgment favoring [nonreligion] over [religion]” . . . . It has no power, “pursuant to democratic processes, [to] expres[s] a preference for [nonreligion over religion].” The aim of religious freedom is to keep the government out of people’s religious choices, not to let it influence or

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<sup>14</sup> *Id.* at 1267-68.

<sup>15</sup> *Maher v. Roe*, 432 U.S. 464, 475 (1977) (quoted in Tebbe, *supra* note 1, at 1282).

<sup>16</sup> *Id.* at 473-74.

<sup>17</sup> *See Regan v. Taxation With Representation*, 461 U.S. 540 (1983).

<sup>18</sup> *See Rust v. Sullivan*, 500 U.S. 173 (1991).

<sup>19</sup> Tebbe, *supra* note 1, at 1291 n.111 (noting that “modern equal protection jurisprudence prohibits discrimination in the area of funding as well as in regulation”).

manipulate religious choices up to a point just short of imposing “undue burdens.”<sup>20</sup>

Laycock and I, along with others, argue that the neutrality requirement, prominent throughout the Court’s religion cases, means that government should minimize its effect on people’s religious choices.<sup>21</sup> In cases beginning with *Sherbert v. Verner*,<sup>22</sup> the Court has said that withdrawing unemployment benefits because of a claimant’s religiously motivated decision puts pressure on her religious choices and violates neutrality.<sup>23</sup> The abortion funding cases distinguished religion cases on precisely this ground.<sup>24</sup> If maintaining some form of neutrality toward religion is a central aim of the Religion Clauses, then “the [abortion] analogy is inapt,” as the Tenth Circuit recently said in striking down Colorado’s exclusion of students at “pervasively sectarian” institutions from broadly available state funding.<sup>25</sup> Accordingly, that is the key question: is government neutrality, defined as avoiding effects on religious choices, central to the particular purposes of the Religion Clauses?

Tebbe’s second set of justifications for exclusions of religion does arise from concerns “particular to religious liberty,” specifically

<sup>20</sup> Thomas C. Berg & Douglas Laycock, *The Mistakes in Locke v. Davey and the Future of State Payments for Services Provided by Religious Institutions*, 40 TULSA L. REV. 227, 235-36 (2004) (footnotes omitted; quoting *Maier v. Roe*, 432 U.S. 464, 474 (1977)).

<sup>21</sup> See *id.* at 232-33 (arguing that the government should “maintain ‘substantive neutrality’ toward religion”); Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 1001-06 (1990) (defining “substantive” neutrality as noninterference with religious choice); Michael W. McConnell & Richard A. Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1, 37-38 (1989) (describing “incentive” neutrality as removing incentives affecting religious choice).

<sup>22</sup> 374 U.S. 398 (1963) (holding the denial of unemployment benefits for the refusal to work on a Saturday unconstitutional as applied to a Seventh-Day Adventist).

<sup>23</sup> *Id.* at 404 (finding “the pressure . . . to forego that practice . . . unmistakable”); *id.* at 409 (noting the neutrality requirement); see also *Thomas v. Review Board*, 450 U.S. 707, 717-18 (1981) (holding that a withdrawal of benefits “put[] substantial pressure on an adherent to modify his behavior and to violate his beliefs” and thus violated “governmental neutrality” by “unduly burden[ing] the free exercise of religion” (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972))).

<sup>24</sup> See *Maier*, 432 U.S. at 474-75 n.8 (distinguishing *Sherbert* on the ground that it “was decided in the significantly different context of a constitutionally imposed ‘governmental obligation of neutrality’” (quoting *Sherbert*, 374 U.S. at 409)).

<sup>25</sup> *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1259, 1260 (10th Cir. 2008) (McConnell, J.) (“The right to choose abortion is a right to be free of undue burdens; the right to religious liberty is a right to government neutrality.” (quoting Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 155, 177 (2004))).

to the Establishment Clause.<sup>26</sup> He argues that policymakers might “reasonably” single out religion for exclusion from government programs because even formally equal funding (1) might “damage equal citizenship because only certain sects would in fact take up the offer of support,” (2) might create “harmful unrest or division” by “highlight[ing] differences of identity among citizens,” and (3) might “impede the religious freedom of taxpayers who object to supporting institutions with which they differ as a matter of conscience.”<sup>27</sup> Although these rationales do not mandate that government exclude religion, he says, they give it the discretion to do so.

