SECURING RELIGIOUS LIBERTY: PRINCIPLES FOR JUDICIAL INTERPRETATION OF THE RELIGION CLAUSES. By Jesse H. Choper.[1] Chicago: University of Chicago Press. 1995. Pp. xiii, 198. $24.95.

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I. INTRODUCTION

In his book, *Securing Religious Liberty*, Jesse Choper articulates a "comprehensive thesis for adjudication of all significant issues that arise under the Religion Clauses of the Constitution." (p. 1) Choper gets off to a promising start. He dissects the Supreme Court's religion cases, illuminates their conceptual incoherence, and demonstrates the need for a more principled approach. Buoyed by his "extensive reflection spanning a period of more than thirty years," (p. 190) Choper offers four grand principles that he believes will resolve all significant issues in religious jurisprudence. His principles are helpful in classifying and conceptualizing issues and he uses them as organizational tools for determining which governmental actions implicate the Free Exercise Clause and which implicate the Establishment Clause.

Choper's application of his four principles is not as helpful, however. His deductions are questionable, as they appear to lack reasoned justifications and suggest unwarranted results. Ultimately, Choper falls victim to the daunting scope of his project, sacrificing depth of analysis for breadth of application. It is, therefore, not hard to understand why the book has been sharply criticized by reviewers and largely ignored by the courts.[3] As Choper himself candidly acknowledges, his thesis will likely prove "unacceptable to every existing interest group." (p. 189)

Contrary to the suggestion of other reviewers, however, we believe the book *is* worth reading: it offers fresh and provocative ideas. One cannot read *Securing Religious Liberty* without engaging Choper's presuppositions, challenging his ideas, and

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3. As of this writing, a Westlaw *allcases* search revealed only two citations to Choper's book: a single cite by the dissent in *Rosenberger v. Rectors and Visitors of University of Virginia*, 115 S. Ct. 2510, 2537 (1995) (Souter, J., dissenting) and another by the circuit court in *ACLU v. Schundler*, 104 F.3d 1435, 1445 n.10 (3d Cir. 1997) (citing Choper for an "interesting discussion" of Establishment Clause implications of tax-supported religious displays).

emerging with a better understanding of the myriad problems arising under judicial interpretation of the Religion Clauses.

In the four sections that follow, this review will (1) summarize Choper's four principles; (2) highlight the early reaction of legal academia; (3) apply Choper's four principles to a few current topics; and (4) conclude with a critique of Choper's analysis.

II. THE FOUR PRINCIPLES

Choper's project is to promote a uniform interpretation and application of the Free Exercise Clause and Establishment Clause. Because he recognizes that the existing legal standards governing these clauses suffer from doctrinal deficiencies and inconsistencies, (p. 38) Choper wipes the slate clean and attempts to develop a new framework for analyzing cases implicating the Religion Clauses. He begins with the basic premise, derived from the history and text of the First Amendment and from "cherished contemporary values," (p. 6) that the purpose of the Religion Clauses is to "protect religious liberty and the integrity of individual conscience." (p. 9) Choper then articulates four principles that he believes will protect religious liberty and limit the influence of judges' "intuitive tendenc[ies]" and "personal predilections" in adjudicating Religion Clause disputes. (pp. 1, 7-8)

A. FREE EXERCISE PRINCIPLES

1. Deliberate disadvantage principle: "Government action that intentionally prejudices individuals because they have or do not have certain religious beliefs should be held to violate the Free Exercise Clause unless the government demonstrates that the regulation is necessary to a compelling interest." (p. 41)

This free exercise principle is the least controversial of the four, and the one most in line with recent Supreme Court holdings. It says that if state action intentionally prejudices (i.e., discriminates against) individuals on the basis of their religious beliefs, that action is subject to strict scrutiny and is presumptively invalid.[4] Choper draws a fine line between legislative motive and legislative purpose in an attempt to distinguish oblique religious inspiration from antagonism toward religion. Legislative purpose describes the "things a legislator hopes to accomplish *by the operation of the statute*," whereas legislative motive

4. See, e.g., *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993).

describes "those things he hopes personally to achieve *by the act of his vote*." (pp. 45-46) Choper then states that religious animus in purpose, not motive, is subject to strict scrutiny when legislators advance "obviously implausible" purposes for challenged actions. (pp. 49-50)

2. Burdensome effect principle: "If government regulations of conduct that are generally applicable and enacted for secular/neutral purposes (i.e., without intent to provide an advantage to religious interests or prejudice individuals because of their religious beliefs) conflict with action or inaction pursuant to the tenets of a particular religion, the Free Exercise Clause should be held to require an exemption under the following circumstances: the claimant has suffered cognizable injury; the exemption does not violate the Establishment Clause; the exemption does not require the government to abandon its entire regulatory program; the individual's beliefs are sincerely held; violation of those beliefs entails extratemporal consequences; an alternative burden is imposed if one exists that does not conflict with the religious objector's beliefs; and the government cannot demonstrate that denial of the exemption is necessary to a compelling interest." (p. 54)

In his introduction, Choper contends that the primary purpose of the Free Exercise Clause is to prevent the "state from impeding the practices of religious *minorities*." (p. 13) (emphasis added) Choper's burdensome effect principle, however, provides exemptions from generally applicable laws for any religious claimant that meets certain conventional criteria: sincerely-held belief; cognizable burden; and subjection to a burdensome law that is not necessary to achieve a compelling governmental interest. But Choper imposes additional, idiosyncratic criteria that the claimant must also meet: the exemption cannot force the government to abandon an entire program;[5] an alternative burden (if one exists) must be imposed on the claimant (e.g., Seventh-Day Adventist must close shop on Saturday instead of Sunday); the exemption cannot violate the Establishment Clause (as Choper contends it does in *Sherbert v. Verner*[6] because the reli-

5. See *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988) (rejecting free exercise claim of Native Americans that would prevent Forest Service from harvesting timber and constructing road in area of national forest traditionally used for their religious purposes).

6. 374 U.S. 398 (1963) (holding that state did not have a compelling interest in denying unemployment benefits to a Seventh-Day Adventist employee who was fired for refusing to work on Saturday, and that the state could not force the employee to abandon religious convictions in order to qualify for benefits).

gious claimant was awarded tax money in the form of unemployment compensation); (p. 21) and, most fundamental of all to Choper's framework, the law (if obeyed) would cause the person to suffer *extratemporal consequences* in the afterlife.

