REVIEW ESSAY

Endangering Religious Liberty

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

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Over the past thirty or so years, Jesse Choper has written more than a dozen articles on various aspects of the First Amendment's Establishment and Free Exercise Clauses.¹ His recent book, *Securing Religious Liberty: Principles for Judicial Interpretation of the Religion Clauses*, "draws heavily" (p. xii) on his prior articles and "articulates a comprehensive thesis for adjudication of all significant issues that arise under the Religion Clauses of the Constitution" (p. 1). It sets forth four principles for application—two purporting to encompass the requirements of the Free Exercise Clause, and two to the same effect for the Establishment Clause.² In the course of explaining the operation of the principles, the book discusses in varying degrees of detail virtually every Supreme Court case of consequence under the Religion Clauses, as well as a number of other actual and hypothetical cases.

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1. The articles are listed in JESSE H. CHOPER, *SECURING RELIGIOUS LIBERTY: PRINCIPLES FOR JUDICIAL INTERPRETATION OF THE RELIGION CLAUSES* xii nn.3-4 (1995)[hereinafter cited by page number only].

2. The two clauses together provide: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. 1. They apply to the states by virtue of the 14th Amendment's Due Process Clause. *See* *Everson v. Board of Educ.*, 330 U.S. 1, 8 (1947) (Establishment Clause); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (Free Exercise Clause).

Choper devotes a chapter to each of his four principles, and at the very start of each of these chapters, he offers an italicized statement of the principle to be discussed. These statements are reprinted *infra* notes 12, 63, and 121.

Like the various articles on which it builds, *Securing Religious Liberty* is thoughtful, provocative, and eminently readable. It is also very impressive in ambition and scope. The range of issues and array of cases that it addresses are quite remarkable, particularly in light of its length of less than two hundred pages.

As a set of proposals for actual implementation, however, *Securing Religious Liberty* is highly problematic. Because the book is so wide-ranging in its coverage of both issues and cases, I will not attempt in this essay to discuss all my points, or even all my significant points, of disagreement with the book. Instead, I will focus on three of Choper's proposals and attempt to show that they are seriously flawed. These three proposals not only are central to Choper's approach but also implicate issues central to current debate about the Religion Clauses. Though framed as a response to Choper, this essay is also intended to serve the affirmative function of justifying positions quite different from Choper's on those vital issues.

In Part I, I question Choper's view that free exercise exemptions from generally applicable laws should be limited to beliefs that people are unwilling to violate for fear of adverse afterlife effects. In Part II, I challenge Choper's thesis that, in and of itself, government endorsement of religion is constitutionally inconsequential. In Part III, I criticize Choper's approach to public funding of religion in general and his broad allowance for aid to parochial schools in particular. I conclude in Part IV by highlighting why, in today's political and judicial climate, the proposals discussed are particularly troubling and demand a thorough response.

I

FREE EXERCISE EXEMPTIONS AND EXTRATEMPORAL CONSEQUENCES

Since the Supreme Court's decision in 1990 in *Employment Division v. Smith*,³ the most hotly debated question by far in free exercise law has been whether the Free Exercise Clause authorizes courts to carve out exemptions from generally applicable laws to prevent the laws from seriously burdening some people's religious liberty. By a 5-4 margin, the Court in *Smith* held that, with limited exception,⁴ the Clause did not grant courts such authority. Although Justice Scalia's opinion for the Court went to considerable lengths to deny that it was effecting a

3. 494 U.S. 872 (1990).

4. The Court indicated that several types of claims provided a basis for court-ordered exemptions, including "hybrid" claims—ones involving "not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections," *id.* at 881-82—and unemployment compensation claims, *id.* at 884.

major change in the law, it plainly turned a central premise of the Court's prior free exercise law on its head. Dating back at least to 1963, the Court had adhered to the view that if an individual proves that a law places a substantial burden on his or her free exercise of a sincere religious belief, the Free Exercise Clause requires that the person be granted an exemption from the law, unless the state can show that denying the exemption is necessary to serve a compelling state interest.⁵

The response to *Smith* among commentators was heavily negative.⁶ Even more striking was the response on Capitol Hill. After a remarkably sustained and intense lobbying effort by a broad coalition of religious and civil liberties groups,⁷ Congress with virtual unanimity enacted the Religious Freedom Restoration Act of 1993⁸ for the express purpose of undoing the change in free exercise law worked by *Smith*.⁹ Whether or not the Act ultimately will suffice to achieve that purpose remains to be seen. A number of scholars, including some critical of *Smith*, have argued that Congress lacks constitutional authority to override the Court's constitutional interpretation in *Smith*,¹⁰ and the constitutionality of the Act has been challenged in the courts with some frequency and at least limited success.¹¹ The matter is no doubt headed for resolution in the Supreme Court before too long.

5. See, e.g., *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 141-42 (1987); *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972); *Sherbert v. Verner*, 374 U.S. 398, 406 (1963). Several years before *Smith*, the Court held that this compelling interest test did not apply to religious exemption claims by prisoners, see *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987), or by military personnel, see *Goldman v. Weinberger*, 475 U.S. 503 (1986). With these types of claims, the Court found a special need for deference to the government and essentially required only that denial of an exemption be reasonably related to a legitimate governmental interest.

6. See, e.g., James D. Gordon III, *Free Exercise on the Mountaintop*, 79 CALIF. L. REV. 91 (1991); Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1; Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109 (1990). But see William P. Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308 (1991).

7. See Douglas Laycock, *Free Exercise and the Religious Freedom Restoration Act*, 62 FORDHAM L. REV. 883, 895-96 (1994); David E. Anderson, *Signing of Religious Freedom Act Culminates 3-Year Push*, WASH. POST, Nov. 20, 1993, at C6.

8. Pub L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. §§ 2000bb to 2000bb-4 (1994)).

9. See 42 U.S.C. § 2000bb(a)(4), (b)(1).

10. See, e.g., Daniel O. Conkle, *The Religious Freedom Restoration Act: The Constitutional Significance of an Unconstitutional Statute*, 56 MONT. L. REV. 39 (1995); Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act Is Unconstitutional*, 69 N.Y.U. L. REV. 437 (1994); Scott C. Idleman, *The Religious Freedom Restoration Act: Pushing the Limits of Legislative Power*, 73 TEX. L. REV. 247 (1994). But see Thomas C. Berg, *What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom Restoration Act*, 39 VILL. L. REV. 1, 62-68 (1994); Douglas Laycock, *RFRA, Congress, and the Ratchet*, 56 MONT. L. REV. 145 (1995).

11. As of March 1996, two courts had held the Act invalid, but one of the two decisions was reversed on appeal. See *Flores v. City of Boerne*, 877 F. Supp. 355 (W.D. Tex. 1995), *rev'd*, 73 F.3d 1352 (5th Cir. 1996); *In re Tessier*, 190 B.R. 396 (Bankr. D. Mont. 1995). In *Hamilton v. Schriro*, 74 F.3d 1545 (8th Cir. 1996)—a case in which two of the three members of the court ruled against the religious claimant without reaching the question of the Act's validity—one judge argued at length that

Like the Act, Choper's "burdensome effect" principle¹² repudiates the basic holding in *Smith* and provides for free exercise exemptions from generally applicable laws. It authorizes courts to grant such exemptions, however, only if the free exercise claimant is able to demonstrate a sincere belief that complying with the law rather than his or her religious precepts would entail "extratemporal consequences" (p. 54)—i.e., adverse afterlife effects.

I agree with Choper that the *Smith* Court erred in broadly disallowing free exercise exemptions. I find quite persuasive the argument made by Choper (pp. 55-57) and others¹³ that free exercise exemptions are vital to give minority religions the sort of protection from legislative insensitivity and unfairness that mainstream religions typically enjoy by virtue of their materially greater influence on the lawmaking process itself. I believe that, in combination with the textual and historical arguments made by various commentators and members of the Court,¹⁴ this argument provides cogent authority for interpreting the Free Exer-

the Act overstepped constitutional bounds. See *id.* at 1557-70 (McMillian, J., dissenting in part). For court decisions rejecting, with detailed discussion, constitutional challenges to the Act, see, in addition to the Fifth Circuit's decision in *Flores* cited above, *Sasnett v. Department of Corrections*, 891 F. Supp. 1305, 1315-21 (W.D. Wis. 1995); *Belgard v. Hawaii*, 883 F. Supp. 510, 512-17 (D. Haw. 1995).

12. As summarized at the start of the chapter devoted to it, this principle provides:

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).

Choper's other free exercise principle, the "deliberate disadvantage" principle, provides:

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).

I fully concur with Choper's suggestion that this latter principle, which he discusses at considerably less length than any of the other principles, is the least controversial of his four (p. 35). I have no substantial difficulty with it and will touch on it only briefly. See *infra* text accompanying note 126. Its basic prohibition on laws that target people for disadvantage out of antipathy for their religion appears to enjoy the unanimous support of the Supreme Court (see *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993)), and rightly so. Such a prohibition follows as easily from the Equal Protection Clause of the 14th Amendment as the Free Exercise Clause and seems a baseline guarantee of each.

13. See, e.g., Laycock, *supra* note 6, at 13-16; Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1419-20 (1990).

14. See, e.g., *Church of Lukumi Babalu Aye*, 508 U.S. at 574-77 (Souter, J., concurring in part and concurring in the judgment); *Employment Div. v. Smith*, 494 U.S. 872, 892-94, 901-02 (1990) (O'Connor, J., concurring in the judgment); Laycock, *supra* note 6; McConnell, *supra* note 6; McConnell, *supra* note 13.

cise Clause to provide for the type of court-ordered exemptions disallowed by *Smith*.

I part ways with Choper, however, when he limits the possibility of free exercise exemptions to claims based on beliefs that people are unwilling to violate for fear of extratemporal consequences. Choper acknowledges that this limitation in effect adopts a definition of "religion" for purposes of free exercise exemptions that is "significantly underinclusive" (p. 86) with regard to the ordinary understanding of what is encompassed by that term. Nonetheless, he argues that the limitation is warranted for a number of reasons.

I identify below and attempt to refute seven arguments that Choper appears to offer on behalf of his position. In my view, Choper's proposed definition of religion for purposes of free exercise exemptions negates much of what is rightly gained by repudiating *Smith*. It is beyond the scope of this essay to mount a sustained defense of an alternative definition proposed by commentators or used by courts¹⁵ or to offer a definition of my own. For present purposes, it seems sufficient to establish that a definition that comes much closer than Choper's to the ordinary understanding of religion should be preferred.

Before proceeding further, it may be useful to clarify briefly the practical significance of the discussion to follow in light of the existence of both *Smith* and the Religious Freedom Restoration Act. One of the oddities of *Securing Religious Liberty* is how little attention Choper devotes to the Act. If *Smith* was the most important development in free exercise law in the past few decades, the passage of the Act was surely a close second. Yet, Choper devotes less than a page to the Act, failing not only to enter the debate over the law's constitutionality but even to acknowledge that the law's constitutionality has been or might be questioned (p. 58).¹⁶ In any event, whatever may have prompted Choper's general inattention to the Act, any discussion of the meaning of religion for purposes of free exercise exemptions has immediate practical sig-

15. As discussed *infra* note 36 and accompanying text, since abandoning in 1961 a narrow definition of religion that it had offered many years earlier, the Supreme Court has avoided committing itself to a particular definition of religion. The Court's results and reasoning in free exercise cases since 1961, however, expressly and implicitly establish certain parameters for a definition. See, e.g., *Thomas v. Review Bd.*, 450 U.S. 707, 714 (1981) ("[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."); *Wisconsin v. Yoder*, 406 U.S. 205, 216 (1972) ("[I]f the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claims would not rest on a religious basis."); see also *infra* text accompanying notes 37-45.

