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### Recommended Citation

Andrew Koppelman (2018) "Tebbe and Reflective Equilibrium," *Journal of Civil Rights and Economic Development*: Vol. 31 : Iss. 1 , Article 6.

Available at: <https://scholarship.law.stjohns.edu/jcred/vol31/iss1/6>

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## TEBBE AND REFLECTIVE EQUILIBRIUM

ANDREW KOPPELMAN\*

The basic method of Nelson Tebbe's fine book, "Religious Freedom in an Egalitarian Age,"<sup>1</sup> is what John Rawls called "reflective equilibrium."<sup>2</sup> Rawls famously proposed a theory of justice that aimed to be "strictly deductive."<sup>3</sup> His deductions, however, take place within a larger account of justification that he calls "reflective equilibrium," in which we try to bring our considered moral judgments into line with our more general principles.<sup>4</sup> "A conception of justice cannot be deduced from self-evident premises or conditions on principles; instead, its justification is the matter of the mutual support of many considerations, of everything fitting together into one coherent view."<sup>5</sup> Any general theory must be consistent with the specific judgments in which we have the greatest confidence, such as our judgments "that religious intolerance and racial discrimination are unjust."<sup>6</sup> These are "provisional fixed points [into] which we presume any conception of justice must fit."<sup>7</sup> The deduction, in short, does not always go in one direction. "It is a mistake to

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<sup>1</sup> NELSON TEBBE, RELIGIOUS FREEDOM IN AN EGALITARIAN AGE (2017) [hereinafter RELIGIOUS FREEDOM].

<sup>2</sup> JOHN RAWLS, A THEORY OF JUSTICE 18 (revised ed. 1999)[hereinafter A THEORY OF JUSTICE].

<sup>3</sup> *Id.* at 103.

<sup>4</sup> *Id.* at 18.

<sup>5</sup> *Id.* at 19.

<sup>6</sup> *Id.* at 17.

<sup>7</sup> A THEORY OF JUSTICE, *supra* note 2, at 18.

think of abstract conceptions and general principles as always overriding [] more particular judgments.”<sup>8</sup>

Tebbe proposes to use this method to address the hotly debated question of religious exemptions from anti-discrimination law. His book is a thoughtful and scrupulous treatment of the problem, and Tebbe’s judgments are generally sound.<sup>9</sup>

One attraction of reflective equilibrium is its correspondence with common sense. People already reason about moral problems in just this way. For that reason, however, these chapters are unnecessary. There are two kinds of skeptic: those who think that warranted outcomes are impossible<sup>10</sup> and those who think that no theory of *religious liberty* is possible and that we can only defend particular prudential judgments. The first group is a familiar kind of undergraduate wiseass who does not really believe what he is saying and is just having fun with you: I can prove that you do not exist, etc. Even if one wishes to engage with such people, there is nothing about this argument that has any specific implications for religious liberty. As for the second group, they are perfectly happy to fight with you about particular judgments of what to do in specific situations. So they can engage with the later chapters of Tebbe’s book without ever talking about Chapters One and Two. The book would have been better without its first two chapters.

Here, I will focus on a deep tension between Tebbe’s devotion to reflective equilibrium and his conviction, stated at many points in the book, that “it is no longer clear that constitutional law should treat religious belief as special, as compared to nonreligious beliefs or non-belief.”<sup>11</sup> In this, Tebbe joins a growing number of scholars who doubt that special treatment for religion is justified.<sup>12</sup> The problem is, as Tebbe admits a few

<sup>8</sup> JOHN RAWLS, *POLITICAL LIBERALISM* 45 (1993)[hereinafter *POLITICAL LIBERALISM*].

<sup>9</sup> I have a somewhat different take on the gay rights/religious liberty conflict, which I will not review here. See Andrew Koppelman, *Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law*, 88 S. Cal. L. Rev. 619 (2015)(discussing accommodation laws and several state laws and observing the American sentiment towards religious objection); see also Andrew Koppelman, *A Free Speech Response to the Gay Rights/Religious Liberty Conflict*, 110 NW U. L. Rev. 1125 (2016)(discussing the tensions between Free Speech and Anti-Discrimination Laws).

<sup>10</sup> RELIGIOUS FREEDOM, *supra* note 1, at 31.

<sup>11</sup> *Id.* at 4–5.

