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## IN (PARTIAL) PRAISE OF (SOME) COMPROMISE: COMMENTS ON TEBBE

CHAD FLANDERS<sup>1</sup>

I want to begin by sketching a point of view that, at best, makes only an implicit showing in Tebbe's persuasive, thoughtful, and challenging book. That viewpoint looks something like this:<sup>2</sup> religion is unique, not just in substance but also in form. Start with substance: religion is a way of looking at the world as not exhausted by secular values or concerns; for money, prestige, or for "utility" broadly construed, or even exhausted by morality. Religion asks, repeatedly of those who believe in it, to do seemingly impossible things. It counts on miracles. Religion sees the world and our lives, fundamentally, as something that we did not make and which come to us as sort of a gift. It tells us that others should be at the center of our universe and not ourselves. And now, go to form: religion, to the believer, pervades that person's life. It is a structure of commands, in part; a collection of virtues, in part; a set of techniques for making it through the day, in part; and a relationship, in part. In both of these ways (form and content), there is nothing quite like religion to many. To put it another way, religion truly is special.

This point of view isn't obviously present in Tebbe's book, which is not to say that it isn't there. But at best, it is buried. The sort of considerations that go into the social coherence method don't include (at least on my reading) many considerations of this type. The social coherentist looks at harm of a concrete, secular sort and fairness of an equal protection variety. There is not much in the way of spiritual harm or the particular benefits of religion or the special demands and needs of religious believers. Perhaps

<sup>1</sup> Thanks to Nelson Tebbe for his comments on a previous draft, and to the participants at the book symposium where this paper was first presented. All errors are my own.

<sup>2</sup> For an earlier attempt at a sketch of religion's specialness, see Chad Flanders, *The Possibility of a Secular First Amendment*, 26 QUINNIPIAC L. REV. 257, 271 (2008).

for good reason are these harms, goods, demands, and needs excluded. To some, they will simply not register; to some, they won't count as reasons. To still others, they might simply be the *wrong kind* of reasons to use in public debate.

This gets me to the problem, and the challenge, of Tebbe's book, that I want to consider in this short essay about it. Many see religion as special only in the sort of way I have described above. But many others, the nonbelievers, will see religion as false, or nonsense, and on top of this presenting a very real risk of harm to people—especially nonbelievers. What are we to do when there exists a divide like this? This is my topic, and if I am more skeptical than Tebbe about a lasting solution, I do not side with those whom he calls the skeptics, or at least not entirely. I do not share, I don't think, the skeptics' underlying conservatism. I do not, generally, oppose the direction of social change we are heading in—or were heading in<sup>3</sup>—on health care, on gay marriage, etc. What I want is to find a framework of accommodation for that change. One which does not force believers to change, but may nudge them in that direction. Call it a *modus vivendi* if you like, but a better term might be compromise. I find too little of that in Tebbe, but I think it is what we may need most of.

There are four very brief sections to my comment on Tebbe's book. The first suggests some skepticism about social coherentism, and its hope to provide a neutral method for adjudicating disputes. I apply this skepticism in the second part to Tebbe's discussion of what counts as "harm" and how to measure it. The third and fourth parts deal with my favored way of dealing with our deep disagreements and compromises when it comes to associations and employment. I should add here that nothing I say is meant to take away from Tebbe's achievement in his book. The writing is elegant; the reasoning sound. I would consider it a high compliment if my remarks here were read as merely pointing out differences in how to apply Tebbe's theories, not as any sort of fundamental disagreement. For there is much that is great and good in this book, and much to agree with.

<sup>3</sup> This draft was prepared and written before Donald Trump was elected President. I am not sure I would say the same things in this paper if I knew the 2016 Election would turn out that way. I would surely not say these words in the same way.