16. In light of Choper's failure to enter this debate, it seems inappropriate for me to do so at any length here. For present purposes, suffice it to say that I regard the Act's constitutionality as a difficult question, but one most reasonably resolved in favor of constitutionality. In my view, properly understood, Congress's "substantive" authority under section 5 of the 14th Amendment is sufficiently expansive to encompass the Act. See Laycock, *supra* note 10, at 153-65.

nificance almost exclusively insofar as it provides guidance for interpreting the Act. If the Act ultimately fails to survive constitutional challenge, then such a discussion would have little practical importance unless *Smith* is overruled.

A. *Particularly Cruel Choices*

One argument that Choper offers for defining religion, for purposes of free exercise exemptions, in terms of extratemporal consequences is that (a) free exercise exemptions are crucial to protect religious adherents from "particularly cruel" (p. 74) choices and (b) choices between government-imposed penalties for disobeying a law and extratemporal consequences for disobeying one's religion most clearly meet this description. According to Choper, "the intuitive judgment persists that obeying the law at the price of perceived eternal repercussions produces substantially greater psychological suffering than does doing so at the cost of compromising scruples with only temporal reactions" (p. 86).

In so arguing, Choper makes two highly dubious assumptions. First, he assumes that the Free Exercise Clause provides protection against only the most excruciating choices—ones producing "unique psychic pain" (p. 76 n.84). It is far from apparent, however, that the Clause should not be interpreted more broadly. In particular, the Clause almost certainly covers a broader range of choices if, as Choper himself contends,¹⁷ it was designed to ensure religious minorities a degree of protection from legislative burdens comparable to that enjoyed by adherents of mainstream religions by virtue of their political power alone. In assuming that only the cruelest of choices are covered, Choper cites nothing specific to the text, history, or logic of the Free Exercise Clause. Instead, he seems to rely upon the notion, criticized in detail below,¹⁸ that "there is an irresistible need for limiting precepts in respect to the burdensome effect principle" (pp. 85-86).

Second, Choper assumes, based on "intuitive judgment" (p. 86), that choices between religious and legal obligations that implicate extratemporal consequences typically involve more "psychic turmoil" (p. 75) than ones made painful by concerns relating to one's well-being, spiritual and otherwise, in this life. It is questionable, however, whether courts should be willing to place substantial weight on such a generalization absent more than "intuitive judgment"—whether Choper's or theirs—in support. Even if, as Choper asserts, "there is no sure method of proving [the generalization] empirically" (p. 75), that does not obviously acquit courts of the obligation to require *some* empirical support

17. See *supra* text accompanying note 13.

18. See *infra* Part I.G.

before making it the basis for drawing a distinction determinative of so weighty a matter as the types of claims that qualify for free exercise exemptions.

Furthermore, assuming for purposes of argument that "intuitive judgment" is sufficient to decide this matter, I suggest, based on *my* intuitive judgment, that the accuracy of the generalization is seriously in doubt. Assume, for example, that *A* believes that her choosing a legal over a religious obligation would have severe consequences for her in this life in the near future and that *B* believes that his doing so would have adverse afterlife effects for him. A strong case can be made for characterizing *A*'s choice as the more traumatic. Basically, it seems much easier to get completely exercised over something awful that you think is going to happen fairly soon and affect life as you know it than over something awful that you think will happen in the rather distant future and affect an existence that you have never known. Moreover, this comparison becomes even more skewed in favor of *A* if *B* believes that extratemporal consequences will not follow if he is able subsequently to achieve absolution—a type of belief in extratemporal consequences that Choper includes within his definition of religion (p. 75 n.84). If *B* believes that he has a lifetime ahead to win forgiveness for his sin, it seems particularly unlikely that he will be as tormented by his choice as *A* by hers.

Finally, although Choper in discussing his extratemporal consequences criterion at times talks about the trauma people experience from "put[ting] their souls in jeopardy for eternity" or "caus[ing] loved ones to be damned forever" (p. 75), he elsewhere states his criterion in ways that suggest that the feared consequences need not be quite so dramatic.¹⁹ The basic requirement appears to be undesirable afterlife effects. If so, the afterlife effects feared by *B* simply may be inherently less fearsome than the adverse lifetime consequences feared by *A*.

B. Limited Application

Choper concedes that an extratemporal consequences criterion excludes much that ordinarily is thought to fall within the definition of religion. He maintains, however, that this is not a ground for serious objection, partly because of the limited purpose for which the criterion is offered (pp. 64, 86). Choper offers it not as a general definition of religion nor as a definition for all constitutional purposes, but only as a definition for purposes of free exercise exemptions. It is "reserved for

19. For example, at one point he describes a belief in extratemporal consequences as a belief that "the results of actions taken pursuant or contrary to the dictates of persons' faith may well extend in some meaningful way beyond their lifetimes" (p. 77).

a 'particular legal context'" (p. 86),²⁰ providing a legal definition for a specific legal problem.

I agree that the meaning of religion for purposes of free exercise exemptions is a legal, rather than theological or sociological, question. I also concede the possibility that, in light of the purposes underlying the Free Exercise Clause, religion may sensibly be understood to have a somewhat different meaning in this context than it has in ordinary usage. I strongly reject, however, Choper's suggestion that a substantial disparity between the meaning of religion here and its meaning in ordinary usage is not particularly problematic. Unlike, for example, the term "bill of attainder,"²¹ "religion" is not a peculiarly legal term. It is only reasonable to assume that when the authors of the First Amendment used it, they anticipated that it would draw its meaning primarily from phenomena outside of the law. If so, the validity of a definition of religion in this context that, like Choper's, deviates substantially from the general understanding of the term must be in serious doubt.

Choper's limited-application defense of his definition of religion is also unpersuasive for another reason. Basically, unless religion is defined as narrowly for purposes of the Establishment and Equal Protection Clauses as for purposes of free exercise exemptions, judicial application of Choper's extratemporal consequences criterion gives rise to insuperable establishment and equal protection problems.²² By granting exemptions only on behalf of religious beliefs implicating extratemporal consequences, courts would be discriminating against religious beliefs not meeting this description. They also would be sending a message that beliefs implicating extratemporal consequences are more important and more deserving of protection. Unless religious beliefs not implicating extratemporal consequences do not count as religious for purposes of the Establishment and Equal Protection Clauses, such a "denominational preference"²³ and endorsement of particular religious beliefs violates both of those clauses. In short, Choper cannot have it both ways. If he wants what he concedes to be a "significantly under-

20. Quoting Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CALIF. L. REV. 753, 762 (1984).

21. See U.S. CONST. art. I, § 9, cl. 3 ("No Bill of Attainder . . . shall be passed.").

22. The Supreme Court has treated classification on the basis of religion as "suspect" for purposes of both the Establishment and Equal Protection Clauses. See *Larson v. Valente*, 456 U.S. 228, 246 (1982) (maintaining, in the course of invalidating a law on Establishment Clause grounds, that "when we are presented with a state law granting a denominational preference, our precedents demand that we treat the law as suspect and that we apply strict scrutiny in adjudging its constitutionality"); *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (characterizing religion along with race and alienage as "inherently suspect distinctions" that trigger a rigorous standard of equal protection review); see also *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 114 S. Ct. 2481, 2504 (1994) (Kennedy, J., concurring in the judgment) (discussing one way in which the Establishment Clause "mirrors the Equal Protection Clause").

23. *Larson*, 456 U.S. at 246.

inclusive" definition of religion for purposes of free exercise exemptions, he cannot at the same time try to defend it as limited in application. He must be willing to extend it to the Establishment and Equal Protection Clauses—a step that, as he recognizes, would create an array of other problems and that he is unwilling to take (pp. 103-05, 115-17).

C. *Acceptably Underinclusive*

Although Choper acknowledges that his extratemporal consequences definition of religion is "significantly underinclusive," he denies that its underinclusiveness is sufficiently great to cast serious doubt on the validity of using it in the context of free exercise exemptions. In part, he argues that, in and of itself, the underinclusiveness is simply not all that great. The concept of extratemporal consequences, he emphasizes, "finds support not only in those traditional religions prevalent in our culture but in most of the world's other major sects as well" (p. 79). In addition, he suggests that the underinclusiveness is made less problematic by the fact that other candidates for a definition of religion are less than perfect in defining religion.

Choper's definition of religion is considerably more underinclusive than he suggests. At various points in his discussion of the definition, Choper himself concedes several important ways in which it is imperfect. First, some religions "altogether ignore the afterlife consequences of one's acts" (p. 80). Second, even if the notion of extratemporal consequences "finds support" in a particular religion, branches of that religion may not teach it.²⁴ Third, religions that teach the concept typically do not tie all their mandates to extratemporal consequences.²⁵ In generalizing about the adequacy of his definition, Choper to some extent loses track of the cumulative importance of these concessions.

Even more significantly, Choper gives undue weight to the fact that the idea of extratemporal consequences "finds support" in a particular religion. The written and oral traditions of religions commonly are sufficiently rich and complex to offer some "support" for an enormous range of ideas. In gauging the adequacy of defining religion in terms of an extratemporal consequences precept, the relevant concern is not, as Choper frames it, whether the precept "finds support" in a particular religion, but rather whether it occupies a place of real importance in that religion. If it does not, then adherents of the religion generally will not

24. According to Choper, "[a]t present *most* branches of Christianity, Islam, and Judaism posit some form of divine judgment after death" (p. 79) (emphasis added).

25. Choper acknowledges that "[e]ven within the Christian tradition there are many articles of faith that do not relate directly to any reward or punishment after death" (p. 80). According to Choper, a "widely followed religious practice that would probably not be shielded" under his definition is "[t]he use of wine for communion" (p. 80).

be able to make a sincere claim for a free exercise exemption based on fear of extratemporal consequences.

Choper's treatment of Judaism illustrates the point. In Choper's view, Judaism is plainly covered by his definition of religion (p. 79). Yet, although it is possible to locate some support for an extratemporal consequences concept in the wealth of writing that has accrued over centuries as part of the Jewish tradition, the dominant focus by far of Judaism, both over the years and today, is this life. Judaism's overriding message is to comply with religious precepts not out of fear of adverse afterlife effects, but rather out of love and reverence of God and obligation to others.²⁶

Choper's ready characterization of Christianity as meeting his definition illustrates another difficulty with his rather mechanical and legalistic inquiry into whether an extratemporal consequences precept "finds support" in a particular religion. The existence of substantial authority in *The New Testament* and elsewhere for locating this precept in Christianity does not mean that Christians are necessarily motivated to conform to religious mandates by fear of such consequences.²⁷ On the contrary, if asked why they feel compelled to comply with a religious mandate, many Christians might respond, for example, that compliance is essential to bring them close to God, or to show their love for Christ, or to give meaning to their existence—all responses that, under Choper's approach, would negate their claim to free exercise protection. Choper's fire-and-brimstone approach to religious motivation may accurately describe the way that the great majority of Christians were taught to think, and actually thought, long ago. I am very skeptical, however, that it has nearly as much descriptive accuracy today.²⁸

Besides maintaining that, in and of itself, the underinclusiveness of his extratemporal consequences criterion is not all that great, Choper suggests that it is reasonable by comparison with the over- and underin-

26. See, e.g., 2 ENCYCLOPAEDIA JUDAICA 336-39 (1971) (entry entitled "Afterlife"); 6 *id.* at 51-55 ("Dina De-Malkhuta Dina"); 6 *id.* at 323-24 ("Duty"); 11 *id.* at 235-37 ("Life and Death"); CHAIM PEARL & REUBEN S. BROOKES, A GUIDE TO JEWISH KNOWLEDGE 107-08 (1956); ABBA HILLEL SILVER, WHERE JUDAISM DIFFERS 265-84 (1989).

27. See Greenawalt, *supra* note 20, at 803-04 (discussing "the variety of beliefs that practicing Christians have about extratemporal consequences").

28. See Paul Badham, *Death*, in THE WESTMINSTER DICTIONARY OF CHRISTIAN THEOLOGY 145, 146 (Alan Richardson & John Bowden eds., 1983):

[I]t has become increasingly common in both secular and Christian thought once more to see death as the end-point of the natural process of life and to eschew any serious thought concerning anything beyond our present existence. Certainly neither the mediaeval emphasis on the fear of death nor the confident hopes of the early Christians are much in evidence today. And though few churchmen explicitly repudiate belief in a future life, the virtual absence of reference to it in modern hymns, prayers and popular apologetic indicates how little part it plays in the contemporary Christian consciousness.

