
RESPONSE

PLAYING AROUND WITH RELIGION'S CONSTITUTIONAL JOINTS

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

In *Excluding Religion*,¹ Nelson Tebbe argues that the Constitution should be construed to allow for “play in the joints”² that would give governments the discretion to exclude religious speech and practice from a variety of support programs, such as social-service or scholarship programs. Tebbe’s article is an impressive, but also puzzling, performance. Let me try to explain what puzzles me about it.

I.

Start with a very practical, and potentially embarrassing, question: These days, how are you or I—how is *anyone*—supposed to argue persuasively about constitutional issues of religious freedom? Despite occasional invocations by Justice Souter or Justice Thomas, the “original meaning” of the First Amendment’s religion clauses has long since been left behind in constitutional jurisprudence; it is scarcely an exaggeration to say that the religion clauses as originally understood

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

² *Locke v. Davey*, 540 U.S. 712, 718-19 (2004).

have effectively been repealed.³ The modern jurisprudence has instead centered itself on a few basic principles of religious freedom. But these principles—neutrality, voluntarism, separation of church and state—are notoriously indeterminate and manipulable, and they are also often in tension with each other. Unsurprisingly, the case law that has developed does more to ratify than to resolve these contradictory signals and directions.

Lacking secure guidance from these standard sources, we might be tempted to look to American political traditions as a default source of direction.⁴ Some Justices—most conspicuously Justice Scalia—sometimes do that.⁵ But tradition is also famously and exquisitely protean. And in any case, enough of the Enlightenment’s ingrained hostility towards the concept of tradition⁶ lingers so that tradition is unlikely to be widely accepted as authoritative.

In this diffuse discursive economy, rhetorical resources are available to support professionally *respectable* arguments for virtually any reasonably sane conclusion—and *compelling* arguments for none. Some advocates are of course more skillful debaters than others—more adept at arranging and polishing up the malleable rhetorical materials to provide elegant backing for their preferred conclusions. And some scholars bring more learning and wisdom—and more fair-

³ For its enactors, the point of the Establishment Clause, as I have argued elsewhere, was to reaffirm in writing what everyone at the time agreed upon—basically that religion was a subject for the states, and not the national government, to address. (This jurisdictional allocation entailed, among other things, the prohibition of a national established church.) The “incorporation” of the clause and the development of modern constitutional doctrine regulating religion amounted to an effective repudiation of that meaning. See STEVEN D. SMITH, *FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM* 17-54 (1995). I defend this jurisdictional interpretation against recent criticisms in Steven D. Smith, *The Jurisdictional Establishment Clause: A Reappraisal*, 81 NOTRE DAME L. REV. 1843 (2006).

⁴ See Steven D. Smith, *Separation as a Tradition*, 18 J.L. & POL. 215, 253-73 (2002) (developing and describing a “traditionalist” approach to understanding American notions of religious freedom and separation).

⁵ See, e.g., *McCreary County v. ACLU*, 545 U.S. 844, 886-89 (2005) (Scalia, J., dissenting) (justifying the public display of the Ten Commandments through a tradition of public recognition of religion dating back to the founding); *Lee v. Weisman*, 505 U.S. 577, 632-36 (1992) (Scalia, J., dissenting) (using the same tradition to defend the practice of giving invocations at public school graduations). For a pre-Scalia decision heavily dependent on tradition, see *Marsh v. Chambers*, 463 U.S. 783, 786-92 (1983).

⁶ See Smith, *Separation as Tradition*, *supra* note 4, at 234 (“It is scarcely an exaggeration to say that the modern [post-Enlightenment] age has not only been hostile to tradition, but indeed has virtually *defined itself* as a revolt against tradition.”)

mindedness—to the task than others do.⁷ Still, at the end of the day, there just is not much to say—no sufficiently definite standards or authorities to appeal to—that could or should convince anybody who is not independently inclined toward a particular advocate's point of view.

Tebbe's article seems to me a case in point. Contending for greater governmental discretion to support or not to support religion, Tebbe moves deftly among doctrines, principles, precedents, and prudential considerations of various sorts. His general conclusion and the supporting reasoning are likely to be persuasive to . . . well, to people who are predisposed to favor his position and to embrace his sort of reasoning. Conversely, people who are *not* naturally inclined to favor Tebbe's position may find his argumentation intricate and impressive—but not at all cogent. So they will not be persuaded. Nor is there any reason why they should be.

II.

