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# ATTEMPTING TO ENGAGE IN SOCIALLY COHERENT DIALOGUE ABOUT RELIGIOUS LIBERTY AND EQUALITY

BY ALAN BROWNSTEIN

## INTRODUCTION

Most book reviews reflect the reviewer's final conclusions about the author's finished work. This review is more of a snapshot of the lengthy dialogue I have been engaged in for several months with Nelson Tebbe, the author of the book being reviewed. The symposium conference organized by the St. John's Journal of Civil Rights and Economic Development in September 2016, invited several church-state scholars to comment on a draft manuscript of Nelson Tebbe's forthcoming book, *Religious Freedom in an Egalitarian Age*.<sup>1</sup> However, the book was not fully completed when this multi-participant dialogue began.

Nelson's<sup>2</sup> manuscript was provocative and challenging. All of the scholars who spoke at the conference offered positive and critical commentary on his work. And, of course, Nelson was given the opportunity to respond. That was the beginning of the dialogue, but it certainly was not the end, at least it was not the end for me. For several months after the symposium conference, I have been exchanging e-mails with Nelson, challenging some arguments in his book, seeking clarifications on other points, and responding to the e-mails I received in reply. Nelson addresses the comments of the reviewers in this symposium issue. I fully

<sup>1</sup> NELSON TEBBE, *RELIGIOUS FREEDOM IN AN EGALITARIAN AGE* (2017) (hereafter "TEBBE").

<sup>2</sup> I am going to refer to Professor Tebbe as Nelson throughout my review. I have known him a long time. Further, because I consider this review to be part of an on-going conversation, it would be artificial to formalize the discussion by referring to him as Professor Tebbe or "Tebbe."

expect that his responses will open the door to as many new issues as it resolves. It is an on-going conversation.

This review is also a temporary single point on a lengthy dialogue because the topic of Nelson's book, religious liberty and equality in contemporary America, is in flux both as a matter of law and of social reality as well. From a legal perspective, the current constitutional framework is uncertain. For example, the most recent Supreme Court religion clause decision, *Town of Greece v. Galloway*,<sup>3</sup> is divorced both from prior language in the Court's jurisprudence and any plausible understanding of social reality.<sup>4</sup>

If new Supreme Court Justices committed to originalism are appointed and confirmed over the next four years, it is not clear what the repercussions will be for church-state doctrine. Justice Scalia, a self-proclaimed originalist, after all, was the author of the Court's opinion in *Employment Division v. Smith*,<sup>5</sup> the case which effectively gutted the Free Exercise Clause. Post *Smith*, there is considerable debate about whether the *Smith* decision can be grounded in the original understanding of the First Amendment.<sup>6</sup> Further, any new originalist Justice who is actually committed to grounding his or her decisions on the historical understanding, instead of using originalism to mask what are essentially ideologically determined constitutional interpretations, will find that adjudicating church-state disputes is a difficult undertaking.<sup>7</sup>

<sup>3</sup> 134 S. Ct. 1811, 1826 (2014).

<sup>4</sup> See Alan Brownstein, *Constitutional Myopia: The Supreme Court's Blindness to Religious Liberty and Religious Equality Values in Town of Greece v. Galloway*, 48 Loyola of L.A. L. Rev. 371, 396-407 (2014) [hereinafter Brownstein, *Constitutional Myopia*].

<sup>5</sup> 494 U.S. 872, 889 (1990).

<sup>6</sup> Compare Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1461-62, 1513 (1990) (arguing that constitutionally mandated religious exemptions are consistent with the original understanding of the First Amendment), with Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915, 948 (1992) (contending that "In eighteenth-century America, where varied Christian sects bickered with one another and thrived, a constitutional right to have different civil obligations on account of religious differences was precisely what dissenters did not demand.").

<sup>7</sup> See, e.g., Alan Brownstein, *The Reasons Why Originalism Provides a Weak Foundation for Interpreting Constitutional Provisions Relating to Religion*, CARDOZO L. REV. 196, 196-97 (2009) [hereinafter Brownstein, *The Reasons Why Originalism Provides a Weak Foundation*].

As a matter of social reality, the role of religion in public life and its relationship to government and the community is shifting and uncertain as well. There is a marked increase in Americans who are not affiliated with organized religions.<sup>8</sup> Attitudes toward Islam are challenging any consensus commitment to religious neutrality.<sup>9</sup> With the doctrinal and social sand shifting so unpredictably with political winds, it is hard to write or say anything today with the sense that it will be valid or even meaningful tomorrow.

So this review is written on a floating log in fast moving flood waters that are altering the law and society river's past path and boundaries. As such, it is much more an essay about ideas and proposals than an article based on case law and particular factual foundations. Therefore, I have included only the barest minimum of footnotes, many of which are to arguments and ideas discussed in my own work.<sup>10</sup> That approach resonates not only with our uncertain world, but also with the central arguments and thesis of Nelson's book. *Religious Freedom in an Egalitarian Age* is a book of arguments and ideas, grounded in normative reasoning as much as it is in conventional legal doctrine.

<sup>8</sup> See, e.g., Robert P. Jones et al., *Exodus: Why Americans are Leaving Religion – and Why They're Unlikely to Come Back*, PUB. RELIGION RES. INST. (Sept. 22, 2016), <https://www.prii.org/research/prii-rns-poll-nones-atheist-leaving-religion/>; "Nones" on the Rise: One-in-Five Adults Have No Religious Affiliation, PEW RES. CTR. (Oct. 9, 2012), <http://www.pewforum.org/2012/10/09/nones-on-the-rise/>; Alan Cooperman, et al., *U.S. Public Becoming Less Religious: Modest Drop in Overall Rates of Belief and Practice, but Religiously Affiliated Americans Are as Observant as Before*, PEW RES. CTR. (Nov. 3, 2015), <http://www.pewforum.org/2015/11/03/u-s-public-becoming-less-religious/>.

<sup>9</sup> See Rachel Zoll & Emily Swanson, *AP-NORC Poll: Christian-Muslim split on religious freedom*, THE ASSOCIATED PRESS – NORC CTR. FOR PUB. AFF. RES. (Dec. 30, 2015), <http://apnorc.org/news-media/Pages/News+Media/AP-NORC-Poll-Christian-Muslim-split-on-religious-freedom.aspx>; *How Americans Feel About Religious Groups*, PEW RES. CTR. (2014), <http://www.pewforum.org/2014/07/16/how-americans-feel-about-religious-groups/>; *Controversies Over Mosques and Islamic Centers Across the U.S.*, THE PEW F. ON RELIGION & PUB. LIFE (2012), <http://www.pewforum.org/2012/09/27/controversies-over-mosques-and-islamic-centers-across-the-u-s-2/>; see generally Gregory C. Sisk & Michael Heise, *Muslims and Religious Liberty in the Era of 9/11: Empirical Evidence from the Federal Courts*, 98 IOWA L. REV. 231 (2012); see James A. Sonne, *Domestic Applications of Sharia and the Exercise of Ordered Liberty*, 45 SETON HALL L. REV. 717 (2015).

<sup>10</sup> Because much of this review contrasts my own views on church-state issues with Nelson's analysis, a significant number of citations are to my own work.

## I. SOCIAL COHERENCE

Each of the commentators at the St John's symposium was assigned particular chapters of Nelson's book to focus on in drafting their remarks for the conference. I was assigned the chapters on freedom of association<sup>11</sup> and employment discrimination.<sup>12</sup> I will discuss these chapters later on in this review. It is difficult, however, to discuss particular topics discussed in the book without addressing the larger project and focusing on key principles which are recurring themes in Nelson's analysis. Accordingly, this review will be substantially more expansive than an essay limited exclusively to my assigned chapters. And the logical place to begin this broader discussion is the method for thinking about liberty, equality and rights on which Nelson grounds his analysis – what he describes as social coherence.<sup>13</sup>

Nelson does not provide us with a short hand, one sentence definition of his social coherence methodology. The core idea is that reasoning about liberty and rights is legitimate and defensible against claims that it is *ad hoc* and intrinsically irrational if it demonstrates coherence. That is, an analysis is not completely arbitrary and conclusory if it is tied together to a range of existing judgements about concrete cases and the principles that are derived from them that a person accepts as collectively accurate.<sup>14</sup> That is the coherence part of the methodology.

The social dimension of the methodology arises from the inevitable reality that the interconnected judgments on which an individual bases new conclusions are grounded in the individual's social and political identity. Social coherence unabashedly recognizes that our coherent judgments are necessarily contingent on our social location.<sup>15</sup> It is not enough, however, for an individual to demonstrate self-awareness of his or her understanding of social reality. That understanding must be sufficiently shared to make arguments accessible and potentially

<sup>11</sup> TEBBE, *supra* note 1, at 80–97 (2017).

<sup>12</sup> *Id.* at 142–163.

<sup>13</sup> *Id.* at 8–11, 25–36.

<sup>14</sup> *Id.* at 8–9.

<sup>15</sup> *Id.* at 31.

persuasive to others. If we are talking about legal arguments, the legal equivalent of shared social reality involves some recognition of broadly accepted legal principles and constitutional doctrine.

I do not have a serious problem with social coherence as a way to approach difficult legal problems relating to religious liberty and equality. I would probably describe the concept a bit differently, but it seems to me that what Nelson identifies as a social coherence approach to problem solving describes what a lot of reasonable legal scholars including constitutional law professors generally do when we write articles and books. Most of us are not philosophers. We start with concrete situations that provide an accepted foundation for our arguments. We reason by analogy. But we do not reason in static isolation. We recognize that conditions, norms, and laws change. We consider the collective experience of the American society and legal system in developing arguments. We recognize that law – including constitutional law – requires a connection to the community, to the polity, to the people. Our arguments have to do more than make sense to us. They have to reflect a shared understanding of law and social reality. This is social coherence or at least a form of social coherence.

Thus, our arguments reflect our understanding of common sense morality. They try to resonate with uncontroverted or at least generally accepted long term principles of American constitutionalism. We can argue for sharp departures from accepted understandings, but when we do so we have to work harder to defend our positions as reasonable legal arguments. In law, advocates of sharp changes in doctrine bear a heavier burden of persuasion than advocates for continuity or incremental change.