## I. SOCIAL COHERENCE

Tebbe's method of social coherentism presents itself at once as both modest and ambitious. The modesty is on display at the end of chapter one, where he writes, "The main point [of the chapter] is that . . . charges of *necessary* irrationality are out of place."<sup>4</sup> Disagreement, he goes on to say, is not the same as arbitrariness.<sup>5</sup> Fair enough, and sound enough. Each side to a debate will give reasons, or otherwise put, considerations in favor of their side. And those reasons can be seen for the most part *as* reasons to the other side. They can see the considerations as (at least) relevant, and not irrelevant, to the question at hand. Positions on religious freedom can be justified and warranted (and so, for that matter, can positions *against* religious freedom).

But then there is this other, ambitious part. Tebbe writes in the introduction that "these questions of religion and equality law *can* be answered."<sup>6</sup> And, more profoundly in the Afterword, Tebbe calls for achieving "a more lasting unity" where "citizens who are subject to government regulation can understand why their arguments have been rejected, but also because they know that their arguments matter and someday may prevail."<sup>7</sup> Tebbe contrasts this unity with a mere "civil peace,"<sup>8</sup> where there are more or less pragmatic accommodations, where each side gets something and the dispute is settled at least for a time, but where both sides do not quite understand one another, so they still remain—at the level of theory—divided.

There is a lot here to admire, both in the modest and the ambitious strains of Tebbe's argument. But I worry more about the ambitious strain. Tebbe holds out hope to the short-term losers "of a particular fight" that their arguments "someday may prevail," even though dissent may "intensify" in the short term.<sup>9</sup> Because I see the advantages of short-term compromise, I look at things a little differently. Most of Tebbe's conclusions in the body of the book show not just short term losses for one side, but long

<sup>4</sup> NELSON TEBBE, RELIGIOUS FREEDOM IN AN EGALITARIAN AGE 35 (2017).

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

<sup>6</sup> *Id.* at 5.

<sup>7</sup> *Id.* at 199.

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

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

term ones (will we reverse course on LGBT rights, on health care? My sense is that Tebbe not only does not think we will, but he actively hopes that we *will not*). For me, the advantage of short-term compromise (which I will get to in a bit) is that we can accommodate the losers, somewhat, as a means of transitioning to a more lasting unity where we *do* actually agree on most reasons and most policies.<sup>10</sup>

More deeply, though, what does Tebbe give to the losers? Here, I show my skeptical side. Saying that both sides can appeal to reasons, and that therefore government policy need not be simply *imposed*, but imposed *with a justification*, just may move the debate between the two sides to a different level. What, precisely, *is* the difference between saying, “Your policy lost because you do not have reasons on your side,” and, “Your policy lost because you have wrong or inadequate reasons on your side?” The policy upshot in both cases is the same, and so too is the sting of defeat. And this is even buying Tebbe’s contention that both sides will be able to see each other’s reasons *as reasons*. This is a very open question. Those who see religion as false will not necessarily see protecting people’s relationship to a non-existent deity as a *reason*. They will see it as a misguided emotional feeling, at best. They will not see it as a consideration in favor of accommodating religion.<sup>11</sup>

I should not be misunderstood. I am not attacking Tebbe for saying that there is one rational answer to questions on law and religion, and that he has provided us with it. I am saying that the fact that there are many solutions and many *rational* solutions may just repackage the skeptic’s worry at another level. The skeptics will now worry that they will lose, because their reasons will not be looked at as persuasive reasons or reasons at all, even though *they* can see them as reasons. The fact that the solution that “wins” will have reasons behind it, whether that will win people’s assent depends on how many of those reasons overlap with *their* reasons, which in many of these cases, will not be many. Moreover, the fact that there will be *many* solutions, even on the

<sup>10</sup> The advantage of compromise, too, is that it may preserve some gains going forward, and avoid a backlash, where we end up worse where we were before. I elaborate more on both of these points later in the paper.

<sup>11</sup> At the same time, I should add that I believe that both sides to the debate should see religious freedom as a value, even if they think most or all religions are false.

coherence model, I do not think will help that much, unless (again) we can show a great convergence on *one* solution. Maybe we can get there, but I am skeptical.