<sup>12</sup> For discussions of the increasing number of scholars who are persuaded of this objection, see KATHLEEN BRADY, *THE DISTINCTIVENESS OF RELIGION IN AMERICAN LAW*:

pages later, that “religious freedom itself is a foundational value.”<sup>13</sup> It is hard coherently to have religious freedom without religion.

Let us be clear about the settled practices that are the background of Tebbe’s work. First Amendment doctrine has used “neutrality” as one of its master concepts, but it treats religion as a good thing. Religious conscientious objectors are often accommodated. Disestablishment protects religion from manipulation by the state.<sup>14</sup> The law’s neutrality is its insistence that religion’s goodness be understood at a high enough level of abstraction that the state takes no position on any live religious dispute.<sup>15</sup> America, the most religiously diverse nation on earth, has been unusually successful in dealing with its diversity.<sup>16</sup>

American legal theorists have proposed a lot of substitutes for “religion.” Conscience is probably the most popular.<sup>17</sup> The shift away from religion reflects the influence of a tendency in contemporary political theory, commonly called *liberal neutrality* (very different from American religious neutrality, which treats religion as a good) that claims that state action should never be justified on the basis of any contested conception of the good.

Tebbe seems to be drawn to liberal neutrality. He constantly worries about unfairness to the nonreligious, even when those people do not exist. (For instance, there is, or more precisely isn’t, Schmelaine Photography, a nonreligious equivalent of Elane Photography, the New Mexico wedding photographer.)<sup>18</sup> In his view, the establishment clause becomes about equal citizenship, because religious minorities become “disfavored members of the political community.”<sup>19</sup>

RETHINKING RELIGION CLAUSE JURISPRUDENCE 17–55 (2015); *see also* ANDREW KOPPELMAN, DEFENDING AMERICAN RELIGIOUS NEUTRALITY 120–65 (2013) [hereinafter AMERICAN RELIGIOUS NEUTRALITY].

<sup>13</sup> RELIGIOUS FREEDOM, *supra* note 1, at 12.

<sup>14</sup> AMERICAN RELIGIOUS NEUTRALITY, *supra* note 12, at 10.

<sup>15</sup> *Id.* at 2.

<sup>16</sup> *Id.* at 1.

<sup>17</sup> See Andrew Koppelman, *Conscience, Volitional Necessity, and Religious Exemptions*, 15 LEGAL THEORY 215 (2009) (discussing scholars who are drawn to this substitute).

<sup>18</sup> RELIGIOUS FREEDOM, *supra* note 1, at 86, 89, 91.

<sup>19</sup> Nelson Tebbe, *Government Nonendorsement*, 98 MINN. L. REV. 648, 659-60 (2013).

Religion matters for Tebbe, because it is a socially significant characteristic of one's identity.<sup>20</sup> There are lots of such characteristics. "Racist" comes to mind. He wants to accommodate comparable "deep and worthy secular commitments of conscience,"<sup>21</sup> but it is not clear that these are detectable. How can the state know "where a secular need really is comparatively pressing and principled"?<sup>22</sup>

Equality certainly was a theme of disestablishment from the beginning: Madison's Memorial and Remonstrance complained that subsidy for religion "violates that equality which ought to be the basis of every law."<sup>23</sup> But an equally important concern was protecting religion from corrupting manipulation by the government.<sup>24</sup> That disappears from Tebbe's analysis.

The denial that religion is special leads Tebbe to want to recharacterize the ministerial exception to anti-discrimination law as freedom of association, which applies only to membership requirements that are related to a group's message.<sup>25</sup> This, he acknowledges, "may require courts to inquire into the belief systems of faiths."<sup>26</sup> Courts thus would have to entertain the possibility that, for example, the Vatican has gotten Catholic ecclesiology wrong. That might not be troubling from the perspective of liberal neutrality, which would treat religion like any other ideology, but it is a big problem if the establishment clause aims to keep state actors from making theological pronouncements. That is why the Supreme Court rejected the old "departure from doctrine" principle, which awarded property to the party in an intra-church dispute that maintained the church's original doctrines.<sup>27</sup>

<sup>20</sup> See RELIGIOUS FREEDOM, *supra* note 2, at 85-86.

<sup>21</sup> *Id.* at 76.

<sup>22</sup> *Id.* at 79.