These rationales for excluding religion are indeed colorable. But Tebbe does not claim they are strong. He calls them only “reasonable” and acknowledges they “are contested in contemporary American society.”<sup>28</sup> He briefly notes some counterarguments: excluding religious choices might violate “the equal citizenship of religious people” and “could produce more civil strife, not less.”<sup>29</sup> Taxpayers’ objections to funding religion have weakened as an argument “in the modern era,”<sup>30</sup> probably because government funds many other institutions and many services of secular value—education, social welfare, health care—that religious institutions provide. But Tebbe does not adjudicate between these contending arguments. Exclusions of religion are permitted, he says, if the arguments for them are merely reasonable.

When constitutional considerations cut both for and against a kind of government action, it may seem sensible to leave the matter to government’s discretion. The problem, however, is that this constitutional indeterminacy appears frequently in the context of religion. For example, governments could reasonably believe that it will promote interreligious harmony to include nonsectarian prayers at public school events or erect displays of widely accepted beliefs such as the Ten Commandments. Justice Scalia was within reason to claim that it can foster toleration to have people of various faiths “voluntarily joining in prayer together, to the God whom they all worship and seek.”<sup>31</sup>

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<sup>26</sup> Tebbe, *supra* note 1, at 1272.

<sup>27</sup> *Id.* at 1273-74.

<sup>28</sup> *Id.* at 1274.

<sup>29</sup> *Id.* For expanded versions of these arguments, see Thomas C. Berg, *Vouchers and Religious Schools: The New Constitutional Questions*, 72 U. CIN. L. REV. 151, 191-94 (2003).

<sup>30</sup> Tebbe, *supra* note 1, at 1274.

<sup>31</sup> *Lee v. Weisman*, 505 U.S. 577, 646 (1992) (Scalia, J., dissenting).

Now (to echo Tebbe) I am saying only that the argument is colorable, not that it is correct: the cohesive effect of prayer might well be outweighed by its alienation of citizens conscientiously opposed to praying. But under Tebbe's theory, a conflict between colorable arguments means the government should have discretion to decide either way. Taking his theory seriously, therefore, could require reconsidering a long line of decisions forbidding various forms of government religious speech, such as stand-alone religious displays in courthouses and classrooms<sup>32</sup> and nonsectarian prayers at school events.<sup>33</sup>

If exclusions of religion contradict some other value fundamental to the Religion Clauses, then it is insufficient that government could "reasonably" think they promote equal respect or social stability. The case would need to be much more certain. But I doubt that the stronger case is supportable, and Tebbe does not try to make it. In contrast, exclusions from broadly available aid unquestionably implicate the distinct value of religious choice: as Tebbe concedes, exclusion typically discourages the choices of individuals in religious matters.<sup>34</sup> Therefore, if protecting religious choice is a fundamental value, one cannot justify excluding religion based on uncertain arguments about equal citizenship or social harmony.

In sum, Tebbe's arguments based on other constitutional provisions and on religion-distinctive considerations succeed only if the protection of religious choice against government influence is not a central First Amendment value. I now turn to that question: how central is religious choice?

## II. THE IMPORTANCE OF RELIGIOUS CHOICE

Tebbe frequently asserts that government has considerable power to affect religious choice by excluding religion from generally available benefits.<sup>35</sup> But I have already questioned two of his arguments: the analogy to other constitutional rights and the merely colorable arguments based on religion-distinctive concerns. What remains in Tebbe's article is primarily an argument from precedent. I address

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<sup>32</sup> *McCreary County v. ACLU*, 545 U.S. 844 (2005) (finding a courthouse display of the Ten Commandments violated the Establishment Clause); *Stone v. Graham*, 449 U.S. 39 (1980) (finding the same for a public-school classroom display).

