2018

Reasoning through Clashes between Religion and Equality: Case Law, Skeptics, and Social Coherence Book Reviews

Michael A. Helfand

REASONING THROUGH CLASHES BETWEEN RELIGION AND EQUALITY: CASE LAW, SKEPTICS, AND SOCIAL COHERENCE

RELIGIOUS FREEDOM IN EGALITARIAN AGE. Nelson Tebbe.[1] Cambridge, Mass.: Harvard University Press, 2017. Pp. x + 288. $39.95 (Hardcover).

Michael A. Helfand[2]

I. INTRODUCTION

One of the few widely shared views regarding contemporary clashes between law and religion is that we are in a state of "deep contestation,"[3] as increasing degrees of social, political and legal polarization have become the norm.[4] Concern over this increasingly deep social division and political polarization has been particularly salient of late. Thus, the admixture of the constitutional recognition of same-sex marriage,[5] litigation surrounding the Affordable Care Act's "contraception mandate,"[6] and claims for religious accommodation from laws that violate faith commitments has created a highly fraught legal environment. And this has led scholars to worry that disagreements have become so deep that there may not even be a way for those who differ to reason about these matters collectively. In the somewhat depressing words of John Inazu,

1. Professor of Law, Cornell Law School.

2. Associate Professor of Law, Pepperdine University School of Law; Co-Director Diane and Guilford Glazer Institute for Jewish Studies.

3. Paul Horwitz, *The* Hobby Lobby *Moment*, 128 HARV. L. REV. 154 (2014).

4. *See generally* Thomas C. Berg, *Religious Accommodation and the Welfare State*, 38 HARV. J.L. & GENDER 103 (2015); Andrew Koppelman, *Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law*, 88 S. CAL. L. REV. 619 (2015).

5. Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

6. *See, e.g.*, Zubik v. Burwell, 136 S. Ct. 1557 (2016); Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

"These deep and often irresolvable differences call into question our constitutional aspiration for 'a more perfect union,' our national metaphor of a great 'melting pot,' and the promise of our nation's seal, *E pluribus unum* ('Out of many, one')."[7]

Given the state of affairs, it is not surprising to now see scholarly works that not only attempt to resolve conflicts between law and religion, but that also aim to provide a method for how those from deeply divided viewpoints might reason about these conflicts.[8] Nelson Tebbe's recent book, *Religious Freedom in an Egalitarian Age*, is one such work and a masterful one at that. As Tebbe notes at the very outset of his book, "[m]any American[s] sense that they are living through a period of intense conflict between religious freedom and equality law" (p. 1).

The book itself aims to provide a method for reasoning about these deep conflicts, what Tebbe refers to as *social coherence*. Drawing from John Rawls's reflective equilibrium method, Tebbe asks participants to reason about concrete dilemmas between religion and equality, and then compare those resolutions about concrete dilemmas to build a coherent vision for addressing these types of conflicts. Tebbe then engages in this very type of reasoning to address a wide range of conflicts between religion and equality, including clashes over anti-discrimination laws in areas such as public accommodations and employment as well as debates over religious exemptions for public officials and government support of religion and religious institutions.

The book itself is extraordinary in its ambition, erudition, and scope. Tebbe covers vast areas of constitutional law seamlessly, bringing the reader on a rich journey through the multiple spheres of law, politics, and moral reasoning relevant to the topics addressed in his book. This is, in many ways, far from surprising. Tebbe is one of the most talented and highly regarded experts in the law and religion field, and *Religious Freedom in an Egalitarian Age* reflects that expertise. The book is a must-read for all those who are working through questions of religious freedom, equality, and the relationship between church and state. Tebbe's proposals for how the law ought to resolve these tense conflicts reflect his wisdom, knowledge, and ability to identify a

7. JOHN D. INAZU, CONFIDENT PLURALISM: SURVIVING AND THRIVING THROUGH DEEP DIFFERENCE 4 (2016).

8. Indeed, John Inazu's book is one such attempt. *See id.*

"careful approach" that "appreciates the power of arguments on both sides" that "can provide a stable, defensible foundation for the future of both free exercise and anti-discrimination law" (p. 5).

This review aims to assess Tebbe's ultimate success in this ambitious project: that is, has Tebbe provided a useful and successful method for reasoning about these "intense conflicts" between religion and equality? All told, the review identifies some challenges for Tebbe's method. To be sure, no attempt to navigate such conflicts will be immune from criticism and Tebbe's framework has much to commend. The comments below therefore represent some questions for Tebbe's framework and some thoughts on where more discussion might be necessary to shore up the social coherence method as articulated by Tebbe.