Extratemporal consequences is Choper's answer to the question, "What is 'religion'?" for purposes of applying the burdensome effect principle. Choper rejects many possibilities, including the expansive "ultimate concerns" definition which posits that religious faith is "the state of being ultimately concerned" in any ideology, including nationalism, secularism, individualism, economic utopianism, or scientific naturalism. (pp. 69-74) He dismisses this concept of religion as being too vague and theologically complex for courts to understand and apply with any consistency. (pp. 71-74) Choper also rejects the "transcendental reality" definition of religion, (pp. 80-85) which includes religions that believe in the temporal significance of human actions and temporal, divine intervention (e.g., most evangelical, Judaeo-Christian traditions). Choper believes this definition is overinclusive, as it encompasses traditionally "secular" ideologies as well as religious ones. (pp. 84-85)

Instead, to balance the broad protection afforded by this principle's exemptions from government regulation, Choper draws a narrow definition of religion: belief in the "extratemporal consequences" of actions. (pp. 74-80) Claimants for religious exemptions must have good faith and sincerely-held beliefs that the results of their actions "extend in some meaningful way beyond their lifetimes." (p. 77) In Choper's view, the religions qualifying for this protection are those that comport with the "conventional, average person's conception of religion" (e.g., belief in God, but not belief in the Republican Party).[7] (p. 77) Thus, Choper believes courts would apply the "extratemporal consequences" definition of religion with greater consistency than the ultimate concerns or transcendental reality definitions.

B. ESTABLISHMENT CLAUSE PRINCIPLES

In his section, "Basic Postulates and Alternative Theories," (pp. 1-40) Choper burns off much of the jurisprudential dross of the Establishment Clause with convincing candor, beginning with

7. By "conventional" forms of religion, Choper does not mean mainstream religion; for instance, he extends his definition to the practice of some Native Americans smoking peyote. (pp. 57, 96)

the "endorsement" test as advocated by Justice O'Connor.[8] He criticizes the endorsement test on the ground that "federal judicial power should not be invoked to remedy harm no greater than 'indignation,' 'offense,' or the 'psychological consequence presumably produced by observation of conduct with which one disagrees.'" (pp. 31-32) He fears that the endorsement test may be used to overturn legitimate government attempts to afford genuine, important religious accommodations. (pp. 31-34) Choper points out that government action that benefits or accommodates one religion would violate his deliberate disadvantage principle if such action were intended to stigmatize another person's religious beliefs.[9] (p. 50)

Choper does not advocate a strict separation of church and state.[10] He implicitly repudiates the *Lemon* test.[11] Choper analyzes both the purpose and effect of government action affecting religion, (pp. 35, 98-99, 160) but in a less formalistic, more flexible framework than that of the *Lemon* test. Government actions may have a religious purpose, as long as they do not pose a significant threat to religious liberty and are not discriminatory. Also contrary to *Lemon*, the "principal effect" of such actions may be to advance religion, as long as they do not pose a meaningful threat to religious liberty. Moreover, Choper never in-

8. See *County of Allegheny v. ACLU*, 492 U.S. 573, 635 (1989) (O'Connor, J., concurring); *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 349 (1987) (O'Connor, J., concurring); *Wallace v. Jaffree*, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring); *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

9. Choper quotes William P. Marshall: "A favorable statement about one class is not necessarily a correlative pejorative remark about another class." (p. 34) (citing Marshall, *The Concept of Offensiveness in Establishment and Free Exercise Jurisprudence*, 66 Ind. L.J. 351, 365 (1991)).

10. Nor does Choper advocate a separation of religion and politics. He recognizes that some degree of religious friction in society is inevitable. Accordingly, he does not believe that "divisiveness" should be a criterion for applying the Establishment Clause. "[I]f government were actually to ban religious conflict in the lawmaking process, this would raise serious questions under the First Amendment's guarantee of political freedom as well as religious liberty." (p. 25)

11. *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (holding that to survive Establishment Clause scrutiny, government action (1) must have a secular purpose, (2) may not have a principal or primary effect of advancing or inhibiting religion, and (3) may not foster an excessive entanglement between government and religion). This test has been severely criticized by at least five members of the current Court. See, e.g., *Lamb's Chapel v. Center Moriches School District*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring) (likening the *Lemon* test to a "ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried"). See generally Michael Stokes Paulsen, Lemon *is Dead*, 43 Case W. Reserve L. Rev. 795 (1993). Reports of *Lemon's* death were premature, however, as the Court recently revived its three-pronged test in *Agostini v. Felton*, 1997 WL 338583 (1997).

vokes the cumbersome "excessive entanglement" prong of *Lemon* as an evaluative criterion.[12]

Choper follows his deconstruction of the Establishment Clause with a substitute framework:

1. Intentional advantage principle: "Government programs that deliberately favor religious interests or government actions that relieve individuals because of their religious beliefs from the burdens of generally applicable regulations should be held to violate the Establishment Clause only if the programs or actions pose a significant threat to religious liberty or if they are discriminatory." (p. 97)

The intentional advantage principle is a variation of the "coercion" test that evaluates state actions based on their *effects* on individual conscience. It states that government actions that intentionally favor religion[13] (e.g., provide exemptions from generally applicable laws, honor religious holidays, fund religious organizations, etc.) violate the Establishment Clause only if they "pose a significant threat to religious liberty." State actions pose such a threat in one of two ways.

The first way is by coercing or significantly influencing people either to violate their religious beliefs, engage in religious activities, or adopt religious beliefs when they would not otherwise have done so. For example, exemptions from compulsory draft laws for religious objectors would fail the intentional advantage principle in Choper's opinion, because they encourage the assumption of religious beliefs and practices by individuals who would seek to qualify for the exemption. (p. 131) Similarly, religious practices in public schools that are "inherently compulsive" (e.g., vocal prayer, Bible reading, released time for religious in-

12. See Jesse H. Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. Pitt. L. Rev. 673, 681 (1980).

13. Choper defines "religion" more broadly for Establishment Clause purposes. Whereas Choper believes religious exercise should be advantaged under the Free Exercise Clause, he believes it should be disadvantaged, or "disfavored" under the Establishment Clause (pp. 24, 162) (though Choper advocates more of a neutralization of religion than a penalization). Thus, no longer does "religion" entail "extratemporal consequences." Rather, religion comprises "all religious beliefs," (p. 115) which include "narrow partisan ideologies" (p. 116) and "ultimate truth" (p. 105) worldview teachings. Choper explains that if the Establishment Clause were only to reach ideologies concerning extratemporal consequences, it would not apply to a wide variety of activities that violate religious liberty; for instance, the public schools could allow voluntary, intercessory prayers to God seeking help in the here-and-now (but not in the hereafter), and state funds could be granted to a sect that does not believe in salvation or other extratemporal consequences. (p. 103) Choper believes that his broader definition of religion for Establishment Clause purposes precludes these results.