Of course, law, even constitutional law, does involve experiments that may not seem socially coherent when they are first asserted. Here, I would suggest the reasonableness of the argument depends in part on the recognized inadequacy of accepted legal understandings. Perhaps more importantly, the test of time will determine whether these new experimental ideas eventually become part of the accepted wisdom. Social coherence in legal analysis has to include the possibility that the unreasonable may become reasonable and the reasonable may become unreasonable over time.

So social coherence makes some sense to me at least for the level of discourse at which many legal scholars operate. Certainly, for the purposes of this review, I accept it as an operational methodology for argument. It is a relatively neutral foundation for a substantive discussion of religious liberty and equality issues.

## II. THE UNSTABLE AND SHIFTING FOUNDATIONS OF CHURCHSTATE RELATIONSHIPS

Nelson's general approach to addressing religious liberty issues in his book is to focus on concrete areas of agreement about religious liberty, freedom of association, equality of status and treatment from which principles can be derived and by analogy to which disputes can be resolved. There is a foundational framework that underlies much of his analysis, however, that is accepted but not fully described. I had a difficult time understanding some of Nelson's arguments until I understood the framework he was accepting. In social coherence terms, I needed to know the location in law and social understandings of Nelson's analysis. Accordingly, let me sketch out briefly, and far too summarily, where I think the foundation of Religious Freedom in an Egalitarian Age is situated in the shifting sands of American church-state jurisprudence.

Put simply, and I mean very simply,<sup>16</sup> I suggest that there are three macro, arguably socially coherent, understandings of the religion clauses and church-state doctrine. The first understanding, and this is the approach that I support and endorse, considers religion to be distinct both for constitutional purposes and in terms of social reality. With regard to social reality, this model for evaluating church-state issues recognizes that religion plays a role in the lives of religiously devout

<sup>16</sup> These three models are generic categories that do not pretend to capture the range of perspectives on church-state issues in the case law and commentary. I am well aware, for example, that some scholars who support the neutral allocation of funds to both religious and secular grantees for educational and social welfare programs do not support government sponsored religious displays or prayers that endorse religion or specific religions. Dramatically oversimplified as they are, however, I think these models reflect core differences that will help readers to locate and understand the arguments presented in *Religious Freedom in an Egalitarian Age*. At a minimum, they were useful to me in thinking about Nelson's book.

individuals that is existentially and experientially distinct from the beliefs and identity of non-religious individuals. For the purposes of the model, this is more of a descriptive, than a normative conclusion.

For constitutional purposes, part of the distinctive nature of religion-state relationships is that they implicate multiple constitutional values including personal liberty and autonomy, equality of status and treatment among groups, freedom of speech, and the need to avoid the centralizing of power. Accordingly, this model attempts to promote the core values of religious liberty and religious equality. It also tries to minimize distorting the marketplace of ideas in favor of or against religious beliefs, ideas, and speech. Further, it attempts to decentralize power by avoiding too close a relationship between church and state.<sup>17</sup>

Generally speaking, this analysis suggests that these multiple goals are best accomplished by defining both religion clauses expansively and enforcing them with some rigor. Indeed, for ease of discussion, we may refer to this approach as the Rigorous Religion Clause model. Thus, laws that substantially burden the exercise of religion must be justified under some form of meaningful review.<sup>18</sup> Serious constitutional constraints are imposed on government subsidies of religious institutions and activities. Publicly sponsored prayers and religious displays endorsing religion are also restricted.

This model recognizes that while there are significant tensions between free exercise and establishment clauses values, in many ways the two clauses and the values they promote work

<sup>17</sup> I have spent the last 25 years writing about this understanding of the religion clauses. See, e.g., Alan E. Brownstein, *Harmonizing the Heavenly and Earthly Spheres: The Fragmentation and Synthesis of Religion, Equality, and Speech in the Constitution*, 51 OHIO ST. L. J. 89 (1990) [hereinafter Brownstein, *Harmonizing the Heavenly and Earthly Spheres*]; Alan E. Brownstein, *Interpreting the Religion Clauses in Terms of Liberty, Equality, and Free Speech Values—A Critical Analysis of “Neutrality Theory” and Charitable Choice*, 13 NOTRE DAME J. OF L., ETHICS & PUB. POL’Y 243 (1999) [hereinafter Brownstein, *Interpreting the Religion Clauses*]; ALAN BROWNSTEIN, THE SOUTER DISSENT: CORRECT BUT INADEQUATE IN CHURCH-STATE RELATIONS IN CRISIS *DEBATING NEUTRALITY* (Stephen W. Monsma, ed.) 151 (2002) [hereinafter BROWNSTEIN, *The Souter Dissent*].

<sup>18</sup> The applicability and nature of that review may be nuanced and complicated. See e.g., Alan Brownstein, *Taking Free Exercise Rights Seriously*, 51 CASE WESTERN RES. L. REV. 55 (2006) [hereinafter Brownstein, *Taking Free Exercise Rights Seriously*].

to reinforce each other.<sup>19</sup> This last point is of particular importance. There is a constitutional and political balance to this understanding of church-state relationships. Under this understanding, government is limited in its ability to interfere with religion and to promote religion.<sup>20</sup> Further, constituencies seeking to protect religious liberty against the imposition of government burdens on religious belief and practice as well as those attempting to prevent the use of government resources and power to favor religion over the non-religious, or majority faiths over minority religions, all see some value in treating religion as distinct for legal and constitutional purposes.<sup>21</sup>

The framework or model described above requires some arbitrary line drawing. More problematically, at a micro level, it results in some individuals and groups incurring costs or harms and experiencing some arguable unfairness. Those costs and perceived unfairness are balanced to some extent and justified more generally as the price that must be paid to achieve the model's multiple goals.

I think this Rigorous Religion Clause model was clearly a socially coherent view during relatively recent constitutional history. It should sound somewhat familiar. In general terms, it was the understanding of church-state doctrine accepted by the courts during the 1960's and 1970's and in many ways reflects much of the case law of the Warren and Burger Courts.

A great deal has changed over the last thirty to thirty-five years, however. The utility of the Free Exercise Clause to protect religious freedom has substantially diminished. According to the Court's decision in *Employment Division v. Smith*, the Free Exercise Clause standing alone provides virtually no protection to religious individuals or institutions against neutral laws of general applicability.<sup>22</sup> The central reasoning of this decision is that for constitutional purposes, it is permissible for the state to

<sup>19</sup> See, e.g., Alan Brownstein, *The Religion Clauses as Mutually Reinforcing Mandates: Why the Arguments for Rigorously Enforcing the Free Exercise Clause and Establishment Clause are Stronger When Both Clauses are Taken Seriously*, 32 *CARDOZO L. REV.* 1701 (2011) [hereinafter Brownstein, *The Religion Clauses as Mutually Reinforcing Mandates*].

<sup>20</sup> *Id.* at 1716–17.

<sup>21</sup> *Id.* at 1720–21.

<sup>22</sup> *Employment Division v. Smith*, 494 U.S. 872, 881 (1990).

treat religious exercise as if it is no different than secular practices. Indeed, along as the state does so, and subjects both religious and secular conduct to the same regulatory regime, the free exercise clause imposes no limit on state action. The *Smith* decision explains why so many current church-state disputes involve the adjudication of religious liberty statutes or controversies about the enactment of such laws.<sup>23</sup> Today, federal constitutional protection of religious liberty rarely gets on the legal playing field.

The scope and rigor of the Establishment Clause has also been sharply reduced. Constraints on government funding of religious institutions have been substantially weakened.<sup>24</sup> Most importantly, they have been reduced if not eliminated under a “neutrality theory” that challenges the idea that religious and secular institutions should be treated differently for funding purposes.<sup>25</sup> Indeed, proponents of this approach draw strong analogies between free speech doctrine and religion clause doctrine.<sup>26</sup> Under this perspective the Court’s analysis in *Rosenberger v. Rectors of the University of Virginia*,<sup>27</sup> a case invalidating on free speech grounds a public university’s discriminatory refusal to fund a student group’s religious periodical while funding similar secular student expressive activities, is to be interpreted and applied as broadly as

<sup>23</sup> See, e.g., *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2759 (2014) (adjudicating religious liberty claim under the federal Religious Freedom Restoration Act).

<sup>24</sup> See, e.g., *Mitchell v. Helms*, 530 U.S. 793, 802 (2000); *Zelman v. Simmons-Harris*, 536 U.S. 639, 643-644 (2002). The Court has also reinterpreted standing requirements to make it increasingly difficult to bring Establishment Clause challenges to federal court for adjudication on the merits. See Steven K. Green, *The Slow, Tragic Demise of Standing in Establishment Clause Challenges*, AM. CONST. SOC’Y FOR L. AND POL’Y (Sept. 2011), available at [https://www.acslaw.org/sites/default/files/Green\\_-\\_Establishment\\_Clause.pdf](https://www.acslaw.org/sites/default/files/Green_-_Establishment_Clause.pdf); I.C. Lupu and R.W. Tuttle, *Ball on a Needle: Hein v. Freedom from Religion Foundation, Inc. and the Future of Establishment Clause Adjudication*, 2008 BYU L. REV. 115, 119 (2008).

<sup>25</sup> See, e.g., Carl H. Esbeck, *A Constitutional Case for Governmental Cooperation with Faith-Based Social Service Providers*, 46 EMORY L. J. 1, 20–21 (1997); Michael McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 134 (1992); See generally STEPHEN V. MONSMA (ed.), CHURCH-STATE RELIGIONS IN CRISIS: *DEBATING NEUTRALITY* (2002).

<sup>26</sup> See, e.g., Esbeck, *supra* note 25, at 20; MONSMA, *supra* note 25, at 6–7.

<sup>27</sup> 515 U.S. 819, 842 (1995).

possible.<sup>28</sup> Indeed, the basic idea that government may even exercise discretion to discriminate between secular and religious institutions and programs in awarding subsidies and grants is challenged.<sup>29</sup>

There has also been a significant retreat from prior case law limiting government's ability to promote religious ideas and messages. *Town of Greece* is only the most recent and most egregious of these decisions.<sup>30</sup> Basically, the Establishment Clause side of the church-state package I described in the first model has broken apart. Here again, free speech doctrine is often employed to justify the state facilitated expression of majoritarian religious messages and displays.<sup>31</sup>

Given the repudiation and fracturing of the Rigorous Religion Clause model, one may reasonably wonder exactly what is left of a socially coherent understanding of church-state relationships. I think the current answer is that there are two opposing perspectives that are being debated explicitly or implicitly. We can call one approach the One-sided Neutrality Model.<sup>32</sup> This approach accepts "neutrality theory" and at least an implicit free speech framework for government funding of

<sup>28</sup> Thus, for example, in *Locke v. Davey*, 540 U.S. 712, 720, 724, n.3 (2004) a case in which the Court upheld state constitutional restrictions that prevented a scholarship recipient from using public funds to pursue a degree in devotional theology, plaintiff argued that *Rosenberger* controlled the case and demonstrated that the state's restriction on public aid for religious purposes violated the free speech clause of the First Amendment.