## II. HARM -- DEFINING IT AND AVOIDING IT

It may help to give an example of the problems of coherence as I see it. I find such a difficulty in Tebbe's chapter on harm.<sup>12</sup> Tebbe, building on his writings co-authored with Richard Schragger and Micah Schwartzman,<sup>13</sup> criticizes the *Hobby Lobby* ruling, in particular the passage where Justice Alito insists—and almost guarantees—that with the accommodation he proposes, the cost to women who are employed by Hobby Lobby would be “precisely zero.”<sup>14</sup> The line, as Tebbe rightly notes, almost has to be false, and its fake precision nearly underscores its obvious falseness.<sup>15</sup> How could anything that replaced the contraceptive mandate have a cost of exactly and precisely zero? How could any transition away from the original plan be costless in terms of time or money? So Tebbe is surely right about this.<sup>16</sup>

<sup>12</sup> See generally Christopher C. Lund, *Religious Exemptions, Third-Party Harms, and the Establishment Clause*, 91 NOTRE DAME L. REV. 1375 (2016) (discussing the problem of defining “harm”).

<sup>13</sup> See generally Nelson Tebbe, Micah Schwartzman & Richard Schragger, *Symposium: Zubik and the Demands of Justice*, SCOTUSBLOG (May 16, 2016, 9:07 PM), <http://www.scotusblog.com/2016/05/symposium-zubik-and-the-demands-of-justice/>; Richard Schragger, Micah Schwartzman & Nelson Tebbe, *The Contraception Compromise*, SLATE (Apr. 14, 2016, 4:51 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2016/04/seven\\_sisters\\_are\\_open\\_to\\_obamacare\\_contraception\\_compromise.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2016/04/seven_sisters_are_open_to_obamacare_contraception_compromise.html); Micah Schwartzman, Richard Schragger & Nelson Tebbe, *Obergefell and the End of Religious Reasons for Lawmaking*, RELIGION & POL. (June 29, 2015), <http://religionandpolitics.org/2015/06/29/obergefell-and-the-end-of-religious-reasons-for-lawmaking/>; Micah Schwartzman, Nelson Tebbe & Robert Tuttle, *Indiana's New Law Allows Discrimination. That Was the Point*, SLATE (Mar. 30, 2015, 1:10 PM), [http://www.slate.com/blogs/outward/2015/03/30/gov\\_mike\\_pence\\_s\\_characterization\\_of\\_indiana\\_s\\_new\\_religion\\_law\\_is\\_wrong.html](http://www.slate.com/blogs/outward/2015/03/30/gov_mike_pence_s_characterization_of_indiana_s_new_religion_law_is_wrong.html); Nelson Tebbe, Richard Schragger & Micah Schwartzman, *Utah “Compromise” to Protect LGBT Citizens from Discrimination Is No Model for the Nation*, SLATE (Mar. 18, 2015, 3:18 PM), [http://www.slate.com/blogs/outward/2015/03/18/gay\\_rights\\_the\\_utah\\_compromise\\_is\\_no\\_model\\_for\\_the\\_nation.html](http://www.slate.com/blogs/outward/2015/03/18/gay_rights_the_utah_compromise_is_no_model_for_the_nation.html); Micah Schwartzman, Richard Schragger & Nelson Tebbe, *The New Law of Religion*, SLATE (July 3, 2014, 11:54 AM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2014/07/after\\_hobby\\_lobby\\_there\\_is\\_only\\_rfra\\_and\\_that\\_s\\_all\\_you\\_need.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2014/07/after_hobby_lobby_there_is_only_rfra_and_that_s_all_you_need.html).

<sup>14</sup> TEBBE, *supra* note 4, at 51.

