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AGAINST LGBT EXCEPTIONALISM IN RELIGIOUS EXEMPTIONS FROM ANTIDISCRIMINATION OBLIGATIONS

CARLOS A. BALL*

Nelson Tebbe's *Religious Freedom in an Egalitarian Age* is a wonderful book.¹ At a time when our country seems so polarized on so many social issues, it is a breath of fresh air to read a book that so thoughtfully grapples with the question of how best to protect religious freedom in our current age of equality. Whether or not one agrees with Tebbe on methodological, policy, or normative questions, it is clear that he takes *both* religious freedom and egalitarian values seriously. Many of us in the legal academy who write on these issues tend to be on one side or the other of that divide, but Tebbe straddles the line, and he does so beautifully and effectively in this book. Not only does he take the arguments of both sides seriously, but even more importantly, I think both sides have until now taken Tebbe's scholarship on the intersection of religious freedom and egalitarian values seriously, and that will only deepen with the publication of this book.² This is a major contribution to the literature that will be discussed and analyzed for years to come.

There are many specific aspects of the book that merit praise. For example, Tebbe deserves credit for grappling extensively with the question of third-party harms. As Tebbe

*Distinguished Professor of Law and Judge Frederick Lacey Scholar, Rutgers Law School. I elaborate on several of the points that I make in this essay in CARLOS A. BALL, *THE FIRST AMENDMENT AND LGBT EQUALITY: A CONTENTIOUS HISTORY* (2017).

¹ NELSON TEBBE, *RELIGIOUS FREEDOM IN AN EGALITARIAN AGE* (2017).

² See generally Nelson Tebbe, *Religion and Social Coherencism*, 91 NOTRE DAME L. REV. 363 (2015) (noting examples of Tebbe's earlier scholarship on the intersection of religious freedom and egalitarian values); Paul Horwitz & Nelson Tebbe, *Religious Institutionalism—Why Now?*, in *THE RISE OF CORPORATE RELIGIOUS LIBERTY* 207 (Micah Schwartzman et al. eds., 2016); Nelson Tebbe, *Religious Accommodation in the Age of Civil Rights: Religion and Marriage Equality Statutes*, 9 HARV. L. & POL'Y REV. 25 (2015).

explains, the avoidance of significant third-party harms must be an essential component of determining the proper scope of religious exemptions, whether constitutionally mandated or legislatively determined, in order to make sure that the government is not in a position of imposing significant costs on some resulting from the religious exercise by others.³ The question of third-party harms arising from religious exemptions has not traditionally received much attention from either courts or commentators, in part because many of the exemptions at issue in the past, such as those involving the smoking of peyote for religious reasons (e.g., *Employment Division v. Smith*)⁴ or waivers from compulsory education requirements (e.g., *Wisconsin v. Yoder*),⁵ did not impose significant harms on identifiable third parties. The same cannot be said, as Tebbe persuasively argues, about the exemption at issue in *Burwell v. Hobby Lobby, Inc.*⁶ The fact that the Supreme Court in *Hobby Lobby* interpreted the Religious Freedom Restoration Act to require that a contraception exemption be granted to closely-held corporations controlled by religious owners made it significantly more difficult for large numbers of women (composed of the corporations' female employees and the female dependents of employees) to have access to contraceptives in the months following the ruling.⁷ This makes the exemption at issue in *Hobby Lobby* much more problematic than the exemptions at issue in *Smith* and *Yoder*. I agree with Tebbe that it is essential to keep questions of third-party harms in mind when considering the proper scope of religious exemptions from LGBT antidiscrimination laws.⁸

³ TEBBE, *supra* note 1, at 52-54.

⁴ *Emp't Div. v. Smith*, 494 U.S. 872, 890 (1990) (holding that denying unemployment compensation to persons who had used peyote for sacramental purposes did not violate the Free Exercise Clause).

⁵ *Wisconsin v. Yoder*, 406 U.S. 205, 234 (1972) (holding that Wisconsin's compulsory school-attendance laws unduly burdened the Free Exercise Clause rights of Amish parents).

⁶ 134 S. Ct. 2751 (2014).

⁷ TEBBE, *supra* note 1, at 51.