struction, and inclusion of "under God" in the Pledge of Allegiance) violate this principle. (pp. 142-43)

The second way government action threatens religious liberty is by compelling people to furnish financial support to religion through their tax dollars. Choper considers this type of "coercion" to be particularly egregious. For instance, he thinks *Sherbert v. Verner*[14] was wrongly decided, in part, because the Court-ordered unemployment benefits in that case amounted to "religious coercion in the form of a tax subsidy for religious practice." (p. 121) Choper would prohibit government from employing chaplains.[15] (pp. 123, 153) However, he would permit government to place religious symbols and slogans on public property (pp. 154-55) as long as the amount of tax funds devoted to such placement is "de minimis." (pp. 154, 157) For instance, public schools could post the Ten Commandments in their classrooms, (p. 147) and any local, state or federal government could constitutionally declare, "Christianity is our religion." (pp. 157-58)

Choper's application of the intentional advantage principle to religion in the schools produces unique results. Because "young people of minority religious groups are extremely sensitive," (p. 141) he thinks the inclusion of the words, "under God," in the Pledge of Allegiance is unconstitutional. (p. 142) For similar reasons, classroom prayer, graduation prayer, and released time religious programs also fail his intentional advantage principle. (pp. 140-45) In order for religious activity to satisfy the principle, a school must provide sufficient alternatives to the religious activity. For instance, equal access and "dismissed time" programs (i.e. religious activities available before or after hours) satisfy the test because they are less "coercive" than released time programs (i.e. religious instruction or activity available during school hours), and because "religion can compete more successfully with arithmetic than with recreation." (p. 151, note 173 (citation omitted)) Choper's theory allows for silent prayer, teaching creation science, and excising evolution from the public

14. 374 U.S. 398 (1963).

15. However, Choper believes that a judge's practice of reciting a prayer at the beginning of each court session does not violate the Constitution under the intentional advantage principle. See *North Carolina Civil Liberties Union Legal Foundation v. Constangy*, 947 F.2d 1145 (4th Cir. 1991). Choper distinguishes this case from *Marsh v. Chambers*, 463 U.S. 783 (1983) (upholding a state legislature's practice of opening each session with a prayer by a publicly paid chaplain), on the grounds that *Marsh* involved an expenditure of tax funds to support the chaplain, thereby violating the intentional advantage principle, whereas *Constangy* involved "no meaningful expenditure of tax funds." (p. 153)

school curriculum, because Choper believes these activities are less coercive than released time programs or the Pledge of Allegiance.

2. Independent impact principle: "Even if its purpose is nonreligious and it has general applicability, government action that benefits religious interests and has no independent secular impact should be held to violate the Establishment Clause if the action poses a meaningful danger to religious liberty." (p. 160)

Under the independent impact principle, a government action's secular effects cannot depend on or derive from the initial completion of a religious aim. (p.167) For instance, Choper believes that vouchers from a state's generally-applicable program for vocational rehabilitation should not be applied to religious schools,[16] because then the state's secular objective would be achieved only through a religious program; the state would be "employ[ing] religion as an engine of civil policy."[17] (pp. 161, 169, 172) However, Choper believes that a state may support the public restoration of church buildings (e.g., Catholic missions, pp. 161, 163) through similar programs of general applicability, because such restoration is not derivative from any religious activity or effect.

Choper believes that a state can fund the *secular* aspects of parochial school education without violating the independent impact principle, as long as the state aid is discounted by the amount that religious influence reduces secular value. (pp. 178-83) In other words, the state would pay a parochial school a fraction of the per capita student cost at public schools based on the number of hours of "secular" education that the parochial school provides. In making this calculation, courts would determine what is purely "secular" as opposed to "religious" education, and parochial schools would have to justify allocating costs to the "secular side of the ledger." (p. 183) Educational voucher programs likely would be constitutional only if the subsidy to religious schools did not exceed the cost or value of the secular educational services rendered by those schools. (pp. 186-87) Choper also would uphold programs in which public school

16. See *Witters v. Washington Dept. of Services for the Blind*, 474 U.S. 481 (1986).

17. This phrase, which Choper uses repeatedly in this chapter, (e.g., pp. 167, 169, 172) is borrowed from James Madison, *Memorial and Remonstrance Against Religious Assessments*, Sec. 5 (cited in *Everson v. Board of Education*, 330 U.S. 1, 67 (1947) (Rutledge, J., dissenting).

teachers provide secular remedial and enrichment instruction to parochial school students on parochial school premises.[18] (p. 37)

III. PEER EVALUATIONS: LEGAL ACADEMIA'S RESPONSE TO *SECURING RELIGIOUS LIBERTY*

Securing Religious Liberty has been cited in at least 15 legal journal articles and has been the subject of five book reviews. The following are capsule summaries of the four important reviews:

1. Eric J. Segall, *Doctrinal Legal Scholarship and Religious Liberty: A Review of Jesse Choper's* Securing Religious Liberty:[19] From a legal realist perspective, Eric Segall argues that Choper's book, like most traditional doctrinal legal scholarship, fails to identify and defend the underlying normative presuppositions from which its proffered results flow. Rather, he claims Choper surveys the legal terrain, derives a few broad principles from that terrain, and then argues that particular results logically flow from those principles. These principles, argues Segall, are too malleable to logically dictate Choper's suggested solutions, and Choper fails to articulate a reasoned justification for many of his conclusions. For instance, Choper's conclusion that the state may publicly declare, "Christianity is our Religion" is either evidence that his Intentional Advantage Principle should be modified or a fallacious inference from the principle itself. His conclusions that the government can place religious symbols on public property, but cannot pay a chaplain to begin legislative sessions with prayer, cannot meaningfully be distinguished, Segall explains, because in both cases the government is using government property and tax dollars to communicate a religious preference. He also finds Choper's disfavor towards neutral assistance programs for students attending religious schools difficult to reconcile with Choper's more favorable treatment of governmental programs that provide aid directly to religious schools. Segall states that Choper's suggested results favor Establishment Clause values

18. Choper disagrees with Supreme Court decisions invalidating such programs, e.g., *Aguilar v. Felton*, 473 U.S. 402 (1985) (invalidating program in which public school teachers provided remedial instruction in parochial schools); *School District of Grand Rapids v. Ball*, 473 U.S. 373 (1985) (invalidating program in which public school teachers provided remedial and enrichment classes in parochial schools); *Meek v. Pittenger*, 421 U.S. 349 (1975) (invalidating program in which public employees provided teaching and counseling services in parochial schools). Consequently, Choper likely would approve of the Supreme Court's recent overruling of *Aguilar* and *Ball* in *Agostini v. Felton*, 1997 WL 338583 (1997).

