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## RESPONSE

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### “EXCLUDING RELIGION”: A RESPONSE

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

Professor Nelson Tebbe’s article, *Excluding Religion*,<sup>1</sup> is a thorough and thoughtful examination by a first-rate young scholar of important and difficult questions: “[W]hether the government may select religious entities for exclusion from its support programs?”<sup>2</sup> If so, when and why? Does such exclusion run afoul of the rule that “government cannot single out particular religious groups for special regulation?”<sup>3</sup> Does it conflict with the equal-treatment and “neutrality” themes that run through many of the Court’s recent First Amendment decisions?<sup>4</sup> Or, do “antiestablishment principles” sometimes permit (even if they do not require) governments to refuse to support religious groups, expression, activities, or symbols?<sup>5</sup> If the answer to this last question is

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<sup>1</sup> 156 U. PA. L. REV. 1263 (2008).

<sup>2</sup> *Id.* at 1265.

<sup>3</sup> *Id.* at 1264.

<sup>4</sup> *See, e.g.,* *Zelman v. Simmons-Harris*, 536 U.S. 639, 654 (2002) (“[W]here a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause.”); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995) (“It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys.”); *Employment Div. v. Smith*, 494 U.S. 872 (1990) (upholding a neutral, generally applicable law that denied unemployment benefits to those who used peyote as an aspect of their religion).

<sup>5</sup> Tebbe, *supra* note 1, at 1264.

“yes”—and, in Tebbe’s view, it is<sup>6</sup>—then what are the implications of this conclusion for the broader (and alliterative) “question of constitutional theory, namely whether and how it is appropriate for a democracy to influence citizen choice concerning commitments of conscience”?<sup>7</sup>

*Excluding Religion* should be read by everyone involved or interested in the scholarly conversation about religion, the Constitution, and liberal democracy. The arguments are carefully developed and well executed. Tebbe’s achievement is all the more impressive given that, as he observes, the relevant doctrine is “inconsistent,”<sup>8</sup> the leading precedents certainly seem to “stand in tension with one another,”<sup>9</sup> and the cases under consideration often involve competing values. Tebbe engages—in a careful, sensitive, and provocative way—the premises that underlie, and the aspirations that animate, our commitment to religious freedom under law. This response will reveal some doubts and reservations, but it is nevertheless an appreciation.

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First, a quick summary of Tebbe’s paper: For a time, it seemed—and the Court often held—that the First Amendment’s Establishment Clause required governments and public officials to “exclude sectarian activities and institutions from subsidies.”<sup>10</sup> (Think here of the many cases involving public support of parochial schools and public assistance to students attending them.<sup>11</sup>) In the free-speech arena, though, a line of cases developed that protected religious activities and expression in so-called public forums by forbidding “viewpoint discrimination” in their management.<sup>12</sup> Over time, the public-forum

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<sup>6</sup> See *id.* at 1267-68 (“Antiestablishment theory . . . provides justifications for permitting exclusions of religion even where it does not provide rationales for requiring them.”).

<sup>7</sup> *Id.* at 1270.

<sup>8</sup> *Id.* at 1266.

<sup>9</sup> *Id.* at 1267.

<sup>10</sup> *Id.* at 1265.

<sup>11</sup> See, e.g., *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973) (holding that New York State’s policy of providing grants to parochial schools violated the Establishment Clause).

<sup>12</sup> See, e.g., *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (finding that the denial of religious groups’ use of school premises after school hours violates the Free Speech Clause); *Widmar v. Vincent*, 454 U.S. 263 (1981) (hold-

concept expanded from the obvious examples—public parks and sidewalks, for instance—to more “metaphysical”<sup>13</sup> ones, including public funding programs.<sup>14</sup>

More or less at the same time, the Court was moving, in its no-establishment cases, from no-aid separationism to equal treatment of religion.<sup>15</sup> Justice O’Connor could observe that “the Religion Clauses—the Free Exercise Clause, the Establishment Clause, the Religious Test Clause, Art. VI, cl. 3, and the Equal Protection Clause as applied to religion—all speak with one voice” and in support of this equal-treatment focus.<sup>16</sup> Taken together, it was widely thought that these developments presented the question whether the Constitution not only permits, but also requires such equal treatment in the context of social-welfare spending and public-funding programs.<sup>17</sup> At least in terms of the current state of play, though, the Justices’ answer seems to be “probably not, but perhaps sometimes.”<sup>18</sup>

In Tebbe’s view, we should, for the most part, stick with “no”:

[T]he state generally ought to be allowed considerable latitude to exclude religious activities and actors from its support . . . . The government need not remain neutral toward religion in its support programs; it may instead sometimes fund one activity rather than another, even when

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ing that a state university that prohibited the use of its facilities for registered student religious groups violated the Free Speech Clause).