⁸ I discuss the issue of third-party harms and religious exemptions in CARLOS A. BALL, *THE FIRST AMENDMENT AND LGBT EQUALITY: A CONTENTIOUS HISTORY* 266-70 (2017) and Carlos A. Ball, *Sexuality, Third-Party Harms, and the "Live-and-Let-Live" Approach to Religious Exemptions*, *LAW, CULTURE & HUMANITIES*, Aug. 24, 2015, at 1. For other writings on the question of third-party harms and religious exemptions, see, e.g., Frederick Mark Gedicks & Rebecca G. Van Tassel, *RFRA Exemptions from the*

Tebbe's treatment of the crucial third-party harm question is just one of the many ways in which he rigorously and thoughtfully grapples with the intersection of equality and religious freedom in the book.

Traditionally, participants in book symposia such as this one praise first and criticize second. The latter part of this equation is challenging for me because I essentially agree with much of what Tebbe has to say in the book. However, I want to make an overarching observation about the book, related to the relative importance of historically-based judgments in Tebbe's project. I also want to suggest that, given his methodological approach in the book, Tebbe is too quick to dismiss the analogy between racial discrimination and sexual orientation discrimination in the context of religious exemptions.⁹

I am struck by the crucial—I could even say *determinative*—role that past resolutions of conflicts involving religious exemptions play in Tebbe's approach to resolving current controversies involving religious liberty on the one hand and LGBT rights and reproductive freedom on the other. Tebbe's social coherence approach follows a two-part process in seeking to resolve the contemporary controversies at issue. First, it analogizes from concrete, past controversies.¹⁰ Second, it abstracts normative principles from past cases.¹¹ Either way, under the social coherence approach that Tebbe defends in the book, participants in the debates, as he puts it, "are likely to rely on commitments that they have come to trust."¹²

Contraception Mandate: An Unconstitutional Accommodation of Religion, 49 HARV. C.R.-C.L. L. REV. 343, 363-68 (2014); Frederick Mark Gedicks & Andrew Koppelman, *Invisible Women: Why an Exemption for Hobby Lobby Would Violate the Establishment Clause*, 67 VAND. L. REV. EN BANC 51, 52-56 (2014); Christopher C. Lund, *Religious Exemptions, Third-Party Harms, and the Establishment Clause*, 91 NOTRE DAME L. REV. 1375, 1377-80 (2016).

⁹ TEBBE, *supra* note 1, at 131 (suggesting that when considering how to exempt religious individuals from LGBT antidiscrimination laws in the context of marriage equality, "it might be best to put the race analogy aside").

¹⁰ *Id.* at 8 (explaining that the social coherence method calls for comparing "a new scenario . . . to familiar situations and to conclusions they have drawn about them after careful consideration").

¹¹ *Id.* at 8-9 (explaining that the social coherence method also relies on "principles, meaning tenets . . . abstracted from particular cases [that are then applied] to the new situation").

¹² *Id.* at 9.

In my estimation, Tebbe is correct that contested legal and policy questions arising from the intersection of religious freedom and equality principles demand difficult normative work. But, after reading the book, I am not sure he realizes the extent to which his social coherence approach is historically driven. Whether through analogies from concrete, *past* cases or by abstracting normative principles from *past* cases, Tebbe is essentially looking at how the country has, *in the past*, accommodated religious freedom in the pursuit of other objectives to guide us through current religious liberty controversies involving LGBT rights and reproductive freedom.

I think Tebbe does a wonderful job in abstracting compelling and normatively defensible principles from the nation's past experiences with religious exemptions, including the importance of avoiding significant third-party harms. At its core, I understand Tebbe's project to be one of historically-grounded judgments, many of which are imbued with normative principles. It seems clear from the book that Tebbe thinks his project is more normative than historical.¹³ But I think the project's normativity is inextricably linked to its historical methodology.

It is easy to overlook (or forget)—as our society grapples, in particular, with contemporary controversies pitting LGBT equality against the rights of speech, association, and to the free exercise of religion of those who oppose that equality—that our nation through the decades has repeatedly dealt with difficult questions related to how best to balance the equality rights of some against the liberty interests of others. Indeed, the contemporary disputes over the proper scope of the state's authority to promote LGBT equality in the face of liberty-based objections are only the latest iterations of a continuing debate in American law and policy over the reach of antidiscrimination laws.