19. 5 Geo. Mason L. Rev. 71 (1995).

over free exercise values, and that Choper should have defended this preference rather than feign objectivity under his four grand principles.

2. John H. Garvey, *Is There A Principle of Religious Liberty?*:[20] This is the only one of the five book reviews of Choper's *Securing Religious Liberty* that applauds Choper's efforts (as a "wonderful" book), albeit with many reservations and qualifications. John Garvey writes that Choper's general principle of religious liberty is "strangely disembodied,"[21] as evidenced by Choper's comparison of religion and race. Garvey believes that Choper views religion as more of a social marker—like race—than as a way of life whose value consists in living out one's faith.[22] For instance, Garvey cites a passage in which Choper characterizes the harm to Native Americans in *Employment Division v. Smith*[23] as being harm to their *rite* of smoking peyote, a *practice* that they consider religious. Their real complaint, says Garvey, is that the law prevents them from living as they should. Nor does Choper's "extratemporal consequences" definition of religion comport with actual religious practice. For instance, Garvey points out that some religions do not believe that salvation is contingent on human action. Garvey also believes that Choper wrongly equates direct tax assessments for religion, clearly forbidden under the Establishment Clause, with *indirect* tax support for religious persons and organizations. Choper, says Garvey, "is concerned with the religious liberty of taxpayers rather than recipients."[24]

3. Christopher L. Eisgruber and Lawrence G. Sager, *Unthinking Religious Freedom*:[25] The authors analyze Choper's book through the lens of political theory. They believe that a determination of the norms and values underlying the First Amendment Religion Clauses is a necessary prerequisite to developing a comprehensive theory of religious liberty, and that Choper fails to identify the values from which his principles derive and through which they are applied. Consequently, Choper produces results that stem from a "formalistic, idiosyncratic, and unsatisfying" interpretation of the Religion Clauses.[26] In particular, the authors take issue with Choper's dismissal of endorse-

20. 94 Mich. L. Rev. 1379 (1996).
21. Garvey, 94 Mich. L. Rev. at 1382 (cited in note 20).
22. Id. at 1382-83 (cited in note 20).
23. 494 U.S. 872 (1990).
24. Garvey, 94 Mich. L. Rev. at 1384 (cited in note 20).
25. 74 Tex. L. Rev. 577 (1996).
26. Eisgruber and Sager, 74 Tex. L. Rev. at 590 (cited in note 25).

ment analysis, his analysis of *Sherbert v Verner*,[27] and the dominant role of money in Choper's Establishment Clause framework. "Not since the gold standard cases has money done so much constitutional work, and the idea that dollars should dominate our understanding of religious justice in this way is simply implausible."[28] The authors note that Choper was uncomfortable with many of the results his principles produced, and questioned why he would work so hard to reach results that undermined his instincts. They suggest, "Choper either did not look for or could not find an attractive theory of religious liberty."[29]

4. Gary J. Simson, *Endangering Religious Liberty*:[30] Gary Simson challenges three of Choper's key propositions: that free exercise exemptions should be limited to beliefs that people are unwilling to violate for fear of adverse extratemporal consequences; that government endorsement of religion is constitutionally inconsequential; and that public aid should be allowed for parochial schools. Simson suggests that a better criterion than belief in extratemporal consequences for determining sincere free exercise claims would be whether a claimant's conviction "occupies a place of real importance in that religion."[31] Next, he explains how Choper underestimates the systematic and long-term harms of government endorsements of religion, such as the "substantial anguish" of non-adherents' alienation, the trivialization of the favored religion, and the distraction to government from such endorsement.[32] Finally, Simson suggests that the application of the independent impact principle to school vouchers would flounder in the quicksand of Choper's complex sacred-secular calculations; that Choper's "time-spent" criterion for funding the exclusively secular aspects of parochial education is impossible to apply, and that such public aid would violate Choper's intentional advantage principle.

IV. THE PRINCIPLES IN ACTION: APPLICATION TO CURRENT RELIGIOUS LIBERTY ISSUES

Subsequent to the publication of *Securing Religious Liberty*, far-reaching and controversial Religion Clause issues have arisen that Choper either does not specifically address in his book or

27. 374 U.S. 398 (1963).
28. Eisgruber and Sager, 74 Tex. L. Rev. at 582 (cited in note 25).
29. Id. at 590 (cited in note 25).
30. 84 Cal. L. Rev. 441 (1996).
31. Simson, 84 Cal. L. Rev. at 449-50 (cited in note 30).
32. Id. at 464-68 (cited in note 30).

addresses in cursory fashion. These issues evidence the difficulty of applying Choper's principles:

1. *Religious Freedom Restoration Act.* Responding to and overturning the effects of *Employment Division v. Smith*,[33] which virtually eliminated strict scrutiny of free exercise claims brought pursuant to the Free Exercise Clause, Congress overwhelmingly passed (unanimously in the House; 97-3 in the Senate) the Religious Freedom Restoration Act of 1993 ("RFRA").[34] RFRA restored the requirement of strict judicial scrutiny of all government actions that burdened religious exercise. The principal effect of RFRA was to require exemptions of religious persons and entities from generally applicable laws (otherwise valid under *Smith*) that substantially burdened their religious exercise.[35] However, the Supreme Court recently held RFRA to be an unconstitutional exercise of congressional power and struck down the law.[36]

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33. 494 U.S. 872 (1990).

34. 42 U.S.C. §§ 2000bb et seq. (1994).

35. See, e.g., *In re Young*, 82 F.3d 1407 (8th Cir. 1996) (holding that RFRA requires exempting from fraudulent transfer provision of bankruptcy law the $13,000 in "tithes" contributed by debtors to their church during the year preceding their bankruptcy petition), rehearing and rehearing en banc denied, 89 F.3d 494, vacated and remanded, 1996 WL 557460 (1997) (for reconsideration, in light of *City of Boerne v. Flores*, see infra note 36); *State v. Miller*, 538 N.W.2d 573 (Wis. App. 1995) (holding that RFRA requires exempting Amish buggies from the traffic law mandating display of Slow Moving Vehicle symbol), aff'd, 549 N.W.2d 235 (Wis. 1996); *Porth v. Roman Catholic Diocese of Kalamazoo*, 532 N.W.2d 195 (Mich. App. 1995) (holding that RFRA requires exempting a Catholic school from a state's employment nondiscrimination law).