<sup>33</sup> *Santa Fe Indep. School Dist. v. Doe*, 530 U.S. 290 (2000) (ruling that student-led prayers at a football game violated the Establishment Clause); *Weisman*, 505 U.S. 577 (holding the same for graduation prayers).

<sup>34</sup> See, e.g., Tebbe, *supra* note 1, at 1282 ("[G]overnment may exclude religion even when doing so influences private choices regarding matters of conscience . . .").

<sup>35</sup> See, e.g., Tebbe, *supra* note 1, at 1267, 1272, 1296.

that subject first, arguing that an approach of preserving religious choice best explains a wide range of Religion Clause cases. Then I offer some other reasons why religious choice is fundamental to Religion Clause traditions and values. Finally, I criticize the idea, inherent in Tebbe's argument, that majoritarian government should have wide discretion in religious-freedom matters.

#### A. Precedent

Tebbe's argument for exclusions of religion relies heavily on precedent, especially *Locke v. Davey*.<sup>36</sup> But numerous aspects of Religion Clause case law support the principle of reducing, rather than increasing, government's discretion to influence private choices in religious matters.

Consider, for example, precedent on the funding of private institutions. Religious schools can be included in voucher programs, but only when parents direct benefits to such schools "as a result of their own genuine and independent private choice"<sup>37</sup> and have "genuine opportunities . . . to select secular educational options."<sup>38</sup> Whether genuine choice exists is not a policy consideration—it is a constitutional threshold barring some programs. The current limits on direct funding to religious schools, articulated in Justice O'Connor's controlling opinion in *Mitchell v. Helms*,<sup>39</sup> also focus on families' choice. She found it unconstitutional to provide direct funds to the schools' religious activities, even on the basis of per capita enrollment, because families lack "control over whether the secular government aid will be applied toward the religious education."<sup>40</sup> If choice is the key criterion for whether religious institutions can be included in aid programs, why should it not be the key for whether they can be excluded?

Or consider the government's own religious speech: official prayers or symbolic displays. Tebbe seeks to fit this area into his approach by noting that a county erecting a historical display about law "could decide to exclude images of the Ten Commandments" even though it could also include them in certain ways.<sup>41</sup> But more funda-

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<sup>36</sup> *Id.* at 1278 ("This Article's basic argument draws much of its support from *Davey*").

<sup>37</sup> *Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002).

<sup>38</sup> *Id.* at 655.

<sup>39</sup> 530 U.S. 793 (2000).

<sup>40</sup> *Id.* at 842 (O'Connor, J., concurring).

<sup>41</sup> Tebbe, *supra* note 1, at 1298.

mental, and distinct to religion, is the fact that the county is *forbidden* to include religion in certain ways: the county is *required*, not just permitted, to exclude the Commandments from any context that would suggest it endorsed their religious message.<sup>42</sup> It would be forbidden to include the Commandments in a display of four “Documents To Live By,” just as the Court forbade a school to post them in classrooms in a way that might suggest students should “venerate and obey” them.<sup>43</sup> Inclusion is permitted only in ways that simply acknowledge the existence or historical role of religion.<sup>44</sup>

The Court has maintained this prohibition even as it has allowed more funding of religious schools:<sup>45</sup> contrary to Tebbe’s argument, the rules about funding and official prayers/symbols are notable for their difference, not their similarity. The difference, as Professor Laycock has put it, “is best explained in terms of individual choice. In the funding cases, each family gets a voucher and each family can decide where to spend [it].”<sup>46</sup> But an official prayer or display “requires a collective decision.”<sup>47</sup> There will be one prayer, chosen by government’s agent, for everyone present: “[n]o one gets to make an individual choice about whether to pray or how to pray.”<sup>48</sup>

The rule against official pronouncements endorsing religion—not just one religion, but also religion in general—is an extraordinary exception to the rule, emphasized by Tebbe, that officials may “favor certain ideas or ideologies over others in their own official speech.”<sup>49</sup> These special limits on religion in government’s own speech do not justify special exclusions of religion from government programs aid-

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<sup>42</sup> See *McCreary County v. ACLU*, 545 U.S. 844, 881 (2005) (understanding “the Establishment Clause to require the Government to stay neutral on religious belief”).

