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RESPONSE

CAUTIOUS CONTEXTUALISM: A RESPONSE TO NELSON TEBBE'S *NONBELIEVERS*

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PROFESSOR Nelson Tebbe's recent article, *Nonbelievers*, provides a comprehensive account of an increasingly visible issue: the status of nonbelievers under religious freedom laws.¹ Rejecting any uniform answer, he argues that courts should employ a polyvalent approach, one which incorporates multiple, context-dependent principles and pragmatics. His article makes an important theoretical contribution, and provides detailed analyses of a wide range of legal disputes that can be expected to grow exponentially in coming years.

Two prominent approaches serve as his foils: (i) the single-value equality theory, which argues against privileging religious believers, and for nonbelievers' equal status; and (ii) defining religion so that nonbelievers are either in or out. Tebbe asserts that even within these categories, the most persuasive scholars end up allowing room for differential treatment in some contexts.² For example, with their "Equal Liberty" theory, Provost Christopher Eisgruber and Professor Lawrence Sager argue that religious freedom guarantees should apply equally to all deep and valuable commitments. Still, confronting intractable facts, like the

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¹ Nelson Tebbe, *Nonbelievers*, 97 Va. L. Rev. 1111 (2011).

² *Id.* at 1142.

male-only Catholic priesthood, they work to cobble together alternative constitutional grounds for permitting such special treatment.³

On the elusive project of defining “religion,” Professor Tebbe reviews leading theories in both religious studies and law, and finds Professor Kent Greenawalt’s “flexible analogical approach” most persuasive. Greenawalt recommends that courts focus on how closely beliefs and practices resemble those of undisputed religions, cautioning that what counts as “religion” may vary depending on the specific legal issue.⁴ Tebbe agrees with this context-sensitivity, but rejects the definitional enterprise itself as a distracting, unhelpful shortcut. Instead, he proposes, courts should “simply ask whether nonbelievers *should* be protected in each doctrinal area, taking all the relevant values into account.”⁵

In this brief Response, I explore several potential concerns about this open-ended approach to the rights of nonbelievers. On the “exemptions” issue, the article’s approach to nonbelievers risks exacerbating existing, troubling inequities created by some individual religious claims. In this and a second example, government religious speech, more familiar legal standards, including Professor Greenawalt’s definitional approach, seem to provide more predictable and attractive results. My reflections begin with the threshold line-drawing challenge: describing the “nonbeliever.”

DEFINING THE “NONBELIEVER”

There is some irony involved in defining “nonbelievers” in an article that rejects the usefulness of defining “religion.” However, here it is done to delineate the article’s scope, rather than to provide a universal definition, and Professor Tebbe candidly admits the “messiness at the edges.”⁶ Still, courts addressing nonbelievers’ claims will also face this task, and these initial categorizations underscore the inherent ambiguities and potential for unfairness.

Tebbe uses the term nonbelievers “to include people who take negative or skeptical positions on the existence of superhuman beings and

³ Id. at 1142, 1145–47 & n.145 (citing Christopher L. Eisgruber & Lawrence G. Sager, *Religious Freedom and the Constitution* 63–66 (2007)).

⁴ Id. at 1136 (citing 1 Kent Greenawalt, *Religion and the Constitution: Free Exercise and Fairness* (2006)).

⁵ Id. at 1139 (emphasis added).

⁶ See id. at 1118.

supernatural powers.”⁷ This category includes both atheists (“commonly thought to deny the existence of a deity”) and agnostics (who are “doubtful or think that there is no way of resolving the question on the available evidence”).⁸

The list of persons who are *excluded* from the category of nonbelievers highlights the elusiveness of “religion” as a legal category. First are those who “identify with a particular religious tradition,” but who are “[u]nenthusiastic, doubting, and even nonbelieving practitioners,” for example, practicing Jews who do not believe in God.⁹ Second are “the growing numbers of [unaffiliated] syncretists and spiritualists who assemble their own notions and rituals in individualistic or idiosyncratic ways.”¹⁰ Third, also excluded are “nonreligious” claims—ones that are “grounded in morality or conscience, independent of any conception of God or the supernatural.”¹¹

To clarify an unavoidably complex analytical project, then, Professor Tebbe limits his focus to “committed nonbelievers,” and he shores up that boundary by a robust account of their uniquely outsider status. Americans now tolerate a wide range of religious traditions, and “the search for sacredness itself is increasingly thought to be a universal aspect of being a moral person.”¹² Thus, Tebbe theorizes, this diffuse commonality may “explain why the few perceived dissenters from this scheme still draw powerful negative sentiments.”¹³

This is certainly a credible account, but there is more to this story, and it shows edges that are not just messy, but fluid and in some cases vanishing. Most significantly, the boundaries of atheism itself are blurring. While the “New Atheists” have taken center stage with their flamboyant mission to disprove and denigrate religion,¹⁴ “atheism” also includes both established and nascent movements to develop comprehensive, se-

⁷ Id. at 1117.