But I need to be more concrete. With respect to the general question of governmental support for religion, modern constitutional jurisprudence sustains at least three clusters of authorities and arguments. First, there are the good old “separationist” decisions and arguments.⁸ The separationist position, which has been recently in retreat but surely is not altogether routed, holds that government is constitutionally *forbidden* to aid religion, and hence is *required* to exclude religion from support programs (such as school-voucher or social-service programs). A second discursive cluster contains cases and analyses invoking an ideal of “neutrality.”⁹ Neutrality is notoriously a

⁷ For an outstanding recent example, see 2 KENT GREENAWALT, *RELIGION AND THE CONSTITUTION: ESTABLISHMENT AND FAIRNESS* (2008).

⁸ The seminal authority in this cluster is of course *Everson v. Board of Education*, 330 U.S. 1, 8-16 (1947), which articulates the principle that the Establishment Clause “was intended to erect a wall of separation between church and State” (internal quotation omitted). For a powerful recent affirmation, see Steven G. Gey, *Life After the Establishment Clause*, 110 W. VA. L. REV. 1 (2007), which defends the separationist approach in light of a concern that the Roberts Court is adopting an integrationist approach to the Establishment Clause.

⁹ Though an increasingly prominent theme in recent decisions, such as in *McCreary County*, 545 U.S. at 860, 874-76, “neutrality” also traces its lineage back to *Everson*. 330 U.S. at 18 (“[The First] Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions, than it is to favor them.”)

“coat of many colors,” as Justice Harlan observed,¹⁰ but the term has most often been employed in recent years to mean that government must treat religion equally (or in an “evenhanded” way)¹¹ or in the same way it treats comparable (a slippery and eminently contestable notion) speech or associations that are not religious.¹² Partisans of this position often argue that government is *required* to include religion in certain kinds of support programs; to exclude religion would be to engage in constitutionally forbidden discrimination.¹³

Finally, there is judicial language in at least one recent decision suggesting the need for “play in the joints”¹⁴—and hence for allowing governments some discretion either to include or not to include religion in at least some support programs. Thus, in *Locke v. Davey*, the Supreme Court ruled that the State of Washington was constitutionally free, though not obligated, to single out theology majors for exclusion from a scholarship program open to qualifying students pursuing every other major.¹⁵

These discursive clusters are at odds with each other, and advocates naturally gravitate to whatever cluster supports their own commitments and conclusions. Advocates like Justice Souter cling to the now somewhat beleaguered separationist themes and authorities.¹⁶ From their base in the neutrality camp, scholars like Douglas Laycock and (now Judge) Michael McConnell offer powerful arguments for inclusion—in some contexts *mandatory* inclusion—of religion.¹⁷

¹⁰ Bd. of Educ. v. Allen, 392 U.S. 236, 249 (1968) (Harlan, J., concurring). For elaboration on “the semantic slipperiness of the term [‘neutrality’],” see SMITH, *FORE-ORDAINED FAILURE*, *supra* note 3, at 77-97.

¹¹ See, e.g., *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 114 (2001).

¹² Important recent decisions in this cluster include *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), and *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995).

¹³ See, e.g., Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 155, 199 (2004) (“Funding secular programs, but not religious equivalents that provide the same secular benefit, is rank discrimination . . .”).

¹⁴ *Locke v. Davey*, 540 U.S. 712, 718-19 (2004).

¹⁵ *Id.* at 725.

¹⁶ See, e.g., *Zelman*, 536 U.S. at 686-88 (Souter, J., dissenting) (arguing that the Court has never “repudiated” or “overruled” the separationist sentiments expressed in *Everson*).

¹⁷ See, e.g., Douglas Laycock, *Substantive Neutrality Revisited*, 110 W. VA. L. REV. 51, 54-56 (2007) (advocating a view of neutrality that requires the government to maintain neutral “incentives” between religious and non-religious choices—a view that may, as a result, require exemptions for religious practice); Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 168-94 (1992) (arguing for a view of the

Tebbe, by contrast, attaches himself (albeit with somewhat mixed allegiances, as we will see) to the “play in the joints” perspective. From that vantage point he offers respectable arguments for the view that government should have qualified discretion to exclude religion from receiving governmental support.

As it happens, I myself find this third position sensible, and so I am sympathetic to some of the arguments Tebbe makes—or at least to their general direction. But I can see no reason why anyone not so inclined should be persuaded.

Often Tebbe seems to be arguing from doctrine or case law. For example, he responds to some of the neutrality based arguments for including religion in support programs by saying that these arguments are hard to reconcile with *Locke v. Davey*.¹⁸ Which is true—but of course the proponents of neutrality can say with equal force that Tebbe’s own view (and *Locke* itself) are inconsistent with neutrality-oriented decisions like *Rosenberger v. Rector & Visitors of University of Virginia*,¹⁹ (which, Tebbe concedes, cannot be reconciled with *Locke*²⁰).