36. See *City of Boerne v. Flores*, 1997 WL 345322 (1997) (6 to 3 decision with Justice Kennedy writing for himself, the Chief Justice, and Justices Stevens, Scalia, Thomas, and Ginsburg). In *Boerne*, the Court held that RFRA exceeded Congress's enforcement power under the Fourteenth Amendment by attempting to change the meaning of the Free Exercise Clause as authoritatively interpreted in *Employment Division v. Smith*. Although this holding invalidated RFRA only as applied to the States, the separation-of-powers overtones in the majority's opinion may signal RFRA's invalidation across the board. Indeed, the Court vacated and remanded for reconsideration in light of *Boerne* the Eighth Circuit's decision in *In re Young*, supra note 35, which applied RFRA to *federal* bankruptcy law. Within a few days of the Court's decision, the President declared that RFRA still applies to federal laws and agencies and Congress began holding hearings and deliberating legislative responses.

Whatever Choper's views of RFRA, he likely would disapprove of the *Boerne* majority opinion, which smacks more of defense of territory than of reasoned adjudication. For instance, to support its holding that RFRA lacks any "proportionality or congruence" to the record of constitutional harms RFRA purportedly sought to remedy or prevent, the majority asserts that RFRA's stringent "least restrictive means requirement . . . was not used in the pre-*Smith* jurisprudence RFRA purported to codify." 1997 WL 345322 at *15. This assertion seriously misstates the "pre-*Smith* jurisprudence," as RFRA's least restrictive means requirement was lifted verbatim from the Court's 8 to 1 decision in *Thomas v. Review Board*, 450 U.S. 707, 718 (1981) ("[t]he state may justify an inroad on religious liberty by showing that it is the *least restrictive means* of achieving some compelling state interest") (emphasis added), which simply restated the free exercise test announced in

Because Choper disagrees with the Court's decision in *Smith* and believes, under the intentional advantage principle, that minority religions may (and often must) be exempted from generally applicable laws drafted by the majority, we think he approves of RFRA.[37] Yet, he refers to RFRA only twice, first stating that "Congress has ensured temporary protection for religious liberty," (p. 58) and later that RFRA is "a particularly salient example of political solicitude for religious freedom." (p. 112) Despite these positive allusions, some implications of RFRA may run afoul of Choper's principles. For instance, RFRA's accommodation was not confined to claimants who believed that their religious practices entailed "extratemporal consequences,"[38] as required under the burdensome effect principle.

Sherbert v. Verner, 374 U.S. 398, 406-07 (1963) ("even if [the state could show a compelling interest] it would *plainly be incumbent upon the [state] to demonstrate that no alternative forms of regulation would combat such abuses* without infringing First Amendment rights") (emphasis added) and further developed in *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972) ("[t]he essence of all that has been said and written on the subject is that only those interests of the highest order *and those not otherwise served* can overbalance legitimate claims to the free exercise of religion") (emphasis added). Also defining the "pre-*Smith* jurisprudence" were the over 200 lower federal court decisions that nearly uniformly applied these restrictive means holdings before the Court issued *Smith*. For example, in *Leahy v. District of Columbia*, 833 F.2d 1046, 1048-49 (D.C. Cir. 1987), then-judge Ruth Bader Ginsburg held that the Supreme Court had just "restated with unmistakable clarity" in *Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136, 141-44 (1987) that the *Sherbert* and *Thomas* compelling interest/least restrictive means test "continues to define the Supreme Court's free exercise clause jurisprudence." Yet, inexplicably, Justice Ginsburg joined the *Boerne* majority in stating just the opposite: that the "least restrictive means requirement . . . was not used in the pre-*Smith* jurisprudence RFRA purported to codify."

This misstatement by the *Boerne* majority could further erode the free exercise test that survived under *Smith* and its "exceptions." See, e.g., *South Jersey Catholic School Teachers Organization v. St. Teresa of the Infant Jesus Church Elementary School*, 1997 WL 411536, at *11-12 (N.J. 1997) (quoting *Boerne* passage criticized above for proposition that the free exercise test under *Smith* is a [single-prong] "compelling interest" analysis that is invoked only in "hybrid" cases involving fundamental rights in addition to free exercise). The importance of the *second* prong of the free exercise test cannot be overstated, however. See, e.g., *Callahan v. Woods*, 736 F.2d 1269, 1272 (9th Cir. 1984) ("The purpose of almost any law . . . can be traced to a fundamental concern of government. Balancing an individual's religious interest against such a concern will inevitably make the former look unimportant. It is therefore the 'least restrictive means' inquiry which is the critical aspect of the free exercise analysis.") *Boerne* is also being cited by states to undermine or invalidate other federal civil rights legislation formerly considered to be authorized by section 5 of the Fourteenth Amendment, such as the Age Discrimination in Employment Act (ADEA), e.g., *Goshtasby v. Board of Trustees of U. of Illinois*, 1997 WL 409401 (7th Cir. 1997), and the Americans with Disabilities Act (ADA), e.g., *Autio v. State of Minnesota*, 1997 WL 367013 (D. Minn. 1997). The authors of this review have a work-in-progress documenting and predicting the fallout of *Boerne*.

37. Prior to the Supreme Court's decision in *Flores*, all seven appellate courts (four federal and three state) that considered RFRA's constitutional validity upheld it.

38. RFRA placed a threshold requirement on claimants to show that the challenged government action "substantially burdens" their religious exercise. A majority of courts construed this "substantial burden" requirement favorably to claimants. See, e.g., *Sasnett*

Also, some accommodations required by RFRA would have involved the government expending tax dollars to accommodate claimants, e.g., building sweat lodges for Native American Indian prisoners or paying unemployment benefits to the plaintiffs in *Employment Division v. Smith.*[39] Arguably, such expenditures would violate the intentional advantage principle.

2. *Charitable Choice.* The "Charitable Choice" provision of the welfare reform law, the "Personal Responsibility and Work Opportunity Reconciliation Act of 1996," permits states to contract with and disburse federal funds to *private* charitable organizations, including *religious* organizations, to provide social welfare services, while affirmatively prohibiting states from discriminating against religious organizations in administering their programs.[40] Advocates of Charitable Choice contend that it protects the institutional autonomy and religious expression of faith-based social service providers while protecting the religious freedom rights of individual welfare beneficiaries. Under Choper's intentional advantage principle, arguably, Charitable Choice would not infringe on either beneficiaries' or providers' religious liberty because states cannot require faith-based providers to compromise their religious character, and providers cannot require beneficiaries to participate in any *per se* religious programs or activities.