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

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

But that to me only raises more questions. I want to start with some basic, practical ones, and then transition to the deeper theoretical ones. My first questions deal with what we can call the baseline problem and the threshold problem.<sup>17</sup> Tebbe does deal with the baseline problem, but he does so in what is to my mind an unsatisfactory way.<sup>18</sup> He writes that we should *not* take the baseline as a libertarian one, where because Hobby Lobby's employees didn't have health benefits before, they shouldn't expect to have them now.<sup>19</sup> I agree with Tebbe that we should reject this free-market, no state benefit, baseline.<sup>20</sup> But Tebbe mentions and then does not deal with another obvious candidate for a baseline: why isn't the baseline on all government programs *that they accommodate religious liberty*?<sup>21</sup> On this picture, *if* Hobby Lobby had a right to be exempted from the contraceptive mandate—a very big if, I grant you—then the employees of Hobby Lobby had no right, no legitimate expectation, to the contraceptive coverage in the first place.<sup>22</sup> And so they are not harmed when it turns out that they do not get it. The religious accommodation baseline makes even more sense if we look at RFRA's language, and the fact that it was *temporally* prior to the ACA.

Tebbe's answer to this may be that we have to look at all the values at play to fix the baseline and to see what counts as harm, and accommodation under RFRA is only one of those values. Fair enough. We have to look at *all* the values, and if they pass some sort of threshold, we say that the accommodation can't happen. This is what I call the "threshold problem." How do we know when we've crossed the threshold? Consider the two obvious harms that might befall Hobby Lobby's employees if their access to contraception is delayed due to the religious objections of Hobby Lobby. First, there is the immediate harm of Hobby Lobby *imposing* its religion on its nonbelieving employees—those who are either of no religion or not of the Greens' religion—which forces them, at the very least, to wait until they get covered by the

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

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

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

<sup>20</sup> TEBBE, *supra* note 4, at 51.

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

<sup>22</sup> *Id.* at 50.

mandate.<sup>23</sup> And second, there are the harms faced by individual women not getting access to contraceptive coverage for some amount of time. This harm could be something as simple as having to pay for contraception themselves, or as complicated as an unwanted pregnancy.

These are very different kinds of harms, and present different kinds of problems. The first kind of harm, one of endorsement, seems like an all or nothing harm. You are harmed by endorsement if you have to bear *any* kind of cost, even the most minor (even “three pence”<sup>24</sup>). Even if the accommodation means taxpayers pay more, even a little bit more, hasn’t there been an imposition on others and what is more, it is *an imposition because of a person’s religion*. Almost anything means we’ve crossed the threshold into harm, which seems in a way right, but in another seems like it *cannot* be right, because then any accommodation that had any effect on others would have to be ruled out, as causing the harm of endorsement. So maybe we just throw endorsement into the mix, along with other types of harm, in trying to figure out whether we’ve passed some threshold above which accommodation of religion is no longer acceptable.

So consider the second kind of harm, viz., the concrete harms that would be suffered by women who are now without contraception (because of the delay caused by the need to fashion an accommodation). This second type of harm seems more like something we would need to measure, that is not simply there, and so is something where we might need to know the true magnitude of the harm in order to see at what point we get to an “undue hardship” to use Tebbe’s favored standard.<sup>25</sup> Again, the types of harms are not too hard to see, and Tebbe speculates about what they are: unintended pregnancies, increased abortions, and (again, at the very least) more out of pocket costs for uncovered women. On top of this, there are the *further* harms to women who were

<sup>23</sup> *Id.* at 51. The idea here is that if Hobby Lobby does not have to cover its employees directly because of RFRA, there will be some delay before a separate mandate that is funded by the insurance companies gets implemented.

<sup>24</sup> James Madison, *Memorial and Remonstrance Against Religious Assessments*, in 5 THE FOUNDERS’ CONSTITUTION 82, 82 (Philip B. Kurland & Ralph Lerner eds., 1987) (rejecting support for an establishment of religion, even if it only amounts to “three pence”).

<sup>25</sup> TEBBE, *supra* note 4, at 62 (noting that the undue hardship standard “has been interpreted by the Supreme Court to address *precisely* the problem of shifting harm to others” and “has been interpreted by lower courts in a sensible way”).

*because of the Court's decision* unable to delay birth, and so suffer economic, social and political losses. These are harms that were *bound* to happen by the *Hobby Lobby* decision, at some level of magnitude, so Alito has to have been simply wrong when he said that there would be no cost.