To similar effect, see John Hick, *Towards a Christian Theology of Death*, in IMMORTALITY 141, 141-45 (Terence Penelhum ed. 1973).

clusiveness of other definitions of religion. In my view, he is no more successful in establishing the latter proposition than the former.

Choper attempts at considerable length to demonstrate the over- and underinclusiveness of definitions of religion that treat beliefs as religious if they implicate a person's "ultimate concern" or invoke a "transcendent reality" (pp. 69-74, 81-85).²⁹ I readily concede that Choper succeeds in identifying over- and underinclusiveness in these definitions. Whether he has shown over- and underinclusiveness that together rival or exceed the underinclusiveness of his criterion is a matter about which I have considerably more doubt. For present purposes, however, I see no need to explore that question further, because it seems to me particularly apparent that his approach is materially worse, in terms of total over- and underinclusiveness, than the analogical approach proposed by Kent Greenawalt.³⁰ Based in substantial part on his perception of what courts in general tacitly have been doing, Greenawalt has argued that the optimal method of defining religion for purposes of the First Amendment is "to identify instances to which the concept [of religion] indisputably applies, and to ask in more doubtful instances how close the analogy is between these and the indisputable instances."³¹

Choper discusses Greenawalt's approach only briefly (p. 85). He concedes that it "would encompass tenets and practices ordinarily thought to be religious that would otherwise be excluded under other definitions" (p. 85), and he makes no serious attempt to show that it is over- or underinclusive. He is apparently content to criticize the approach as too vague to be viable.³² As discussed below,³³ however, I believe that this criticism, which Choper offers in conclusory fashion, is not well-founded. I therefore see little reason to accept Choper's suggestion that, in light of the over- and underinclusiveness of other possible definitions of religion, the imperfection of his criterion is only to be expected and basically tolerable. Greenawalt's definition illustrates that courts can do quite a bit better.

29. For support for a definition in terms of "ultimate concern," see *International Soc'y for Krishna Consciousness v. Barber*, 650 F.2d 430, 440-41 (2d Cir. 1981); Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056, 1072-83 (1978). For support for one in terms of "transcendent reality," see Steven G. Gey, *Religious Coercion and the Establishment Clause*, 1994 U. ILL. L. REV. 463, 529; Stanley Ingber, *Religion or Ideology: A Needed Clarification of the Religion Clauses*, 41 STAN. L. REV. 233, 285-86 (1989).

30. Greenawalt, *supra* note 20.

31. *Id.* at 763.

32. Choper criticizes Greenawalt's approach for "uncertainties" and for "its capacity for a relatively boundless judicial discretion that threatens the dispassionate treatment of beliefs secured by the Religion Clauses" (p. 85).

33. See *infra* Part I.F.

D. Original Intent

According to Choper, the intent of the framers provides support for his extratemporal consequences criterion. His original intent argument consists of the statement that "the extratemporal consequences concept has roots reaching to such key founders as William Penn, James Madison, and Thomas Jefferson," along with two footnotes citing authority for these individuals' views (p. 79 & nn.94-95). The fact, however, that these and other founders may have believed in extratemporal consequences offers little, if any, reason to conclude that they intended to limit the meaning of religion in the First Amendment to beliefs implicating extratemporal consequences.³⁴ In using the word "religion" in the First Amendment, they understood that they were invoking a concept that in practice did not always include a belief in extratemporal consequences. They also could not help but understand that they were selecting a word with capacity for evolution and growth. Even if, in their view, "religion" almost always implied belief in extratemporal consequences, they advertently allowed, by using "religion" in the First Amendment and avoiding any specific mention of "extratemporal consequences," for the possibility that in the future such a belief might be considerably less characteristic of the belief systems covered by the Religion Clauses.

In discussing the Supreme Court's "first real attempt at a definition of religion" (p. 67) in 1890—a definition equating "religion" with "one's views of his relations to his Creator"³⁵—Choper points out the obvious inadequacy of a definition rooted in a narrow understanding of original intent. This definition "[p]robably reflect[ed] the less complicated conception of 'religion' that prevailed in the earlier years of our republic," but this "concordance [has been] fractured by the evolution of our present multireligious society" (p. 67). In attempting to use original intent for his own purposes, Choper fails to apply this lesson to himself.

E. Supreme Court Precedent

Choper attempts to derive support for his extratemporal consequences criterion from the fact that the concept "has appeared in major Supreme Court decisions" (p. 79). Quoting from the majority opinion in one case and a concurring opinion in another (pp. 79-80), however, Choper proves no more than the entirely unsurprising fact that the Justices have recognized that free exercise rights are seriously burdened

34. For discussion of the limited historical evidence of the founders' views on the meaning of religion, see George C. Freeman III, *The Misguided Search for the Constitutional Definition of "Religion,"* 71 GEO. L.J. 1519, 1520-24 (1983).

35. *Davis v. Beason*, 133 U.S. 333, 342 (1890).

when religious adherents are required by law to act in ways that they believe would have extratemporal consequences. He does not show that there is any support on the Court for the view reflected by his extratemporal consequences criterion—the view that free exercise rights *cannot* be seriously burdened *unless* claimants believe that extratemporal consequences are at stake.

Notwithstanding Choper's suggestion to the contrary, by all indications no such support exists. Since abandoning in 1961 the narrow, theistic definition of religion that it had offered in 1890,³⁶ the Court has avoided expressly committing itself to any particular definition. What the Justices have said—and not said—is enough, however, to suggest strongly that no significant support exists for a definition of religion based on extratemporal consequences. In examining whether a law burdens religious liberty, the Justices' opinions typically make no mention whatsoever of whether the free exercise claim at hand implicates a belief in extratemporal consequences.³⁷ Even more striking, on a number of occasions, the Justices have treated claims as "religious," within the meaning of the Free Exercise Clause, that rather clearly were not predicated on fear of extratemporal consequences.

Thus, for example, in *Bowen v. Roy*,³⁸ the appellees had objected on the basis of their Native American religious beliefs to a requirement that they obtain a Social Security number for their young child as a condition of receiving welfare benefits in her behalf. As the Court pointed out, the appellees believed that "the uniqueness of the Social Security number as an identifier, coupled with the other uses of the number over which she has no control, will serve to 'rob the spirit' of [their] daughter and prevent her from attaining greater spiritual power."³⁹ Although the appellees explained their feelings of religious compulsion in terms other than fear of extratemporal consequences, a majority of the Court took the view that they were entitled to a free exercise exemption from the welfare requirement.⁴⁰ Moreover, even the members of the Court who did not agree that the appellees were entitled to a free exercise ex-

36. See *Torcaso v. Watkins*, 367 U.S. 488 (1961). Although the 1890 definition plainly failed to survive *Torcaso*, it already may have been implicitly abandoned in *United States v. Ballard*, 322 U.S. 78, 86-87 (1944).

37. See, e.g., *Thomas v. Review Bd.*, 450 U.S. 707 (1981); *Sherbert v. Verner*, 374 U.S. 398 (1963).

38. 476 U.S. 693 (1986).

39. *Id.* at 696.

40. See *id.* at 715-16 (Blackmun, J., concurring in part); *id.* at 728-30 (O'Connor, J., joined by Brennan and Marshall, JJ., concurring in part and dissenting in part); *id.* at 733 (White, J., dissenting). This view did not result in a judgment in the appellees' favor because Justice Blackmun also took the view that the free exercise claim should not be reached unless the district court decided on remand that the case was not moot.

The case also involved a free exercise claim that the government should be prohibited from using information already in its possession. The Court rejected this claim by an 8-1 vote. *Id.* at 699-701.

emption never questioned the religious nature of the claim. Indeed, those Justices wrote or joined opinions that repeatedly referred to the claim as "religious."⁴¹

*Goldman v. Weinberger*⁴² similarly illustrates the tension between Supreme Court precedent and an extratemporal consequences precept. The petitioner, an Orthodox Jew, maintained that the Air Force was obliged by the Free Exercise Clause to allow him to wear a yarmulke while in uniform, despite a regulation generally barring headgear. He did not argue that he needed to wear the yarmulke to avoid extratemporal consequences, but rather because "'a yarmulke is an expression of respect for God . . . intended to keep the wearer aware of God's presence.'"⁴³ Maintaining that "[o]ur review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society,"⁴⁴ the Court rejected the claim. Like the four dissenters, however, the majority did not indicate the slightest reservation about treating a claim not rooted in fear of extratemporal consequences as religious within the meaning of the Free Exercise Clause. In the Court's view, the issue was not at all whether the claim was religious, but rather "whether military needs justify a particular restriction on religiously motivated conduct."⁴⁵

F. Relative Clarity

Choper maintains that the narrowness of his definition of religion is justified in part by its "relative clarity" and by the importance of clarity to avoid "parochial judicial application" (p. 85). He also suggests that his definition is superior in this regard to other prominent attempts to define religion. Although I agree that Choper's definition is clearer than other leading alternatives and that a definition of religion must have a certain degree of clarity to be viable, I do not believe that the clarity of his definition provides significant justification for its narrowness.

Basically, although clarity is important in a legal standard, it is not so important as to excuse the very substantial underinclusiveness of

41. See, e.g., *id.* at 695 ("The question presented is whether the Free Exercise Clause of the First Amendment compels the Government to accommodate a religiously based objection. . ."); *id.* at 716 (Stevens, J., concurring in part and concurring in the result) ("Our respect for the sincerity of their religious beliefs . . .").

42. 475 U.S. 503 (1986).

43. *Id.* at 525 (Blackmun, J., dissenting) (quoting petitioner's deposition). See also *id.* at 509 (opinion of the Court) (wearing a yarmulke is "a practice described by petitioner as silent devotion akin to prayer").

44. *Id.* at 507.

45. *Id.*

Choper's definition. The tradeoff is simply too disproportionate. The Supreme Court's early definition of religion in terms of "one's views of his relations to his Creator"⁴⁶ can also boast a high degree of clarity, but even Choper would concede that that hardly establishes its adequacy.⁴⁷ When the drafters of the First Amendment included the term "religion" in the Free Exercise Clause, they intentionally sacrificed some degree of clarity in order to allow for evolution and growth. By exalting clarity over correspondence to evolving notions of religion, Choper's narrow definition of religion ignores the balance that the authors of the Clause implicitly struck.

In short, although "relative clarity" is, as Choper suggests, a "virtue" (p. 85), I believe that he proves by his definition that too much clarity can be a vice. Concededly, if the other leading alternatives were so unclear as not to be viable, Choper's attempt to defend his definition on the basis of clarity would have substantial force. Despite, however, some comments by Choper indicating that *he* may regard all other obvious options as untenably unclear,⁴⁸ I see little basis for such a charge. In particular, although Choper reserves his harshest criticisms in this regard for Greenawalt's analogical approach,⁴⁹ that approach seems to fall comfortably within the range of clarity within which constitutional standards generally fall. In terms of clarity, it compares quite favorably with, for example, the Supreme Court's three-prong obscenity test,⁵⁰ dormant commerce power balancing approach,⁵¹ or multi-criteria standard for deciding the suspectness of legislative classifications.⁵²

46. *Davis v. Beason*, 133 U.S. 333, 342 (1890).

47. *See supra* Part I.D.

48. As already noted, *see supra* note 32, Choper criticizes Greenawalt's approach for "uncertainties" and for "its capacity for a relatively boundless judicial discretion that threatens the dispassionate treatment of beliefs secured by the Religion Clauses" (p. 85). In addition, he charges that the definitions based on "ultimate concern" and "transcendent reality" are "beset with serious shortcomings," including that they "suffer from ambiguity" (p. 85).

49. *See supra* note 48.