<sup>43</sup> *Stone v. Graham*, 449 U.S. 39, 42 (1980).

<sup>44</sup> Compare *Lynch v. Donnelly*, 465 U.S. 668 (1984) (permitting inclusion of a crèche with secular Christmas symbols), with *County of Allegheny v. ACLU*, 492 U.S. 573 (1989) (invalidating a crèche standing alone). Similarly, the Court suggested in *Stone* that the Commandments could be used in an objective “study of history, civilization, ethics, [or] comparative religion.” 449 U.S. at 42.

<sup>45</sup> Compare, e.g., *McCreary County*, 545 U.S. 844 (invalidating officially sponsored religious display), and *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (invalidating school-sponsored prayer), with *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (approving funding to religious schools), and *Mitchell v. Helms*, 530 U.S. 793 (2000) (same).

<sup>46</sup> Douglas Laycock, *Church and State in the United States: Competing Conceptions and Historic Changes*, 13 IND. J. GLOBAL LEGAL STUD. 503, 532 (2006).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> Tebbe, *supra* note 1, at 1297.

ing a range of private activities.<sup>50</sup> To the contrary, special limits on government's religious speech suggest a special concern with minimizing government's influence over religious choices, which cuts against any broad power to exclude religion from aid programs.<sup>51</sup>

Finally, Tebbe's broad reading of *Locke v. Davey* is far from compelled. The first part of the Court's opinion did broadly state that the withdrawal of a theology student's scholarship imposed only a minor burden on religion, one "far milder" than criminal or civil sanctions.<sup>52</sup> But the much longer part focused on features limited to the training of students for the ministry. The Court called it a "distinct category of instruction,"<sup>53</sup> different from "education for other callings,"<sup>54</sup> and said that states had "historic and substantial"<sup>55</sup> interests, dating back to founding-era revolts against taxes for clergy, in denying such funding.<sup>56</sup> These arguments have little application to general funding of students in religious colleges or K-12 schools, which teach the same

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<sup>50</sup> Tebbe rightly notes government's power to exclude religion not just when it speaks itself, but also when it "pays private actors to transmit its own views" as in the federally funded family-planning program in *Rust v. Sullivan*, 500 U.S. 173 (1991). Tebbe, *supra* note 1, at 1297-99. But programs like college scholarships or vouchers cannot be characterized as paying private actors to transmit the government's views. Such programs usually support a wide range of instruction and views. And if such aid were characterized as transmission of government views, then students would be constitutionally forbidden, in contradiction of *Zelman*, to use their aid in courses with religious content.

<sup>51</sup> In the third large area of religion cases—conflicts between religious exercise and the law—the Court has held, controversially, that the Free Exercise Clause rarely requires exemptions for religiously motivated conduct from "neutral laws of general applicability" however burdensome their effects. *Employment Div. v. Smith*, 494 U.S. 872, 879 (1990). Tebbe does not discuss free exercise in *Excluding Religion*, but previously he defended his position that the Religion Clauses protect "liberty and autonomy," not choice or substantive neutrality in religious matters, on the ground that choice and neutrality cannot support free exercise exemptions. See Nelson Tebbe, *Free Exercise and the Problem of Symmetry*, 56 HASTINGS L.J. 699 (2005). Exemptions limited to religious exercise, he argued, distort private choice by "encourag[ing] religiosity" in cases involving "conduct that others would like to undertake for secular reasons." *Id.* at 714. This argument, however, fails to weigh the fact that religiously motivated conduct faces a serious disincentive when it is subjected to criminal or civil sanctions. Thus, exemption is very often the proper course on balance; the inducement to religiosity outweighs this only when the conduct coincides strongly with self-interest and others can easily switch their activity to a religious variation. A full discussion of this issue is beyond the scope of this Response.

<sup>52</sup> *Locke v. Davey*, 540 U.S. 712, 720 (2004).