Is this kind of speculation enough? I am not sure. Do we need to know *how many women* suffered and *how much* they suffered to see whether we've passed the threshold? What if it turned out that there were only two unintended pregnancies that are directly attributable to the *Hobby Lobby* decision? What if many women were able to seek and find low or no cost contraception? Do these kind of (to my mind, a little impertinent) questions matter in how we analyze the harm? Do we need to know over the long haul if the unintended pregnancies really did cause an economic or political loss to the women? Or do we reach a point where the harm "depends on too many factors to draw a causal connection"?<sup>26</sup> In any event, aren't these the type of questions that are relevant to seeing whether there is merely a "hardship" as opposed to an "undue hardship"?<sup>27</sup>

And then we get what is to my mind is the really hard question. Stipulate that there is hardship; stipulate that the hardship is undue and real. How do we balance this against the other looming, and possible hardship, viz., the hardship that would be faced by *Hobby Lobby*? Do we weigh things in this fashion—or does the undue hardship on third parties automatically outweigh any burden on the religious believer? I do not know the answer to this question on Tebbe's picture, and that worries me. I can agree that Alito blundered, but I may think that *even so* given the gravity of the religious harm at stake—an asserted complicity with *murder*—it could be that the harms on the other side were accommodated enough, given account of enough, both because of what I see the baseline as, and what I see as the concrete harms on the other side.

So this is what I meant when I said in the previous part that social coherence may just change the way we look at disagreements, but it may not make those disagreements any less fierce, any less intractable. We can agree that both sides have

<sup>26</sup> *Id.* at 58.

<sup>27</sup> *Id.* at 62.

reasons, but we may disagree about what the best reasons are, and how to weigh those reasons. We may have gotten precisely nowhere, substantively, toward an agreement. We have just changed the terms of that disagreement.

### III. PROTECTING ASSOCIATIONS

I find Tebbe's discussion of freedom of association generally agreeable. In particular, I appreciate Tebbe's focus on the purpose of institutions and calibrating the level of protection to the association based on the function it fulfills. Others, most notably Paul Horowitz, have also championed this approach, and it makes sense.<sup>28</sup> Different institutions do different things and, more importantly, need different things and so some associations may require more freedom and more autonomy to function adequately given what they are.<sup>29</sup> What I also especially like about this approach is that it makes the freedom of associations less formal—less a matter of simply getting out of the way of associations. Instead, it says that associations deserve a certain amount of freedom because of the goods they help us realize, not because of any sort of right-as-trump they can assert against the government.

But part of my job in this essay is to quibble, and so quibble I must, and quibble in service of my larger thesis. That thesis, again, was that social coherence may not get us to much in the way of agreement, that it only will (at best) reproduce our disagreement in a different register, and so we may be better off going with a sort of *modus vivendi* compromise, as a way of managing social change and deep (but reasonable) disagreement. And if in the previous part on harm I argued that many might think that Tebbe's definition of harm is too vague to do any work here I want to raise questions about whether we should accept Tebbe's—somewhat strong—version of freedom of association. If in the last part I leaned right (defending the claims of religious believers), in this part I lean left (defending egalitarianism). But the goal is the same: to show that these abstract principles will be

<sup>28</sup> See generally PAUL HOROWITZ, *FIRST AMENDMENT INSTITUTIONS* (2013). For my own take on religious institutionalism, see generally Chad Flanders, *Religious Organizations and the Analogy to Political Parties*, in *THE RISE OF CORPORATE RELIGIOUS LIBERTY* 103 (Micah Schwartzman, Chad Flanders & Zoë Robinson eds., 2016).

<sup>29</sup> TEBBE, *supra* note 4, at 81.

interpreted in very different ways, depending on what considerations we feel are the most important, and where we may (and in fact do) deeply disagree.