50. *See Miller v. California*, 413 U.S. 15, 24 (1973) (citations omitted):

The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

51. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (citation omitted):

Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

52. *See Plyler v. Doe*, 457 U.S. 202, 216 n.14 (1982) (citations omitted):

At various points elsewhere in the book, Choper makes statements about the need for clarity in constitutional law that provide an important backdrop for evaluating his criticisms of the clarity of other definitions of religion. These statements evidence a degree of commitment to clarity in constitutional standards that, I believe, is shared by neither the Court nor the great majority of constitutional scholars. For example, in a section early in the book entitled "Judicial Role," Choper maintains:

[O]ne of the major goals in generating intellectually coherent legal principles should be to produce standards that, in application, will work as forcefully as attainable to constrain judges from inserting their own ideological beliefs into constitutional decision making in ad hoc, unreasoned ways [This goal] is especially important under my conception of the appropriate role of an independent judiciary in regard to the ambiguity and judgment inherent in constitutional interpretation.

Consequently, I urge the Court to apply the constitutional rules faithfully and consistently even when doing so may require the justices either to invalidate specific practices that were apparently approved by those who gave us the fundamental law or to decline to reject laws that seem plainly to be at war with primary constitutional values An optimum thesis should produce as few such results as possible—ideally none at all. But acknowledging that many readers will disagree, I am willing to have my proposed principles be short of flawless on this score in order to achieve other urgent needs (pp. 7-8).

Later in the book, Choper sounds a similar theme when he characterizes a "conventional 'balancing' approach" of individual versus governmental interests as a "comparison of incommensurables that creates serious problems of judicial prerogative in constitutional adjudication" (p. 93). Although balancing has long been a basic ingredient of the Court's methodology in deciding a wide variety of individual rights

Several formulations might explain our treatment of certain classifications as "suspect." Some classifications are more likely than others to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective. Legislation predicated on such prejudice is easily recognized as incompatible with the constitutional understanding that each person is to be judged individually and is entitled to equal justice under the law. Classifications treated as suspect tend to be irrelevant to any proper legislative goal. Finally, certain groups, indeed largely the same groups, have historically been "relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." The experience of our Nation has shown that prejudice may manifest itself in the treatment of some groups. Our response to that experience is reflected in the Equal Protection Clause of the Fourteenth Amendment. Legislation imposing special disabilities upon groups disfavored by virtue of circumstances beyond their control suggests the kind of "class or caste" treatment that the Fourteenth Amendment was designed to abolish.

questions,⁵³ it apparently falls well short of the standard of clarity that, in Choper's view, constitutional adjudication demands.

In sum, although other leading definitions of religion may not be paragons of clarity, Choper's criticism of them as woefully lacking in clarity should be taken with a sizable grain of salt. To a large extent, the criticism reflects Choper's own, rather extreme views about the need for clarity in constitutional law.

G. Need for Limiting Precepts

In proposing for purposes of free exercise exemptions a definition of religion that "admittedly" is "significantly underinclusive," Choper relies heavily upon what he perceives to be "an irresistible need for limiting precepts in respect to the burdensome effect principle" (pp. 85-86). According to Choper, "the absence of such constraints on judicial power was a primary reason, if not *the only* cause, for the Court's rejection [in *Smith*] of its earlier, more protective Free Exercise Clause doctrine" (p. 86).

In making this irresistible-need argument, Choper at times appears to be arguing simply that a rather narrow definition of religion is needed to persuade a majority of today's Court to abandon *Smith* and return to the pre-*Smith* regime of free exercise exemptions. On other occasions, he seems to be arguing that such a definition is needed to ensure that, if courts have authority to carve out free exercise exemptions from generally applicable laws, lawmakers are not seriously hampered in fulfilling their mandate to govern in the people's best interests. For purposes of analysis, I will assume that Choper is trying to make both arguments. As indicated below, I believe that neither has substantial force.

1. Salability to the Court

Prior to *Smith*, the Court's free exercise approach required that a religious claimant substantially burdened by the operation of a generally applicable law be granted an exemption from the law, unless the state could show that not granting the exemption was necessary to serve a compelling interest. In departing from that approach and largely immunizing generally applicable laws from claims for religious exemptions, Justice Scalia and the four other Justices who joined his opinion for the Court in *Smith* maintained, among other things, that judicial application of a compelling interest test "to all actions thought to be reli-

53. See, e.g., *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976) (procedural due process); *Barker v. Wingo*, 407 U.S. 514, 530-33 (1972) (speedy trial); *Schneider v. State*, 308 U.S. 147, 160-62 (1939) (free speech).

giously commanded" is incompatible with the government's need to govern. It is "courting anarchy."⁵⁴

Pointing to that language in *Smith*, Choper offers his concededly "significantly underinclusive" definition of religion as one that today's Court might find palatable in combination with the pre-*Smith* approach to free exercise exemptions. According to Choper, "it is unlikely that an extremely broad definition of religion will be permitted to coexist with an extremely generous protection of the claims that fall within that definition" (p. 63). If the compelling interest test is confined, however, only to claims implicating extratemporal consequences, then, in Choper's view, the chances are good that a Court that felt compelled to jettison the pre-*Smith* approach to free exercise exemptions would be receptive to getting back into the business of such exemptions.

As an initial matter, I question the validity of this argument on its own terms. In *Smith* the Court adopted an approach that essentially abandons rigorous review of religious exemption claims in favor of no meaningful scrutiny at all. Would the Court that decided *Smith* be as satisfied with an approach that reserves the compelling interest test for religious exemption claims implicating extratemporal consequences? I am skeptical to say the least.⁵⁵ Perhaps Choper is correct that some language in the majority opinion in *Smith* intimates that the Court would be happy to continue applying the compelling interest test if only some way could be found to narrow the range of claims to which the test would apply. It is important to keep in mind, however, that that same opinion also claimed that it was not straying from the bounds of recent precedent. As various commentators essentially have shown,⁵⁶ that opinion's handling of precedent may have set a record of sorts for number of disingenuous distinctions. To assign great importance to any particular language in that opinion seems highly unwarranted.

More basically, I question Choper's tacit assumption that the soundness of a proposed definition of religion turns substantially on whether it is somehow able to garner five votes on today's Court. If the

54. *Employment Div. v. Smith*, 494 U.S. 872, 888 (1990).

55. A related question that, in light of my other objections, I see no need to press is whether the narrow conception of free exercise to which Choper's definition caters continues to command five votes on the Court. Choper simply assumes that it does, but the matter is not free from doubt. Although three of the *Smith* dissenters and only one Justice who joined the Court's opinion in *Smith* has since retired, the fifth vote for the *Smith* conception of free exercise conceivably has been lost simply as a result of change in personnel. Moreover, broad scholarly disapproval and virtually unanimous congressional repudiation of the *Smith* conception may have caused one or more of those still on the Court who subscribed to that conception to have second thoughts. See *supra* notes 6-9 and accompanying text. Several months before Congress pushed *Smith* to the background by enacting the Religious Freedom Restoration Act, one Justice who joined the Court after *Smith* urged reconsideration of the case. See *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 559-77 (1993) (Souter, J., concurring in part and concurring in the judgment).

56. See, e.g., Gordon, *supra* note 6; Laycock, *supra* note 6; McConnell, *supra* note 6.

ultimate objective is to propose a definition that comports most fully with the purposes that the Free Exercise Clause was designed to serve, this assumption seems dubious at best.

2. Importance to Governance

In arguing that a relatively narrow definition of religion is needed to avoid impeding the government's ability to govern, Choper tacitly assumes that an interpretation of a constitutional provision is unsound if it would seriously undermine the government's ability to govern in the people's best interests. I have no difficulty with this assumption. It seems to me an obvious ramification of the Constitution's basic commitment to democratic government. I do not believe, however, that due respect for the government's need to govern calls for a definition of religion nearly as limited as Choper's. In my view, a definition of religion substantially more in keeping with that term's ordinary meaning would not seriously undermine the government's ability to govern in the people's best interests.

Most obviously, from at least 1963 until *Smith* in 1990, courts were applying a compelling interest test in the free exercise area without imposing artificial limits (like an extratemporal consequences requirement) on the meaning of religion, and government was not, by all appearances, seriously impeded in lawmaking. Although claimants had broad latitude to argue for free exercise exemptions, courts did not routinely grant such exemptions. They commonly found either that the claimant's religious liberty was not substantially burdened⁵⁷ or that denial of the claimed exemption was necessary to serve a compelling state interest.⁵⁸ Moreover, in the relatively infrequent case in which a court determined that an exemption was in order, the exemption granted to the claimant virtually always left the challenged law essentially intact.⁵⁹

57. See, e.g., *Tony & Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 303-05 (1985) (finding that minimum wage and recordkeeping requirements of Fair Labor Standards Act did not tangibly burden religious foundation workers' religious liberty); *Messiah Baptist Church v. County of Jefferson*, 859 F.2d 820, 823-26 (10th Cir. 1988), cert. denied, 490 U.S. 1005 (1989) (finding that zoning regulations did not materially burden church's free exercise).

58. See, e.g., *Bob Jones University v. United States*, 461 U.S. 574, 602-04 (1983) (finding that denial of tax-exempt status to petitioners was necessary to compelling interest in eradicating racial discrimination in education); *EEOC v. Pacific Press Publishing Ass'n*, 676 F.2d 1272, 1279-81 (9th Cir. 1982) (finding that application of Title VII was essential to compelling interest in eliminating employment discrimination).

59. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (exempting Amish parents of children who complete 8th grade from the state's requirement that all children be sent to school until the age of 16; the parents had claimed that school attendance after 8th grade exposed the children to worldly influences antithetical to the Amish religion); *Quaring v. Peterson*, 728 F.2d 1121 (8th Cir. 1984), *aff'd by equally divided Court*, 472 U.S. 478 (1985) (granting an exemption from a state driver's license requirement that applicants must have their photograph taken and affixed to the license; the claimant

In response to the above argument, it might be argued that the results in the pre-*Smith* case law reflect a tacit, substantial dilution of the compelling interest test. Quoting Gerald Gunther's observation in 1972 that that test, when applied in the equal protection area, is "strict in theory but fatal in fact"⁶⁰ (p. 94), Choper makes clear that in his view conscientious application of the test in free exercise cases before *Smith* would have produced far different results, with serious repercussions for the government's ability to govern.

Choper is not alone in making this tacit-dilution claim,⁶¹ and I am not entirely unsympathetic to it. In a number of instances, courts have found the compelling interest test met where I think there was strong reason to find otherwise. Ultimately, however, I am unpersuaded that there was systematic, substantial dilution of the test. In my view, Choper's claim to the contrary probably fails to make proper allowance for reasonable differences of opinion in the application of the test. In addition, it appears to assume a rigidity in that test that the test was never intended to have and, consistent with the government's need to govern, could not sensibly be given.⁶²

Even if I am wrong, however, and the pre-*Smith* case law is best understood as tacitly applying a substantially diluted compelling interest

had maintained that the requirement forced her to violate her belief as a Christian that the Second Commandment's prohibition on graven images forbids the making of photographs).

60. Quoting Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

61. See, e.g., Frederick Mark Gedicks, *RFRA and the Possibility of Justice*, 56 MONT. L. REV. 95, 95-96 (1995); McConnell, *supra* note 6, at 1127-28; but see Laycock, *supra* note 7, at 901-02 (expressing reservations about this view).

62. Shortly after asserting that it is "surely true" that the compelling interest test is "fatal in fact" if "applied with integrity, in undiluted form" (p. 94), Choper offers several examples of cases in which the test would be met. As one of the examples—"substance abuse counselors refuse to abstain from using drugs themselves despite their obvious status as role models for their dependent clients" (p. 96)—makes especially clear, Choper himself recognizes that the test is not sensibly applied as rigidly as his fatal-in-fact characterization of it suggests. Although "compelling" might be understood to require an interest so vital that, if not fulfilled, the system would be in ruins, Choper illustrates by this example that he understands it to require considerably less than that.