<sup>29</sup> See, e.g., *Id.* at 725; see also Brief for Petitioner at \*26, \*27, *Trinity Lutheran Church of Columbia, Inc. v. Pauley*, Brief for Petitioner, 136 S. Ct. 891 (8th Cir. 2016) (No. 15-577) (arguing that it is unconstitutional for state to exclude religious daycares and preschools from government grant program). The Supreme Court accepted Petitioner's argument, *Trinity Lutheran Church of Columbia, Inc. v. Pauley*, 137 S.Ct. 2012 (2017)

<sup>30</sup> See Brownstein, *Constitutional Myopia*, *supra* note 4, at 398.

<sup>31</sup> See, e.g., Matthews, on behalf of M.M. v. Kountze Indep. Sch. Dist., 484 S.W.3d 416, 421 (Tex. 2016); Vikram David Amar & Alan E. Brownstein, *The Establishment Clause and the Free Speech Clause in the Context of the Texas High School Cheerleader Religious Banner Dispute*, JUSTIA, (Nov. 9, 2012), <https://verdict.justia.com/2012/11/09/the-establishment-clause-and-the-free-speech-clause-in-the-context-of-the-texas-high-school-cheerleader-religious-banner-dispute>; Alan E. Brownstein, *Prayer and Religious Expression at High School Graduations: Constitutional Etiquette in a Pluralistic Society*, NEXUS, 5 Nexus 61, 66—67 (2000).

<sup>32</sup> The one-sided nature of this model is occasionally conceded by its proponents. See, e.g., Esbeck, *supra* note 25, at 27 (acknowledging that "it would be rhetorical, but still a fair comment, to say that in neutrality theory religion gets the best of both worlds: religion is free of burdens borne by others but shares equally in the benefits."); see also Brownstein, *Interpreting the Religion Clauses*, *supra* note 17, at 246—56 (criticizing the one-sided, non-neutral nature of neutrality theory).

religious institutions and activities. Government may subsidize religion under any funding scheme that allocates resources according to neutral, secular criteria. Indeed, religious and secular grantees – either individual or institutional – are so similarly situated that it would be unconstitutional for the state to decline to subsidize religious institutions and activities when it is providing financial support to secular grantees or beneficiaries. The One-sided Neutrality Model also supports government endorsement of religion through state sponsored messages and displays, just as government can endorse secular messages at its discretion.<sup>33</sup> But proponents of this approach continue to insist that religion is distinctive as a matter of social reality and that religious liberty deserves distinctive and significant constitutional or statutory protection, even when providing this protection imposes harm on third parties.

The other emerging approach, let's call it the "Limited Liberty, Egalitarian Model" accepts the demise of Establishment Clause values to a considerable extent, particularly with regard to government funding of religion. But it also rejects the idea that religion is all that distinctive as a matter of social reality or that it should generally be thought to warrant special legal treatment.<sup>34</sup> From this perspective, the foundation of "neutrality theory" underlying recent cases is more or less correct, but it can't be isolated. It requires more than equal treatment between religious and secular recipients of government aid. It also requires in many cases the generalizing of the protection provided to religious conscience and religious associations.

I think Nelson's book is a thoughtful, searching attempt to demonstrate that one of these two current competing approaches is more socially coherent and provides for better church-state relationships in our society. His analysis is grounded fairly firmly in the emerging Limited Liberty, Egalitarian Model. His support

<sup>33</sup> I recognize that there are church-state scholars who support a neutrality model for government funding, but also reject the government endorsement of religion through state sponsored prayer and religious displays. The three models I discuss are far too limited to describe the broad range of church-state perspectives that are presented in the academic literature or in social dialogue. Nonetheless, I think they capture core paradigm positions that reflect central, socially coherent disagreements about church-state relationships.

<sup>34</sup> See generally, Micah Schwartzman, *What If Religion Is Not Special?*, 79 U. CHI. L. REV. 1351 (2013).

for this model is hardly unjustified. The alternative approach, the One-sided Neutrality Model, has lots of problems.

The One-sided Neutrality Model is arguably internally incoherent because the lack of a distinction between the religion and the secular in neutrality theory and the analogy to free speech doctrine in funding cases seem inconsistent with the idea that religion deserves special protection and should receive special exemptions from regulations – when neither protection or exemptions are available to non-religious individuals and institutions. Further, the costs and harms and perceived unfairness of protecting religion alone can't be balanced against or justified by a comprehensive church-state framework promoting multiple values. The One-sided Neutrality Model is much more limited and well, one-sided, in the values it protects and promotes. Also, because this model supports expansive government funding of religious organizations, it undermines the persuasive force of claims to religious autonomy. It is much more difficult to justify independence from government control when an institution or program is funded by the state to serve public purposes.

I do not suggest that the One-sided Neutrality Model is indefensible or that it lacks support in the polity and in law. There is more than enough residual grounding in law and culture to make this perspective socially coherent if not persuasive. But that after all is the reason for Nelson's book. He sees the need to challenge the One-sided Neutrality model and to provide a more socially coherent and persuasive alternative to it.

As a general matter, I believe the One-sided Neutrality Model is vulnerable to many of Nelson's arguments. In many respects the model is hard to justify. From my perspective, moving away from the Rigorous Religion Clause Model – the approach I support – was a major mistake. I think from a multiple values perspective, protecting distinctive free exercise rights or expansive religious accommodations under a legal regime without establishment clause constraints on the state promotion of religion is difficult to defend.

This does not mean, however, that I agree with important, even critical arguments presented in *Religious Freedom in an Egalitarian Age*. But the direction of my disagreement is important. I am challenging Nelson's thesis from the perspective

of someone who supports a return to the Rigorous Religion Clause Model. I am not convinced that religious liberty and equality can be adequately protected under a framework that minimizes the distinctive nature of religion and allows for substantial government funding of religious institutions. Nelson's response to my position in part is that we have moved too far away from this old model for it to continue to provide a socially coherent foundation for analyzing church-state disputes. I have to acknowledge the power of that argument. I recognize how far we have moved, and from my perspective how much we have lost, over the last 30 years. I have been watching, lecturing and writing with dismay as the church-state world of life and law has changed for the worse over the last 30 years.

I do not believe, however, that 30 years of bad law and bad policy requires us to choose between what I consider to be two problematic approaches to church-state relationships. The One-sided Neutrality Model is not only problematic in its own right. Its failing has a dynamic dimension to it. The shift to this model substantially undermines the distinctive treatment of religion and makes challenges to a robust, distinctive regime of religious accommodations much more persuasive. The One-sided Neutrality Model's vulnerabilities provoke alternative approaches that respond to its defects, but risk creating new and different problems for religious liberty and anti-discrimination values in doing so. Thus, the core question for me is not whether a book like *Religious Freedom in an Egalitarian Age* can effectively criticize the weaknesses of the One-sided Neutrality Model. I think it can and does. The critical question is whether a more comprehensively neutral alternative of the kind that Nelson proposes can adequately promote and protect the multiple values that are in play in church-state issues. I have questions and concerns about an approach that generalizes religious liberty protection to a more generic regime of associational freedom and freedom of conscience. Those questions and concerns are the primary focus of my review of Nelson's book.

### III. THE AVOIDING HARMS PRINCIPLE AND THE UNFAIRNESS TO OTHERS PRINCIPLE

Nelson identifies two core principles that operate to limit the scope of religious exemptions or accommodations: the avoiding harms principle<sup>35</sup> and the unfairness to others principle.<sup>36</sup> These principles would apply to limit both constitutionally grounded exemptions and discretionary legislative accommodations. The Establishment Clause operates to enforce the avoiding harms principle in appropriate circumstances. The Establishment Clause arguably may have a role to play in enforcing the unfairness to others principle as well – although its applicability in this regard is less certain and the circumstances in which it would operate to invalidate religious exemptions would be more limited.<sup>37</sup>

#### A. *The Avoiding Harms Principle*

At a generic, broad, and abstract level, the harm or costs of laws should be considered along with the exemption from the laws, and benefits should not be examined separately from costs. We should not look at benefits alone. We should also look at costs. But Nelson makes a much more precise argument here. He contends that religious liberty exemptions (whether recognized by courts as a matter of constitutional law, created by specific acts of legislative discretion, or required by a general religious liberty statute such as RFRA) should be limited to those situations in which the exemption does not cause unacceptable harm to third parties. Here Nelson notes correctly that the Supreme Court has stated on several occasions that the Establishment Clause imposes constraints on religious exemptions that favor certain faiths over other or that extend too far by imposing undue burdens on non-beneficiaries.<sup>38</sup>

<sup>35</sup> TEBBE, *supra* note 1, at 49–70.

<sup>36</sup> *Id.* at 71–79.

<sup>37</sup> *Id.* at 74–77 (discussing among other cases, the Court’s extension of conscientious objector exemptions to include secular pacifists).

<sup>38</sup> *Id.* at 55–56.

I do not question Nelson's basic argument that the Establishment clause imposes some cap or limit on the scope of religious accommodations because of the harm they cause to third parties. I have two distinct concerns, however, about his discussion of this principle. As a practical matter, I have reservations about the way that Nelson describes the operational methodology he endorses for determining when an exemption goes too far and burdens third parties too much. As a conceptual matter, I think the avoiding harm principle is more complicated than Religious Freedom in an Egalitarian Age suggests.