Start with the easy point that the three categories that Tebbe identifies—intimate associations, community groups, and values organizations—cannot be put into firm categories and can tend to blur into one another.<sup>30</sup> So we should see them on a continuum, and I do not think Tebbe would disagree with this (and indeed has elsewhere used the language of seeing the various groups on a “spectrum”). On one end are the intimate associations, which are important, Tebbe says, to identity and on the other end are values organizations, which have their own value as important contributors to public debate; community groups are somewhere in between and share characteristics with both intimate associations and values organizations (this again shows how Tebbe’s distinctions are not set up like silos).<sup>31</sup> As we move from intimate associations to values organizations, the protection decreases, and the public interest increases. The middle group, community groups, are important sites of “social capital” and also influence citizens’ “ideas and impulses.”<sup>32</sup>

Let me focus on an example of an association: a private golf and tennis club. Here we have, arguably, a place of somewhat intimate association, where not only are friendships made, but also business deals are struck, and where the conversations can run the gamut from frivolous to deeply serious. So we should keep this community group relatively free from government intervention, right? Well, maybe. It may depend on how large it is, how exclusive it is and how bureaucratic it is.<sup>33</sup> The “immunity,” as Tebbe says, for these community groups is only presumptive.<sup>34</sup> But why should my golf and tennis club enjoy this presumptive immunity? Suppose it wants to limit its membership to women only. Why not force it to integrate no matter how small it is? After all, there may even be benefits to forced integration of this sort—why assume the only positives are on the side of group

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 83.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 84.

<sup>34</sup> *Id.*

exclusivity? I do not see much willful formation or civic solidarity present, at least of the kind we might want. Nor do these groups really enrich public debate at all.

And why not double down on equality? Is it impossible to imagine non-crazy, plausible restrictions on even intimate association? Maybe we want to say everyone has to send their kids to public schools and there is no right of privacy to allow parents to avoid a public, more-or-less secular, education (there was a big to-do about this a while ago).<sup>35</sup> Why cannot equality go at least this far, not to abolish the family but simply to make children go to public schools so that they can avoid harmful ideas about gender norms, for example? Does this interfere with the right of intimate association, or make it impermissible? “*But what about equality?*”, I want to say.

Suppose I do say that: what is the response that the coherentist gives, that she does not share the intuition that the right of intimate association requires the right of parents to choose where and how to education their children? That seems a thin reed indeed. Or maybe we discuss the *good* of intimate association. This is where I would go—but how are we able to weigh that good against the good of equality (because surely it is a good)? In the later chapters of Tebbe’s book, equality almost always seems to win; I just wonder if the liberal egalitarian will wonder here, in this early chapter, why equality shouldn’t win too. Or maybe the liberal egalitarian will say: intimate association is fine, but I draw the line at children. There are places in the chapter regarding freedom of employment where Tebbe almost, but not quite, reaches this conclusion. He does show some sympathy with Seana Shiffrin’s argument that children have a distinct interest in developing “independence of mind.”<sup>36</sup>

Again, though, my overarching point remains: how is the method coherence supposed to settle these sorts of debates, and find the right answer? If we are uncertain that it can, then we might be tempted to look to another, perhaps more promising route—not a route toward an answer, but something less: a route

<sup>35</sup> See Marc DiGirolami, *Chemerinsky Urges Compulsory Public Schooling and the Elimination (and Unconstitutionality?) of Private Schooling*, MIRROR OF JUST. (Jan. 6, 2013) <http://mirrorofjustice.blogspot.com/mirrorofjustice/2013/01/chemerinsky-urges-compulsory-public-schooling-and-the-elimination-and-unconstitutionality-of-private.html>.

<sup>36</sup> TEBBE, *supra* note 4, at 160.

to a feasible *compromise*. I explore this option in the next, and final, part of my paper.