The fact that application of the test in the equal protection area has resulted much more frequently in invalidation than application in the free exercise area offers some support for the claim of tacit dilution in free exercise cases. In my view, however, it primarily reflects the reality that the kinds of laws that generally trigger the test in the equal protection area rarely present close cases. Most obviously, laws that discriminate against racial minorities typically cannot come close to meeting the test because they are rooted in gross stereotypes. See Gary J. Simson, Note, *Mental Illness: A Suspect Classification?*, 83 YALE L.J. 1237, 1250-51 (1974). Moreover, recognizing the bias that typically underlies such laws, courts properly approach the state's defense of them with a healthy dose of skepticism. By contrast, the laws from which free exercise claimants seek exemption are generally free from suspicion for particular bias, and courts have no obvious reason not to approach with some degree of deference the implicit legislative judgment that compliance with the law is important to the general welfare. For various perspectives on the compelling state interest test, see *Conference on Compelling Government Interests: The Mystery of Constitutional Analysis*, 55 ALB. L. REV. 535 (1992).

test, I still think Choper fails to show an "irresistible need" for a narrow definition of religion. For one, even if scrupulous application of the test would produce a significantly higher percentage of victories for religious exemption claimants than in the past, the same dynamic that ostensibly produced diluted application in the past might be expected to do so again. Moreover, even if it did not, it is far from clear that the government's ability to govern effectively would be seriously undermined as a result. After all, since the legislative process generally makes allowance for the needs of adherents of mainstream religions, court-ordered exemptions typically would be limited in scope to affected members of relatively small groups.

Finally, even assuming for purposes of argument that application of the compelling interest test to claims for free exercise exemptions would seriously undermine the government's ability to govern, Choper still fails to demonstrate the necessity of a narrow definition of religion. The bottom line is that he does not show that accommodating the government's need to govern by narrowing the definition of religion is preferable to doing so by moderating the applicable test. He simply assumes that it is, but respect for the drafters' choice of language in the First Amendment suggests otherwise. They broadly called for protection of the free exercise of "religion," offering no indication that they wished to protect some forms of religion but not others. If sound interpretation of the Free Exercise Clause indeed requires "limiting precepts," Choper's extratemporal consequences precept seems considerably less appropriate than one, such as a less exacting standard of review, that accommodates the government's need to govern without casting various forms of religion outside the scope of the Clause.

In sum, Choper's argument for his definition of religion based on "an irresistible need for limiting precepts" in administering a system of free exercise exemptions is no more persuasive than his other arguments for his definition. None of them offers even moderately strong support for an interpretation of religion in this context far narrower than the ordinary understanding of that term. Although his definition draws upon a familiar, mainstream religious belief, it excludes a wide variety of beliefs that cannot sensibly be understood as other than religious. Particularly in light of Choper's recognition that free exercise exemptions are vital to ensure protection for less widely shared and less familiar religious beliefs, one might have hoped that he would not be content with a definition of religion in this context unless it covered much more.

II

GOVERNMENT ENDORSEMENT OF RELIGION

The basic thrust of Choper's "intentional advantage" principle⁶³ is that government is generally free to act in ways that endorse a particular religion or religious belief, or religion over nonreligion. Government simply must avoid being so aggressive in aligning itself with one or another religion or religious belief or with religion generally that it can fairly be charged with either "(a) coercing or significantly influencing people either to violate their existing religious tenets, or to engage in religious activities or adopt religious beliefs when they would not otherwise do so, or (b) compelling people to afford financial support either to their own religion or to that of others" (p. 118).

In treating endorsement, in and of itself, as constitutionally innocuous and focusing instead on the forms of coercion or compulsion described above, Choper parts ways quite dramatically with the Supreme Court. Characterizing government endorsement of religion, public funding of religion, and active state involvement in religious activity as the "three main evils" at which the framers of the Establishment Clause took aim,⁶⁴ the Court for years has treated a virtually exclusive purpose or likely effect of endorsing religion as grounds for invalidation.⁶⁵ Not surprisingly, then, Choper would decide many cases differently than the Court decided them. He contends, for example, that the Court was wrong in *Stone v. Graham*⁶⁶ to strike down a law requiring that public schools post the Ten Commandments in all classrooms. Choper readily concedes that the law endorsed religion, but he treats that as inconsequential. He would have upheld the law because, with the posting of the Commandments being privately funded, the law compelled no one's

63. As summarized by Choper at the start of the chapter discussing this principle, the intentional advantage principle provides:

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).

Choper's other Establishment Clause principle, the "independent impact" principle, is discussed *infra* Part III.

64. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

65. Although the Court in *Wallace v. Jaffree*, 472 U.S. 38, 56 & n.42 (1985), and *Allegheny County v. ACLU*, 492 U.S. 573, 592-94, 599-600 (1989), articulated an endorsement test more clearly than it had before, the test is rooted in the inquiries into purpose and effect required by the two-prong Establishment Clause test of *Abington School Dist. v. Schempp*, 374 U.S. 203, 222 (1963), and by the successor, three-prong test of *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). As the Court noted in *Allegheny County*, 492 U.S. at 592, "whether the challenged governmental practice either has the purpose or effect of 'endorsing' religion [is] a concern that has long had a place in our Establishment Clause jurisprudence."

66. 449 U.S. 39 (1980).

financial support and because, in his view, the law did not coerce or significantly influence any students to alter their religious beliefs (p. 147).

Similarly, while conceding that Pittsburgh's display of a privately owned creche inside its county courthouse was government endorsement of religion, Choper maintains that the Supreme Court in *Allegheny County v. ACLU*⁶⁷ was wrong to disallow it. He would decide the case differently because the display did not draw on tax-raised funds and because, in his view, it did not coerce or significantly influence any observers to change their religious beliefs (pp. 154-55). Indeed, Choper is so firm in his resolve that endorsement should be treated as a non-issue under the Establishment Clause that he posits that, in the "highly improbable" circumstance that the Supreme Court is ever faced with a municipal proclamation declaring Christianity the city's official religion, the Court should let this blatant endorsement stand as long as the city does not couple the proclamation with any sort of enforcement mechanism (p. 157).

In refusing to treat endorsement as a basis for invalidation under the Establishment Clause, Choper appears to acknowledge that the history of the adoption of the Clause is against him. He concedes that a municipal proclamation of the sort described above "unmistakably represents the specter of a specific evil that the Establishment Clause seeks to prevent" (p. 157), and he supports that concession with a footnote quoting Douglas Laycock for the proposition that "[t]he only universal element of every establishment was government endorsement of one or more religions" (p. 157 n.203).⁶⁸ Choper also suggests that an approach treating endorsement as a basis for invalidation "would satisfy our historically grounded concerns" (p. 158).

In defense of his contrary approach, Choper offers a number of arguments. In the discussion to follow, I identify and analyze these various arguments. I contend that Choper fails to provide a cogent justification for denying government endorsement of religion the significance that, by all indications, the framers of the Establishment Clause attached to it and intended it to have. Instead, his arguments generally demonstrate a lack of appreciation on his part for the framers' wisdom in seeking to make government endorsement of religion a thing of the past.

A. *The Harmfulness of Endorsements*

In defending his approach to endorsements, Choper relies heavily on the argument that the ill effects of government endorsements of re-

67. 492 U.S. 573 (1989).

68. Quoting Douglas Laycock, "Noncoercive" Support for Religion: Another False Claim About the Establishment Clause, 26 VAL. U. L. REV. 37, 42 (1991).

ligion are too insubstantial to justify judicial invalidation. As discussed below, this argument fails for three reasons. First, his discussion of the "feelings of alienation or offense" (p. 29) experienced by nonadherents of the government-sponsored religion or religious belief seriously understates the harm associated with such feelings. Second, by discussing harm to nonadherents only in terms of feelings of alienation and offense, Choper ignores other types of significant harm that endorsements regularly inflict on nonadherents. Third, by focusing exclusively on immediate harm to nonadherents, Choper fails to recognize important systemic and long-term harms.

1. *Alienation and Offense*

In gauging the harmfulness of endorsements, Choper focuses on the "feelings of alienation or offense" experienced by individuals who do not share the government-sponsored religion or religious belief. He does not deny that endorsements "may cause reasonable people to feel offended or alienated" (p. 31). He maintains, however, that judicial intervention on behalf of such feelings "run[s] counter to the general precept 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).⁶⁹ Whatever alienation nonadherents may feel, their "'actual political standing'" is not changed "'in any realistic sense; no one loses the right to vote, the freedom to speak'" (p. 31).⁷⁰ Moreover, some feelings of alienation are natural any time someone "'has lost a fair fight in the arena of politics'" (p. 30 n.114).⁷¹

Choper contrasts the "distressed sensibilities" (p. 29) felt by religious minorities when the government sponsors mainstream religions, with the "tangible disrespect" felt by racial minorities when government "'displays the symbols of white supremacy'" (p. 101).⁷² Unlike government endorsements of the racial majority, government endorsements of mainstream religions are "often (indeed, usually) benign, genuine, and sometimes even important" (p. 31). Indeed, rather than feel that they have been treated with disrespect when government endorses mainstream religions, religious minorities often can be expected

69. Quoting, respectively, *Harris v. City of Zion*, 927 F.2d 1401, 1405 (7th Cir. 1991), *cert. denied*, 505 U.S. 1218 (1992); *ACLU v. City of St. Charles*, 794 F.2d 265 (7th Cir.), *cert. denied*, 479 U.S. 961 (1986); *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 485 (1982).

70. Quoting Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266, 307 (1987).

71. Quoting Mark Tushnet, *The Constitution of Religion*, 18 CONN. L. REV. 701, 712 (1986).

72. Quoting Kenneth L. Karst, *The First Amendment, the Politics of Religion and the Symbols of Government*, 27 HARV. C.R.-C.L. L. REV. 503, 511 (1992).

to view such endorsements as simply "public recognition of certain appealing beliefs or appreciation for various beneficial activities" (p. 102).

The clear import of Choper's discussion of nonadherents' feelings of alienation and offense is that anyone who feels seriously aggrieved by a government endorsement of religion is being hypersensitive. In his view, any reasonable person would recognize that the government was not trying to offend anyone, but simply paying deference to "certain appealing beliefs" held by much of society. In essence, people have a right to feel disappointed and even a bit offended that their religious beliefs were not the ones that the government decided to sponsor, but politics always has winners and losers, and courts have no business interfering with basically healthy activity in order to soothe the hurt feelings of sore losers. Just because they weren't invited to the party is no excuse for trying to spoil it for everyone.

What Choper's tough-minded approach seems to ignore is that if the "appealing" religious beliefs sponsored by government are not your beliefs and indeed conflict with ones that you hold with deep conviction and even reverence, it is not hypersensitive in the least to feel that you have been treated with "tangible disrespect." However "benign" the government's motives may be—and I seriously question whether this label applies with any more logic to government actions taken in conscious disregard of the heartfelt beliefs of religious minorities than to the government endorsements of white supremacy that Choper finds so obviously malevolent⁷³—government endorsement of religion sends to nonadherents of the favored religion a message of very basic disrespect. It tells them that, in the eyes of their government, beliefs that lie at the core of their self-identity are second-rate (if not worse) and that they as citizens are simply second-class.⁷⁴

2. *Other Harms to Nonadherents*

In discussing the harmfulness of endorsements solely in terms of nonadherents' feelings of alienation and offense, Choper ignores at least two types of significant harm that endorsements commonly inflict on nonadherents. First, he ignores the considerable anguish that endorsements may cause nonadherents by subtly pressuring them to con-

73. In a symposium piece responding to a lead article by Choper, I have addressed in detail his suggestion, made more fully in that article, that his indulgent approach to government endorsement of mainstream religions draws support from differences between laws intentionally favoring mainstream religions and ones intentionally favoring the racial majority. See Gary J. Simson, *Laws Intentionally Favoring Mainstream Religions: An Unhelpful Comparison to Race*, 79 CORNELL L. REV. 514 (1994).