*B. Practical Problems with Applying the Avoiding Harms Principle*

The primary practical question about the avoiding harm principle, as Nelson acknowledges, is determining when the burden on third parties necessitates the invalidation of an exemption on Establishment Clause grounds.<sup>39</sup> While the Supreme Court has stated repeatedly that some such limit exists, it has provided very little guidance on how it should be identified. The Court's position here has been virtually all bark and no bite: there is no coherent line of cases providing criteria or doctrine for answering this question.<sup>40</sup>

Given the paucity of authority, a variety of answers might be considered socially coherent as they would not directly contradict an accepted line of authority. Nelson chooses as a starting place for identifying unacceptable burdens,<sup>41</sup> the standard adopted by the Supreme Court in *Trans World Airlines v. Hardison*<sup>42</sup>, the case interpreting Title VII's requirement that employers must reasonably accommodate the religious practices of their employees unless doing so would result in an undue hardship to their business.<sup>43</sup> Under the Court's interpretation of this statute anything more than a de minimis burden would

<sup>39</sup> *Id.* at 60–61.

<sup>40</sup> Nelson acknowledges that cases like *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter Day Saints* are inconsistent with the avoiding harms principle. See TEBBE, *supra* note 1, at 56–57. I find it more difficult to reconcile this case and others, such as *Texas Monthly v. Bullock*, than he does.

<sup>41</sup> TEBBE, *supra* note 1, at 62.

<sup>42</sup> 432 U.S. 63 (1977).

<sup>43</sup> *Id.* at 78-84.

constitute an undue hardship and relieve the employer of any duty to accommodate the religious needs of an employee.<sup>44</sup>

As I shall explain shortly, Nelson ultimately describes a standard that is somewhat less draconian than this one for determining whether religious accommodations are constitutionally permissible. Yet it is difficult for me to understand why he grounds his analysis in the *Hardison* decision in the first place. Consider how dissenting Justices Marshall and Brennan, strong supporters of both free exercise rights and establishment clause constraints on the government's promotion of religion, described the majority opinion in *Hardison*:

"Today's decision deals a fatal blow to all efforts under Title VII to accommodate work requirements to religious practices. The Court holds, in essence, that although the EEOC regulations and the Act state that an employer must make reasonable adjustments in his work demands to take account of religious observances, the regulation and Act do not really mean what they say. An employer, the Court concludes, need not grant even the most minor special privilege to religious observers to enable them to follow their faith. As a question of social policy, this result is deeply troubling, for a society that truly values religious pluralism cannot compel adherents of minority religions to make the cruel choice of surrendering their religion or their job. And as a matter of law today's result is intolerable, for the Court adopts the very position that Congress expressly rejected in 1972, as if we were free to disregard congressional choices that a majority of this Court thinks unwise. I therefore dissent."<sup>45</sup>

I think it is fair to say that most advocates for religious liberty condemn the *Hardison* standard for providing far too little protection to employees who are members of minority faiths.<sup>46</sup> Their arguments have increasingly received favorable responses. California, for example, is a deep blue state. The Democratic Party controls virtually all statewide offices and both houses of the state legislature.<sup>47</sup> Yet in 2012, California enacted the

<sup>44</sup> *Id.* at 84.

<sup>45</sup> *Id.* at 86–87 (Marshall, J., dissenting).

<sup>46</sup> This is a personal observation, but I cannot recall ever speaking with a religious liberty advocate who had anything positive to say about the *Hardison* decision.

<sup>47</sup> *California State Legislature*, *BALLOTPEdia*, [https://ballotpedia.org/California\\_State\\_Legislature](https://ballotpedia.org/California_State_Legislature) (last visited Sept. 8, 2017).

California Workplace Religious Freedom Act (WRFA) amending the California Fair Employment and Housing Act (FEHA). FEHA imposed a duty on employers to accommodate the religious practices of employees that had been interpreted to parallel the *Hardison* standard.<sup>48</sup> As amended by WRFA, the de minimis standard of the *Hardison* opinion was replaced with the following, much more demanding language:

(u) “Undue hardship” means an action requiring significant difficulty or expense, when considered in light of the following factors:

- (1) The nature and cost of the accommodation needed.
- (2) The overall financial resources of the facilities involved in the provision of the reasonable accommodations, the number of persons employed at the facility, and the effect on expenses and resources or the impact otherwise of these accommodations upon the operation of the facility.
- (3) The overall financial resources of the covered entity, the overall size of the business of a covered entity with respect to the number of employees, and the number, type, and location of its facilities.
- (4) The type of operations, including the composition, structure, and functions of the workforce of the entity.
- (5) The geographic separateness, administrative, or fiscal relationship of the facility or facilities.<sup>49</sup>

Given the significant criticism and challenges directed at the *Hardison* analysis as a statutory standard and the strong legislative attempts to strengthen the duty of employers to accommodate the religious practices of employees, I’m not at all sure why it was necessary to look to *Hardison* as the basis for determining constitutional constraints on religious accommodations. This is particularly the case because Nelson

<sup>48</sup> Rosanna Sattler & Laura Otenti, *CA Workplace Religious Freedom Act*, EMP. L. STRATEGIST, [http://www.pbl.com/uploads/23/doc/CA\\_Workplace\\_Religious.pdf](http://www.pbl.com/uploads/23/doc/CA_Workplace_Religious.pdf) (last visited Sept. 8, 2017).

<sup>49</sup> CAL. GOV’T CODE § 12926(u) (Deering 1980).

envisions a greater scope to permissible religious exemptions than the literal language of *Hardison* would suggest. Nelson explains that some lower courts in adjudicating accommodation cases under Title VII have been engaged in a more thoughtful inquiry of burdens on religion and costs to others.<sup>50</sup> Even if most courts adjudicating these cases do not engage in such an inquiry, however, Nelson argues that the best understanding of the undue hardship test and the standard he endorses for evaluating the constitutionality of accommodations under the Establishment Clause “involves a relational determination.”<sup>51</sup> Some form of balancing is required. “If the cost to others is slight *in comparison to the burden on religious freedom*, courts [should find the cost] to be de minimis”<sup>52</sup> and, accordingly, the accommodation should withstand Establishment clause review. The question for courts is whether the costs of accommodations “are relatively light compared to the interference with religious freedom that the accommodation is designed to remedy.”<sup>53</sup>

A standard of review requiring courts to employ some kind of a balancing test to determine when a religious accommodation violates the Establishment Clause has much to commend it. I remain uncertain, however, as to how Nelson envisions the balancing test will work. His evaluation of the of the Court’s reasoning in *Hardison* makes me uneasy. In discussing the religious freedom side of the balance, I would have emphasized that observing the Sabbath is considered to be a fundamental obligation of many faiths. While I agree with Nelson that the cost of the accommodation, another employee losing the opportunity to take a weekend day off, is a real harm,<sup>54</sup> in my judgment the critical issue in these cases is what steps may be taken to reduce this cost to an acceptable level. An employee required to work on Saturday to accommodate a Sabbatarian might receive preferences in vacation scheduling or overtime opportunities or an increase in pay (offset perhaps by a reduction in the pay of the accommodated employee) or a variety of other valued privileges

<sup>50</sup> TEBBE, *supra* note 1, at 65–66.

<sup>51</sup> *Id.* at 66.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 61.

<sup>54</sup> *Id.* at 63; Brownstein, *Taking Free Exercise Rights Seriously*, *supra* note 18, at 71.

to mitigate his loss. There may be situations where no such alternatives are possible and the harm to other employees justifies denying the accommodation. But I would not consider the administrative convenience costs incurred by the employer in mitigating those costs to be a sufficient justification for denying the accommodation – unless the employer confronts truly significant difficulty and expense in doing so.

If I am reading him Nelson correctly, I think he would put a thumb on the Establishment Clause side of the balancing scale in these cases. I worry about the weight of that thumb. And I would put a thumb on the religious accommodation side of the scale. From my perspective, the harm caused by a religious exemption must be very substantial and not susceptible to being mitigated or spread to bar the accommodation under the Establishment Clause.

I am also uncertain as to whether Nelson would require courts to extend any deference to the legislature's conclusion that on balance an accommodation was warranted. Consider the California WRFA religious accommodation statute described earlier. Would that law be subject to an Establishment Clause challenge on its face under Nelson's analysis because it requires employers to incur serious costs before they can deny an accommodation? Would any weight be assigned to the legislature's considered conclusion that this statutory standard was necessary to protect religious minorities' access to employment and a livelihood?

Alternatively, the new California law might only be subject to Establishment Clause challenge as applied. Courts would have to consider the actual cost of the accommodation to the employer, fellow employees, or other third parties and weigh it against the importance of the employee's religious liberty interests. In considering that possibility I think it is important to confront a core issue that a balancing test presents in these circumstances. A primary reason why the Supreme Court concluded that free exercise rights could not be protected against neutral laws of general applicability in *Employment Division v. Smith* is that it doubted the ability of federal courts to fairly and effectively balance the state's interest in refusing to exempt religious individuals or institutions from general laws against the burdens

the denial of an accommodation would impose on religious freedom.<sup>55</sup>

The balancing test Nelson proposes would seem to assign a very similar task to federal courts – although here courts are asked to use a balancing analysis to determine whether the Establishment Clause requires the *invalidation* of an accommodation while in *Smith* courts had to use a balancing test to determine whether the Free Exercise requires the *adoption* of an accommodation. In either case, doubts about the subjectivity and indeterminacy of such a balancing analysis require some attention and discussion. Certainly one might ask this question: if a balancing test may be reasonably and effectively employed under the Establishment Clause to invalidate unacceptably burdensome accommodations, is there any reason to continue to support the *Smith* opinion's argument that the balancing of religious freedom and state interests is so difficult and constitutionally improper that it requires dramatically limiting the scope of free exercise rights?<sup>56</sup>

### *C. Conceptual Problems with the Avoiding Harms Principle*

The conceptual problem with the avoiding the harms principle is more complicated. Nelson recognizes there is an issue here. He is working on resolving it. That is more than I can say for myself. I am only flagging the issue because I was provoked into thinking about it by reading Nelson's manuscript.

The problem is the following: as a general matter, laws often cause harm to individuals. And exemptions from laws do so as well. Both religious and secular individuals are regularly exposed to harm from laws and exemptions from laws designed to further secular goals and beliefs. I take the following to be an accepted principle of constitutional law. As a default principle, laws or exemptions from laws do not violate the Constitution

<sup>55</sup> *Employment Division v. Smith*, 494 U.S. 872, 889 n.5 (1990).