II. PLURALISM, SKEPTICISM, AND THE PURPOSE OF SOCIAL COHERENCE

Tebbe begins *Religious Freedom in an Egalitarian Age* with an explanation of the motivation behind the project. Tebbe notes the convergence among law and religion scholars that the doctrine is fundamentally "messy"—that is, legal decisions and choices related to religious freedom flow from a contorted amalgamation of multiple considerations, values, and principles. And these different pieces to the religious freedom present, at least superficially, a broader picture of irrationality and indeterminateness to the doctrine.

In highlighting this convergence, Tebbe draws upon the work of two groups of scholars, groups he terms "pluralists" and "skeptics." He classifies pluralists as those "who embrace the idea that multiple values are needed to account for correct judgments across the entire range of religious freedom cases" (p. 7) and includes such scholars as Kent Greenawalt, Marc DeGirolami, Alan Brownstein, Steven Shiffrin, Paul Horwitz (p. 203 n.17), and, apparently, Tebbe himself.[9] But pluralism, in its use of different values, considerations, and principles, explains Tebbe, has become vulnerable to the growing criticism of skeptics across the

9. This is apparent throughout *Religious Freedom in an Egalitarian Age*, but is also a characterization that Tebbe appears to have previously applied to his prior work. *See* Nelson Tebbe, *Religion and Social Coherentism*, 91 NOTRE DAME L. REV. 363, 365 (2015) (describing some of his previous work as employing a "polyvalent method").

political spectrum. As described by Tebbe, "Skeptics have been arguing not only that the jurisprudence on religious freedom is messy . . . but further that the law is *inherently* or *necessarily* patternless" (p. 5). Tebbe is quick to note that these skeptics do not advocate discarding the prevailing religious freedom enterprise, but instead encourage the law to "muddle through, seeking modus vivendi solutions without any hope of principled results" (p. 6). In this way, Tebbe notes that, ultimately, the proposals of skeptics and pluralists for addressing "ground-level conflict" are quite similar—employing a significant dose of pragmatics and "all-things-considered judgements" (p. 7)—even as they derive from somewhat divergent philosophical underpinnings. But this convergence, according to Tebbe, cannot mask the fundamental challenge of skeptics to pluralists. If a pluralist approach to religious freedom is to truly thrive, it must answer the charge of irrationality. And it is to this project that *Religious Freedom in an Egalitarian Age* is, in large part, dedicated.

Thus, Tebbe dedicates the first section of his book to outlining his methodological approach that is geared to meeting the challenge of skepticism—that is, the inability to systemize religion clause doctrine in any meaningful and principled way. That method, which Tebbe first explored in a previous essay,[10] is *social coherence*. Tebbe describes this first section as "*relatively* independent from the rest" of the book in that the latter sections can be understood independently (p. 13), but it is ultimately essential to appreciating Tebbe's contribution to ongoing religious freedom jurisprudence. On Tebbe's account, the best way to meet the existence of multiple and competing values at stake in religious debates is to employ *social coherence*, which asks us to mine our intuitions about how to navigate these plural commitments in concrete cases and then reason, in a deliberative fashion, from those concrete intuitions so that they increasingly fit together.

Social coherence is thus a method that both utilizes a mode of reasoning that encourages thinking through a prism of coherence and also emphasizes the role of social dynamics in this process of reasoning. Noting his indebtedness to John Rawls's theory of "reflective equilibrium," Tebbe explains that when

10. *Id.*

people encounter new moral questions or dilemmas, "they evaluate their convictions by asking whether they fit together with each other" (p. 26). This process of assessing the fit of a person's various commitments is different than reasoning directly from first principles and then applying them to concrete circumstances. Instead, it requires vacillating between considered judgments about concrete circumstances and general principles, thereby reasoning in a manner that increases the degree of overall coherence to our intuitions. In Tebbe's words, this method can help explicate the overall rationality of pluralist judgments by "[o]scillating among judgments and principles," thereby giving "legal actors a way to reason through problems that are highly intricate" (p. 30). Tebbe sees this approach as particularly useful in clashes between religion and equality, which implicate a wide range of considerations and values. In this way, Tebbe's method is an attempt to rehabilitate a pluralist approach to these legal dilemmas.