Charitable Choice requires that tax funds be used only for "secular" services such as child care, literacy education, job training, or food service—not for religious instruction, proselytization, or worship. Under Choper's independent impact principle, tax dollars can be used to fund the secular functions of religious organizations (at least in the parochial school context). Here, federal funds would only be used to fund secular—not religious—welfare purposes.[41]

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v. Sullivan, 908 F. Supp. 1429, 1444 (W.D. Wis. 1995) (substantial burden shown if a practice "motivated by a sincerely held religious belief [was] significantly or meaningfully curtailed"), aff'd, 91 F.3d 1018 (7th Cir. 1996) (Posner, C.J.), vacated and remanded, 1996 WL 665251 (1997) (for reconsideration in light of *City of Boerne v. Flores*, supra note 36). The minority test, applied consistently only by the Ninth Circuit, required a claimant to demonstrate that the burdened practice was (1) "mandated" by the claimant's faith, (2) a "central" tenet of religious doctrine, and (3) "substantially" interfered with. E.g., *Bryant v. Gomez*, 46 F.3d 948, 949 (9th Cir. 1995). Even the Ninth Circuit occasionally ignores this test. See, e.g., *Cheema v. Thompson*, 67 F.3d 883, 885 (9th Cir. 1995).

39. 494 U.S. 872 (1990).

40. See 42 U.S.C.A. § 604a (1997 Supp.).

41. Choper also suggests that the independent impact principle would allow *tax exemptions* for religious organizations only if the exemption is "commensurate with some secular benefit from church to state—for example, social welfare services or 'good works' that some churches perform." (p. 172) (citation omitted).

However, Charitable Choice could be interpreted as unconstitutional under Choper's independent impact principle. Under this principle, tax dollars should not be used to fund the secular objectives of religious organizations if the fulfillment of those objectives would entail religious activity. For instance, Choper would overturn *Bowen v. Kendrick*,[42] in which the Court upheld inclusion of religious organizations in a neutral, generally-applicable grant program for teenage sexuality counseling, on the basis that Congress used religion as an engine of civil policy in funding an organization whose counseling involved religious principles. (pp. 168, 172) Similarly, Choper could find Charitable Choice to be unconstitutional under the independent impact principle, based on the inevitable furtherance of the recipient organizations' religious missions in the process of providing welfare services. The application of Choper's Establishment Clause principles to Charitable Choice, then, is intriguing but confusing. They neither dictate a clear result nor provide judges clear guidance in resolving the issue of Charitable Choice's constitutionality.

3. *Participation of religiously-affiliated schools in school voucher programs.* Choper briefly addresses vouchers at the end of the book. (pp. 186-88) Under his independent impact principle, Choper opposes the inclusion of religious organizations in neutral, generally-applicable public voucher programs when the public subsidy exceeds the value of the secular service rendered. To guard against such an excess, Choper's secular services system would require detailed accounting of religious schools' expenditures of state funds to ensure that voucher amounts were only used for secular purposes, and that such amounts did not exceed the amounts spent for those same secular purposes in public schools. (pp. 182-83)

Presumably, Choper would overturn general educational voucher programs that include religious schools[43] but fail to confine tax dollars to secular education. The fact that religion seeps

42. 487 U.S. 589 (1988).

43. Choper acknowledges (though he disagrees with its result) that *Witters v. Washington Dep't of Services for the Blind*, 474 U.S. 481 (1986), "effectively resolves the constitutional question in favor of vouchers." (p. 186) Accord Richard C. Reuben, *Are School Voucher Plans Constitutional?*, 13 Calif. L. 35 (Oct. 1993) (dialogue between Jesse Choper and Professor Bernard James); Jesse H. Choper, *The Establishment Clause and Aid to Parochial Schools—An Update*, 75 Calif. L. Rev. 5, 12-14 (1987). But see *Simmons-Harris v. Goff*, 1997 WL 217583, at *10 (Ohio Ct. App., 1997) (invalidating school choice program, under the Establishment Clause, because it "provides direct and substantial, non-neutral government aid to sectarian schools"), *stay granted pending appeal* (Ohio, July 24, 1997).

into the process of achieving the state's secular ends probably would taint these programs in Choper's view, coercing unsuspecting taxpayers into involuntarily supporting someone else's religious ends. As one commentator has noted, however, direct tax assessments to benefit religion should be distinguished from incidental benefits to religion pursuant to neutral, generally-applicable programs.[44] It is questionable whether tax dollars under these programs are actually spent for *religion* when the state pays those dollars to *individuals* who then choose to apply them to religious activities or institutions. As other commentators have noted, eligible recipients of these programs have a property interest in the vouchers that government infringes by restricting the use of those vouchers.[45] Choper does not address this argument.[46]

4. *Rosenberger v. Rector and Visitors of University of Virginia.*[47] In *Rosenberger*, a state university used student activity fees to pay the printing costs of student publications, but refused to pay the costs of a religious student group's publication. The Supreme Court held that the Establishment Clause permitted, and the Free Speech Clause compelled, the university to subsidize the religious student publication on the same basis as the other publications.

The University's program would probably fail Choper's independent impact principle. Under that principle, the secular effect of a generally-applicable program may not depend on or derive from the initial completion of a religious aim. (p. 167) The University would have funded the religious newspaper as a means of achieving its secular goal of supporting student publications, which would have been accomplished only as a consequence of producing a pervasively religious, proselytizing newspaper, thus violating the principle.

The cases Choper cites as examples of invalid programs under the independent impact principle all involve the expendi-

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44. See Garvey, 94 Mich. L. Rev. 1385 (cited in note 20).

45. See Eisgruber and Sager, 74 Tex. L. Rev. at 583-84 (cited in note 25).

46. Nor does Choper address the issue of whether state-facilitated financing programs for colleges are constitutional if they include religiously-affiliated schools. For examples of Supreme Court cases holding that religiously-affiliated colleges may participate in such programs, see *Roemer v. Bd. of Public Works of Maryland*, 426 U.S. 736 (1976) (upholding state noncategorical grant program that included religiously-affiliated college among its recipients); *Hunt v. McNair*, 413 U.S. 734 (1973) (upholding state-facilitated bond financing program that included religiously-affiliated college); *Tilton v. Richardson*, 403 U.S. 672 (1971) (upholding state capital improvement grant program that included religiously-affiliated college).

47. 115 S. Ct. 2510 (1995).

ture of *tax money*.[48] In contrast, *Rosenberger* could be read as permitting the state to apply *private* funds, rather than tax dollars, to religious student organizations, since the funds in *Rosenberger* were comprised of required student activity fees. Characterized in this light, the program could satisfy the independent impact principle.[49] Because the funds were extracted, controlled, and applied by the state, however, they bore a striking resemblance to tax dollars. Once again, it is not clear how Choper's principles should be applied to this case, though Choper has criticized its holding.[50]

V. APPLYING THE RELIGION CLAUSES THROUGH A GLASS DARKLY

1. *Presuppositional truisms.* Choper's analysis is deductive. He begins with four grand principles (none of which receives much inductive support), then applies these principles in determining whether Supreme Court religion cases were decided rightly or wrongly. Choper struggles to be fair and balanced in fashioning his principles. To avoid subjectivity and "personal predilections," his analysis is process-oriented rather than result-oriented. He follows his principles to the conclusions he feels they logically lead to, then takes great pains to let the reader know that he does not agree with all the results he manipulates his principles to achieve.