In my view, a policy setting approach in this area that looks to history for guidance is the correct one, which is essentially why I agree with much of what Tebbe has to say in

¹³ See *id.* at 8-9 (describing the social coherence approach as calling for the reaching of judgments and the application of principles).

the book. In contrast, it seems to me that behind the call for expansive religious exemptions in the context of LGBT equality that go beyond the scope of past religious accommodations is the notion of “same-sex marriage exceptionalism,” that is the contention that marriage equality presents us with novel questions about the intersection of religious freedom and the scope of antidiscrimination laws that demand *new* forms of religious exemptions from the application of antidiscrimination laws—such as, for example, immunity from the application of antidiscrimination laws benefitting for-profit corporations and government employees.

I believe we should reject the notion of LGBT rights exceptionalism, including that which is applicable to marriage equality issues. It is true that the particulars of the contemporary debates over the intersection of LGBT rights and liberty claims are relatively new; the tension between equality and liberty in the context of LGBT rights could not arise when there were no legal protections for sexual minorities. Sexual orientation antidiscrimination laws are of relatively recent vintage, and therefore the conflict between religious liberty and LGBT equality is also of relatively recent vintage. But even if the particulars are relatively new, the broader question of how to enforce antidiscrimination laws while accommodating liberty-based interests is an old and recurring one in American history. Our country has grappled with the liberty-based limits to the application of antidiscrimination laws at many different times, including during the adoption of the Civil Rights Act of 1875;¹⁴ during the enactment of the Civil Rights Act of 1964;¹⁵ during the controversy, in the early 1980s, involving the question of whether particular religious educational institutions were entitled to tax breaks despite their race-based policies;¹⁶ during the 1980s and 1990s, as the courts grappled with the application of gender antidiscrimination laws to all-male organizations;¹⁷

¹⁴ See BALL, *supra* note 8, at 156-60.

¹⁵ See *id.* at 169-171, 173-74, 179.

¹⁶ See *Bob Jones Univ. v. United States*, 461 U.S. 574, 579 (1983).

¹⁷ See, e.g., *N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1, 4 (1988); *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 539 (1987); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 612 (1984).

and during the last forty years as the courts have developed and implemented the constitutionally-based ministerial exception to antidiscrimination laws.¹⁸

Given the country's extensive experience grappling with the proper contours of liberty-based limits—including those grounded in religious freedom—to the application of antidiscrimination laws, there is no need, in my view, for new and expansive accommodations that depart significantly from the ways in which the nation has in the past accommodated liberty considerations while seeking to attain equality objectives in the context of race and gender.

I recognize that there is a certain irony in the fact that an LGBT egalitarian such as myself is calling for the use of history as a guide for the resolution of current LGBT controversies given that it has been LGBT rights *opponents*, of course, who have repeatedly relied on historical traditions and practices to deny LGBT equality claims, including those related to marriage. But *that* history has been one of male and heterosexual privilege and exclusion. That is a history, in other words, that is morally suspect.

But the history of how American antidiscrimination law has sought to accommodate religious liberty is *not* normatively suspect. In fact, I think our country has reached time-tested, reasonable, and workable compromises arising from the intersection of race and gender equality, on the one hand, and religious freedom, on the other hand; generally speaking, how the nation's laws have accommodated religious freedom in the pursuit of racial and gender equality has worked well for all sides.

Well-established exemptions, such as the ministerial exemption and the religious exemptions to Title VII of the Civil Rights Act of 1964, have provided important protections to religious groups by allowing them, in some contexts, to pursue their spiritual missions without having to abide by

¹⁸ See, e.g., *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 176-77 (2012); *Starkman v. Evans*, 198 F.3d 173, 175 (5th Cir. 1999); *McClure v. Salvation Army*, 460 F.2d 553, 560-61 (5th Cir. 1972).

antidiscrimination obligations applicable to other entities.¹⁹ At the same time, the well-established religious exemptions have not interfered, to any significant degree, with the ability of antidiscrimination laws to achieve their objectives. The ways in which our country, through the decades, has balanced the pursuit of equality for marginalized groups against the religious freedom rights of equality opponents constitute time-tested, reasonable, and workable compromises that we should use as guides in addressing contemporary disputes arising from the tension between the attainment of LGBT equality and the protection of religious freedom.