74. See *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring) ("Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community . . .").

form their actions or beliefs to the sponsored religion or religious belief. Choper's intentional advantage principle provides for judicial intervention when a particular government action favors one religion or religious belief so strongly that the pressure on nonadherents to conform is very difficult to resist. In effect, however, if a particular government action is not "inherently compulsive" (pp. 142-43) to this degree, Choper acts as if its pressures to conform do not exist. So doing, he fails to take account of the anguish that even an endorsement generating low-level pressure to conform may cause some nonadherents—children, in particular—to experience.⁷⁵ Even more importantly, he fails to take account of the intense pressures to conform and accompanying anguish that a number of individually "noncoercive" endorsements of one religion, or of religion over nonreligion, may generate cumulatively, when they occur concurrently or in series over time.

Thus, for example, even assuming, as Choper argues (p. 147), that a law requiring that the Ten Commandments be posted in public school classrooms does not generate sufficient pressure to conform to violate his intentional advantage principle, it may well generate enough pressure to be a source of substantial anguish for schoolchildren not sharing the sponsored religious beliefs. Moreover, if this endorsement occurs in combination or sequence with other endorsements that Choper would find "noncoercive"—such as a ban on instruction in evolution (pp. 145-46) or a creche prominently displayed by itself inside a government building (pp. 154-55)—the likelihood that those schoolchildren will suffer substantial anguish seems particularly high. Yet, as Choper approaches the matter, such anguish is beside the point.

A second type of harm to nonadherents that Choper ignores is less direct but no less real. Endorsements send a message to adherents, as well as nonadherents, of the favored religion.⁷⁶ Moreover, what they tell adherents is not only that the adherents' religion is favored but that the nonadherents' religions (or lack of religion) are not. Such messages reinforce and lend legitimacy to the prejudices that many adherents may hold about the disfavored religions (or the lack of religion), thereby increasing the likelihood that those prejudices will be translated into action. "Benign" as many endorsements may seem, it is not far-

75. In *Engel v. Vitale*, 370 U.S. 421, 430 (1962), the Court made clear that proof of an Establishment Clause violation "does not depend upon any showing of direct governmental compulsion." It recognized, however, that "[w]hen the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain." *Id.* at 431.

76. See *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring) (maintaining that endorsements send "an accompanying message to adherents that they are insiders, favored members of the political community").

fetches to believe that they can help create an atmosphere in which religion-based hate crimes and other vivid displays of religious intolerance are more apt to occur. My point, however, does not depend upon such dramatic examples. As affirmations to adherents of their superiority and of nonadherents' inferiority, endorsements can reasonably be expected to provide impetus to less apparent, but often quite devastating, acts of social and economic discrimination against nonadherents. They encourage not only people in positions of authority relative to nonadherents, but nonadherents' peers as well, to treat nonadherents unfavorably in the workplace, the schools, social relationships, and a variety of other contexts.

3. *Systemic and Long-Term Harms*

Perhaps the most serious flaw in Choper's treatment of the harmfulness of endorsements is his complete inattention to the harms that they inflict aside from immediate harms to nonadherents. Among other things, government endorsement of religion is harmful to government itself.⁷⁷ When government gets into the business of conferring endorsements on one or another religion, it makes itself the focal point for a potentially intense and highly distracting competition between religions for a valuable form of government largesse. As the Supreme Court has pointed out on a number of occasions,⁷⁸ when government invites religious discord into the political arena, it seriously threatens to undermine its ability to deal effectively with other matters of pressing importance. Government endorsements of religion may also create problems for government by causing significant sectors of the citizenry to feel alienated from their government. Because government relies for its effectiveness on broad-based participation and support, the alienating effect of endorsements can be a burden for both nonadherents and their government.

Endorsements can also be problematic for the favored religion. It is hardly uncommon for endorsements to take a form that trivializes the religion or religious belief that they purport to advantage.⁷⁹ The creche

77. See *Engel*, 370 U.S. at 431 ("[A] union of government and religion tends to destroy government and to degrade religion.").

78. See, e.g., *Aguilar v. Felton*, 473 U.S. 402, 414 (1985); *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756, 795-98 (1973); *Lemon v. Kurtzman*, 403 U.S. 602, 622-25 (1971); see also Paul A. Freund, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680, 1692 (1969) ("While political debate and division is normally a wholesome process for reaching viable accommodations, political division on religious lines is one of the principal evils that the first amendment sought to forestall.").

79. As James Madison wrote in 1785 in his famous *Memorial and Remonstrance Against Religious Assessments*, "experience witnesseth that ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation." For the full text of the *Memorial and Remonstrance*, see *Everson v. Board of Educ.*, 330 U.S. 1, 63-72 (1947) (app. to opinion of Rutledge, J., dissenting).

in *Lynch v. Donnelly*⁸⁰ that was displayed by the city of Pawtucket and somehow upheld as sufficiently secular by the Supreme Court⁸¹ vividly illustrates the point. Surrounding this reproduction of an event sacred to the Christian religion were such figures and decorations as a Santa Claus house, reindeer, and, best of all, cutouts of a clown, elephant, and teddy bear.⁸² Similarly, prayers sponsored by government for public consumption commonly offer bland and generic invocations of divine guidance that degrade religion and insult the devout.⁸³

Lastly, endorsements are a threat to posterity. They lay the groundwork for moving incrementally toward a system in which religious liberty, particularly for religious minorities, is substantially diminished. Small favors stimulate the demand for larger ones, and as certain inroads on liberty are tolerated and become familiar, further ones tend to follow easily as a matter of course.⁸⁴ Government endorsement of religion was a central feature of the religious establishments that prompted the adoption of the Establishment Clause.⁸⁵ Replication of this feature of religious establishments carries with it the danger of drawing the entire system closer in form to such establishments and to the gross injustices that they represent. As the Court has explained, the framers of the First Amendment apparently so assumed when they "did not simply prohibit the establishment of a state church or a state religion," but instead "commanded that there should be 'no law respecting an establishment of religion.' . . . A given law might not *establish* a state religion but nevertheless be one 'respecting' that end in the sense of being a step that could lead to such establishment."⁸⁶ As the embodiment of one of the "three main evils"⁸⁷ that the framers associated with established religions, a law endorsing one or another religion would seem to be precisely the type of "step that could lead" to an established religion that the framers had in mind.

B. Importance to Mainstream Religions

In addition to claiming that government endorsements of religion are not sufficiently harmful to warrant judicial invalidation, Choper argues that interpreting the Establishment Clause to prohibit endorsements

80. 465 U.S. 668 (1984).

81. For a devastating critique of *Lynch*, see William Van Alstyne, *Trends in the Supreme Court: Mr. Jefferson's Crumbling Wall—A Comment on Lynch v. Donnelly*, 1984 DUKE L.J. 770.

82. *Lynch*, 465 U.S. at 671.

83. See Laycock, *supra* note 68, at 62-65.

84. See Madison, *supra* note 79 ("[I]t is proper to take alarm at the first experiment on our liberties.").

85. See Laycock, *supra* note 68, at 41-48.

86. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

87. *Id.*; see *supra* text accompanying note 64.

is "unduly restrictive of government authority" (p. 32). Most notably, a judicially enforced prohibition on endorsements "would substantially disable state attempts to respond to felt needs of adherents of mainstream religious groups" (p. 30). It would fail to honor "the value judgment that it is worthwhile for government to acknowledge the feelings of members of mainstream religions about 'their most central values and concerns' by responding to their wishes not to be 'excluded from a public culture devoted purely to secular concerns'" (p. 100).⁸⁸ To illustrate the inappropriateness of interpreting the Establishment Clause to prohibit endorsements, Choper offers two examples of state attempts to accommodate mainstream religions that he sees as important to society but doomed under such an interpretation of the Clause: (1) allowing student religious clubs the same after-school access as other student clubs to public school classrooms (p. 32); and (2) recognizing Thanksgiving as a national holiday (p. 34).

Choper's attempt to make an affirmative case for endorsements based on their importance to mainstream religions is unpersuasive for a number of reasons. I discuss below three that seem particularly significant.

1. Nature and Impact of an Endorsement Test

In arguing for endorsements based on their importance to mainstream religions, Choper tacitly relies upon an extreme and unrealistic version of an endorsement test and, as a result, overstates the impact of such a test on attempts to accommodate mainstream religions. Although Choper appears to assume otherwise, the Supreme Court has never read the Establishment Clause as a mandate to invalidate any law that conceivably might be perceived by some people as expressing some preference, however minimal, in favor of a particular religion or religious belief (or in favor of religion over nonreligion). Instead, the Court essentially has construed the Clause as requiring invalidation only if (1) the law is proven to rest virtually entirely on a purpose of communicating a preference in favor of a particular religion or religious belief (or in favor of religion over nonreligion), or (2) the law is likely to be viewed by a reasonable observer as communicating a material preference in favor of a particular religion or religious belief (or in favor of religion over nonreligion).⁸⁹

88. Quoting Smith, *supra* note 70, at 311.

89. See, e.g., *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 395 (1993); *Allegheny County v. ACLU*, 492 U.S. 573, 592-94, 599-600 (1989). As indicated elsewhere, see Gary J. Simson, *The Establishment Clause in the Supreme Court: Rethinking the Court's Approach*, 72 CORNELL L. REV. 905, 910, 923-24 (1987), I would frame an endorsement test somewhat differently than the Court appears to frame it. My principal disagreement is that I would require the invalidation of any law that would not have been adopted but for the purpose of endorsing

Choper's two examples of important accommodations that could not survive an interpretation of the Establishment Clause as prohibiting endorsements actually help illustrate that such an interpretation is not as inhospitable to mainstream religions as Choper represents. His first example regarding the permissibility of after-school religious clubs deals with a problem that the Supreme Court addressed in 1990 in *Westside Community Board of Education v. Mergens*.⁹⁰ *Mergens* presented the question of whether the Establishment Clause prevents a school from granting a proposed Christian club the same after-school access to classrooms as it grants to other clubs.⁹¹ As the Court noted, the club wished to meet "to read and discuss the Bible, to have fellowship, and to pray together."⁹² With such stalwart separationists as Justices Brennan and Marshall concurring in the judgment and with only one Justice (who did not reach the constitutional question) in dissent, the Court held that religious clubs could be included in a school's after-school club program without running afoul of the Establishment Clause's prohibition on endorsements. Although there was some disagreement among the Justices as to the measures that a school needs to take to ensure that its inclusion of religious clubs does not convey a message of endorsement, no one on the Court found this accommodation of mainstream religions inherently incompatible with the Court's endorsement test.

Whether or not an endorsement test precludes recognizing Thanksgiving as a national holiday is another problem that the Justices have addressed, though only in dictum. Choper seems to assume that government recognition today of Thanksgiving as a national holiday must be understood as an endorsement of religion because of Thanksgiving's religious antecedents. However, as Justice Brennan explained in the course of his opinion for the four dissenters in the Pawtucket creche case, the perpetuation of Thanksgiving as a national holiday is not reasonably viewed as an endorsement of religion. Whatever its origins, "the current practice of celebrating Thanksgiving is unquestionably secular and patriotic."⁹³ In retaining it as a national holiday, the government acts "solely for secular reasons."⁹⁴

religion, regardless of whether that purpose was exclusive or even primary. Given the Court's approach to effects, however, this disagreement about the treatment of purposes of endorsement would rarely translate into disagreement about results.

90. 496 U.S. 226 (1990).

91. The school board had denied equal access to the Christian club, maintaining that it was obliged to do so by the Establishment Clause. The Court addressed the Establishment Clause issue after concluding that the federal Equal Access Act required equal access.

92. *Mergens*, 496 U.S. at 232.

93. *Lynch v. Donnelly*, 465 U.S. 668, 716 (1984) (Brennan, J., dissenting).

94. *Id.* at 715. The Court's opinion included a brief aside on Thanksgiving that made clear that the Justices in the majority also saw no Establishment Clause problem in recognizing it as a national holiday. *See id.* at 675-76. However, except for Justice O'Connor (who joined the Court's opinion

I suspect that Choper's response to my discussion of his two examples is that the Justices were simply retreating from the logical implications of their endorsement test. I suggest, however, that the difficulty here lies not with the Justices, but with a too rigid understanding on Choper's part of the demands of the test.