<sup>13</sup> *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 830 (1995) (“The [Student Activities Fund] is a forum more in a metaphysical than in a spatial or geographic sense, but the same principles are applicable.”).

<sup>14</sup> *See, e.g., id.*; *see also* *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 543-44 (2001) (finding viewpoint discrimination in the government’s denial of public funding to legal-services organizations that challenge existing welfare laws).

<sup>15</sup> *See generally, e.g.*, Ira C. Lupu, *The Lingering Death of Separationism*, 62 *GEO. WASH. L. REV.* 230 (1994) (documenting the historical shift of the Court away from no-aid separationism); Eugene Volokh, *Equal Treatment Is Not Establishment*, 13 *NOTRE DAME J.L. ETHICS & PUB. POL’Y* 341, 365-72 (1999) (arguing that equal treatment is “constitutionally compelled” and exploring the strains in the Court’s jurisprudence that support this view).

<sup>16</sup> *Bd. of Educ. v. Grumet*, 512 U.S. 687, 715 (1994) (O’Connor, J., concurring in part and concurring in the judgment).

<sup>17</sup> *See, e.g.*, Michael Stokes Paulsen, *A Funny Thing Happened on the Way to the Limited Public Forum: Unconstitutional Conditions on “Equal Access” for Religious Speakers and Groups*, 29 *U.C. DAVIS L. REV.* 653, 710-17 (1996) (“The First Amendment creates an affirmative right of equal access to funding by religious speakers and groups.”).

<sup>18</sup> *See* *Locke v. Davey*, 540 U.S. 712 (2004) (holding that it does not violate the First Amendment for a state to exclude otherwise-entitled theology majors from a scholarship program). For a critique of *Davey*, see, for example, 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 (2004).

doing so may skew private incentives toward nonreligious activities and messages . . . .<sup>19</sup>

This is (at least “partly”) because the free exercise of religion is “best conceptualized primarily (though not exclusively) as a right to liberty or autonomy”<sup>20</sup>—a right that is not unconstitutionally burdened by governmental nonsupport—and also because such nonsupport will often be backed by good reasons, including “promoting equal citizenship for members of minority faiths . . . , fostering community concord, or respecting taxpayers’ freedom of conscience.”<sup>21</sup>

There are, however, “five limits”—five “bright-line rule[s]”—to Tebbe’s “proposal that the government be allowed to aid observance selectively”<sup>22</sup>: The government “may not target particular sects for disfavored treatment in its support programs”;<sup>23</sup> it may not “violate the rule against unconstitutional conditions”;<sup>24</sup> “exclusions of religion may not be driven by antireligious animus”;<sup>25</sup> the government may not, with respect to religious speech, “engag[e] in viewpoint discrimination when it subsidizes a range of private expression”;<sup>26</sup> and officials should not be permitted to “ban[] religious speech from traditional public fora.”<sup>27</sup> His permissible-exclusion proposal and its limits should be, Tebbe suggests, helpful as we think about the “(limited) ability of a constitutional democracy to incentivize private behavior across a wider range of constitutionally protected activity. In more instances than those that have generally been recognized, the government may be able to encourage protected behavior that it considers worthwhile.”<sup>28</sup>

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<sup>19</sup> Tebbe, *supra* note 1, at 1267.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 1269.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 1270.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 1270-71.

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In my view, the equal-treatment norm has an important role to play in identifying the enforceable content of the Religion Clauses.<sup>29</sup> That said, Tebbe is right to remind us that the Clause and its values cannot be captured entirely in an equal-treatment rule, or in the discourse of "equality" more generally.<sup>30</sup> After all, religious freedom is, one would think, at least in part about, well, *freedom*.<sup>31</sup> What's more, religion *is*, sometimes and for some purposes, different; governments may and should, sometimes and for some purposes, treat religion in a special or distinctive way.<sup>32</sup> To say this is not necessarily to agree with Tebbe that governments should be able to selectively exclude religious believers and institutions from public-welfare benefits to which they are otherwise entitled,<sup>33</sup> but it is still worth saying.