At the end of the day, there is no good reason, in the context of LGBT issues, to depart in significant ways from how anti-discrimination law has in the past accommodated religious dissenters in the context of race and gender. I am therefore not so quick, as Tebbe does in his book, to put the race analogy aside in grappling with the question of how broad religious exemptions should be in the area of sexual orientation equality.²⁰

Supporters of expansive religious exemptions in the context of LGBT rights often take offense when egalitarians argue that religious exemptions in the context of sexual orientation should not be significantly broader than those in the context of race—race is different, they insist, because essentially all religious actors who believe it is proper to make racial distinctions always act in bad faith (i.e., they are racists).²¹ On

¹⁹ For the Supreme Court's elucidation of the ministerial exception, see *Hosanna-Tabor*, 565 U.S. at 188-89. The religious exemptions to Title VII are found in 42 U.S.C. § 2000e-1(a) ("This title shall not apply to . . . a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.") and in 42 U.S.C. § 2000e-2(e)(2) ("[I]t shall not be an unlawful employment practice for a school, college, university, or other educational institution . . . to hire and employ employees of a particular religion if such . . . institution . . . is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society . . .").

²⁰ See *TEBBE*, *supra* note 1, at 131.

²¹ For example, Thomas Berg argues that those who, in earlier times, dissented on religious grounds "from basic racial equality . . . showed an intransigence that bespoke a permanent dismissal of African-Americans as full humans." Thomas C. Berg, *What Same-Sex-Marriage and Religious-Liberty Claims Have in Common*, 5 NW. J.L. & SOC. POL'Y 206, 235 (2010).

the other hand, it is argued, many of those who, on conscience grounds, believe it is proper to make distinctions on the basis of sexual orientation, in particular when it comes to marriage, act in good faith (i.e., they are not homophobic).²² Another variation of this argument is that while reasonable people can still disagree on the appropriateness of same-sex marriage bans, no reasonable person can disagree on the appropriateness of anti-miscegenation laws. This is essentially Kent Greenawalt's argument for treating religious exemptions differently in the context of the legal recognition of interracial marriages than similar exemptions in the context of same-sex marriages, a contention that Tebbe notes in his book.²³

The problem with these efforts to distinguish between religious dissent from LGBT equality and religious dissent from racial equality is that they contain unavoidable assessments of the reasonableness of the two sets of religious views. It seems to me that efforts to distinguish religious-based objections to LGBT equality from religious-based objections to race equality—in

²² It is argued that religious dissenters from marriage equality act in good faith because “[t]here is a serious debate about the relationship of sexuality and procreation to marriage, and about the relevance of the ‘centuries of tradition—of accumulated social knowledge—which the world’s great religions embody’ and which almost uniformly has treated marriage as a relationship between a man and a woman.” *Id.* (quoting JONATHAN RAUCH, *GAY MARRIAGE: WHY IT IS GOOD FOR GAYS, GOOD FOR STRAIGHTS, AND GOOD FOR AMERICA* 165 (2004)). For her part, Robin Fretwell Wilson claims that

[w]hile the parallels between racial discrimination and discrimination on the basis of sexual orientation should not be dismissed, it is not clear that the two are equivalent in this context. The religious and moral convictions that motivate objectors to refuse to facilitate same-sex marriage simply cannot be marshaled to justify racial discrimination.

Robin Fretwell Wilson, *Matters of Conscience: Lessons for Same-Sex Marriage from the Healthcare Context*, in *SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS* 77, 101 (Douglas Laycock, Anthony R. Picarello, Jr. & Robin Fretwell Wilson eds., 2008). It is also contended that “[s]ometimes the[] refusals of service [to LGBT people] may be an act of bigotry or social protest, but very often, the claim to feel personal moral responsibility, or even fear of divine punishment, will be in complete good faith.” Douglas Laycock, *Afterword*, in *SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS* 189, 195 (Douglas Laycock, Anthony R. Picarello, Jr. & Robin Fretwell Wilson eds., 2008).

²³ TEBBE, *supra* note 1, at 131. See Kent Greenawalt, *Religious Toleration and Claims of Conscience*, 28 *J.L. & POL.* 91, 114 (2013) (arguing that, unlike with interracial marriage bans, there is still no consensus on the unreasonableness of same-sex marriage bans, and that therefore “it will take some time before that perspective is shared by the vast majority of citizens and is no longer a subject on which people are seriously divided. [As a result], some accommodation may properly be given in the meantime for those not yet able to perceive the moral truth of the matter”).