#### IV. EMPLOYMENT DISCRIMINATION

There is a line, a few pages into the chapter on employment discrimination, which I feel Tebbe's position is a little too hard on pragmatism, and on its cousin, compromise. It comes, fittingly, in a discussion on the Utah Compromise on gay rights and religious organizations. Tebbe writes that the Utah compromise "can be supported on pragmatic grounds, as a kind of *modus vivendi*, but it sits uncomfortably with mediating principles that account for our judgments in civil rights law."<sup>37</sup> Later on in the book, those judgments on civil rights law come through clearly and end up winning much of the time. But even in this passage, Tebbe concludes that the exemption offered by the Utah compromise is uncomfortable and "too broad" and that it creates "dissonance," which is presumably a very bad thing for an approach that prizes and indeed makes as the basis for justification "coherence."<sup>38</sup>

But there are virtues to compromise, and I want to rehearse them now and, to a great extent, endorse them. Of course, the problem with compromises is obvious: compromises will always be open to the objection that they are not principled, or better yet, that they do not fit either side's principles very well. No one gets exactly what they want, and so neither side is fully happy. At the same time, neither side is fully unhappy. That is the benefit of compromise. We each get some of what we want, so no one goes away completely unsatisfied. So while we sacrifice the best case scenario, we avoid the worst case.

Compromises can also buy us time. Compromises are not for all time, they do not end things, as a principled conclusion might. (If we got the right principles, why should we change; indeed, why should we want to budge at all?) Buying time may mean that things on the ground change. It may give institutions time to have discussions on the inside, and they may come to evolve in a way that the tension disappears between religious

<sup>37</sup> *Id.* at 151-52.

<sup>38</sup> *Id.* at 151.

belief and civic equality.<sup>39</sup> Or some institutions may stick to their guns, but they may decide to retrench, that is, they may decide that it is not worth fighting all the time to be both, say, an institution with public functions like a school or a hospital, and that they should just stand down and become a church—a purely religious organization. Both things are good news for progressives—but they require that progressives not go for the win right away; it requires that they wait. Compromise, on my view, gives both sides at least a structure to hope for and maybe pursue social change. Social change might not happen, of course—and it may even be the case that progressives themselves will be the ones that change, and appreciate the position of the believers who *do not* want to change. Compromise does not give us unity, but it does give us civil peace, and this is no small thing. Moreover, in giving *something* to each side, compromise may prevent a backlash: the side that gets some of what it wants, now, may forestall the possibility that when the side that seems to be losing *wins* and gets more power, it will turn back the clock.

So much for my defense of compromise. I think compromise is an option Tebbe does not explore fully or fully enough to my liking. For what happens if one side or the other rejects the principle that the other side sees as necessary for any kind of coherence? We get a war, or proxy wars, or one side may simply lose—not because it died out naturally or because it decided to become something else, but because *the other side won*. I think we should only accept this if we think that coherence can only be had by one set of principles and not the other, and that it is fairly obvious that this is the case. But I think it is fairly obvious that this *is not* the case, and both sides can be reasoned, and coherent.

Take some things that Tebbe says in the chapters on association and employment discrimination that people might, on principled grounds, reject. First, might they not reject that what Tebbe calls value organizations—large bureaucratic structures, such as national religious organizations—exist for something more than just to contribute to pluralism and a diverse debate? Tebbe (as I pointed out in the previous Part) gives a functional

<sup>39</sup> See generally Chad Flanders, Accommodation and Compromise: Turning Hard Cases into Easier Ones (Oct. 22, 2016) (unpublished manuscript) (on file with author) (expanding on the possibility that buying time through compromises can lead to the departure of tension between religious belief and civic equality).

account of the rights of religious organizations and of associations generally; I am in broad sympathy with this approach, and have argued for a version of it myself. But Tebbe I think is too narrow in his understanding of what goods are out there for those groups to realize. He seems to limit their role to that of being expressive associations.

There is another thing that these groups do, however. I take it that it is not crazy to think the *promotion of religious belief itself* may be a good. In fact, far from thinking this is not crazy, I tend to think that religion is itself a unique human good, and that religious organization insofar as they are good at protecting and promoting this good, deserve an extra kind of associational freedom. It is not just because religious organizations being out there make for a type of diversity; they may do this as well, but maybe they do not. Religious organizations may, at many points, simply reproduce the positions of other secular groups and may even do that pretty poorly. But religious organizations may also, on top of this, simply promote *religion as such*. I certainly hope that they would do this, and that they also should do this, and the associational protection that we give to them reflects the fact that we *want* them to do this. The religious believer then will (perhaps) give greater protection to religious organizations than Tebbe will, and for this reason, viz., that religion is a good thing—and why is not this *also* a coherent thing to believe? It is just that the religious believer finds his coherence by emphasizing the uniqueness and importance of religion<sup>40</sup> over the importance of diverse public debate.