2. *Feelings of Exclusion*

A second flaw in Choper's argument for endorsements based on their importance to mainstream religions is that he exaggerates the strength of the government's interest in trying to ensure that members of mainstream religions do not feel "excluded from a public culture devoted purely to secular concerns" (p. 100).⁹⁵ As an initial matter, I question whether, in our current public culture in which the Establishment Clause is understood to prohibit endorsements, a significant number of adherents of mainstream religions indeed have such feelings of exclusion. Assuming for purposes of argument, however, that they do, I question even more strongly whether such feelings are warranted and entitled to substantial weight.

Basically, anyone who feels "excluded from a public culture devoted purely to secular concerns" seems to me to have a rather distorted perception of our public culture—a perception that confuses government neutrality in matters of religion with hostility toward religion. Our public culture is in no realistic sense "devoted purely to secular concerns." In making the Establishment Clause a part of our public culture's basic charter, the framers of the First Amendment were not seeking to establish a religion of non-religion in the United States. Their goal was to ensure a public culture in which religious liberty could truly flourish; and by almost any measure, religion in the United States has thrived.⁹⁶ Religious diversity has increased tremendously since the time of the framing.⁹⁷ In addition, as indicated by, for example, rates of church and synagogue membership, the proportion of peo-

but wrote a separate opinion explaining her analysis of the case), it is questionable whether the Justices in the majority were thinking seriously about an endorsement test. They seemed on the verge of breaking sharply with precedent and expressly embracing a very unrestrictive Establishment Clause approach. See Simson, *supra* note 89, at 906-07.

95. Quoting Smith, *supra* note 70, at 311.

96. See MARY FARRELL BEDNAROWSKI, *AMERICAN RELIGION: A CULTURAL PERSPECTIVE* 4 (1984):

One might speculate that in a nation which guarantees no special favors to any one religion and in which there is no state religion, religion itself might become a matter of some indifference to the citizens. In many ways, just the reverse has been the case. In the eyes of much of the rest of the world, America is perceived as a hotbed of religious fervor and activity in which hundreds of religious groups flourish—more than 1,200, in fact.

97. See *id.* at 8-14; Laycock, *supra* note 68, at 53.

ple in this country who practice religion at least fairly actively seems to have risen substantially over the years.⁹⁸

In short, to the extent that members of mainstream religions feel "excluded" from our public culture because they, no different than members of minority religions and people who reject all religion, are unable to get the government to endorse their religious beliefs, I think it is regrettable. I deny, however, that such feelings even arguably supply reasonable justification for moving to a public culture that welcomes government endorsement of mainstream religions. Choper's enormous solicitude for such feelings—a solicitude perhaps particularly remarkable in light of his impatience with nonadherents' feelings of alienation and offense⁹⁹—is seriously misplaced.

3. *Constitutional Roots*

As noted above, in urging the importance of endorsements and characterizing a prohibition on endorsements as "unduly restrictive" (p. 32), Choper relies upon the "value judgment" that "it is worthwhile for government to acknowledge the feelings of members of mainstream religions about 'their most central values and concerns' by responding to their wishes not to be 'excluded from a public culture devoted purely to secular concerns'" (p. 100). My third and most fundamental objection to Choper's attempt to justify endorsements in light of their importance to mainstream religions is that there is no reason to believe that this "value judgment" is one that the framers of the Establishment Clause shared. Indeed, based on their strong aversion to and distrust of endorsements,¹⁰⁰ there is every reason to believe that it is one that they rejected.

Choper at no point makes clear the source of this "value judgment" that is so central to his approach. Early in the book, however, he indicates his belief that "cherished contemporary values" (p. 6) should figure importantly in constitutional interpretation, along with history and text. I assume, therefore, that this value judgment is one of the "cherished contemporary values" to which Choper broadly refers. If

98. "[T]he rates of church/synagogue membership have been in constant ascent throughout American history: 7 percent in 1776; 37 percent by 1850; 50 percent by 1930; 62 percent by 1980." ALAN SILVERSTEIN, *IT ALL BEGINS WITH A DATE—JEWISH CONCERNS ABOUT INTERMARRIAGE* 58 (1995). Rabbi Silverstein, international president of the Rabbinical Assembly of Conservative Judaism, also observes:

While Americans are free to cast religion aside, in actuality the percentage who express a belief in God has climbed to a record high of 96-plus percent, a level that exceeds virtually every other country in the world. Moreover, Americans have achieved unprecedented levels of church/synagogue-based voluntarism and charitable giving.

Id.

99. See *supra* Part II.A.1.

100. See Laycock, *supra* note 68; *supra* text accompanying note 68.

so, it is certainly not a contemporary value that *I* cherish. Moreover, even if, as I suspect, I am in the minority on this matter, the question remains whether the majority's "cherished contemporary values" legitimately may be invoked to justify a constitutional interpretation that flies in the face of the framers' apparent intent.

Maybe I am just old-fashioned, but I frankly don't think this is even a close question. As a document intended to govern long after its adoption, the Constitution obviously was intended to be interpreted in light of changing circumstances and times. Yet, as the Supreme Court has often and, I believe, correctly told us,¹⁰¹ the touchstone for interpretation remains the framers' intent—the basic value judgments and broad purposes that they sought to perpetuate. As illustrated perhaps most clearly by judicial interpretation of the Cruel and Unusual Punishment Clause,¹⁰² courts at times may need to consult contemporary values in order to give meaning today to the framers' intent. That exercise, however, is worlds apart from the one in which Choper seems to be engaged here. By allowing "cherished contemporary values" to trump the framers' apparent intent, Choper rejects the usual and, I think, eminently defensible understanding that the Establishment Clause, like numerous other constitutional provisions, was adopted for the precise purpose of ensuring that certain fundamental values are not overridden by the "cherished contemporary values" of the majority of the day.

C. Logical Implications from Free Exercise

Choper argues that endorsements of mainstream religions are appropriate not only because of their importance to mainstream religions but also as a logical extension of the protection afforded religious minorities by the Free Exercise Clause. Under Choper's burdensome effect principle,¹⁰³ the Free Exercise Clause is understood as authorizing courts to carve out religious exemptions from generally applicable laws. According to Choper, the primary beneficiaries of such exemptions are religious minorities, and "[a] major explanation" for authorizing courts to grant the exemptions "lay in recognizing the sensitive consideration given in the political process to the desires of mainstream religions" (pp. 102-03). By granting exemptions to religious minorities, the courts "restore [to them] some degree of influence in securing their constitutional right to religious freedom, power that was already pos-

101. See, e.g., *Williams v. Florida*, 399 U.S. 78, 98-100 (1970); *South Carolina v. United States*, 199 U.S. 437, 448-50 (1905); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 187-89 (1824).

102. See, e.g., *Thompson v. Oklahoma*, 487 U.S. 815, 821-23 (1988) (plurality opinion); *Trop v. Dulles*, 356 U.S. 86, 99-101 (1958) (plurality opinion). See also RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 135-36 (1977) (discussing appropriate interpretation of the Cruel and Unusual Punishment Clause).

103. See *supra* note 12.

sessed by mainstream religions in the lawmaking system" (p. 103). In Choper's view, this rationale for exercising judicial power on behalf of religious minorities logically leads to the conclusion that government should be allowed to endorse mainstream religions:

Justifying use of the Court's authority for minority religions by pointing to the normal political force held by mainstream religions acknowledges the actual use and legitimacy of that law-making power. It follows, in my view, that this legislative advantage for mainstream religions should be permitted—even when it extends beyond exemptions from generally applicable rules—in the absence of a meaningful threat to religious liberty (p. 103).

One difficulty with the above argument is that it depends upon an interpretation of the Free Exercise Clause that is not firmly in place. In offering the argument, Choper simply refers to his burdensome effect principle as authority for the notion that the Free Exercise Clause empowers courts to carve out religious exemptions from generally applicable laws. As discussed in Part I, however, the current state of the law on the matter is unclear.¹⁰⁴ Under the Supreme Court's 1990 decision in *Employment Division v. Smith*,¹⁰⁵ the Free Exercise Clause does not authorize courts to carve out such exemptions. Under the Religious Freedom Restoration Act of 1993, adopted for the express purpose of displacing the free exercise interpretation laid down by *Smith*, the Clause does give courts this authority. Thus far, courts generally have found that the Act successfully displaces *Smith*, but the matter is not free from doubt. If the Supreme Court ultimately strikes down the Act as unconstitutional, Choper's argument would lose all its force unless and until the Court overrules *Smith*.

An even more severe problem posed by Choper's argument—indeed, in my view, an entirely insuperable problem—is that it relies upon a rather formidable logical leap. As noted in Part I,¹⁰⁶ I fully agree with Choper that an interpretation of the Free Exercise Clause as authorizing court-ordered exemptions draws substantial support from the fact that such exemptions help ensure religious minorities a degree of protection from religious burdens that adherents of mainstream religions generally enjoy by virtue of their political power alone. I strongly disagree with Choper, however, that if this justification for interpreting the Free Exercise Clause to provide for court-ordered exemptions is sound, then government endorsement of religion must be sound as well. This justification "acknowledges" the "legitimacy"

104. See *supra* text accompanying notes 3-11.

105. 494 U.S. 872 (1990).

106. See *supra* text accompanying note 13.

(p. 103) of the political power wielded by mainstream religions only when they use it to protect themselves from legislation that seriously burdens their religious liberty. Choper tacitly and, I think, illogically assumes that it acknowledges the legitimacy of this power regardless of the end for which mainstream religions use it.

As even the majority in *Smith* recognized, the legitimacy of using political power to prevent substantial government-imposed burdens on religious liberty is strongly supported by the Free Exercise Clause itself.¹⁰⁷ Whatever else the Clause may mean, it surely at least means that burdens of this sort are not desirable—perhaps unavoidable at times, but ideally kept to a minimum. According to Choper, acknowledgment of the legitimacy of this one, very discrete use by mainstream religions of their political power requires acknowledging the legitimacy of their using their political power to secure government endorsements of mainstream religions. He might just as well argue that it requires acknowledging the legitimacy of their using their political power to secure laws outlawing the practice of minority religions henceforth.¹⁰⁸ Both arguments mistake a particularized acknowledgment of legitimacy for blanket approval of whatever political results mainstream religions can manage to achieve.

D. Importance to Minority Religions

In arguing that interpreting the Establishment Clause to prohibit endorsements is “unduly restrictive of government authority” (p. 32), Choper emphasizes the impact of such a prohibition on mainstream religions but also cites its impact on minority religions. According to Choper, a judicial bar on endorsements “would substantially disable state attempts . . . to relieve legally imposed burdens that prevent members of minority faiths from pursuing their religious duties” (p. 30). To illustrate his point, he argues that a state could not, consistent with an endorsement test, exempt members of Native American religions from a law generally criminalizing peyote use. Although such an exemption would be based on the special importance of peyote to the practice of Native American religions, it “may reasonably be viewed as government endorsement of religion” (p. 33). This “may be a particularly fair

107. See 494 U.S. at 890.

108. Perhaps recognizing that his logic would support such outrageous laws, Choper tacks on a qualification, “in the absence of a meaningful threat to religious liberty,” to the inference that he draws (p. 103). Thus, “in the absence of a meaningful threat to religious liberty,” mainstream religions should get to reap whatever legislative advantages they can secure. Although the qualification makes Choper’s ultimate position more palatable, it does not make the logical inference he draws any sounder. Indeed, the need to tack on the qualification only evidences the untenability of his basic logic.

perception by nonadherents who are criminally prosecuted for using peyote" (p. 33).