order to justify broader religious exemptions in the sexuality context—fail from the beginning because they are grounded in the notion that some religious views are more reasonable than others. Even if exemption proponents are correct in their belief that many religious opponents of LGBT equality act in good faith, it is extremely problematic to set policies, including religious exemptions from generally applicable laws, on ostensible distinctions between reasonable and unreasonable religious views.²⁴

Indeed, it is difficult for outsiders to determine the degree of good faith with which individuals assert religious claims. Such a determination usually requires intrusive inquiries into the nature of and justifications for particular religious values, inquiries made even more problematic by the fact that religious beliefs are by their nature grounded in considerations of faith rather than in those of reason. As a result, courts are appropriately hesitant to scrutinize either the sincerity of religious litigants or the reasonableness of their views.²⁵

In short, unlike Tebbe, I do not think we should put the race analogy aside when determining the proper scope of religious exemptions from LGBT equality measures. Instead, the burden should be on those who want to treat LGBT equality differently from racial (or gender) equality when it comes to religious exemptions to explain why that differential treatment is justified, and claims based on the good faith of those who object

²⁴ See generally Carlos A. Ball, *Bigotry and Same-Sex Marriage*, 84 UMKC L. REV. 639 (2016) (where I further explore questions related to good faith and bigotry in same-sex marriage debates).

²⁵ For example, although the Supreme Court in *Bob Jones University* rejected the university's contention that its religious-based understandings of racial equality precluded the government from withdrawing tax benefits because of the institution's race-based policies, it accepted the proposition that the university had "a genuine belief that the Bible forbids interracial dating and marriage." *Bob Jones Univ. v. United States*, 461 U.S. 574, 602 n.28 (1983); see also *United States v. Ballard*, 322 U.S. 78, 87 (1944) ("The religious views espoused by respondents might seem incredible, if not preposterous, to most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake that task, they enter a forbidden domain."). As Ira Lupu notes, "the inquiry into sincerity cannot completely escape the distinctly bad aroma of an inquisition. The decisionmaker can rarely be morally certain that the claimant is not sincere in his professed religious commitments." Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 954 (1989).

to the application of LGBT equality mandates on religious grounds simply do not cut it.

It bears emphasizing that to argue in favor of treating religious exemptions from sexual orientation antidiscrimination obligations in generally similar ways as our country's laws have treated religious exemptions in the context of race and gender antidiscrimination obligations is not to argue in favor of absolutist egalitarian positions in these matters. As demonstrated by our nation's historical treatment of religious liberty as it impacts the pursuit of racial and gender equality, the question is not whether exemptions should be provided; instead, the question is the extent of their scope.

In reviewing that history elsewhere, I have identified five characteristics of the ways in which American antidiscrimination law, before the advent of same-sex marriage, sought to accommodate religious dissent while pursuing equality objectives.

First, the exemptions have granted religious organizations some accommodations from antidiscrimination obligations that go beyond what is constitutionally required. Second, the exemptions have generally distinguished between the discretion of religious organizations to make distinctions on the basis of religion and their ability to take other protected traits, such as race and gender, into account. Third, the exemptions have applied to a broad category of religious organizations, not just to houses of worship. Fourth, the exemptions have been limited to nonprofit religious organizations [and thus have not been made available to for-profit entities]. Finally, the exemptions have not allowed government officials to decide which members of the public to serve based on the officials' religious views.²⁶

Policymakers and citizens, in assessing contemporary controversies over the state's authority to promote LGBT equality, should look to these traditional ways in which American antidiscrimination law has sought to balance equality and religious freedom.²⁷ It is true, of course, that the mere fact that American antidiscrimination law has traditionally granted

²⁶ BALL, *supra* note 8, at 251.

²⁷ *See id.* at 263.

religious accommodations that go beyond what is constitutionally required; distinguished between the ability to hire coreligionists and the discretion to take other protected traits into account; allowed a broad category of religious organizations to benefit from exemptions and not just houses of worship; limited the beneficiaries of those accommodations to nonprofit entities; and refused to exempt religious government employees from antidiscrimination obligations does not conclusively establish, as a normative matter, that the same should apply to religious exemptions from antidiscrimination laws in all circumstances, including those involving sexual minorities.²⁸ Nevertheless, these time-tested characteristics of exemptions from antidiscrimination obligations create a strong presumption that they should be followed in determining the scope of exemptions in matters related to LGBT rights.