⁸ Id. at 1117–18.

⁹ Id. at 1119.

¹⁰ Id.

¹¹ Id.

¹² Id. at 1125.

¹³ Id.

¹⁴ See, e.g., Richard Dawkins, *The God Delusion* (Houghton Mifflin Co. 2006); Sam Harris, *The End of Faith* (W.W. Norton & Co. 2004); Christopher Hitchens, *God is Not Great: How Religion Poisons Everything* (Hatchette Book Group USA 2007).

cular, reason-based alternatives to the religion-based life.¹⁵ The latter versions are hard to distinguish from the “religion” of the unaffiliated, yet (often quite vaguely) spiritual. Moreover, the most trenchant cultural divide today is between the traditionalist and the modern. The more orthodox religionists seem as likely to ostracize the do-it-yourself New Ager as the politely ambivalent rationalist. Since agnostics occupy a middle ground, their “outsider” status is less certain, and their claims seem particularly undifferentiated from “nonreligious” conscience claims. Introducing these ambiguities lays the groundwork for my comments on one major area analyzed in *Nonbelievers*, exemptions.

NONBELIEVERS AND EXEMPTIONS

The right of religious believers to exemptions from neutral, generally-applicable laws is a particularly contested doctrinal arena.¹⁶ The project of focusing specifically on nonbelievers’ claims exacerbates the essential dilemma.

Before evaluating Professor Tebbe’s highly-nuanced solution, it is useful to briefly sketch what some, including myself, see as the problem. In the post-*Smith* modern era, most exemption claims arise under the federal RLUIPA and RFRA statutes, which require strict scrutiny where laws substantially burden conduct that is motivated by a person’s sincerely-held religious belief. This is a fairly limitless concept: the conduct need not be required by, or central to, any established, organized religion, nor even viewed as “religious” by others. This leads directly to the quandary demonstrated by Eisgruber and Sager’s famous “two Mrs. Campbells.” Under the current legal regime, where one woman opens a

¹⁵ See, e.g., Bruce Ledewitz, *Church, State, and the Crisis in American Secularism* (2011) (arguing for establishment of a “higher law” using religious symbols as one aspect of creating a new “hallowed secularism”).

The difference is well-illustrated by an NPR interview with Paul Kurtz, who founded the Center for Inquiry three decades ago “to offer a positive alternative to religion,” and “says he was ousted in a ‘palace coup’” by “new atheists.” Barbara Bradley Hagerty, *A Bitter Rift Divides Atheists*, NPR (Oct. 19, 2009) (“Merely to critically attack religious beliefs is not sufficient. It leaves a vacuum. What are you for? We know what you’re against, but what do you want to defend?”), available at: <http://www.npr.org/templates/story/story.php?storyId=113889251>. Even this divide has blurry edges. See, e.g., Project Reason: Spreading Science and Secular Values, <http://www.project-reason.org> (last visited June 16, 2012).

¹⁶ See, e.g., Winnifred Fallers Sullivan, *The Impossibility of Religious Freedom* (2005).
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soup kitchen in her home motivated by her religious belief, and her neighbor does exactly the same based on a secular moral belief, only the first woman is entitled to escape the obstacles and expenses imposed by local zoning, building and health laws.¹⁷ One does not have to believe that religion is not “special”¹⁸ to be troubled by this distinction, which is unavoidable when the law makes the individual the sole authority for defining “religious” for exemption purposes.¹⁹

Professor Tebbe’s multi-factor approach to the nonbelievers issue incorporates the rationale for this “hands off” doctrine: judicial incompetence to decide religious questions, which involve the supernatural and non-rational. Noting that nonbelievers’ foundational truths ostensibly are rational and limited to the natural world, Tebbe suggests a two-tiered approach. Where nonbelievers seek exemptions from regulations “because of convictions that are in fact *integral to their nonbelief*,” they should be accorded equal treatment.²⁰ But given this difference, courts should have more leeway to scrutinize nonbelievers’ claims that practices are “demanded by nonbelief itself,” and thus eligible for Free Exercise and related exemptions.²¹

I agree that the outcomes of nonbelievers’ “religious freedom” claims should vary by context, but reluctantly conclude that Professor Tebbe’s “integral to nonbelief” standard would function less well than the existing “flexible analogical” approach to defining religion. At the simplest level, it is not clear as a practical matter how courts could pass over the definitional threshold, given that text and history privilege only “religion.”²²

¹⁷ See Eisgruber & Sager, *supra* note 3, at 11–13.