Inevitably, Choper's application of his principles is more normative than descriptive, as such application involves moral, political, and policy judgments based on normative presuppositions.[51] In determining and applying his principles, Choper makes a number of value judgments based on presuppositions that he doesn't clearly identify or sufficiently support. To Choper's credit, he recognizes that many of his judgments will reflect his personal values, and he promises to "self-consciously

48. See, e.g., *Bowen v. Kendrick*, 487 U.S. 589 (1988); *Witters v. Washington Dep't of Services for the Blind*, 474 U.S. 481 (1986); *Mueller v. Allen*, 463 U.S. 388 (1983).

49. The intentional advantage principle does not apply here, since the program was generally applicable and not designed to support religion. By way of analogy, however, Choper believes that a state may require copies of the Ten Commandments to be posted in public school classrooms, if the copies are paid for by *private funds* (p. 147) (citing *Stone v. Graham*, 449 U.S. 39 (1980)). Even though the state's intent in requiring the posting of the Ten Commandments would be to favor religion, no tax money would be used and no one's religious beliefs would be coerced or influenced in a significant way.

50. See Jesse H. Choper, *Dangers to Religious Liberty From Neutral Government Programs*, 29 U.C. Davis L. Rev. 719 (1996) (criticizing and minimizing the "neutrality" holding of *Rosenberger*).

51. See Segall, 5 Geo. Mason L. Rev. at 72-73 (cited in note 19).

identify those points along the way where predilection rather than logic provides a significant link in the discussion." (p. 11) However, he fails to address many of these predilections. For example, Choper's book reveals a relativistic perspective that the First Amendment should be interpreted in accordance with *contemporary* values and traditions, in addition to the history and text of the amendment. (pp. 1, 6, 122, 171, 177) Because the framers could not have foreseen such developments as public education, antidiscrimination law, and unemployment insurance, (p. 5) Choper believes that we must interpret church/state problems arising in these and other contemporary contexts in accordance with contemporary values. However, Choper does not define "contemporary values." He does not provide guidance for how they should be determined, nor does he discuss how the *correct* contemporary values should be chosen from among competing sets of values in applying the Religion Clauses.

Implicit in Choper's work is a naturalistic, reductionist view that only that which is scientifically "verifiable" in the physical world belongs to the "rational," whereas that which is not verifiable, or is taken on faith, is not debatable. (pp. 82-83) Because religion is a matter of subjective "belief," Choper does not believe that we can discuss it rationally or argue its substantive merits.[52] Nowhere in his book does Choper acknowledge that

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52. See generally Francis Schaeffer, *Escape From Reason* (InterVarsity Press, 1968) (describing how modern philosophy considers religion to be in the nonrational, unverifiable realm of "freedom" rather than in the rational realm of "nature"); accord Phillip E. Johnson, *Reason in the Balance: The Case Against Naturalism in Science, Law & Education* (InterVarsity Press, 1995). Ironically, the latter book, authored by Choper's longtime Berkeley colleague, was published the same year as Choper's *Securing Religious Liberty*. Johnson, like Choper, clerked for Chief Justice Earl Warren in the 1960s before joining the Berkeley law faculty and, like Choper, has lectured and published widely on "law and religion." Although their credentials are similar, Johnson's predilections on the topic are quite different:

> The most influential intellectuals in America and around the world are mostly *naturalists*, who assume that God exists only as an idea in the minds of religious believers. In our greatest universities, naturalism—the doctrine that nature is 'all there is'—is the virtually unquestioned assumption that underlies not only natural science but intellectual work of all kinds. . . . It is said that naturalism is science, whereas theism belongs to religion; naturalism is based on reason, whereas theism is based on faith; and naturalism provides knowledge, whereas theism provides only belief. Science, reason and knowledge easily trump religion, faith and belief.

Id. at 7-8, 10. Using a form of the "ultimate concerns" definition of religion, Johnson explains that "metaphysical naturalism" is the "established religious philosophy" in America, id. at 35-50, a "story that is promulgated aggressively in the educational world and the media with the resources of government." Id. at 15. Johnson says there is nothing "sinister" or even "inherently unconstitutional" about the de facto existence of such a public religious philosophy, and that it "is *established* not in the sense that it is formally

religion could be a rationally defined and chosen value in his hierarchy of "contemporary values."

Choper holds a dualistic view that secular effects of government programs can and must be completely *independent* of religious expression or activity, and that religious content dilutes the "full secular value" of an activity or service. (pp. 164-67, 177) Choper assumes that courts, in determining whether secular effects are independent of religious activity, can make clear distinctions between the secular and the sacred, even within a religious environment such as a sectarian school. (pp. 179-83) This view overlooks the complex nature of presuppositions underlying *all* beliefs, whether religious or secular. It places the judiciary in the position of having to evaluate the substantive *content* of belief, ensuring that the religious quantum of such content is appropriately de minimus to qualify for funding. Choper does not explain how judges should make such fine distinctions between the secular and religious, or strike a proper balance between the two. Nor do his four principles provide such guidance. Under Choper's hierarchy of the Religion Clauses, in which the Establishment Clause trumps the Free Exercise Clause when the two are in conflict, (pp. 24, 54, 97, 160) the secular would inevitably triumph over the sacred.

2. *Recipe for confusion.* Although the results of Choper's analysis are creative, some of them undermine the validity of his principles. For instance, Choper believes that *Witters v. Washington Dep't of Services for the Blind*[53] should be overturned and that the state should refuse to allow recipients of aid under generally-applicable funding programs (e.g., scholarships for the visually impaired at issue in *Witters*) to apply that aid to religious organizations or activities. (p. 169) Such a refusal, however, risks violating Choper's deliberate disadvantage principle. Because religious schools would be required to distinguish the "religious" elements of their educational programs from the "secular elements" of those programs, the schools would have an incentive to secularize in order to qualify for state aid. Furthermore, if

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enacted . . . but in the sense that it provides a philosophical basis for lawmaking and public education." Id. at 35-36.