More deeply still, most religious organizations—however large—can seem to be rather *intimate*. Many people who belong even to large churches see those as *essential* to identity formation and their sense of themselves as persons. And spiritual relationships may work differently than intimate ones, or rather, they can be intimate in different ways. Many, most, Catholics have never met the Pope or maybe even their parish priest. But they do in some sense have a very personal, very intimate relationship with them—or at least they could, or they could *think* they do (and maybe in this case thinking there is a relationship is not too far from actually having a relationship). They may view

<sup>40</sup> On this, recall the defense of the value of religion with which I began this essay.

fellow Catholics as family, and as the church—even not their local church—as a sort of home. When they travel, they can find a haven in a church of their denomination, and know (somehow) that they are among friends. The church can be a large, bureaucratic institution, but it can also and at the same time be intimate. This may be yet another way—the religious believer could conclude—in which religion is special and how religion frustrates easy efforts to categorize it, its institutions, and the corresponding protection we should give to them.

Second, we should consider the case of Flint Dollar.<sup>41</sup> I believe Tebbe sees his case as an easy or even straightforward one, that he was simply a music teacher who should not have been fired for posting on Facebook that he had become engaged to his same-sex partner. But is it unprincipled, does it show a lack of coherence, to say that in religious schools *even music teachers* are engaged in a sort of ministry, and that therefore they have to set an example—in word and in deed—for the students? Bracket even for a second whether music is an important part of the spiritual mission of the school, so that the music teacher is a kind of minister. That idea seems plausible to me, at least as plausible as the argument that a church organist is not merely a musician but an active religious presence in a church service.<sup>42</sup> I think that a religious school could emphasize that *every teacher* is supposed to be living the mission of the church and that this trumps any equality principle that may be implicated. Now, I want to ask: why is there not at least as much plausible coherence in *this* position, as there is in Tebbe's? Where does the religious believer go wrong, so that her position is not just different than Tebbe's, but also in some sense dissonant, not just with Tebbe's beliefs *but with her own*? The religious believer will simply say that she draws the line on equality at the church door, and with the role of the teacher as role model and example. Do not get me wrong. I do not like the firing of Flint Dollar, I will say that much.<sup>43</sup> But I do

<sup>41</sup> TEBBE, *supra* note 4, at 142, 157.

<sup>42</sup> See *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1041 (7th Cir. 2006) (holding that the music director of a church acted in a “ministerial” role), *abrogated on other grounds* by *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012).

<sup>43</sup> What I want—and what Tebbe may want—is a world in which an institution can be *both* religious *and* egalitarian, where liberal values find a place within religion and are not always pitted against it. Such a vision is present in JOHN DEWEY, *A COMMON FAITH* 80 (2d ed. 2013), which I have always thought was an underrated book. But the book did not

not want to say that those who support it are somehow incoherent, and that at pains of being incoherent, they have to give up their position about religious school autonomy.

Which is what gets me back to compromise. What I see in many of these religious debates, or conscience wars, as some have named them, is two deeply divided sides, with viable reasons on both of those sides. We could plausibly argue each side. I want to put off the day where we have to say *one side simply has to win*. If compromises can put off that day, then I say that is a vote in favor of compromise. Sometimes respect means stopping short of getting everything we want, which may bring us closer to the day when not just one side wins, but everybody does.

describe our world when it was written, nor does it describe our world now. The question then, is what to do in the meantime, before religion and liberalism *do* become a common faith? My argument in the text is that compromise may both the best we can do, and the best means of progress to the hopeful vision Dewey laid out.