Tebbe is careful to note a number of features of a coherence approach to legal dilemmas. The first is that intuitions are meant to reinforce each other; that is, we test our intuitions about concrete cases by considering other similar cases to see if our multiple intuitions paint a coherent picture. In what might be viewed as a blockchain method of reasoning, the more our intuitions fit together, the more confident we can become in our outlook. By contrast, if the pieces of our intuitions fail to fit, it requires evaluating them in light of each other.

A second important element of Tebbe's theory is that a coherence method will only generate outcomes that are warranted or justified—as opposed to outcomes that are "real or true" (p. 27). This is a function of the fact that Tebbe's project provides a mode of reasoning where individuals test their intuitions against their own intuitions. It does not advocate for a particular moral vision, just a method of moral reasoning that can leverage our own intuitions into a vision for how to resolve legal conflict. Thus, Tebbe notes: "religious freedom law leaves plenty of room for disagreement. Actors will recommend different solutions to a particular problem" (p. 30).

This second qualification does raise the worry that conclusions derived through a method of coherence are ultimately arbitrary, and therefore skeptics who see this area of law as an amalgamation of arbitrary, indefinite, and sometimes

contradictory considerations are ultimately correct. In Tebbe's view, this would be a mistake; when people generate outcomes through coherence reasoning, "they are saying that the solution coheres with their other constitutional commitments and that the alternative does not" (p. 39). Of course, all this means is that people can justify their conclusions based upon their own constitutional commitments in other cases, rendering their outcome still contingent and thus, to some extent, still grounded in other personal beliefs. But at least any particular judgment is proposed against the background of a systematic approach that fits with a range of concrete and specific commitments. In this way, Tebbe explains, the particular judgment is "backed by reasons" and can be "rationally justified" (p. 40). Accordingly, the skeptics' charge of irrationality levelled against religious freedom jurisprudence, and in particular pluralist approaches to that jurisprudence, is ultimately unjustified.

Tebbe employs this method to great effect in Part III of the book, titled "Applications," where he evaluates the clash between religion and equality in anti-discrimination law, focusing on both public accommodations and employment law, as well as in cases of government funding and subsidy of religion and religious institutions. In each of these contexts, Tebbe outlines various paradigms for assessing each case, using both larger theoretical frameworks in conjunction with concrete cases to test the readers' intuitions. For example, when it comes to public accommodations laws that protect LGBT people, Tebbe outlines two paradigms: religious exemptions from public accommodations laws that protect other classifications and "conscience clauses" that allow medical professionals to refuse participating in procedures that conflict with their religious commitments (pp. 127-29). Tebbe then toggles back and forth between those paradigms, outlining his argument for why the analogy to civil rights laws, as opposed to conscience clauses, is more apt. And to bolster this claim, Tebbe engages the reader with three concrete cases implicating public accommodations laws: one regarding religious facilities open to the public, one regarding religiously affiliated adoption agencies, and one regarding the high-profile cases of businesses refusing to provide their services at same-sex weddings. Using those cases to triangulate around a set of cohesive legal conclusions, Tebbe provides his approach for how courts should evaluate claims for religious exemption to public

accommodations laws, an approach that ultimately encourages courts to reject those claims for exemption (pp 136-38).[11]

In these chapters, *Religious Freedom in an Egalitarian Age* is at its very best. It provides methodological guidance to leverage how people think about complex cases that pit the competing values of religion and equality against each other. To be sure, the reader might very well quibble—or outright disagree—with Tebbe's conclusions.[12] But Tebbe is fully aware of that possibility, regularly noting that his method of social coherence does not justify only one outcome to these dilemmas. Tebbe simply hopes the book provides a method for reasoning about these dilemmas that embraces the existence of multiple values, and demonstrates how people can provide justified and warranted reasons for reaching a particular outcome notwithstanding—or, in fact, maybe because of—these competing values that often pull each person in opposite directions. In this regard, *Religious Freedom in an Egalitarian Age* is an unequivocal success.

III. PRINCIPLES, CASES AND THE APPLICATION OF SOCIAL COHERENCE

The book, however, has another section, sandwiched between the first part on method and the third part on applications. In this second section, Tebbe aims to answer the question "What principles should guide our thinking about conflicts between religious freedom and equality law?" (p. 49). Drawing from his pluralist orientation, Tebbe identifies "four primary commitments that run through defensible constitutional decisions in this area" (p. 49): avoiding harm to others, fairness to others, freedom of association, and government non-endorsement. For each of these principles, Tebbe articulates both their nature and origin, providing some helpful examples so as to flesh out what they each entail as a matter of concrete commitment in practice.