<sup>56</sup> For a discussion of the similarity between the balancing required to determine if a free exercise exemption would be required and the balancing involved in determining whether a discretionary exemption goes too far and violates the Establishment Clause, see Alan Brownstein, *Continuing the Constitutional Dialogue, A Discussion of Justice Steven's Establishment Clause and Free Exercise Jurisprudence*, 106 NW. U. L. REV. 605, 643–648 (2012).

solely because the cause harm to, or impose costs on, third parties who may not be directly benefited by the law.

Further, it is not just statutory law or the common law that causes harm to third parties. Constitutional law does as well. Courts will often protect the exercise of constitutional rights even though doing so causes real harm to individuals. Rights are expensive political goods. They require protection even when there is a painful price for doing so. Freedom of speech is an obvious example. Moreover, the harm caused by protecting speech is not always spread broadly or equally. When the Nazis march through Skokie, a community where many Jews and Holocaust survivors reside; when a defamed victim's reputation is destroyed but he or she cannot satisfy the constitutional standard for obtaining redress; when protestors rejoice in the death of a soldier at the cemetery where parents are mournfully burying their son or daughter, the exercise of rights causes special harm to particular individuals. Thus, it seems to me that there is a socially coherent foundation for recognizing that free exercise mandated exemptions or discretionary legislative accommodations, just like the protection provided to other rights, may be justifiable even though they cause some real harm to others.

Of course, there is an Establishment Clause in the First Amendment and the courts have recognized that at some point religious exemptions may extend too far and impose unacceptable costs on third parties. When that occurs, the Establishment Clause can be invoked to challenge the exemption.

Exactly why is that so? Since many secular laws, and secular exemptions to their application, result in third party harms without being subjected to serious constitutional review, why does the Establishment Clause impose constraints on only religious exemptions that cause harm to third parties? The answer to this question, and Nelson makes this point, would seem to be that there is something distinctively problematic as a constitutional matter about people suffering harms as a result of the state exempting *religious* individuals or institutions from regulations that other individuals and institutions must obey.

The government cannot require some people to incur costs in order for other people to engage in religious exercise.<sup>57</sup>

This idea certainly has constitutional roots. It builds on the contention that the religious liberty of taxpayers is impermissibly burdened when the taxes they pay are used for religious worship, proselytizing or instruction. It resonates with the Establishment Clause doctrine restricting government subsidies of religious institutions and activities. That doctrine has been undermined by judicial decisions in recent years (I think incorrectly), but one can certainly argue that it was long accepted and had an extended pedigree.

If this is the foundation of the argument, however, more needs to be done to connect it to the conclusion that religious exemptions violate the Establishment Clause if they cause harm to third parties. What happens, for example, if the state generalizes the law to exempt both religious and secular acts of conscience? (Nelson's fairness principle, discussed later in his book and in this review, seems to strongly endorse general exemptions over religion specific exemptions.) Here, the harm to third parties continues. Indeed, it increases in scope. A broader harm causing exemption typically means that more people will be harmed. Notwithstanding the increase in the extent of the harm caused by the accommodation, does the fact that the beneficiaries of the accommodation are both secular and religious mean that the Establishment Clause limit on third party harms no longer applies? That's an arguable solution to the problem, but would it be a preferred solution? More people would suffer harm. Further, it is not even clear that a generalized neutral exemption solves the constitutional concern about people not having to incur costs in order to allow other people to engage in religious exercise.

After all, even under a generalized exemption statute, it may be clear that some, perhaps most, of the harmful conduct permitted by the exemption will be engaged in for religious purposes. If we were talking about the funding of religious institutions, the case law enforcing strong Establishment Clause constraints on subsidies to religious institutions held that the generality of the funding scheme standing alone did not

<sup>57</sup> TEBBE, *supra* note 1, at 52–54.

immunize it from Establishment Clause review.<sup>58</sup> One might argue that a similar analysis should apply to exemptions so that even if the exemption is generalized, there would still be a reason to be concerned because some people would be harmed by exempting a religious person or institution from an otherwise generally applicable law?

This response suggests that even if the exemption is generalized, the Establishment Clause should still operate to protect people from harm caused by exempting religious individuals or institutions from generally applicable laws. But that solution also raises awkward questions. Would this mean that the exemption has to be more limited for the religious individual or institution than it is for the secular individual or institution because only the former is subject to Establishment Clause constraints? Because the concern about people incurring costs to allow others to engage in religious exercise does not arise when exemptions accommodate secular beliefs, the exemption for secular individuals and institutions would not need to be narrowed to reduce harm to third parties. Only the application of the exemption for religious individuals and institutions is limited by the Establishment Clause third party harm principle.

Still another alternative would suggest that Establishment Clause constraints on exemptions accommodating both religious and secular acts of conscience which result in third party harms should apply across the board. The Constitution would preclude the accommodation of conscience based on either religious or secular beliefs if an exemption caused unacceptable harm to, or imposed unacceptable costs on, third parties. This solution solves some problems, but it leads to one important unanswered question. Why should we have a constitutional framework that accepts exemptions from laws for any number of reasons to further a seemingly limitless range of state interests – notwithstanding the harm these exemptions cause to third parties – with only one exception: exemptions are constitutionally impermissible if they are designed to respect and protect the conscience of the individual?

<sup>58</sup> See generally *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756 (1973).

I do not claim to have an answer to these questions. I believe they have not been addressed in case law and commentary to any serious extent because Establishment Clause cases invalidating accommodations on the grounds that they impose unacceptable harm on third parties have been rare and relatively anomalous. If a more demanding Establishment Clause limit on accommodations was enforced by courts, these questions would become more salient. I look forward to reading Nelson's future work addressing these issues.

*D. The Unfairness to Others Principle*

The unfairness to others principle can be stated simply. It is unfair to grant religious individuals exemptions from laws without providing a similar exemption to individuals with comparably profound secular commitments that are burdened by the laws' requirements. Indeed, providing religious exemptions exclusively in such situations is not only normatively unfair, it denies nonreligious individuals the right to equal citizenship.<sup>59</sup>

I respect, but disagree, with much of Nelson's analysis here. Part of the problem is that I think there are persuasive reasons for distinguishing religious exercise from other conduct and beliefs. Nelson appears to me to be more ambivalent about this distinction. But we are not going to resolve this issue in this symposium – so let's leave this disagreement aside for the moment.

I also think that the distinctive nature of religion is more generally accepted in our society than the idea that religion is just another belief system. In my judgment, the idea that religion is distinctive resonates to a greater extent with the conventions of our jurisprudence than the view that religion is neither special nor deserving of specific accommodations. There are hundreds of religious accommodations in local, state and federal law, the overwhelming majority of which apply on their face to religion alone. Most notably, in addition to the First Amendment which speaks of religion, not conscience, there is the federal Religious Freedom Restoration Act (RFRA)<sup>60</sup>, numerous state RFRAs,<sup>61</sup> the

<sup>59</sup> See TEBBE, *supra* note 1, at 71–73.

<sup>60</sup> Religious Freedom Restoration Act of 1993 §§ 2–7, 42 U.S.C. §§ 2000bb-2000bb(4) (2012).

Religious Land Use and Institutionalized Persons Act (RLUIPA)<sup>62</sup> which applies to both religious land use and the religious exercise of inmates, and the exemption in Title VII for religious organizations.<sup>63</sup> Thus, I would argue that, at a minimum, the principle that religious beliefs and practices warrant special protection and exemptions is a socially coherent summary of accepted legal and social mores.

I also am uncertain as to how courts can identify what counts as a secular profound commitment that is comparable to religion. I am inclined to agree with Andrew Koppelman's argument in his paper in this symposium<sup>64</sup> and elsewhere<sup>65</sup> that there is simply no way to identify, protect and cabin the class of all deeply valued human concerns.<sup>66</sup> More importantly, I do not view the recognition of particular liberty rights, but not others, as denigrating individuals who value other protected interests. In addition to religion, we recognize and provide special protection and privileges to rights involving marriage, speech, family and children, keeping and bearing firearms, and abortion.<sup>67</sup> Relationships, activities, and identities outside of these designated interests, however deeply felt and valued they may be, are treated differently.<sup>68</sup> The artist and author receive

<sup>61</sup> See, e.g., CONN. GEN. STAT. § 52-571b (2017); FLA. STAT. §§ 761.01-761.061 (2017); VA. CODE ANN. § 57-2.02 (2017).

<sup>62</sup> Religious Land Use and Institutionalized Persons Act §§ 2-8, 42 U.S.C. §§ 2000cc-2000cc(5) (2012).

<sup>63</sup> 42 U.S.C. § 2000e-1(a) (2012).

<sup>64</sup> Andrew Koppelman, *Tebbe and Reflective Equilibrium*, 31 J. CIV. RTS. & ECON. DEV. 125 (2018).

<sup>65</sup> ANDREW KOPPELMAN, DEFENDING AMERICAN RELIGIOUS NEUTRALITY, 165 (2013).

<sup>66</sup> *Id.* ("Because no single legal rule can protect all deeply valuable concerns, more specific rules are necessary.")

<sup>67</sup> See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015) (recognizing that marriage is a protected right); *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008) (recognizing that keeping and bearing firearms is a protected right); *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 846 (1992) (recognizing that abortion is a protected right); *Moore v. City of E. Cleveland, Ohio*, 431 U.S. 494, 503 (1977) (recognizing that family unity is a protected right); *Wisconsin v. Yoder*, 406 U.S. 205, 213–14 (1972) (recognizing that religion is a protected right); *Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205, Will Cty., Illinois*, 391 U.S. 563, 573 (1968) (recognizing that speech is a protected right).

<sup>68</sup> See, e.g., *Vill. of Belle Terre v. Boraas*, 416 U.S. 1, 8–9 (1974) (determining that the interest of family members in living together is a protected right, but the interest of college roommates in living in the same dwelling is not).

constitutional protection for their work.<sup>69</sup> The craftsman whose product is non-expressive does not.<sup>70</sup> For some people, freedom of speech is largely irrelevant to their lives. Protecting the land they own and on which they base their livelihood and identity might be a far more valued interest. Again, I largely agree with Andrew Koppelman that assigning value to and protecting one liberty interest does not insult or deny the value of other interests.<sup>71</sup>

I do not mean to suggest that there are no circumstances in which it seems to be normatively unfair to protect religious exercise or religiously motivated conduct, but not to protect similar secular practices or conduct motivated by secular beliefs. In most such situations, however, I think the foundation of our concern is not the difference in treatment. The problem is not that religion is unfairly protected, it is that these other interests arguably deserve constitutional or statutory recognition in their own right. I am open to the argument that acts of secular conscience or other secular commitments deserve to be recognized and protected in appropriate circumstances; I make no claim that the list of rights we currently recognize is finite and exclusive. I do not agree, however, that because we recognize some liberty rights, we are denying rights of equal citizenship to individuals whose deepest values have not been recognized as liberty rights.