<sup>23</sup> JAMES MADISON, THE PAPERS OF JAMES MADISON 82 (William T. Hutchinson et al. Chicago and London: University of Chicago Press eds., 2000).

<sup>24</sup> See Andrew Koppelman, *Corruption of Religion and the Establishment Clause*, 50 WM. & MARY L. REV. 1831 (2009) [hereinafter *Corruption of Religion*].

<sup>25</sup> This is the prevailing law of freedom of association. See ANDREW KOPPELMAN & TOBIAS BARRINGTON WOLFF, A RIGHT TO DISCRIMINATE? HOW THE CASE OF *BOY SCOUTS OF AMERICA V. JAMES DALE* WARPED THE LAW OF FREE ASSOCIATION (2009).

<sup>26</sup> RELIGIOUS FREEDOM, *supra* note 1, at 94.

<sup>27</sup> *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 450 (1969).

American law looks nothing like liberal neutrality, and it is not obvious that liberal neutrality's implications are politically sustainable. Drug policy, for instance, is indefensible without the judgment that certain uses of recreational drugs cut people off from good lives.<sup>28</sup>

Now, it may be possible to defend the singling out of religion in terms that secularists could accept, by treating it as a workable proxy for values that the law cannot directly reach – conscience, or integrity, or whatever.<sup>29</sup> But that will not change the fact that “religion” persists as an operational category. The ministerial exception from anti-discrimination law, for instance, applies only to ministers.<sup>30</sup> It is not an instance of a more general freedom of conscience.

I doubt whether, if Tebbe changed his mind about this, it would affect his judgments about public accommodations, employment law, and so forth. He clearly is ready to give some weight to the wishes of those who do not want to comply with anti-discrimination laws. What difference does it make how one describes those wishes?

One advantage of the focus on religious liberty is that it makes clear just how deep the disagreement is that we are trying to cope with. America has long been a counterexample to Rousseau's dictum that “it is impossible to live at peace with those whom one believes to be damned.”<sup>31</sup> The same-sex marriage issue, in which one side loathes what the other holds holy, tests that proposition anew.

One salient aspect of the current conflict is that religious conservatives fear being stamped out. The conservative columnist Rod Dreher describes an emerging consensus on the right “that the most important goal at this stage is not to stop

<sup>28</sup> See generally Andrew Koppelman, *Drug Policy and the Liberal Self*, 100 NW. U. L. REV. 279 (2006).

<sup>29</sup> See Andrew Koppelman, *Nonexistent and Irreplaceable: Keep the Religion in Religious Freedom*, 142 COMMONWEAL (Mar. 27, 2015), <https://www.commonwealmagazine.org/nonexistent-irreplaceable>; Andrew Koppelman, *Religion's Specialized Specialness*, 79 U. CHI. L. REV. Dialogue 71 (2012); Andrew Koppelman, “Religion” as a Bundle of Legal Proxies: Reply to Micah Schwartzman, 51 SAN DIEGO L. REV. 1079 (2014).

<sup>30</sup> Andrew Koppelman, “Freedom of the Church” and the Authority of the State, 21 J. CONTEMP. LEGAL ISSUES 145, 145-146 (2013).

<sup>31</sup> JEAN-JACQUES ROUSSEAU, ON THE SOCIAL CONTRACT 131 (Roger D. Masters ed. & Judith R. Masters trans., 1978).

gay marriage entirely but to secure as much liberty as possible for dissenting religious and social conservatives while there is still time.”<sup>32</sup> They are right to be scared.

At one point, Tebbe offers a worrying justification for tolerance:

Governments may well be wise to stay their hand out of recognition that groups may need time to deliberate over rapid changes in social mores on questions like marriage equality and transgender inclusion. Decisions like *Obergefell* send a clear message of constitutional commitments on such questions, and private groups can be expected to respond over time.<sup>33</sup>

This expectation is likely to be disappointed, at least with respect to some groups. The Catholics, Mormons, Orthodox Jews, and Southern Baptists will not come around any time soon. Tolerance had best not depend on any prediction that they will.

<sup>32</sup> Rod Dreher, *Does Faith = Hate?: Gay Marriage and Religious Liberty are Uneasy Bedfellows*, AM. CONSERVATIVE (Oct. 9, 2013), <http://www.theamericanconservative.com/articles/does-faith-hate/>.

<sup>33</sup> RELIGIOUS FREEDOM, *supra* note 1, at 192.