One might ask, after glancing at the title of Tebbe's paper, "Why would government want to single out religion for exclusion from such benefits, if the Constitution does not require it?" Tebbe suggests, in response, that "[a] legislature might decline to facilitate religion for good reasons, such as promoting equal citizenship for members of minority faiths (or no faith at all), fostering community concord, or respecting taxpayers' freedom of conscience."<sup>34</sup> These are all, to be sure, often "good reasons" for legislating (which is not to say that they are always sufficient to justify the legislation for which they are offered

<sup>29</sup> See, e.g., Richard W. Garnett, *The Right Questions about School Choice: Education, Religious Freedom, and the Common Good*, 23 CARDOZO L. REV. 1281, 1287-93 (2002) (concluding that the First Amendment does not bar religion-neutral school-choice programs); Nicole Stelle Garnett & Richard W. Garnett, *School Choice, the First Amendment, and Social Justice*, 4 TEX. REV. L. & POL. 301, 333-36 (2000).

<sup>30</sup> See generally STEVEN D. SMITH, GETTING OVER EQUALITY: A CRITICAL DIAGNOSIS OF RELIGIOUS FREEDOM IN AMERICA (2001) (questioning whether "principles" like equality truly lie at the core of the Religion Clauses).

<sup>31</sup> Cf. Tebbe, *supra* note 1, at 1267 ("[F]ree exercise is best conceptualized primarily . . . as a right to liberty or autonomy . . ."). See generally Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313 (1996) (presenting liberty itself, rather than religion or secularism, as the true guarantee of the Religion Clauses).

<sup>32</sup> See, e.g., Richard W. Garnett, *Religion and Group Rights: Are Churches (Just) Like the Boy Scouts?*, 22 ST. JOHN'S J. LEGAL COMMENT. 515 (2007) (exploring why and how religious institutions occupy a distinctive place in the constitutional order).

<sup>33</sup> See generally Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 155, 162-95 (2004) (contending that the discriminatory exclusion at issue in *Davey* threatens religious liberty).

<sup>34</sup> Tebbe, *supra* note 1, at 1267; see also *id.* at 1272-74 (exploring these three rationales in more detail).

in support). But, are they, as Tebbe suggests, “Establishment Clause” reasons?<sup>35</sup>

I have my doubts. In my view, the possibility that some equal-treatment policies could cause “people not affiliated with those faiths [that take up the offer of support] . . . to view themselves as belonging to disfavored classes of citizens”<sup>36</sup> should not—Justice O’Connor’s “endorsement test” notwithstanding<sup>37</sup>—play a significant role in the interpretation and enforcement of the Religion Clauses.<sup>38</sup> This is not because governments should be in the business of making members of minority faiths—or anyone else—feel like second-tier citizens. It is because, instead, Courts are not likely to be able, in a predictable and sensible way, to identify government actions that in fact cause people—even “reasonable” people—to view themselves in this way or to distinguish unconstitutional or otherwise objectionable instances of such action from those that are unavoidable or acceptable in a democracy. Similarly, I have argued in detail elsewhere that judicial predictions or observations of “divisiveness based upon religion”<sup>39</sup> should play no role in judges’ efforts to identify the enforceable constraints imposed on legislators and other government officials by the Religion Clauses.<sup>40</sup> This is not only because (though it is in part because) judicial enforcement of a no-divisiveness rule would almost certainly cause more unrest than it would prevent or soothe, but also because “divisiveness based on religion” is inevitable in a free society. Political communities have to resolve, and most religious traditions address, important questions; if a question is important, people are going to disagree—and must be permitted to disagree—about it. True, one could accept my argument and still believe, with Tebbe, that the desire to avoid “divisiveness” is a good reason for legislators to

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<sup>35</sup> *Id.* at 1272 (referring to the “detailed set of arguments concerning government support . . . that surround the Establishment Clause”).

<sup>36</sup> *Id.* at 1273.

<sup>37</sup> See, e.g., *Lynch v. Donnelly*, 465 U.S. 668, 687-89 (1984) (O’Connor, J., concurring) (arguing that the test for whether a government action “runs afoul” of the Establishment Clause should include a focus on the question of whether the action manifests an endorsement or disapproval of religion).