Here again, however, I think it is important to understand this disagreement about the fairness of religious exemptions in terms of the three models I described at the beginning of this book review.<sup>72</sup> I look at religious exemptions from the perspective of the Rigorous Religion Clause model, a constitutional regime in which government support for religion is sharply limited by Establishment Clause constraints on the government's funding of religious institutions. Those constraints,

<sup>69</sup> See, e.g., *Brown v. Entertainment Merchants Association*, 564 U.S. 786 (2011) (recognizing that even new mediums like video games are sufficiently expressive to be protected speech under the First Amendment).

<sup>70</sup> See, for example, the current debate about whether baking a wedding cake is protected as speech in *Masterpiece Cakeshop, LTD v. Civil Rights Comm.* No. 16-1111, Dec. 5, 2017, [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/](https://www.supremecourt.gov/oral_arguments/argument_transcripts/)

<sup>71</sup> KOPPELMAN, *supra* note 65, at 165 (“Acknowledgment of the unique value of each human good is no insult to the others.”).

<sup>72</sup> See *supra*, notes 16–35 and accompanying text.

standing alone, may seem unfair to religious individuals and institutions; they certainly disadvantage religious groups in a welfare state where government funding is so common. Under this model, the Establishment Clause also imposes serious constraints on the government's ability to express religious messages or promote religious ideas. No such constraint applies to government support of secular messages or ideas. In this complex constitutional regime, restricting government interference with religion more aggressively and expansively than we restrict government interference with secular beliefs and conduct may not be generically unfair -- that is, it should not be viewed as unfair when we take into account all of the situations in which religion is treated less favorably than secular ideas and institutions.

Of course, this macro argument will not alleviate fairness concerns in every case in which an accommodation is limited to religious exercise and does not extend to secular beliefs or belief-based practices. Still I think there is some value to thinking about offsetting benefits and burdens in discussing how the two religion clauses fit together. The argument is most useful when religion is being discussed as a generic perspective or belief system and compared to equally generic secular perspectives and beliefs -- which is what Nelson does in the principles section of his book.<sup>73</sup>

This quid pro quo analysis is far less precise when we are talking about particular faiths. However, I think there is still some utility to it. For example, many minority faiths are protected by free exercise rights, but are also burdened by Establishment Clause constraints on their ability to receive state support for religious institutions.<sup>74</sup> Orthodox Jews, for example, could be (and should have been) protected by a rigorous free exercise doctrine that granted them exemptions from Sunday closing laws. They would also argue that they are substantially burdened by "no aid" doctrine that prohibited government support for their Jewish day schools. Similarly, some minority faiths would benefit from religious accommodations, but feel

<sup>73</sup> TEBBE, *supra* note 1, at 49.

<sup>74</sup> *See, e.g., Lemon v. Kurtzman*, 403 U.S. 602, 625 (1971) (finding that state funding religious school teachers' salaries violates the Establishment Clause).

burdened by constitutional constraints on religious displays, contending that such restrictions secularize society and undermine their religious messages.

Indeed, because of the diversity of beliefs in American society, many faiths are powerful in some jurisdictions and weak in others. If we think about state and local decision-making, the Mormons, for example, are limited by the Establishment Clause in Utah where they have the political power to be an established religion, but they are minorities seeking free exercise protection in other jurisdictions, such as California. Even a very large faith such as Catholicism -- which can certainly claim to be burdened by Establishment Clause constraints on government funding and other limitations on the government promotion of religion -- finds itself needing free exercise protection when some of its beliefs conflict with important secular ideals.<sup>75</sup>

From the perspective of the Limited Liberty Equality Model, which serves as the general foundation of Religious Freedom in an Egalitarian Age, all of this analysis misses the mark. It is grounded in a jurisprudence that has been repudiated by the Court and rejected by most church-state scholars as well. There is little utility or social coherence for that matter in taking Establishment Clause constraints on the government's promotion of religion into account in evaluating the fairness of religious accommodations when those constraints no longer exist. As I indicated in the beginning of this review, there is considerable force to this position. Nonetheless, I believe it is important to understand the limits of the competing dominant models in contemporary jurisprudence. Focusing on the Rigorous Religion Clause model provides what I think is needed perspective to understand that the choices we confront today are not intrinsic to United States church-state doctrine.

Finally, I challenge Nelson's argument that denying religious individuals or institutions exemptions from neutral laws of general applicability does not subordinate them, deny them equal citizenship, or cause them non-endorsement harms.<sup>76</sup> If the experience of the religious group or individual denied an

<sup>75</sup> See, e.g., *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 73—74 (Cal. 2004). See generally *Zubic v. Burwell*, 136 S. Ct. 1557 (2016)

<sup>76</sup> TEBBE, *supra* note 1, at 117—119.

exemption or accommodation is relevant to the analysis as an empirical matter (I think it is, I'm not sure if Nelson does) then I think that religious individuals that are denied exemptions often feel disrespected and subordinated. Interests that are critically important to their identities and core beliefs are ignored and treated as if they are valueless and unworthy of recognition.<sup>77</sup> Moreover, I think there is a powerful, socially coherent argument that supports the idea of non-endorsement and disrespect in these cases.

We live in a society where exemptions from laws are commonplace. Legislation is often drafted along the contours of interest groups that lobby and use their political influence to skew the parameters of laws. Often, the interests that influence legislative decisions may seem unimportant and undeserving of attention to neutral observers. Compromises in legislation are a statement about which groups count in our society. Further, if we focus on religion, in most cases laws are drafted to avoid the burdening of large, politically-powerful faiths.<sup>78</sup> If the contours of the law circumscribe the practices of religious majorities, exemptions are unnecessary. With that understanding as a foundation for evaluating the message communicated by government conduct, denying religious exemptions may certainly be characterized as communicating a message of subordination and disrespect.<sup>79</sup>

#### IV. FREEDOM OF ASSOCIATION AND EXEMPTIONS FROM CIVIL RIGHTS LAWS PROHIBITING EMPLOYMENT DISCRIMINATION

Nelson's analysis of freedom of association and its impact on laws prohibiting employment discrimination is thoughtful, nuanced and complicated. This makes it difficult to summarize and discuss his analysis in a relatively brief essay such as this one. Accordingly, I am going to focus on a few core ideas.

Nelson breaks down private associations into three categories:

<sup>77</sup> See Brownstein, *Continuing the Constitutional Dialogue, A Discussion of Justice Steven's Establishment Clause and Free Exercise Jurisprudence*, supra note 56, at 631-56..

<sup>78</sup> *Id.* at 632-33. .

<sup>79</sup> *Id.* at 631—36.

1. Intimate associations. The classic example of an intimate association is the family. Indeed, it is not clear to me that anything other than familial relationships are included in this category in Nelson's association cosmology. We protect these associations because they are basic to personhood – to the self-defining identity of a person. Constitutional law provides maximum protection to intimate associations against anti-discrimination laws.<sup>80</sup>
2. Close and contained associations. These are defined as local organizations that are limited in size. They are critically important organizations because of the role they play in value formation among their members. These associations are incubators of views on fundamental questions of personal and public morality. Associations do not qualify to be included in this category if they are too large or are not tightly knit.<sup>81</sup>
3. Values organizations. These associations are regional and national in size. They are primarily important because they express independent voices in the marketplace of ideas.<sup>82</sup>

As to all of these associations, Nelson suggests that there is generally no socially coherent or persuasive reason to treat religious groups differently than secular groups.<sup>83</sup> Intimate associations, as well as close and contained associations should be allowed to choose their members and leaders without the constraints of anti-discrimination laws. Values organizations should be shielded from anti-discrimination laws in the selection of their leaders or speakers but only to the extent that doing so is required by their ideological commitments and mission.<sup>84</sup>

The analysis changes to some extent if we shift from an association's decisions regarding membership and leaders to an association's decisions regarding employment. Intimate

<sup>80</sup> TEBBE, *supra* note 1, at 82.

<sup>81</sup> *Id.* at 83–85.

<sup>82</sup> *Id.* at 85.

<sup>83</sup> *Id.* at 88–96.

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

associations' constitutional protection does not extend to employment, such as the hiring of baby sitters or a clerk at a Mom and Pop store, but civil rights laws often exclude small business operations from their coverage in any case.<sup>85</sup>

For discrimination in employment purposes, close and contained local community associations can hire employees in leadership positions free from civil rights laws. As to other employees, these associations can discriminate on the basis of belief or ideology pretty much across the board, but they cannot discriminate in hiring on other grounds.<sup>86</sup>

With regard to values organizations, policy makers and communicators can be hired and fired free from the constraints of civil rights laws, but only for reasons that are required by their mission or ideology. Also, employees whose work is connected to the formation or implementation of the group's mission can be subject to belief discrimination and perhaps other kinds of discrimination as well.<sup>87</sup>

I think there are problems with the way these categories are defined by function. For example, the line between close associations that are important because of the role they play in value formation and larger values associations that are important because they express independent voices in the marketplace of ideas seems somewhat arbitrary. Larger organizations may play an important role in value formation as well as the dissemination of ideas. It is not uncommon for a national religious association, such as a mainline Protestant denomination, for example, to decide the values the denomination will espouse on controversial issues such as the denomination's position on homosexual relationships and same-sex marriage through a national discussion among the representatives of local congregations. That seems to me to be value formation at the national level. Local congregations categorized as close associations, on the other hand, frequently add their independent voice to the local marketplace of ideas. However, it is probably the case that no manageable category scheme for associations can avoid some arbitrary line drawing.

<sup>85</sup> TEBBE, *supra* note 1, at 146-47.

<sup>86</sup> *Id.* at 147-48.

<sup>87</sup> *Id.* at 148.

Some imprecision in defining categories is simply the price of working with a limited number of categories.