¹⁸ See, e.g., Brian Leiter, *Why Tolerate Religion?*, 25 *Const. Comment.* 1, 1–2 (2008).

¹⁹ Of course, using a “centrality” requirement creates other problems. See Sullivan, *supra* note 16 (detailing experts’ disagreements and religious bias when a judge erroneously required centrality in a state RFRA case involving cemetery memorials).

²⁰ Tebbe, *supra* note 1, at 1163 (emphasis added).

²¹ *Id.* at 1161–62.

²² Subsequent to publication of *Nonbelievers*, in *Hosanna-Tabor Evangelical Lutheran Church v. EEOC*, No. 10–553 (Jan. 11, 2012), the Supreme Court affirmed this basic point. Slip op. at 14 (rejecting argument that religious employers should use freedom of association—instead of the ministerial exception—because that suggestion “is hard to square with the text of the First Amendment itself, which gives special solicitude to the rights of religious organizations”). See also *Kaufman v. McCaughtry*, 419 F.3d 678, 682 (7th Cir. 2005) (beginning analysis of prisoner’s Religion Clause claims by holding that his atheism qualified as a “religion”).

Note that while Tebbe interprets *Kaufman* as treating plaintiff’s claim more like a secular than a religious claim, *supra* note 1, at 1162–63, I read the opinion as rejecting the prisoner’s

The more interesting points focus on outcome categories. The easiest case would involve a nonbelievers' organization with some of the features of a religious congregation, such as regular gatherings, secular festivals or rituals, and some collective emphasis on ethics or creating lives of meaning. Longstanding models have been recognized by courts as "religion" for exemption purposes, and this type of project is poised for substantial growth.²³

Where things get sticky is where an individual claims that engaging in a specific, legally-restricted act (or refraining from legally-required conduct) is "integral" to his or her "nonbelief." At first glance, this would seem to present the kind of Establishment Clause problem where the State requires actions with religious content (e.g., attending AA or reciting the Pledge of Allegiance). But current doctrine already provides that either the State requirement is held unconstitutional, or the nonbeliever is entitled to an exemption.

The real challenge derives from individual atheists' claims which resemble, or are indistinguishable from, "claims by people with deeply held secular commitments."²⁴ Professor Tebbe's decision to leave to one side ordinary conscience claims, while certainly understandable in light of all the complexities he does take on in this article, leaves the whole conundrum unresolved.

Even given the latitude to take a skeptical view, what criteria could a court employ to determine the validity of an individual atheist's claim that certain conduct is demanded by his *nonbelief*? Copying the "sincerity" test now used for religious claims would only exacerbate the existing inequities. And realistically, providing such freedom to atheists—without also offering Free Exercise-type exemptions to all conscience-based claims—is virtually unimaginable. This is not to say that Professor Tebbe has proposed doing any such thing, but only to observe that nonbelievers' individual, unaffiliated claims cannot be adequately addressed without integrating secular conscience claims into the mix.

Free Exercise claim because he failed to show that his atheism was substantially burdened by denial of regular group meetings.

²³ See, e.g., *Soc'y for Ethical Culture in the City of N.Y. v. Spatt*, 415 N.E.2d 922, 924, 926 (N.Y. 1980).

²⁴ Tebbe, *supra* note 1, at 1162–63 & n.214.

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The flexible analogical approach to defining religion appears to offer some justifiable limits. Most clearly, nonbelievers' claims for "religious" exemptions would be treated equally with recognized religious claims where they were connected to an atheist or humanist organization which provides some system of beliefs and practices.²⁵ But where individual nonbelievers' exemption claims are indistinguishable from other deeply-held secular life commitments, they should be treated as such. That could mean leaving the law as is, where only a few such claims have been granted. Alternatively, nonbelievers' claims could be addressed by adopting an equality theory, and providing exemptions to all conduct required by all sincere, deeply-held commitments.