<sup>38</sup> See generally Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the “No Endorsement” Test*, 86 MICH. L. REV. 266 (1987) (rejecting the “no endorsement” test as theoretically deficient and practically unworkable).

<sup>39</sup> *Van Orden v. Perry*, 545 U.S. 677, 698 (2005) (Breyer, J., concurring).

<sup>40</sup> Richard W. Garnett, *Religion, Division, and the First Amendment*, 94 GEO. L.J. 1667, 1670 (2006) (presenting the divisiveness argument as “misguided and quixotic” in a pluralistic society like the United States).

exclude religion from a particular public-funding policy. Still, this desire should not itself justify such exclusion; the constitutional permissibility of exclusion would, it seems to me, need to be established without reference to legislators' or judges' irenic aspirations.

Further, with all due respect to James Madison,<sup>41</sup> the argument that public support for religion violates objecting taxpayers' liberty of conscience is not, despite its "pedigree in American constitutional history,"<sup>42</sup> a particularly persuasive one.<sup>43</sup> To be sure, freedom of conscience was at the heart of most Americans' thinking about religious liberty and church-state relations at the Founding.<sup>44</sup> Yes, Jefferson's proclamation that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical"<sup>45</sup> packs a lot of rhetorical weight. It is not, however, reflected at all in the reality of politics and government today. Every taxpayer furnishes money for the "propagation of opinions which he disbelieves"; indeed, every taxpayer pays for all kinds of government actions to which they have serious objections in conscience. There are, of course, good reasons to worry about the effects on religious freedom of public support for religious activities;<sup>46</sup> the asserted burden such support imposes on the conscience of one who objects to it is not, in my view, one of these reasons.

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My principal reservation—my regret, perhaps—about *Excluding Religion* is that, at the end of the day, Tebbe's conclusions are not as bracing or radical as one might have expected, or even hoped. As noted earlier, Tebbe qualifies his permissible-exclusion claim with

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<sup>41</sup> See, e.g., James Madison, Memorial and Remonstrance Against Religious Assessments (1785), reprinted in 2 THE WRITINGS OF JAMES MADISON 183-91 (Gaillard Hunt ed., 1901).

<sup>42</sup> Tebbe, *supra* note 1, at 1274.

<sup>43</sup> For a critique, see, for example, Steven D. Smith, *Taxes, Conscience, and the Constitution*, 23 CONST. COMMENT. 365 (2006).

<sup>44</sup> JOHN WITTE, JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT: ESSENTIAL RIGHTS AND LIBERTIES 39 (2000) ("Liberty of conscience was the general solvent used in the early American experiment in religious liberty. It was almost universally embraced in the young republic—even by the most rigid establishmentarians.")

<sup>45</sup> Thomas Jefferson, *Bill for Establishing Religious Freedom*, in GREAT QUOTATIONS ON RELIGIOUS FREEDOM (Albert J. Menendez & Edd Doerr eds., 2002).

<sup>46</sup> See, e.g., Andrew Koppelman, *Corruption of Religion and the Establishment Clause*, 50 WM. & MARY L. REV. (forthcoming May 2009).

“five limits,” each of which is “defended with . . . theoretical arguments.”<sup>47</sup> My impression, though, is that these limits fit uneasily with the claim they constrain.

Let’s assume one is on board with Tebbe’s core claim, that is, that the government may, for good reasons, exclude religion from its support. Why, exactly, should this claim be qualified by a rule that “government may not target particular sects for disfavored treatment”?<sup>48</sup> It is true that “the rule against denominational preferentialism is an uncontroverted feature of the American conception of religious freedom.”<sup>49</sup> But, should it be? Tebbe says that sectarian exclusion is “odious.”<sup>50</sup> Why?<sup>51</sup> If, as Tebbe contends in the fascinating, provocative conclusion of his paper, the government may “influence citizens’ choices among competing commitments of conscience,”<sup>52</sup> then why shouldn’t the government—even a decent, liberal government like ours—be able to use the “carrot power” of funding support selectively, to push, or nudge, citizens toward religious commitments and traditions that are consonant with the values of the political community, and away from those that are not?