<sup>53</sup> *Id.* at 721.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 725.

<sup>56</sup> *Id.* at 722-23.

subjects, preparing students for the same callings, as their secular counterparts.<sup>57</sup> Tebbe cites almost exclusively *Davey*'s short "burden" passage and little or nothing from the far longer discussion of clergy training.<sup>58</sup> Moreover, as Judge McConnell recently recognized for the Tenth Circuit, "the wholesale exclusion of religious institutions and their students" from generally available aid imposes a greater burden than the clergy-training exclusion, which allowed scholarship students in non-theology majors to attend pervasively religious schools and take theology and religiously grounded courses.<sup>59</sup> In short, although the Court may ultimately extend *Davey* to allow the exclusion of religious choices from college scholarships or K-12 voucher programs, the bulk of the opinion gives no support to such exclusions.<sup>60</sup>

### B. Religion Clause Traditions and Concepts

The goal of respecting religious choices also comports with both the historical traditions and the concepts that animate the Religion Clauses. A full discussion is beyond the scope of this Response, but for historical matters, begin with James Madison's Memorial and Remonstrance against Virginia's proposed tax to support Christian clergy.<sup>61</sup> Madison's first paragraph asserts the centrality of choice: religion "can be directed only by reason and conviction, not by force or violence,"<sup>62</sup> and thus "[t]he religion . . . of every man must be left to the conviction and conscience of every man."<sup>63</sup> Other themes appear, including maintaining equality and preserving social "moderation and harmony."<sup>64</sup> But the latter is instructive: Madison attributes violence not to the existence of discord or "difference in [r]eligious opinions,"

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<sup>57</sup> For amplification of these arguments, see Berg & Laycock, *supra* note 20, at 248-52.

<sup>58</sup> See Tebbe, *supra* note 1, at 1280 (citing *Davey*, 540 U.S. at 720, 721, with no cites to later pages except for a summary reference back to "burden," *id.* at 725).

<sup>59</sup> Colo. Christian Univ. v. Weaver, 534 F.3d 1245, 1255-56 (10th Cir. 2008) (citing *Davey*, 540 U.S. at 724, 725 & n.9).

<sup>60</sup> I also believe, contrary to Tebbe, *supra* note 1, at 1292-95, that the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.*, limits the federal government's ability to exclude religion from benefits. See, e.g., Carl H. Esbeck, *The Application of RFRA to Override Employment Non-Discrimination Clauses Embedded in Federal Social Service Programs*, 9 Engage 140 (June 2008), available at [http://www.fed-soc.org/doclib/20080703\\_Esbeck.Engage.9.2.pdf](http://www.fed-soc.org/doclib/20080703_Esbeck.Engage.9.2.pdf).

<sup>61</sup> James Madison, Memorial and Remonstrance Against Religious Assessments (1785), reprinted in 2 THE WRITINGS OF JAMES MADISON 183-91 (Gaillard Hunt ed., 1901).

<sup>62</sup> *Id.* at 184 (quoting VA. DECLARATION OF RIGHTS, art. 16 (1776)).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 189.

but to the “vain attempts of the secular arm to extinguish [the] discord, by proscribing” difference.<sup>65</sup> The remedy is not to calculate whatever policy will reduce religious conflict—which would parallel Tebbe’s argument for excluding religion from benefits—but to provide “equal and compleat [sic] liberty.”<sup>66</sup> Choice and liberty were the means the Framers enacted to deal with religious divisions at the national level. And within a few decades, disestablishment spread to all the states, and clergy taxes disappeared, giving way to the “voluntary principle,” as leading religious commentator Robert Baird called it, under which religion relied “upon the efforts of its friends, acting from their free will”<sup>67</sup>—that is, according to private choices with minimal government influence.