11. For more on the particulars of how Tebbe applies his theory to contemporary conflicts between religion and equality, see Sarah Barringer Gordon, *The Value of Moderation, Tebbe-Style*, JOTWELL (Oct. 25, 2017), https://conlaw.jotwell.com/the-value-of-moderation-tebbe-style/.

12. Nathan Chapman's review of *Religious Freedom in an Egalitarian Age* focused on this form of criticism. Nathan S. Chapman, *Is There a Rawlsian Solution to Conflicts over Religious Liberty?*, LAW & LIBERTY (Oct. 16, 2017), http://www.libertylawsite.org/book-review/is-there-a-rawlsian-solution-to-conflicts-over-religious-liberty/.

Especially given his pluralist orientation, Tebbe is exceedingly careful to note that by identifying these four primary commitments he is not "denying that there may be others" (p. 49). But the list is, at first glance, somewhat curious, in that no principle or value that is specific to religion makes the top-four cut. Thus, there is nothing about the value of religious experience, the importance of faith to identity formation, the principle of religious freedom, or anything else that captures the unique value of religion within the context of clashes between religion and equality. This might make some wonder how Tebbe will be able to make good on his promise to provide "a proposal that appreciates the power of arguments on both sides," and thereby "provide a stable, defensible foundation for the future of both free exercise and antidiscrimination law" (p. 5).

This omission, however, is by design and represents one of the foundational commitments of *Religious Freedom in An Egalitarian Age*. As expressed in his discussion of the fairness to others principle, Tebbe maintains that government provision of religious accommodations—but withholding those same accommodations from those with similar, but secular objections—"risks a particular kind of unfairness. . . . that kind of partiality [that] may harm the right of others to *equal citizenship*" (p. 72). Indeed, as Tebbe notes in his discussion of freedom of association, associational protections should not be made "specific to *religious* community groups," but should be extended to secular groups as well (p. 93). Thus, Tebbe provides his take on a growing and two-fold philosophical debate over the specialness of religion. The first threshold question implicated in this debate is whether religion is special and therefore deserving of special legal treatment.[13] And among those rejecting religion's specialness, the debate then turns to whether the law should level the playing field by granting analogous secular commitments the same status as religion—to

13. *Compare* BRIAN LEITER, WHY TOLERATE RELIGION? (2013) (arguing against religion's special status), *and* Micah Schwartzman, *What If Religion Is Not Special?*, 79 U. CHI. L. REV. 1351, 1427 (2012) [hereinafter Schwartzman, *Not Special*] (same), *with* Andrew Koppelman, *Religion's Specialized Specialness: A Response to Micah Schwartzman,* What If Religion Is Not Special?*; 79 U. Chi. L. Rev 1351 (2012)*, 79 U. CHI. L. REV. 71 (2013) (arguing that religion serves as a useful proxy to promote important goods and thereby deserves special treatment), *and* Christopher C. Lund, *Religion Is Special Enough*, 103 VA. L. REV. 481 (2017) (arguing that religion promotes a range of important values, justifying its unique legal status).

"level up," so to speak[14]—or whether the law should level the playing field by dismantling the special protections granted religion—to "level down," so to speak.[15] Framed in this way, Tebbe both discounts the specialness of religion, but advocates a legal strategy of leveling up so that secular commitments analogous to religion receive the same degree of protection.

From a philosophical perspective, Tebbe's view on the specialness of religion doesn't stand out. It is a well-travelled approach to a complex philosophical question related to the status of religion and religious accommodation claims. But the claim is somewhat peculiar when considered in the context of Tebbe's overall project of social coherence. To see how, consider what Tebbe articulates as one of the chief challenges levelled by skeptics against social coherence.

According to Tebbe, the fact that his social coherence method only produces warranted or justified outcomes leads to the skeptics' challenge that the outcomes are too subjective or individualistic. Tebbe provides an example of this worry: "Imagine a white supremacist who is internally consistent, or a male chauvinist who believes he has a coherent worldview that includes the Constitution. Surely such people cannot claim to have views that are rationally justified" (p. 43). And yet, social coherence, which asks people to build a theory whose rationality derives from the internal consistency of concrete judgments across a range of cases, seems at first glance without the resources to reject the claims of the racist or chauvinist as unjustifiable.