Another limit that Tebbe proposes and embraces is that government may not “engage in exclusions that appear to be driven by simple animus against religion.”<sup>53</sup> (As this limit is elaborated, it is not clear that it has much bite.) We can and should all agree that our Constitution and traditions leave little room for “simple animus against religion” by government. Quite the contrary: as John Garvey has explained, our Constitution protects religious freedom because “religion is a good thing.”<sup>54</sup> But again, recall Tebbe’s view that a liberal democracy may and should—I have argued that they inevitably

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<sup>47</sup> Tebbe, *supra* note 1, at 1269.

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

<sup>49</sup> *Id.* at 1319.

<sup>50</sup> *Id.* at 1320.

<sup>51</sup> Cf. John Finnis, *Endorsing Discrimination Between Faiths: A Case of Extreme Speech?* (Notre Dame Law School Legal Studies Research Paper No. 08-08, 2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1101522](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1101522) (arguing that the government may have legitimate motives for siding against certain religious views).

<sup>52</sup> Tebbe, *supra* note 1, at 1335.

<sup>53</sup> *Id.* at 1327.

<sup>54</sup> John H. Garvey, *An Anti-Liberal Argument for Religious Freedom*, 7 J. CONTEMP. LEGAL ISSUES 275, 291 (1996).

will<sup>55</sup>—encourage citizens to pursue certain comprehensive commitments rather than others. To accept, and to welcome, the prospect of such “encourage[ment]” is, it seems to me, difficult to reconcile with the sharp antipathy Tebbe expresses toward preferentialism and viewpoint-based funding choices. *Why* is it the case that the government may not “exclude religion” from support when it thinks that religion—a particular religion, perhaps—amounts to an undesirable comprehensive commitment, one that the public authority would rather its citizens not endorse and, perhaps, strongly oppose? *Why* is it abhorrent for a liberal state—which, as Tebbe observes, seeks to embrace and promulgate certain visions of the good and not others—to subsidize some religious visions but not others, or to welcome the effects on citizens’ views and actions of some religious teachings but not others? It would seem noncontroversial that some faiths are more simpatico with political liberalism than others, so why should the state not be able to subsidize accordingly?

To be clear, I am *not* proposing or endorsing denominational preferentialism in funding programs and in the administration of so-called public forums. I share Tebbe’s view that it is outside the power, and usually outside the competence, of governments to make “theological” judgments and determinations.<sup>56</sup> Still, I am not yet sure why the thinking that prompts Tebbe to accept the permissibility of excluding, or declining to support, religion, does not carry him further, to a somewhat more “muscular” liberalism.

In another work, I wrote that

[s]ecular, liberal, and democratic governments do, or at least could, find it in their interest to cause changes not only in what religious believers profess and how they behave, but also in what religious communities teach, praise, condemn, and require. . . .

. . . [L]iberal, democratic governments like ours necessarily care what their citizens believe, and therefore will invariably seek to shape the content of citizens’ beliefs through government speech and other means, including regulation, subsidization, and criminalization. The state does this not simply for the sake of self-expression, but in order to form and change the minds of

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<sup>55</sup> Richard W. Garnett, *Assimilation, Toleration, and the State’s Interest in the Development of Religious Doctrine*, 51 UCLA L. REV. 1645, 1669-82 (2004) (discussing the ways in which government can and does influence religious doctrine).

<sup>56</sup> See generally, e.g., Richard W. Garnett, *The Freedom of the Church*, 4 J. CATH. SOC. THOUGHT 59 (2007) (discussing, among other things, the rule that the political authority may not make theological decisions).

those to whom it speaks. A speaker hoping to change listeners' minds is not indifferent to the message of her competitors.<sup>57</sup>

This is a claim—or a set of claims—that, like Tebbe's article, is in tension with what he calls a “no-influence theory” of the limits on liberal government.<sup>58</sup> The point of my claim, though, was not so much to cheer state efforts to “shape the content of citizens' beliefs through government speech and other means,” but instead to warn that the inevitability of such efforts poses a real threat to religious freedom, one that is not likely to be repelled with assurances that the state must act nonpreferentially, or must act with a secular purpose, or must not make theological judgments. If we believe, as Tebbe and I do, that there should be limits on the power, and on the ambition, of governments when it comes to the content of citizens' commitments and the objects of their loyalty, it is essential that we think hard not only about the location of these limits, but also about the reasons for them and the worth of what it is that they protect.

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<sup>57</sup> Garnett, *Assimilation*, *supra* note 55, at 1700.

<sup>58</sup> Tebbe, *supra* note 1, at 1339.