Moreover, in Professor Laycock’s words, protecting private religious choice coincides with and helps harmonize “nearly all the concepts used to describe religious liberty” in America: “separation, voluntarism, equality, neutrality, and liberty.”<sup>68</sup> Separation, although an important concept, is a means to an end, and the most plausible end is keeping government out of religious choices. Neutrality is prevalent in the Court’s cases, but its meaning is not that government treats religion the same as all other activities—which would contradict the very existence of constitutional clauses specific to religion—but rather that government acts in a way that minimizes its influence over religious choices. And voluntarism, the idea that religion should succeed or fail based on its own appeal rather than government promotion, still applies today—although it must adjust to modern circumstances in which government provides many educational and social-welfare benefits to individuals or private entities. In that context, preserving religion’s ability to succeed or fail based on its appeal calls for including it on equal terms in programs of government benefits, at least those that facilitate individuals’ choices.

### C. Counter-Majoritarianism

Finally, the thesis that government has broad discretion to exclude religion is objectionable for its majoritarian nature. The ideal of legislators deliberating whether the inclusion of religion will cause social strife or promote equal citizenship is unlikely to be realized.

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<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> ROBERT BAIRD, RELIGION IN THE UNITED STATES OF AMERICA 288 (1844).

<sup>68</sup> Laycock, *supra* note 46, at 532-33.

Religious schools will be included in places where the faiths that operate them are numerous or powerful, and excluded in places where majorities are suspicious of those faiths. But majoritarianism and government discretion contravene the spirit of the Religion Clauses, which is reflected in one founder's comment that "rights of conscience . . . will little bear the gentlest touch of governmental hand."<sup>69</sup> When a subject is governed by not one but two constitutional restrictions, originally adopted under pressure from religious minorities, political discretion is not a prime value.

Tebbe argues, turning to democratic-process theory, that decisions about selective funding "will not normally present problems of political dysfunction" because "religious groups, taken as a whole, will not be able to band together and protect themselves from loss of funding or other support."<sup>70</sup> Crucial to that confidence, he emphasizes, is the prohibition against singling out particular sects for exclusion from funding.<sup>71</sup> Recall, however, that among Tebbe's rationales for excluding religion is the prospect that "only certain sects would in fact take up the offer of support,"<sup>72</sup> creating a perception of state favoritism. Under this very premise, the exclusion of religion from funding will often affect only a few sects, likely to constitute a minority, and not a broad coalition.<sup>73</sup>

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<sup>69</sup> Congressman Daniel Carroll, Remarks before the House of Representatives (Aug. 15, 1789), in 1 ANNALS OF CONG. 757-58 (Joseph Gales ed., 1834). For extended treatment of this theme, see Thomas C. Berg, *Minority Religions and the Religion Clauses*, 82 WASH. U. L.Q. 919 (2004).

<sup>70</sup> Tebbe, *supra* note 1, at 1274.

<sup>71</sup> *Id.* at 1274-75 ("Certainly, the story might be different if particular sects were singled out by the legislature . . .").

<sup>72</sup> *Id.* at 1273.

<sup>73</sup> Moreover, Tebbe's reliance on the no-sect-discrimination principle may be undercut by its interaction with another complicating doctrine, that of unconstitutional conditions. Under the latter, even if government can refuse to fund a religious activity, it cannot refuse to fund separate activities of the same organization that do not include religious content. *Cf., e.g., FCC v. League of Women Voters*, 468 U.S. 364, 400 (1984) (noting that states cannot withhold benefits to broadcasters that separate their editorialized and noneditorialized content) (cited in Tebbe, *supra* note 1, at 1323 n.236). But this distinction threatens discrimination in funding against selected religious institutions: those that incorporate religious content throughout their activities. Indeed, the Tenth Circuit recognized in *Colorado Christian University* that it is sect discrimination to exclude students at "pervasively sectarian" colleges from aid while including students at religious colleges that confine religion to certain activities. *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1257-60 (10th Cir. 2008). At the least, an exclusion limited to pervasively religious institutions likely imposes on them as a minority and undercuts the no-sect-discrimination principle as a political safeguard of fairness.

## CONCLUSION

Tebbe's argument for government discretion to exclude religion succeeds only if preserving the religious choice of individuals and groups is not a fundamental First Amendment value. That is the issue that needs to be joined, more fully than *Excluding Religion* does.

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