To respond, Tebbe leans heavily on the *social* aspect of his coherence theory. According to Tebbe, the social aspect means that individuals rely on all sorts of precedent—including legal, political, and social forms of precedent—within their reasoning process. These forms of precedent, Tebbe explains, "shape not only their interests but also their information—the facts and arguments that they consider when they work through some new problem" (p. 31). Among other consequences, highlighting the social component of social coherence "bolsters the method's appropriateness for constitutional law, which draws part of its legitimacy from responsiveness to popular will" (p. 32).

14. *See, e.g.*, Micah Schwartzman, *Religion as a Legal Proxy*, 51 SAN DIEGO L. REV. 1085 (2014).

15. *See, e.g.*, LEITER, *supra* note 13, at 94–100.

In turn, Tebbe argues that for a conclusion related to constitutional law to be warranted within a social coherence framework, it "must take into account precedents and principles that are authoritative among contemporary American jurists" (p. 43). Thus, the arguments deployed by the racist and male chauvinist fail because "their claims are incoherent as interpretations of the Constitution because they contravene basic legal principles" (p. 43). For a claim to be warranted under a social coherence framework, a person must "assimilate uncontroverted features of the jurisprudence" (p. 43). So, for example, "[t]hose features include not only the text and history of the Equal Protection Clause," but also "precedents like *Brown v. Board of Education* in the race context and parallel decisions that render discrimination legally suspect in the gender context" (p. 43). In this way, the ideologies of the racist and male chauvinist are "unjustified understandings of American law" (p. 43) and therefore cannot be considered warranted.

The role of legal precedent as a side constraint within the social coherence framework is of vital importance to understanding Tebbe's project. The purpose of the framework is to provide a method that can respond to the skeptics who view religious freedom jurisprudence as irrational and indeterminate. Tebbe's response is that using concrete judgements to build a unified vision for how to resolve conflicts between religion and equality can generate rational and warranted conclusions. But this response is threatened by the rejoinder of subjectivity—that is, can we truly view social coherence as generating rational and warranted responses simply because the responses are internally consistent? It is to address this rejoinder of the skeptics that Tebbe leans heavily on the body of constitutional law, including its texts and legal decisions. Thus, using a social coherence framework to address questions of constitutional law requires being part of the project of constitutional law. And that project, what is ultimately a social project, entails remaining true to the "uncontroverted features of the jurisprudence," which include Supreme Court precedents that are "authoritative among contemporary American jurists" (p. 43).

Understanding the role of precedents in Tebbe's scheme helps explain why Supreme Court decisions play such a prominent role in the story he tells about the principles that animate his vision of religious freedom and equality law. Articulating such

principles could have simply been done on the level of philosophical and moral theory. But doing so would be to miss the critical role of law and legal decisions in Tebbe's method. Without these decisions as pegs in the coherence framework, the entire project slides towards the skeptic's allegation of subjectivity.

Indeed, one of the unique features of Tebbe's analysis is that, with the exception of *Burwell v. Hobby Lobby*, he does not expressly disagree with any Supreme Court precedent. This is apparently because it is important that the principles he describes not be merely "vague ideals or aspirations," but that "[t]hey have the status of constitutional law" (p. 49). That is part of staving off the skeptic's critique. Thus, in his chapter on the principle of avoiding harm to others, Tebbe doesn't criticize Supreme Court opinions that might be taken to undermine the principle; instead, he distinguishes them. For example, Tebbe argues that *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter Day Saints v. Amos*, which upheld the constitutionality of the exemption that allows religious organizations to discriminate on the basis of religion in employment,[16] can be understood as fully consonant with the principle of avoiding harm to others; that is because it can be understood as a case allowing some degree of harm to others when the religiously-motivated employer is a "church [or] closely affiliated non-profit[] that [is] not engaged in significant commercial activities" (p. 57). This special treatment of certain religious organizations stems from the fact that "employees are normally on notice that the religious organization is limited to members of the church" (p. 56).

This penchant for distinguishing and affirming—as opposed to expressly rejecting—existing constitutional case law appears consistently throughout the book. An extreme example is Tebbe's treatment of the Supreme Court's decision in *Town of Greece v. Galloway*, in which the Court upheld the town board's practice of hosting a prayer at their monthly meeting.[17] Tebbe discusses *Town of Greece* in the context of the principle of government non-endorsement (pp. 102-03). The Court's decision in *Town of Greece* does not fit well with Tebbe's overall judgment that "the paradigmatic example of government speech that violates the Constitution is endorsement of religion" (p. 102). Tebbe fully

16. Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter Day Saints v. Amos, 483 U.S. 327 (1987).