It is hard to see how anything could be settled in this way. To be sure, *Locke* is more recent than *Rosenberger*; presumably everyone can concede that much. But surely the disagreement transcends mere chronology. Rather than counting years, we might count cases, and there seem to be more Supreme Court decisions over the last couple of decades affirming “neutrality” than celebrating “play in the joints.” So it is quite possible to depict *Locke*, not *Rosenberger*, as the aberration. At times Tebbe seems to be mainly interested in *predicting* how courts are likely to rule on the contested issues.²¹ His predictions may or may not prove to be right (and their accuracy could well be influenced by the 2008 Presidential election), but, either way, such prognostications do little to show how the issues *should* be resolved.

Perhaps sensing the futility of this sort of argumentation, Tebbe tries to go beyond lawyerly citations and predictions. Thus, he asserts that freedom of religion is best conceptualized as a right to liberty or

Religion Clauses that embraces a religious pluralism, which protects religious practice from both government promotion and hinderance).

¹⁸ See, e.g., Tebbe, *supra* note 1, at 1291, 1326-27.

¹⁹ For a forceful presentation of this view, see Laycock, *supra* note 13, at 169-70, 191-95.

²⁰ Tebbe, *supra* note 1, at 1306 (“This Article contends that [*Locke* and *Rosenberger*] cannot be reconciled . . .”).

²¹ See *id.* at 1291, 1295, 1307 (noting the improbability of Justice Scalia’s dissenting argument in *Locke* being repeated in future cases, of a given interpretation of the RFRA “to prevail in any court,” and of *Rosenberger* being overruled by the Roberts Court, respectively).

autonomy, much like free speech, rather than a right to neutrality or equal treatment.²² Mere denial of government support, even if discriminatory, does not actually curtail anyone's liberty, he suggests, and hence does not infringe this sort of autonomy right.²³

Again, as it happens, I'm inclined to agree. In fact, I am more attracted to Tebbe's view than Tebbe himself is (because, as we will see shortly, Tebbe retains a relatively strong commitment to governmental neutrality in matters of religion). But again, I detect nothing in the article that ought to dissuade the proponents of a more expansive neutrality—the Laycocks and McConnells. After all, neutrality is undeniably an appealing notion. Conversely, "discrimination" clearly seems like an evil—indeed, it might not be too much to say that just as in older Christian thought *pride* was the central human vice, to contemporary political sensibilities *discrimination* is the central and manifestly deplorable evil. Neutrality's proponents have surely devoted more effort to explaining why government *should* be religiously neutral than Tebbe has expended in explaining why government *need not* be neutral. And they can point out that the cases—not just the free exercise decisions, but also the nonestablishment and free speech cases—overflow with language proclaiming the necessity of neutrality.

Tebbe tries to analogize religious freedom to freedom of speech,²⁴ but the analogy, even if apt, is not especially helpful to his cause. That is because free speech itself is increasingly understood primarily as a neutrality or equality right: free speech these days typically does not mean that government cannot restrict speech, but only that it cannot impose viewpoint-discriminatory and, perhaps, content-discriminatory restrictions.²⁵ It is good to remember that *Rosenberger*, which Tebbe is at pains to criticize and limit,²⁶ was primarily a free speech case.

Beyond characterizing religious freedom as an autonomy right, Tebbe repeatedly contends that government decisions not to support religion are defensible by reference to a trio of more pragmatic, or

²² *Id.* at 1291 n.111 ("[This Article] goes only so far as to say that religious freedom is best understood primarily as a right to autonomy or liberty, not neutrality or equality.").

²³ *Id.* at 1267 ("[F]ree exercise is best conceptualized primarily . . . as a right to liberty or autonomy that, like other such rights, may be selectively funded without burdening its exercise and triggering constitutional objections.").

²⁴ *Id.* at 1296-1318.

²⁵ *See, e.g.,* R.A.V. v. City of St. Paul, Minnesota, 505 U.S. 377, 391 (1992) (declaring a Minnesota bias-motivated crime ordinance unconstitutional that went "beyond mere content discrimination, to actual viewpoint discrimination").