This means that if a proponent of LGBT equality contends that religious exemptions from sexual orientation antidiscrimination laws should be *narrower* than the exemptions that legislatures have granted religious dissenters in the past in matters related to race and gender—for example, by not extending exemptions beyond those that are constitutionally required or by limiting the beneficiaries of those exemptions to houses of worship, to the exclusion of other types of religious organizations—the proponent should have the burden of showing why LGBT equality should be treated differently from other forms of equality.²⁹

Similarly, if an opponent of LGBT equality contends that religious exemptions from sexual orientation antidiscrimination laws should be *broader* than the exemptions that legislatures have granted religious dissenters in the past in matters related to race and gender—for example, by making religious exemptions available to for-profit entities or to government employees—the burden should be on the opponent to show why LGBT equality should be treated differently from other forms of equality.³⁰ As Alan Brownstein aptly puts it, “the contention that religious

²⁸ See *id.* at 263-64.

²⁹ See *id.* at 264.

³⁰ See *id.*

objectors to same-sex marriage must receive special accommodations beyond those that would be provided to others in comparable circumstances raises questions about preferentialism and equity that need to be addressed and resolved.”³¹ In short, if there is going to be LGBT rights exceptionalism when it comes to the scope of religious exemptions from antidiscrimination laws, the burden should be on proponents of that exceptionalism to establish why it is required.³²

The clash between equality and liberty is a recurring issue in the history of American antidiscrimination law, rendering the ongoing debates over the intersection of LGBT equality and religious freedom neither exceptional nor surprising. The nation’s history shows that it has been possible in the past to reach workable compromises between the pursuit of equality for marginalized groups and the protection of important liberty interests enjoyed by opponents of that equality.

Any such compromise, whether legislatively crafted (as in Title VII) or judicially mandated (as in the ministerial exception), can be criticized for being too narrow or too broad. Nonetheless, the generally reasonable compromises that legislatures and courts have implemented in this area have had two distinct benefits. First, they have helped to calm the waters, so to speak, by reducing the social and political conflict that accompanies the initial, and seemingly inevitable, clash between equality and liberty in the application of American antidiscrimination law. Second, most of the compromises have provided important protections to religious organizations without significantly interfering with the government’s efforts to eradicate racial and gender discrimination.³³ This historical record provides grounds for optimism that the nation will be able to reach reasonable and workable compromises on how best to balance equality and liberty in the context of LGBT rights that, although not

³¹ Alan Brownstein, *Gays, Jews, and Other Strangers in a Strange Land: The Case for Reciprocal Accommodations of Religious Liberty and the Right of Same-Sex Couples to Marry*, 45 U.S.F. L. REV. 389, 410 (2010).

³² See BALL, *supra* note 8, at 264.

³³ See *id.* at 178-80 (discussing the compromise that led to the final language of Title VII of the Civil Rights Act of 1964).

satisfying the concerns of advocates on all sides, end up being generally accepted as fair and appropriate.

I agree with Chad Flanders when he emphasizes, in his contribution to this symposium, the normative and pragmatic importance of compromise in this area of law and policy.³⁴ Of course, to emphasize the importance of compromise is not to endorse the merits of any particular compromise. However, I agree that, as a general matter, participants on both sides of contemporary debates over the extent to which considerations of religious liberty should limit the scope of LGBT equality measures would be well served by engaging in those debates in the spirit of compromise.

At the same time, the determination of which compromises are ultimately unacceptable to each side because they violate first principles requires unavoidable reliance on normative assessments and judgments. Tebbe is therefore undoubtedly correct that the resolution of difficult normative questions is an indispensable component of determining how to resolve ongoing controversies implicating the intersection of religious freedom and egalitarian values. At the same time, as Tebbe's methodology also shows, the question of what constitute reasonable resolutions to contemporary clashes between religious liberty and the pursuit of egalitarian objectives can and should be guided by defensible normative principles that emerge from how our country has attempted to resolve those clashes in the past. In other words, there is no need to reinvent the exemption wheel. The bottom line is this: we should be suspicious of the contention that the push for LGBT rights, in particular as it relates to marriage equality, constitutes a unique threat to religious liberty that requires significant departures from the ways in which American antidiscrimination law has accommodated religious liberty in the past.

³⁴ Chad Flanders, *In (Partial) Praise of (Some) Compromise: Comments on Tebbe*, __ J. C.R. & ECON. DEV. (forthcoming 2017) (manuscript at 2, 13-15) (on file with the Journal of Civil Rights and Economic Development).