17. Town of Greece v. Galloway, 134 S. Ct. 1811 (2014).

recognizes this, describing the endorsement test as "besieged," noting that the test went "unsupported" in *Town of Greece* (p. 102).

But Tebbe refuses to allow the *Town of Greece* decision to change his assessment of the current status of constitutional law: "Still, the best understanding of constitutional law is that meaningful boundaries continue to limit government endorsement of religion" (p. 102). And in his attempt to maintain that government non-endorsement still represents the best characterization of where the Supreme Court's constitutional jurisprudence currently stands—as opposed to where he thinks it ought to be—Tebbe shoehorns the case into his overall principle of government non-endorsement, suggesting that *Town of Greece* "arguably retained the premise that *if* the scheme had promoted a religion . . . then it would have run up against the Establishment Clause" (pp. 102-03).[18]

This is a stretch that would at first glance seem unnecessary. Constitutional law scholarship is replete with articles and books simply arguing that the Supreme Court got certain cases wrong.[19] But Tebbe appears, at times, to go to great lengths in order to avoid making such pronouncements. The logic driving such a tactic is understandable once the reader realizes that social coherence needs, at least for the most part, to uphold Supreme Court case law so that constitutional text and constitutional precedent can serve as a side constraint, allowing Tebbe's method to adequately respond to the skeptic who could otherwise view social coherence as too individualistic to generate conclusions that are rational or warranted. Put differently, maybe Tebbe's reluctance to reject *Town of Greece* stems from the following concern: if Tebbe can simply assert that *Town of Greece* is wrongly decided, then the male chauvinist or racist can simply assert that the Supreme Court's equal protection jurisprudence is wrongly decided. Thus, while much constitutional scholarship

18. Paul Horwitz's review of *Religious Freedom in an Egalitarian Age* has noted this peculiar treatment of *Town of Greece* as well, although he does not explore the issue in the broader context of Tebbe's social coherence method. *See* Paul Horwtiz, *Both Sides Have Their Reasons*, COMMONWEAL (October 4, 2017), https://www.commonwealmagazine.org/both-sides-have-their-reasons.

19. For example, in the popular press, I have taken such a position—that *Town of Greece* is wrongly decided. *See* Michael A. Helfand, *America Doesn't See Its Religious Minorities*, THE FORWARD (May 23, 2014), https://forward.com/opinion/198368/america-doesn-t-see-its-religious-minorities/.

simply rejects Supreme Court decisions as wrongly decided, it does so because the authors develop theories based upon first-order principles and then impose those principles in a top-down fashion on existing caselaw; Tebbe's theory hopes to generate warranted judgments based on bottom-up concrete judgments drawn from particular constitutional dilemmas and principles.

Case law's side-constraint function in Tebbe's theory appears to result in other somewhat uneven applications. When it comes to his critique of *Burwell v. Hobby Lobby*—the one decision described as unjustified, even if not "necessarily unjustifiable" (p. 69)—Tebbe is careful to emphasize that the principle of avoiding harm to others still retained a majority of justices (p. 68). Thus, Tebbe carefully counts five justices that endorsed the avoid-harm-to-others principle, noting that Justice Kennedy's concurrence "removed" "any doubt" that the principle served as a premise of the *Hobby Lobby* decision (p. 68). Indeed, Tebbe goes so far as to suggest that, at least on the level of principle, avoiding harm to others was embraced by all of the justices, although in so doing he dismisses a footnote that indicates to the contrary in the Court's majority opinion as "implausible and unconvincing" (p. 68). Accordingly, the true problem with *Hobby Lobby* is not, on Tebbe's reading, that the Court rejected the principle of avoiding harm to others; it was that the Court's decision envisioned a remedy—the expansion of the religious exemption so that employees would all receive contraception just not directly from the employer's insurance coverage—that was not retroactive. As a result, the decision left a gap in coverage for some employees, thereby highlighting the Court's failure to condition its decision on avoiding harm to others in practice (p. 68).