My primary concerns with Nelson's freedom of association analysis go to more fundamental matters. To begin with, I believe that there is a powerful and persuasive socially coherent argument for treating religious associations and institutions differently than their secular counterparts.

Looking at the way the law operates, it seems clear to me that the distinction between the religious and the secular is pervasive in our society and legal system. Specific religious accommodations are hardly uncommon and there are numerous notable examples of constitutional and statutory law distinguishing between religious and secular institutions. The ministerial exception applies only to religious congregations.<sup>88</sup> Title VII prohibits discrimination on the basis of religion, but not discrimination on the basis of secular belief or identity. Title VII only exempts religious organizations from the prohibition against religious discrimination.<sup>89</sup> RLUIPA only applies to religious land uses. Obviously, the beneficiaries of the land use provisions of this federal law are religious associations. Federal RFRA and numerous state RFRA's also apply exclusively to religious associations and institutions as well as religious individuals. Thus, I think some distinction between religious and secular associations and institutions is accepted and settled in our legal system.

I think there are several justifications for this distinction. First, there is a sense in which a religious congregation overlaps all three of the different associations that Nelson describes. Religious congregations connect with family life more than any other kind of association in our society. Religion relates to marriage, procreation, child rearing, life cycle changes, and the death of family members. For devoutly religious people, religion is an intrinsic part of their family association. Religious congregations are obviously involved in value formation and the transmission of values within the religious community. Religious associations also have a voice in the market place of ideas. While

<sup>88</sup> *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 132 S.Ct. 694, 705—06 (2012).

<sup>89</sup> *See generally* *Spencer v. World Vision*, 633 F. 3d 723 (9<sup>th</sup> Cir. 2011).

national or regional religious associations may be speakers and idea communicators at the state or national level, religious congregations have a voice at the local level. I doubt that any secular association can demonstrate the depth and breadth of religious associations across these categorical lines.

Second, many Americans believe in the concept that certain conduct, places, and purposes are holy or sacred. A house of worship and related facilities is a sanctuary – a sacred place. Funds donated to religious associations are reserved for sacred purposes. Even if a church allows a third party to use its multi-purpose facility for a non-denominational purpose, there is an understanding that the use of space must be consistent with the sacred nature of the location. Similarly, if a religious congregation hires staff using funds that were donated to it for denominational purposes, the congregation should be able to require that employees hired support its beliefs and mission.

Third, courts are sensitive and rightly so to legal standards that require treating certain religions differently than others. The parameters of the close, contained, and tightly knit association that Nelson envisions seem indeterminate. If there is no special rule for religious congregations, one must assume that some congregations are insufficiently close or tightly knit to fall within the category. Similarly, some discriminatory decisions by religious values organizations may be deemed necessary to the organization's mission while discriminatory decisions by other religious organizations may be determined to be inadequately connected to the organization's mission.<sup>90</sup> A legal framework that results in certain religious associations being permitted to discriminate while other, similar, religious organizations are denied such exemptions undermines our commitment to religious neutrality.

Fourth, religious institutions operate under Establishment Clause constraints. These institutions may be ineligible for

<sup>90</sup> The primary reason Justice Brennan concurred in the Supreme Court's decision in *Corporation of the Presiding Bishop v. Amos*, 107 S. Ct. 2862 (1987) to uphold the broad exemption from Title VII which permitted religious organizations to discriminate on the basis of religion in hiring staff was that he doubted the ability of courts and juries to accurately determine what constituted a religious function for minority faiths. *Id.* at 2872–73 (Brennan, J., concurring). One might be equally concerned about judicial discretion in determining what is required by a religious association's mission.

government aid that their secular counterparts receive. The government may provide expressive support for the mission of secular associations, but cannot provide similar encouragement to religious groups. Given the Establishment Clause limitations that religious institutions operate under, one might argue that distinctive associational freedom for religious organizations works to even the playing field to some extent.

I understand that Nelson is unpersuaded by my argument that religious organizations are distinctive because their autonomy and protection implicates each of the three constitutional values that underlie his categorical framework: intimate association, value formation, and the dissemination of independent voices in the market place of ideas. But I am not sure why. I think that a values based analysis of church-state issues, which recognizes that multiple values are in play, demands that we look to the accumulation of values and interests on both sides of conflicts, in order to resolve problems and ultimately develop doctrine. If a rule of decision, such as protecting the autonomy of religious associations, furthers more of the values we consider relevant and important to associational freedom, I think that rule is independently and distinctly justifiable compared to other rules of decision that further more limited values.

I also recognize that the forth distinction has limited applicability in light of the current Court's Establishment Clause jurisprudence. This contention is one of the places where I am arguing from a Rigorous Religion clause model while Nelson's analysis is grounded, in many ways quite reasonably, in more contemporary religion clause jurisprudence. If we are limited by the parameters of current religion clause doctrine to a conflict between the One-Sided Neutrality Model and the Limited Liberty, Equalitarian Model, there is considerable persuasive force to Nelson's analysis calling for the equalizing of the associational freedom of religious and secular associations.

My arguments about the distinctive nature of religion and the special justifications for protecting religious associational autonomy clash with a church-state jurisprudence that insists that there is nothing distinctive about religious organizations and that, accordingly, religious organizations should receive government financial support on the same terms as secular

organizations. My arguments clash with the reality that religious organizations which claim a special autonomy right to operate independently from government will also be receiving substantial government funds – funds which are being provided to the religious organization to serve the public good as that good is determined by the state officials who authorize and review such subsidies. My arguments about the special nature and status of religious beliefs and identity clash with a jurisprudence that permits government to influence individual and collective religious beliefs through its power to sponsor and express religious displays, sectarian messages, and directed prayers in government meetings and activities.

Perhaps, most importantly, my arguments must confront the reality that autonomy and freedom from state regulatory interference in determining an association's members and hiring its staff is empowering. Having distinctive autonomy protection provides associations with expressive missions a valuable competitive advantage in the market place of ideas. It gives religious voices a stronger and less encumbered foundation than their secular counterparts.<sup>91</sup> Who would doubt that a legal framework providing left wing organizations distinctive autonomy protection and freedom from regulations unavailable to right wing organizations distorted the marketplace of ideas? How then, if all else is equal with regard to government support and promotion of religious and secular organizations in funding and government speech, can we justify providing religious associations valuable freedoms that are not available to their secular counterparts?

Let us put these establishment clause concerns aside, at least for the moment. My intuitive discomfort with Nelson's framework for resolving associational freedom issues and exemptions from anti-discrimination laws goes beyond my contention that the nature of religious associations justifies providing them distinctive protection. I also worry that Nelson's approach creates serious risks that an analysis which distinguishes between religious and secular associations is more

<sup>91</sup> See Brownstein, *Interpreting the Religion Clauses*, *supra* note 17, at 271–74; see also Brownstein, *The Religion Clauses as Mutually Reinforcing Mandates*, *supra* note 19 at 1714.

likely to avoid. Basically, Nelson urges us to expand the scope of exemptions from anti-discrimination laws for secular associations – particularly for close associations. Under his thesis, such associations can discriminate against anyone in choosing members and can discriminate on the basis of religion or secular belief in hiring staff. What is critical here is that religious congregations receive no special associational protection because they are religious. At the local level, they would only receive protection against anti-discrimination laws if they qualify as a close association.

Initially that analysis seemed to me to locate conflicts between religious liberty and anti-discrimination laws somewhere between the proverbial rock and a hard place. On the one hand, I worried that under Nelson's analysis we would define close associations so narrowly we would end up not protecting a lot of religious congregations against anti-discrimination laws. On the other hand, I thought if close associations were defined more broadly to include all or virtually all religious congregations, we would end up protecting a very large number of local associations against civil rights laws that prohibit discrimination on the basis of religion – and perhaps on the basis of other protected identities as well.

I recognize that determining the scope of associational freedom and the resolution of conflicts between associational freedom and anti-discrimination laws is a difficult undertaking. And this is particularly so when we are discussing close associations. There is a perilous Catch 22 here. These are associations that play a critically important role in the formation of values in our society. These associations are incubators of the society's and polity's views on fundamental questions of personal and public morality. Thus, there is a powerful case to be made for extending substantial protection to these associations against government interference with their membership and hiring decisions. If we define freedom of association expansively, however, these values will be formed and fundamental questions answered in associations where racial minorities and women are not members and Jews and Moslems cannot even be hired as employees. It is in the nature of rights that they are expensive political goods, but this is surely a very high price to pay, both for excluded individuals and groups and for society as a whole.

While conceding the difficulty of the project, I remain unconvinced that a neutral and generic approach to associational freedom is preferable to an analysis that distinguishes between religious and secular associations and provides distinctive protection for religious institutional autonomy. In e-mail correspondence with Nelson after the conference, he made it clear that the close association category was intended to include all local religious congregations with the possible exception of mega-churches. That clarification alleviates my concern about the rock – about religious congregations falling outside the category and receiving inadequate protection. However, it does not reduce my misgivings about the hard place – the risk that this analysis substantially expands the scope of exemptions from anti-discrimination laws.

The picture presented by this approach in small town America may be particularly bleak. Here, there may be an insufficient number of minority group residents to organize many associations of their own. Minorities may be systematically shut out of the public life of the community by being denied membership in all of the private associations in which social, political, and economic bonds are developed. Size is relative. A club with 50 members may monopolize life in a small town while a club with 350 members may be a drop in the bucket of associational choices in New York City.

Nelson does not believe his framework risks this result. He certainly does not intend for it to require these consequences. The definition of close associations, however, is sufficiently indeterminate that it is difficult to know exactly how these exemptions from civil rights laws would apply. Nelson relies on case law defining a bona fide private club to provide working guidelines for defining a close association.<sup>92</sup> I confess that I have not studied this line of authority closely. I'm not sure whether it focuses on value formation which is the defining characteristic of close associations under Nelson's framework.

More importantly, I don't think the courts developing and applying these criteria to private clubs thought that they were also developing doctrine which would determine whether a religious congregation would be exempt from anti-discrimination

<sup>92</sup> TEBBE, *supra* note 1, at 90–91.

laws prohibiting discrimination on the basis of religion. The criteria for identifying a protected association might have been broadened considerably, if courts recognized that this would be the only basis for protecting the associational autonomy of religious congregations and organizations.