One can imagine two unique categories of nonbeliever claims which could be considered "integral to nonbelief," and yet bear little relationship to identifiably "religious" practices. First, consider the common myth (and occasional reality) of prisoners' "religious exemption" claims for a special diet, such as steak and wine. For those who have affirmatively concluded that God is dead and there is no afterlife, arguably there is a clear connection between claims for special treatment and a "this is it" mentality. But few would argue that such claims should be honored as "religious," even if such desires were alleged to be central to a nonbeliever's purely materialist worldview. Second, the hyper-aggressive stance of many New Atheists suggests a novel type of nonbeliever claim: demanding the right to denigrate religion in some context where government rules require civil or tolerant behavior.²⁶ Of course, any anti-religious propaganda, no matter how offensive, is addressed by the Free Speech Clause; the intriguing question would arise if a "religious liberty" exemption was requested to engage in religion-bashing conduct. Especially since secular conscience claims were placed outside the scope of the article, it seems that this proposed approach to nonbelievers' claims risks increasing the chance of anomalous results.

²⁵ See Greenawalt, *supra* note 4, at 128–29, 144 (highlighting Third Circuit Judge Arlin Adam's approach as the most sophisticated and insightful, whose analogical definition includes "the presence of formal or surface signs similar to those of accepted religions") (citations omitted).

²⁶ One illustration arises in the holiday display context: requesting the addition of a "Happy Solstice" sign differs markedly from demanding a sign proclaiming, "There is no god. The Christ Child is a Myth." And the latter could easily be deemed "integral to" someone's nonbelief. See Harris, *supra* note 14, at 14–15 (arguing that religious moderates do not go far enough, what is needed is an end to tolerance of religion).

GOVERNMENT (NON)RELIGIOUS SPEECH

Reviewing a second example, government religious speech, Professor Tebbe's creative, less structured analysis generates (though does not demand) a fairly controversial outcome.

Tebbe posits a future case where a progressive Vermont municipality erects in its town square a recognizable atheist slogan, "Good Without God," and he then provides an extended argument for its constitutionality.²⁷ To demonstrate his approach, Professor Tebbe evaluates a number of potentially relevant considerations: religious peoples' current national majority and historical dominance; the awkward doctrine of ceremonial deism and its deleterious impact on atheists; and the inapplicability of structural theories and separationist traditions.²⁸

Making a novel argument, he suggests that a local government's atheist sign would not violate the Establishment Clause because it would not make mainstream Christians into political outsiders, given that they form the majority at the national and state levels. And, he posits, perhaps municipal atheist speech could roughly compensate for the lingering God-speech now excused as ceremonial deism (e.g., the national motto). Both of these assertions strike me as problematic. First, the social meaning of exclusion at the local, community level is felt more intensely, and the dynamics of local political decision-making are more personal. And second, religious symbols from earlier, more homogeneous eras can be distinguished from those created more recently, as weapons in the modern culture wars.²⁹

Moreover, the article describes precedent and pragmatism as incorporated in its polyvalent approach. Based on that standard, an atheist town sign is unconstitutional. Establishment Clause doctrine is unusually clear on this: government is prohibited from taking a position on a religious question, and atheism constitutes a negative statement as to the truth of religion.³⁰ The generous use of multiple principles and rationales here appears to invite significant, likely-contested doctrinal change.

²⁷ Id. at 1172–75.

²⁸ Id. at 1174–75.

²⁹ See generally Mary Jean Dolan, Government Identity Speech and Religion: Establishment Clause Limits After *Sumnum*, 19 Wm. & Mary Bill of Rts. J. 1, 63 (2010).

³⁰ For a complete analysis, including the relevant precedent, see, e.g., Thomas B. Colby, A Constitutional Hierarchy of Religions? Justice Scalia, The Ten Commandments, and the Future, [C:\Users\ommm17073\Desktop\Dolan Nonbelievers Response_EICdocx.docx](file:///C:/Users/ommm17073/Desktop/Dolan%20Nonbelievers%20Response_EICdocx.docx)

CONCLUSION

Professor Tebbe's article demonstrates that there is no single valid answer to whether nonbelievers should be protected and restricted by the Religion Clauses and related statutes. But given the uncertain fit of "nonbelief" into provisions on "religion"—and the lingering issue of simple moral conscience claims—these two examples provide some room for caution. In light of nonbelievers' expanding numbers and increasing social activism, these legal issues will proliferate. In the midst of this social change, for now it may be preferable to adhere more closely to established doctrines and standards, with all their flaws, rather than to encourage an unconstrained application of all potentially relevant factors to these novel questions.

Professor Tebbe's thorough evaluation of the nonbelievers issue provides an engaging new paradigm. By pushing on some of his original points, in this brief Response I hope to add to the ongoing scholarly analysis of this important legal puzzle.

ture of the Establishment Clause, 100 *Nw. Univ. L. Rev.* 1097, 1098–1102 (2006) (hypothesizing three alternative town signs, including one proclaiming atheist views, to illustrate the risks created by Justice Scalia's stance against neutrality). See also Greenawalt, *supra* note 4, at 150.