By contrast, when recounting the Supreme Court's decision in *Texas Monthly, Inc. v. Bullock*—a decision that addressed a Texas law that exempted religious publications from sales tax—Tebbe focuses almost exclusively on Justice Brennan's plurality opinion, which provides important and significant support for the principle of fairness to others. But the plurality opinion only gets Tebbe to four, which he then attempts to supplement with Justice Blackmun's concurring opinion, an opinion also joined by Justice O'Connor (p. 75). Blackmun's concurrence, however, is somewhat opaque. Tebbe emphasizes Blackmun's conclusion that "[a] statutory preference for the dissemination of religious ideas offends our most basic understanding of what the Establishment

Clause is all about"; at the same time, Blackmun also noted in his concurrence that "some forms of accommodating religion are constitutionally permissible,"[20] at a minimum raising a question as to whether *Texas Monthly* can be read as supporting the "constitutional status" of the fairness to others principle. To be sure, scholars have long disputed what to make of the Court's decision in *Texas Monthly*. The point here is that the social coherence method, and its need to combat the skeptics' critique of subjectivism, appears to lead Tebbe to frame his principles as all having "the status of constitutional law," as opposed to merely advancing a theory based on first-order principles as to why he thinks that the dissent in *Hobby Lobby* is correct as is the plurality in *Texas Monthly*. But that methodological need comes somewhat at the expense of a consistent application of when we ought to care about how many justices embraced specific overarching principles.

As alluded to above, the most challenging tension between the social coherence method and Tebbe's reliance on case law comes in his treatment of *Hosanna-Tabor v. EEOC*, which reaffirmed the "ministerial exception"—the constitutional rule that congregations are shielded from liability under various anti-discrimination laws when they hire and fire clergy, and potentially other employees integral to the congregations' religious mission (p. 57). Indeed, as Tebbe notes in his discussion of freedom of association, associational protections should not be made "specific to *religious* community groups," but should be extended to secular groups as well (p. 93). Thus, reconciling the principles of avoiding harm to others, freedom of association, and fairness to others, Tebbe advocates modifying anti-discrimination law by levelling up so as "to make its provisions equally available to sacred and secular organizations" (p. 95), characterizing *Hosanna-Tabor* as a case where "freedom of association prevails over the principle of avoiding harm to others" (p. 57).

The problem with this assessment of *Hosanna-Tabor* is that it appears to conflict with the substance of the Court's unanimous decision. The case addressed the claims of Cheryl Perich, a fourth-grade teacher at a church-operated school, that her employer violated her rights under the Americans with Disabilities Act.[21]

20. Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 28 (1989) (Blackmun J., concurring).

21. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171 (2012).

The employer, however, claimed that it was shielded from liability by the ministerial exception because Perich was a "called teacher."[22] Perich and the EEOC, in pressing the case, argued that whatever protections were afforded religious institutions by the First Amendment stemmed from the freedom of association and not the religion clauses.[23] Thus, as characterized by the Court, "[t]he EEOC and Perich . . . see no need—and no basis—for a special rule for ministers grounded in the Religion Clauses themselves."[24]

The Court, however, rejected Perich's claims and specifically attacked this argument. According to the Court,

> We find this position untenable. . . . It follows under the EEOC's and Perich's view that the First Amendment analysis should be the same, whether the association in question is the Lutheran Church, a labor union, or a social club. That result is hard to square with the text of the First Amendment itself, which gives special solicitude to the rights of religious organizations.[25]

Now it is completely reasonable to disagree with this conclusion as being philosophically unsound. Many critics of granting religious claims special legal status have done just that—attacked this argument as philosophically incoherent.[26] But to characterize the principle of fairness to others as a "constitutional commitment" (p. 71) and having "the status of constitutional law" (p. 49) would seem, at least without some discussion or qualification, to mis-describe the current state of the Supreme Court's religion clause jurisprudence.[27] Indeed, in *Hosanna-Tabor* there aren't even any concurrences or dissents upon which to hang the proverbial hat; the opinion was unanimous and seems to, at a bare minimum, discount the fairness to others principle, given

22. *Id.* at 699–700, 708 (differentiating "called teachers"—teachers "called to their vocation by God through a congregation"—from "contract teachers"—teachers "appointed by the school board without a vote of the congregation").

23. *See* Oral Argument at 37:22-25, *Hosanna-Tabor*, 565 U.S. 171 ("We don't see that line of church autonomy principles in the Religion Clause jurisprudence as such. We see it as a question of freedom of association.").

24. *Hosanna-Tabor*, 565 U.S. at 189.

25. *Id.*

26. *See, e.g.*, LEITER, *supra* note 13; Schwartzman, *Not Special*, *supra* note 13.

27. Moreover, and without going into detail here, the current state of the Supreme Court's Establishment Clause jurisprudence would also seem to manifest a view that religion is subject to special treatment—a view that is, of course, subject to philosophical criticism.

that Tebbe formulates the principles as follows: "government favoritism on the basis of religion risks a particular kind of unfairness. . . . that kind of partiality may harm the right of others to *equal citizenship*" (p. 72). That formulation does not, at least in an obvious way, fit with the Court's decision in *Hosanna-Tabor*.