Let's consider the synagogue I attend as an example to illustrate the problem. I live in Davis, California. It is a college town of about 30,000 students and 30,000 non-student residents. The membership of my synagogue, Congregation Bet Haverim, is about 275 families. That's fairly large for a small town, but other religious congregations in Davis are even larger. We are very non-selective in accepting members. You have to be Jewish, but that's about it and we don't inquire very much about why you think you are Jewish. A lot of houses of worship in Davis are like that. If a person asserts that he or she accepts the doctrines of the faith, they are accepted as a member. No other qualifications for membership are required.

If religious congregations such as Bet Haverim will be recognized as a close association, not because it is a *religious* association, but because of its generic characteristics, then I assume that other associations of similar size, and a similar level of selectivity, would also, necessarily, have a strong case that they qualify as a close association. We would also take into account the key purpose for protecting close associations – independent value formation.<sup>93</sup> That is certainly true for a synagogue or other house of worship. Presumably, other associations that satisfy the size and selectivity criteria and also are involved in value formation would be very strong candidates for inclusion in the close association category.

If my synagogue satisfies the criteria for identifying a close association, arguably a great many other local associations fit these criteria as well. Consider local youth programs such as the Little League or AYSO (soccer league). I think the Little League is far more selective than my synagogue. It discriminates on the basis of age, geography, and gender.<sup>94</sup> It also claims to be focused

<sup>93</sup> *Id.* at 84 (“[I]dentifying groups that qualify for this sort of First Amendment protection ought not to be a formalistic exercise; rather, it should always relate back to the purposes for protecting community groups in a democratic society.”).

<sup>94</sup> See David Fintz, *The Women's Right To Participate In The Game Of Baseball*, 15 CARDOZO J.L. & GENDER 641, 652 (2009).

on value formation: the values of perseverance, teamwork, sportsmanship etc. Suppose in a particular town, the local Little League decided to exclude Muslims because it argued that Islam was inconsistent with the association's ideals about sportsmanship and teamwork. Then it would even be more selective. If a religious congregation is a close association, all youth programs similar to the Little League are as well and exemptions for these organizations from anti-discrimination laws would be required. Nelson tentatively agrees that under his analysis these youth organizations are close associations.

By analogy, I thought that small county bar associations would also be close associations. They do not have official responsibilities or authority like the State Bar in California. They are completely voluntary. They are limited by profession and geography. They are *very* involved with legal ethics and value formation. Moreover, there are numerous other "bar associations" that identify with particular groups of lawyers: the Hispanic bar association, the Asian Pacific bar association, a Jewish bar association. There are other legal associations that do not call themselves bar associations: the Women's Lawyers Association or the Christian Legal Society. And then there is the Inn of Court which is very selective of individual members.

All of these groups are involved with value formation to some degree (some more than others). Are these close associations? If they limited their membership or leadership positions to Hispanics, women, Christians etc., they would be as or more selective than my synagogue. Would they be protected against some anti-discrimination laws? The membership of all of these associations practice a particular profession and to that extent there is an economic dimension to their identity. Nelson argues that this would preclude them from being recognized as a close association. I am not sure why this should be the case. No one would mistake the Christian Legal Society or an Inn of Court Chapter for a trade association. Further, very selective private clubs may limit their membership to professionals, e.g., doctors, lawyers, and successful businessmen and women etc. Local plumbers or high school teachers need not apply. If these clubs are close associations even though they limit their membership to a range of professionals, it is not clear to me why an association comprised of members of a particular profession is not a close

association as well. Certainly, I would think far more value formation activities occur at an Inn of Court or Christian Legal Society meeting than at a restricted athletic club.

I also thought that parent organizations such as the PTA might be a close association. In Davis, they are divided by school, and the elementary schools are not that large. I do not know whether they are formally limited to the parents of children attending a particular school or if that is just the general custom, but suppose membership in each chapter is limited to the parents of children attending a particular school. A school PTA in Davis is usually much smaller than my congregation. Would that make it a close association compared to a religious congregation? PTA's are very involved in value formation. Leaving aside the question of whether discriminatory policies would be acceptable to the national parent organization, if a group organized and identified itself as the Women's PTA for X school on the theory that raising kids is a woman's job, would it be permitted to exclude male parents? Would a Christian PTA chapter be a close association permitted to exclude Jewish and Muslim parents?

Nelson suggests that a PTA chapter would not be a close association, but again I am not sure why this must be so. Surely parents of a particular faith whose children attend the same public school could create a private association to address school concerns from the perspective of their faith. If they discovered that this group included many of the members of the school's PTA, why would they not be permitted to reconstitute themselves as the Protestant PTA of X school?

I thought neighborhood associations might also be sufficiently small and selective to constitute a close association. Neighborhood definitions and boundaries are arbitrary. A group may define the "neighborhood" in ways that include residents of certain races and economic classes and exclude residents who live a couple of blocks away because they are poorer or ethnically different. There is no rule defining the boundaries of neighborhood associations. The boundaries are defined by the members who start the association. Or think of an ethnic neighborhood association such as a "Chinatown" neighborhood association. There are no fixed limits to what constitutes "Chinatown" in a city. Such an association may draw boundary lines based on the ethnicity of residents. These neighborhood

associations may be larger or smaller than my synagogue. To the extent that they promote the cultural values of a particular ethnic community, they would seem to be involved in value formation.

From my various post conference discussions with Nelson, I think he envisions the operation of his generic associational freedom framework to protect virtually all religious congregations and houses of worship as close associations. But it would not protect discriminatory decisions by so many other associations that religious minorities, and in some circumstances other minorities as well, could be effectively excluded from much of the public life of a community. I need to have a better understanding of how the framework he endorses can accomplish this goal.

American society intuitively recognizes that religious groups, notwithstanding all of the good that they do for their own members and the community at large, are intrinsically exclusionary. That intuition, I suggest, is not so commonly accepted for other kinds of associations in our society. The fact that the exclusionary nature of religious associations is recognized to be distinctive and deserving of greater protection from the mandates of civil rights laws than secular associations may be a valuable working arrangement that maximizes both religious liberty and anti-discrimination principles. While our communities wrestle with the extent to which we should accommodate religious exemptions from civil rights requirements, we need to keep our eye on our ultimate goals. A legal regime which provides less distinctive protection to religious liberty while allowing more discrimination against minorities by secular organizations may not be the best solution to the admittedly difficult conflict between liberty and equality interests that we are confronting today.

#### V. THE SOCIALLY COHERENT ANALOGY TO IDENTITY DISCRIMINATION BASED ON SEXUAL ORIENTATION

One final issue regarding employment discrimination is very difficult to resolve, but I think it needs to be addressed. Nelson argues with considerable persuasive force that exemptions from civil rights laws for religious organizations, like

the exemption in Title VII from the prohibition against religious discrimination in hiring, are limited to belief or ideological discrimination. Religious organizations cannot discriminate against any of the groups recognized in Title VII and protected as to their identity, such as racial minorities or women.<sup>95</sup> In this sense, Nelson suggests that religious organizations are being treated just like secular organizations. An environmental organization, for example, is permitted to discriminate against non-environmentalists in hiring staff. Similarly, religious organizations can discriminate in hiring in favor of members of their own faith. Thus, both religious and secular organizations can discriminate on the basis of a job applicant's beliefs, but not other prohibited grounds, without violating civil rights laws.<sup>96</sup>

I think this analysis is too summary in its characterization of the operation of civil rights laws and the exemption provided for religious organizations. We do not protect religious individuals against discrimination on the basis of religion in civil rights statutes because we are trying to protect the liberty right to hold religious beliefs or limit employers from engaging in belief (or ideological) discrimination. We include religion as a protected class in civil rights statutes like Title VII because we believe religion is an identity, just like race and sex describe a person's identity.<sup>97</sup> We prohibit discrimination in hiring on the basis of religion because religion describes who a person is, not what they do or say or believe.<sup>98</sup>

Accordingly, when we allow religious organizations to discriminate on the basis of religion in hiring, we are permitting those organizations to discriminate against the members of a protected class defined by its members' identity. Secular organizations receive no similar exemption. They are not permitted to discriminate against job applicants based on the person's identity if that identity is recognized as defining a protected class. Non-environmentalists are not recognized as having a distinctive identity nor are they members of a protected

<sup>95</sup> TEBBE, *supra* note 1, at 89, 91–92.

<sup>96</sup> *Id.* at 95–96.

<sup>97</sup> See William P. Marshall, *Smith, Christian Legal Society and Speech-Based Claims for Religious Exemptions from Neutral laws of General Applicability*, 32 *CARDOZO L REV.* 1937, 1939–42 (2011).

<sup>98</sup> *Id.*

class. The law treats such individuals as people who hold particular beliefs, not as people who have a distinct identity.<sup>99</sup> Further, the law does not recognize the need to protect people who hold such beliefs from discrimination in hiring. The foundation of class prejudice and discrimination which civil rights laws are designed to challenge simply does not apply to people whose beliefs are in some way insufficiently pro-environment.

Conceptualized in this way, we confront a more difficult question when we try to explain why a religious organization, say a Protestant denomination, can discriminate against Muslims or Jews, but not women or African-Americans. In both circumstances, the religious organization may claim that discrimination is required by the tenets of its faith and in both cases it is discriminating against the members of a protected class based on their religious, racial, or sexual identity.

The answer to that question, whatever it is, will be relevant to any discussion of exemptions for religious organizations from civil rights laws prohibiting discrimination on the basis of sexual orientation. We will have to decide whether discrimination on the basis of sexual orientation is more like discrimination on the basis of religion – for which an exemption is granted to religious organizations – or whether it is more like discrimination on the basis of race, gender or national ancestry where exemptions from employment discrimination laws are generally denied.

A social coherence analysis is based in considerable part on reasoning by analogy. The question we need to answer here requires us to determine what would be the most persuasive analogy for discrimination on the basis of sexual orientation. I have spent some time trying to think through the answer to this question,<sup>100</sup> and I suggest it is not susceptible to an easy and obvious answer.

<sup>99</sup> *Id.* at 1941.

<sup>100</sup> Alan Brownstein, *Gays, Jews, and Other Strangers in a Strange Land: The Case for Reciprocal Accommodation of Religious Liberty and the Right of Same-Sex Couples to Marry*, 45 U.S.F.L.REV. 389 (2010).