²⁶ Tebbe, *supra* note 1, at 1304-07.

perhaps quasi-constitutional, considerations: promoting equal citizenship, avoiding divisiveness, and respecting the freedom of conscience of taxpayers who object to supporting religion.²⁷ These considerations, frequently invoked by separationists, do not in Tebbe's view support the usual separationist conclusion—namely, that support for religion is constitutionally *impermissible*. But he thinks they are weighty enough to warrant *discretion* not to provide such support.²⁸

Once again, though, these rationales are repeatedly invoked in the article, but nowhere are they methodically developed.²⁹ And indeed, Tebbe's position here seems somewhat puzzling as an argument for *discretion*. As we will notice more closely in a moment, Tebbe effectively concedes that there is considerable merit in the neutrality proponents' claim that government is constitutionally forbidden to discriminate against religion. Separationists (like Justice Souter in *Rosenberger*³⁰) typically respond that excluding religion from aid programs reflects not forbidden discrimination but rather constitutionally mandated separation.³¹ And they might want to support this claim by invoking the kinds of considerations listed by Tebbe. For example, a separationist could contend that aiding religion—even when the aid consists merely of inclusion in a more general aid program—would treat religious minorities and agnostics as less than equal citizens. But Tebbe evidently thinks this claim, or at least this conclusion, is mistaken. It seems that including religion in an aid program does not *in reality* treat minorities as less than equal; if it did, the separationists' argument for a prohibition on aid would be persuasive.

²⁷ See, e.g., *id.* at 1267 (“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 control, or respecting taxpayers’ freedom of conscience.”).

²⁸ *Id.* at 1267-68.

²⁹ See, e.g., *id.* at 1272-76. Elsewhere, however, the divisiveness rationale has been powerfully and methodically criticized. See Richard W. Garnett, *Religion, Division, and the First Amendment*, 94 GEO. L.J. 1667, 1670 (2006) (“It is both misguided and quixotic . . . to employ the First Amendment to smooth out the bumps and divisions that are an unavoidable part of the political life of a diverse and free people . . .”). And though the claim that government support for religion violates the consciences of objecting taxpayers has often been made, I have argued elsewhere that this claim is unsustainable either in history or in logic. See Steven D. Smith, *Taxes, Conscience, and the Constitution*, 23 CONST. COMMENT. 365 (2006). Tebbe’s analysis of these considerations, by contrast, is far more conclusory.

³⁰ *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 863-99 (1995) (Souter, J., dissenting).

³¹ *Id.* at 868-76 (Souter, J., dissenting).

So then how is it that the constitutional prohibition forbidding religious discrimination is overcome? Tebbe is less than precise on this point, but it looks as if government gets to exclude religion—to *discriminate against* it, as the neutrality proponents might say—not because inclusion would *actually* offend constitutional requirements of equality, but rather because some people *think it would*.³² Thus, a (supposed) constitutional imperative of nondiscrimination gives way to . . . well, to a constitutional misunderstanding. That view seems odd.

Perhaps this is not Tebbe's view. But I confess that I cannot make out exactly how the quasi-constitutional considerations he repeatedly invokes operate to leave us with neither a prohibition of aid (as the separationists claim) nor a prohibition of discrimination (as neutrality proponents contend), but rather with a sort of constitutionally-underwritten *discretion*.

III.

Actually, if you favor the pro-discretion, “play in the joints” position in this area (as Tebbe does, and as I am inclined to do), there is a much simpler way to get there—and one far more frugal in its use of constitutional resources. You could just say that *both* the “no aid” separationist and the neutrality arguments are mistaken, or at least not of constitutional stature, and hence that *the Constitution* itself leaves government unconstrained in this context. For example, you might argue that the religion clauses merely mean that government may not legally *coerce* people in matters of religion. Hence, so long as governments refrain from legal coercion, they may include or not include religion in support programs as they see fit.³³

³² See, e.g., Tebbe, *supra* note 1, at 1273 (footnotes omitted, emphasis added):

Officials might reasonably decide that funding religious entities would damage equal citizenship because only certain sects would in fact take up the offer of support. That could create a situation in which the government became identified with a particular sect or sects as a practical matter—*however mistakenly*—so that people not affiliated with those faiths would *come to view themselves* as belonging to disfavored classes of citizens.

³³ If non-coercion seems like a free exercise constraint only, and if you are concerned to preserve some separate job for the Establishment Clause to do, that should be easy enough. You could say, for instance, that the establishment prohibits governmental *endorsements* of religion. (Though I would advise strongly against saying this. See Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the “No Endorsement” Text*, 86 MICH. L. REV. 266, 267 (1987) (arguing that such a

The basic idea here—namely, that freedom of religion means non-coercion, not neutrality—would be nicely compatible with Tebbe's repeated suggestion that religious freedom should be viewed primarily as a liberty right. Despite its apparent congruity with his own notions, however, Tebbe seems not at all attracted to this constitutionally demure position. While resisting the stronger claims of neutrality proponents like Laycock and McConnell, Tebbe would retain a good deal of the neutrality agenda. Thus, all of the limits on government's discretion advocated in Part III of the article sound in neutrality.³⁴