To reiterate, Tebbe could conclude that the Court's decision in *Hosanna-Tabor* was wrongly decided. But given that Supreme Court case law apparently serves as an essential side constraint in the social coherence framework—preventing social coherence from sliding into subjectivism—one understands his reluctance to do so. For Tebbe, warranted constitutional interpretations "must assimilate uncontroverted features of the jurisprudence" (p. 43). Now one of the challenges when assessing the role of Supreme Court decisions in the social coherence method is that Tebbe does not quite provide a framework for what counts as an "uncontroverted feature[] of the jurisprudence." It therefore leaves open the possibility that if in the context of equal protection, "[t]hose features include not only the text and history of the Equal Protection Clause, but precedents like *Brown v. Board of Education*" (p. 43), then it might also be true, given that it was unanimously decided, that uncontroverted features of the jurisprudence also include not only the text and history of the religion clauses, but precedents like *Hosanna-Tabor v. EEOC*.

Of course, *Hosanna-Tabor v. EEOC* is not *Brown v. Board of Education*. Accordingly, maybe Tebbe has a theory working in the background of his assessments that privileges some constitutional precedents over others—maybe even some sort of view of "super-precedents"[28]—such that some cases are, on his view, far more fundamental to constitutional law and jurisprudence, and therefore far more "authoritative among contemporary American jurists" (p. 43). But, as already noted, *Religious Freedom in an Egalitarian Age* doesn't provide much in terms of explanation on this point to help the reader flesh out which decisions do and don't count as "uncontroverted features of the jurisprudence" (p. 43). Moreover, if there are some cases

28. The concept of super-precedents entered public debate during the confirmation hearings of Justice John Roberts. *See* Jeffrey Rosen, *So, Do You Believe in 'Superprecedent'?*, N.Y. TIMES, Oct. 30, 2005, at C1. It has also been a topic of significant discussion in the scholarly literature. *See, e.g.*, Michael Sinclair, *Precedent, Super-Precedent*, 14 GEO. MASON L. REV. 363 (2007); Michael J. Gerhardt, *Super Precedent*, 90 MINN. L. REV. 1204 (2006); William M. Landes & Richard A. Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J. L. & ECON. 249, 251 (1976).

that have garnered insufficient support to qualify as necessary features of the constitutional enterprise—such that disagreement with them would not render someone's interpretations as illegitimate "understanding[s] of the *United States* constitution" (p. 43)—then it remains a wonder that Tebbe does not simply dismiss cases like *Town of Greece v. Galloway* and *Hosanna-Tabor v. EEOC* as wrongly decided.

More likely is that Tebbe's commitment to social coherence—and its ability to respond to charges of subjectivism—requires that he not unsettle too much constitutional case law. For without that anchor, the social element in the social coherence framework might not be able to generate warranted or rational judgments that do not fall prey to claims of indeterminacy. However, Tebbe's understandable reluctance to reject constitutional decisions—and instead to massage tensions between them and his primary principles—paints an uncomfortable picture that leaves the reader wondering if there is a principled way for Tebbe to read existing Supreme Court case law.

IV. CONCLUSION

The criticisms of the last section notwithstanding, Tebbe's *Religious Freedom in an Egalitarian Age* is first-rate work that should be read by anyone interested in questions of religious freedom and equality law. Ultimately, the drawbacks of Tebbe's approach are a function of the project's ambitious aims—to find a way to reason about conflicts between religion and equality without simply allowing debate to devolve into rancorous name-calling or bald assertions about how the law ought to decide. Tebbe seeks to leverage our intuitions about concrete cases so that we can build a bottom-up picture that accounts for the multiple values at stake in any given case. This pluralist impulse is to be lauded—indeed, I myself have endorsed something like it elsewhere.[29] But the cries of the skeptic still loom large in such an approach, asking us whether our commitment to consistency and fit can overcome the accusations of subjectivity. These questions

29. *See, e.g.*, Michael A. Helfand, *Implied Consent: A Primer and a Defense*, 50 CONN. L. REV. (forthcoming 2018); Michael A. Helfand, *Religious Institutionalism, Implied Consent, and the Value of Voluntarism*, 88 S. CAL. L. REV. 539 (2015).

remain not just for Tebbe, but for any scholar of constitutional theory and interpretation.