Choper's expansive definition of religion for *Establishment Clause purposes* includes beliefs in "ultimate truth" and general "ideologies." (pp. 104-05, 116-17) Naturalism, as defined by Schaeffer and Johnson, fits into this definition. Thus, if government funding and support is directed at persons or institutions that espouse a naturalistic ideology, it would raise serious Establishment Clause concerns in the area that troubles Choper the most—public funding and support of religious beliefs and activity. This problem escapes Choper's attention, evidently because of his own naturalistic presuppositions.

53. 474 U.S. 481 (1986).

states were to refuse to allow religious schools to participate in voucher programs, such exclusion arguably would constitute a "deliberate disadvantage" to both religious schools and voucher recipients. This exclusion would discriminate against individuals because of the religious content of their beliefs, and would discriminate against schools on the basis of the religious content of their curricula, thereby violating Choper's first free exercise principle.[54]

Another example is the inconsistency in Choper's application of Establishment Clause principles to *Sherbert v. Verner*[55] and *Employment Division v. Smith*.[56] He believes that *Sherbert* was wrongly decided because the Court-ordered unemployment benefits amounted to "religious coercion in the form of a tax subsidy for religious practice." (p. 121) Although the plaintiffs in *Smith* also sought unemployment benefits, Choper believes they should have won their case. Rather than address the unemployment compensation issue in *Smith*, however, Choper merely recites part of the Court's holding—that Oregon did not have to grant a free exercise exemption from its law prohibiting possession of peyote. (p. 55, 57-58) Never does he affirm, let alone mention, the Court's holding that Oregon may deny unemployment benefits premised on a claimant's violation of a generally-applicable law. This omission is selective, since Choper urges at once that *Smith* be reversed *and* that free exercise exemptions allowing receipt of government funds violate the Establishment Clause. Choper never addresses this inconsistency.

In attempting to make fine, nuanced distinctions, Choper often makes arbitrary ones. For instance, Choper applies his intentional advantage principle to conclude that the government may make Good Friday a paid state holiday, but only if the state does not intend to observe Good Friday as a *religious* holiday.[57] (pp. 155-56) Yet, the same state may declare, "Christianity is our religion" as long as it does not spend significant tax funds in the

54. Arguably, money given to individuals pursuant to neutral programs such as that in *Witters* does not actually belong to the government—or to the taxpayers—but rather to individuals who have met the criteria of such programs and are therefore entitled to the money. Cf. *Goldberg v. Kelly*, 397 U.S. 254 (1970) (holding that welfare benefits are a matter of statutory entitlement for persons qualified to receive them, and that such persons are entitled to procedural due process before benefits may be terminated); see Eisgruber and Sager, 74 Tex. L. Rev. at 583-84 (cited in note 25).

55. 374 U.S. 398 (1963).

56. 494 U.S. 872 (1990).

57. Choper's expansive definition of religion under the intentional advantage principle includes ultimate concerns and "nonreligious ideologies." (pp. 104-05, 116-17) Yet, Choper does not necessarily consider Good Friday to be a *religious* holiday for purposes of applying the principle.

process. (pp. 157-58) Although Choper's questionable application of his principles produces such incoherent results, he never questions these results; he simply bears them, sometimes in grim resignation.[58]

3. *Separation anxiety*. The purpose of Choper's project is to develop a comprehensive thesis for adjudication of all significant issues that arise under the Religion Clauses (p. 1) and, ultimately, to protect religious liberty in America. (p. 9) In his efforts to preserve the separation of church from state money under the Establishment Clause, however, Choper loses sight of an essential part of the religious liberty equation: facilitating the free exercise of religion. Instead, what emerges from Choper's presuppositions, principles, and applications is the message that religion is more of a dangerous, irrational force than a positive good and that religion should be neutralized by government and the courts, lest it coerce taxpayers to support religion or suffer unwilling cognitive dissonance or conversion.

Choper's analysis does not reflect the nature of religious exercise in our society or the cultural context in which the Religion Clauses operate (i.e., the increasingly a-religious nature of our society and the sensitivity with which government officials and agencies shield themselves from religious activity and influence[59]). As a result, Choper is overly sensitive to such issues as tax funds ultimately making their way into religious organizations' coffers and the effect that the Pledge of Allegiance, released time, or graduation prayer will have on the conscience of public school children.

Nor does Choper recognize the possibility, under the Religion Clauses, of non-coercive cooperation between government and faith-based organizations in addressing causes and seeking solutions to societal problems such as poverty, crime, and addiction. He is more concerned with constructive separation than a constructive partnership, and apparently believes the latter is an oxymoron.

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58. In his "Afterword" section, (pp. 189-90) Choper indicates his dissatisfaction with many of his results, such as permitting public schools to excise the study of evolution from the curriculum, allowing local governments to erect sectarian displays on public property, permitting government to declare that "Christianity is our religion," and prohibiting the accommodations at issue in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Walz v. Tax Commission*, 397 U.S. 664 (1970).

59. See Stephen L. Carter, *The Culture of Disbelief* (Basic Books, 1993) (arguing that religion and religious influence have been excised from public life and should be restored).

VI. CONCLUSION

Choper's failure to justify his normative presuppositions and apply his corresponding Religion Clause principles consistently is not unique to him; the same problems plague the Supreme Court's largely arbitrary and inconsistent jurisprudence in this area. As difficult as it is to interpret and apply the Religion Clauses, Choper demonstrates that it is even more difficult to ascertain abstract fundamental principles underlying those clauses and apply them consistently and sensibly. Choper criticizes the Supreme Court's approach to state aid to schools as "'sacrific[ing] clarity and predictability for flexibility,'"[60] (p. 176) but he substitutes one flexible, confusing framework for another. In applying Choper's principles, judges inevitably would give effect to their individual predilections, further confusing and mystifying Religion Clause jurisprudence.

In the end, Choper's work is a provocative but unpersuasive attempt to bring clarity and consistency to the muddled arena of Religion Clause jurisprudence. He understands the problems involved in such an undertaking, but cannot avoid them. His project overreaches and thus collapses under the weight of its laudable idealism. Choper does not provide much hope for a uniform interpretation of the Free Exercise and Establishment Clauses. Instead, he only adds his distinctive, confusing spin to a rather arbitrary and ambiguous jurisprudence.

EXPLICIT & AUTHENTIC ACTS. By David Kyvig.[1] Lawrence, Kansas: University Press of Kansas. 1996. Pp. 604. Hardcover, $55.00.

John Vile[2]

Of all the innovations of the U.S. Constitution, the process of providing for formal constitutional change through an amending process may be one of the most underappreciated. When properly functioning, such a mechanism renders violent revolution unnecessary by allowing for legal changes without the resort to violence. A well-constructed amending mechanism also helps

60. Citing *Committee for Public Education v. Regan*, 444 U.S. 646, 662 (1980).

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