In this section, Tebbe insists on a requirement of nonpreferentialism:³⁵ though government in Tebbe's view should have discretion to disfavor religion in comparison to comparable *non-religious* activities or interests, government is forbidden to disfavor any religion vis-a-vis *other religions*. In addition, Tebbe would prohibit government from declining to include or subsidize religion based on unconstitutional conditions,³⁶ or on viewpoint discrimination,³⁷ or on "animus"³⁸ (which, contrary to what the term implies, Tebbe defines without reference to actual motivation³⁹). And he would preserve a requirement that government treat religion neutrally, and hence refrain from discriminating against religion, not in general—because to say that would be to abandon Tebbe's whole position, and to move into the Laycock-McConnell camp—but in "traditional public fora" such as streets or parks.⁴⁰

In a longer response these limits would warrant more detailed analysis and criticism. For now, the important point is that all of these

"no endorsement" approach would only serve to "introduce further ambiguities and analytical deficiencies" into the Establishment Clause doctrine.) Or you might even make the stunningly obvious but reckless suggestion that the Establishment Clause is about preventing religious *establishments*—the official establishment of churches, in other words—with "establishment" defined in terms of the features the framers would have associated with an established church. For an illuminating discussion and enumeration of those features, see Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105 (2003).

³⁴ See Tebbe, *supra* note 1, at 1318-35.

³⁵ *Id.* at 1319-22.

³⁶ *Id.* at 1322-27.

³⁷ *Id.* at 1331-33.

³⁸ *Id.* at 1327-31.

³⁹ *Id.* at 1330 (defining an animus-based exclusion as "one that bars religious groups from exceptionally broad government support programs or otherwise permits a stark mismatch between the scope of the exclusion and the scope of state aid").

⁴⁰ *Id.* at 1333-35.

limits gain their force and appeal from the supposed constitutional mandate that government be neutral in matters of religion. In support of his “nonpreferentialism” limit, for example, Tebbe says that “[n]onpreferentialism is bedrock constitutional law, long considered a basic feature of American jurisprudence.”⁴¹ Maybe so, but there are surely at least as many, and probably more, judicial pronouncements declaring that government must be neutral both among religions and between religion and “nonreligion.” In modern doctrine, nonpreferentialism seems to be a corollary of this more general requirement of neutrality, which itself has been “long considered a basic feature of American jurisprudence.” Consequently, this and other limits proposed by Tebbe exhibit a good deal of residual loyalty to the modern commitment to neutrality/equality. (Which of course raises the obvious question: if the Constitution demands this much neutrality, why not the whole shebang?)

Tebbe’s prescribed limits on governmental discretion ensure that issues of inclusion or exclusion of religion will continue to be debated and litigated within a thick, swirling cloud of constitutional principles, prohibitions, obligations, and conditions—and hence under the heavy supervision of the judiciary. Tebbe says that his limits are “bright-line” restrictions that would require little exercise of judgment by courts.⁴² I emphatically disagree;⁴³ but this is not the place to pursue the matter. Suffice it to say that under Tebbe’s proposal, the constitutional elephant is still very much in the room and is as bulky as ever. Judges will not be out of the religion business, and religion-clause scholars like Tebbe (and myself) will not be applying for unemployment compensation anytime soon.

CONCLUSION

In the end, Tebbe’s argument for a heavily-qualified discretion to exclude religion is respectable but unconvincing. If you are inclined to be persuaded, you can find the support you need here; if you are not inclined to be persuaded, there is no reason why you should be. This verdict is not an indictment of the Article. Under the current

⁴¹ *Id.* at 1319.

⁴² *See id.* at 1269, 1318.

⁴³ On whether the “unconstitutional conditions” doctrine could be rendered straightforward or even coherent, for example, consider Larry Alexander’s verdict (which is expressed in his essay’s title): Larry Alexander, *Impossible*, 72 DENV. U. L. REV. 1007 (1995).

conditions of religion-clause discourse, “respectable but unconvincing” is probably as much any such normative argument can realistically aspire to be: an argument can fall short of that mark but cannot readily surpass it.

Which brings me to what I find the most puzzling aspect of performances like this one. What is it that motivates scholars to invest the considerable time and thought and ingenuity needed for such performances? Again, the question does not constitute a criticism of Nelson Tebbe’s impressive (by prevailing professional standards) article. There is an obvious and utterly down-to-earth reason for Tebbe, or me, or any of us individually, to write this sort of article: we are law professors, and this is what law professors do. But *why* exactly, at this point, do we persist in doing what we do? What exactly do we hope to accomplish? It’s a puzzle.

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