Choper acknowledges Justice O'Connor's argument in *Wallace v. Jaffree*¹⁰⁹ that if an exemption is "strongly supported"¹¹⁰ by the Free Exercise Clause, it should not be understood as an endorsement. According to O'Connor, the fact that some people might so misunderstand it is "entitled to little weight."¹¹¹ Choper argues, however, that O'Connor's argument fails to rescue exemptions for minority religions from a finding of endorsement. One problem with her argument, according to Choper, is "its potential circularity" (p. 34 n.133). Another problem in his view is its practical insignificance after *Smith*. Although it made sense, Choper concedes, to talk about exemptions "strongly supported" by the Free Exercise Clause when O'Connor did so in *Jaffree* in 1985, the concept has lost almost all meaning "under the current rule [of *Smith*] that there are virtually no exemptions 'strongly supported' by the Free Exercise Clause" (p. 34 n.133).

O'Connor's argument deals with the problem raised by Choper far more effectively than he allows. Choper's "potential circularity" objection to her argument is difficult to evaluate because Choper simply alleges "potential circularity" without explaining what he means. Perhaps he is suggesting that O'Connor's argument tries to define away the problem, rather than really deal with it. If so, he fails to grasp her point.

In gauging whether particular government action is reasonably viewed as conveying a message of endorsement, it is only appropriate to charge observers with knowledge that the government has a constitutional obligation to comply with the demands of the Free Exercise Clause. When government, acting pursuant to this obligation, carves out for a minority religion an exemption that is "strongly supported" by the Clause, observers reasonably view the exemption as an effort to honor the state's constitutional obligations, not as any sort of attempt to communicate a preference for the exempted religion.

Like Justice O'Connor, I do not discount the possibility that some people will not understand the government action for what it really is. Some may be unaware of, or not appreciate, the nature of the state's obligations under the Free Exercise Clause. Others, like the nonadherents who, in Choper's example, are criminally prosecuted for using peyote, may be too resentful of the exemption enjoyed by the minority religion to care a great deal about the state's free exercise obligations. If, however, as I have argued elsewhere and as I believe Justice

109. 472 U.S. 38 (1985).

110. *Id.* at 83 (O'Connor, J., concurring in the judgment).

111. *Id.*

O'Connor and a majority of the Court have tacitly assumed,¹¹² an endorsement test is most sensibly aimed at rooting out laws motivated substantially, if not entirely, by an intent to endorse religion, it is crucial to try to judge government action by what it really is. An assumption that observers have a fairly good understanding of the requirements that the Free Exercise Clause imposes on the state is indispensable to the task.

Choper's reliance on *Smith* to blunt Justice O'Connor's argument is unpersuasive for three reasons. First, Choper again seems to be trying to have it both ways. As discussed above,¹¹³ Choper's argument that endorsements of mainstream religions are appropriate as a logical extension of the protection afforded religious minorities by the Free Exercise Clause depends on an interpretation of the Clause antithetical to the one adopted in *Smith*. In making the argument, Choper deals with the obstacle posed by *Smith* by ignoring it, acting as if *Smith* does not exist. In contrast, here, where *Smith* appears to lend support to one of his arguments, Choper trots it out front and center, essentially treating it as an indubitable statement of the law.

Second, in relying on *Smith* as establishing that "there are virtually no exemptions 'strongly supported' by the Free Exercise Clause," Choper treats the Religious Freedom Restoration Act as if it does not exist. By its terms, the Act reinstates the Supreme Court's pre-*Smith* interpretation of the Free Exercise Clause and gives reality and substance to the notion of exemptions "strongly supported" by the Clause. Unless and until the Court rules that the Act exceeds constitutional bounds, Choper is wrong to claim that there are "virtually no" such exemptions.

Third and lastly, even assuming, for purposes of argument, that *Smith* is plainly controlling and that the Religious Freedom Restoration Act is of no concern, the general absence of free exercise exemptions *because of Smith* fails to show either that O'Connor's argument is flawed or, more broadly, that a prohibition on endorsements is untenable because of its effect on minority religions. As Choper himself argues, the Court's interpretation in *Smith* of the Free Exercise Clause reflects an erroneous understanding of the Clause. The fact that O'Connor's argument may have little force in the context of a fundamentally flawed reading of the Free Exercise Clause is hardly a serious objection to her argument. By the same token, the fact that in this context a prohibition on endorsements may have unduly harsh effects on minority religions is hardly a serious objection to such a bar. In both instances, the finger of blame is sensibly pointed only at *Smith*.

112. See Simson, *supra* note 89, at 917-24.

113. See *supra* text accompanying notes 103-04.

As a final point regarding Choper's general claim that an endorsement test would seriously impede state attempts to avoid burdening minority religions, I suggest that, even in the context of a system in which free exercise exemptions virtually never exist, an endorsement test is substantially less problematic for minority religions than Choper maintains. If a state in this context creates a statutory exemption for a minority religion, it cannot credibly claim that it is merely seeking to comply with constitutional obligations. Often, however, it can very credibly claim that it is doing no more than acknowledging that adherents of the exempted religion will be put to a very painful choice unless granted an exemption and that granting them an exemption would not significantly impair the overall effectiveness of the law. In such instances, an exemption generally seems best understood not as communicating any sort of preference for the exempted religion, but rather simply as expressing recognition of an exceptional and unnecessary hardship that failure to grant the exemption would impose. Absent a strong showing that the state unjustifiably failed to make similar allowance for a comparably forceful religious or nonreligious claim for exemption, I believe such an exemption should pass an endorsement test and be allowed to stand.

E. Parades of Horribles

According to Choper, the soundness of his approach to endorsements is not fairly judged by how it handles "extremely implausible," "very worst" cases like a municipal proclamation that Christianity is the city's official religion (pp. 157-58). Instead, its soundness should be measured by its utility for "ordinary and recurring circumstances" (p. 158). If my arguments thus far in Part II are persuasive, I believe I have shown that Choper's approach is inadequate for "ordinary and recurring circumstances." By Choper's own terms, then, I see no need to discuss in any great detail his final, very-worst-case argument for his indulgent approach to endorsements. Two brief observations, however, seem in order.

First, Choper's municipal proclamation example—the only example he provides in making this final argument—offers some indication that he may be too quick in general to dismiss as remote certain disturbing implications that his approach would have. He maintains that it is "highly improbable" (p. 157) that the Supreme Court would ever be faced with such a proclamation. However, the facts of a case that the Court decided in 1994—*Board of Education of Kiryas Joel Village*

*School District v. Grumet*¹¹⁴— suggest the contrary. When the Village of Kiryas Joel, New York, was incorporated in 1977, its boundaries were very deliberately drawn to include only Satmar Hasidic Jews—a group that actively seeks to avoid contact with people not belonging to their sect. Although the village has never expressly proclaimed Satmar Judaism its official religion, such a proclamation would simply formalize what is already a reality. If it ever becomes apparent to the village authorities that the Court would look kindly upon a municipal proclamation of its official religion, I have no doubt that the proclamation would be readily forthcoming. By the same token, I do not find it at all far-fetched that some municipalities that are less religiously homogeneous than Kiryas Joel would make similar proclamations if the Court adopted an approach as endorsement-friendly as Choper's. Possibilities precluded by current doctrine may well be exploited if and when it is no longer obviously futile to pursue them. Groups eager to secure greater governmental support of religion are hardly wanting in capital, organization, and zeal.¹¹⁵

Second, Choper's willingness to shrug off as remote the harrowing possibility of municipal proclamations of this sort is especially remarkable in light of his concession that such a proclamation "unmistakably represents the specter of a specific evil that the Establishment Clause seeks to prevent" (p. 157). If an approach cannot handle one of the core problems that led to the adoption of the Establishment Clause, that ought to sound an alarm that there must be something terribly wrong with the approach. Rather than second-guess the framers as to whether an evil of this sort is really worth worrying about, Choper much more logically might have second-guessed his approach.

F. A Note on Coercion

To underline the importance of rejecting Choper's indulgent approach to endorsements, it may be useful at this point to highlight the very limited protection of religious liberty that is afforded by the coercion test that Choper would apply to laws intentionally advantaging religion. I have already noted several types of laws that Choper concedes could not survive an endorsement test but would survive his coercion one: a requirement that the Ten Commandments be posted in all public school classrooms, a prohibition on teaching evolution in public schools, the display of a creche in a county courthouse, and a municipal

114. 114 S. Ct. 2481 (1994); see Ira C. Lupu, *Uncovering the Village of Kiryas Joel*, 96 COLUM. L. REV. 104 (1996); Gary J. Simson, *Kiryas Joel II Revisits Issue of Favoritism*, NAT'L L.J., Feb. 6, 1995, at A23.

115. See, e.g., *A Campaign to Put Biblical Values in the Public Schools*, N.Y. TIMES, Apr. 13, 1994, at B11; Gustav Niebuhr, *Conservatives' New Frontier: Religious Liberty Law Firms*, N.Y. TIMES, July 8, 1995, at 1.

proclamation declaring Christianity the city's official religion. Other laws that, according to Choper, would violate an endorsement test but not his coercion one include a moment-of-silence law adopted solely for the purpose of returning prayer to school (pp. 147-48), the inclusion of a Catholic mass in a city-run Italian cultural festival (p. 155), and (probably) a judge's practice of reciting aloud a prayer at the start of proceedings each court day (p. 153).

Choper concedes that all of the above laws deliberately favor religion. He also acknowledges that all of them either have failed to survive Establishment Clause review in the courts or, in the case of his hypothetical municipal proclamation, would fail to do so under existing Supreme Court precedent. Nevertheless, with the possible exception of the judicial prayer practice (on which Choper uncharacteristically hedges), Choper is essentially untroubled by the laws because they do not entail more than minimal public financial contributions and because, in his view, they do not "coerc[e] or significantly influenc[e] people either to violate their existing religious tenets, or to engage in religious activities or adopt religious beliefs when they would not otherwise do so" (p. 118).

Choper finds that his coercion test is violated by Bible reading or vocal prayer in public school classrooms (pp. 140-42) and by prayer exercises at public school graduations (p. 142 n.134). According to Choper, these practices are "inherently compulsive" (pp. 142-43) as a result of "powerful, albeit subtle" (p. 141) peer group pressures to conform. With these practices, unlike those favoring religion that Choper finds quite acceptable, "[t]he emotional strain is frequently so great that it results in unwilling participation in preference to some degree of social ostracism" (p. 141).

The fact, however, that Choper finds that these practices violate his coercion test hardly guarantees that even these deliberate government efforts to advantage religion would be barred if courts follow Choper's thinking and worry only about coercion and not about endorsement. If asked to decide whether these practices overstep the bounds of Choper's test, I personally would agree with Choper that they do. However, particularly with regard to graduation prayer, I doubt that the matter is so clear-cut that people may not reasonably disagree. Despite Choper's emphasis at the start of the book on the need for legal standards that "in application, will work as forcefully as attainable to constrain judges from inserting their own ideological beliefs" (p. 7), his coercion test is considerably less than exemplary in that regard. It is rather vague, draws heavily on judicial intuition, and invites substantial variations in application as a result.

As applied by Choper, the test appears to ask whether there is good reason to believe that some people actually succumb to the pressures of religious conformity despite personal religious beliefs to the contrary. It is quite unclear what proportion of nonadherents must be expected to yield for a constitutional violation to be found, but Choper seems to suggest that it needs to be fairly substantial. The possibility that a judge could conclude in good faith that graduation prayers pass this test seems apparent simply from Choper's own conclusion to that effect in print more than thirty years ago¹¹⁶—a conclusion that he only recently revised.¹¹⁷ I am so troubled by classroom prayer and Bible reading that I have great difficulty conceding that a conscientious judge could find that they pass Choper's coercion test. Nonetheless, Justice Stewart's dissenting opinion in the Court's landmark school prayer decision, *Abington School District v. Schempp*,¹¹⁸ offers some indication that this possibility is not foreclosed. The Bible-reading and prayer practices struck down by the Court in *Schempp* provided for excusing students who did not wish to participate. Applying a coercion test seemingly quite similar to Choper's, Justice Stewart, the sole dissenter, was unwilling to assume, in the absence of specific evidence in the record, that the practices under review placed "any coercion of any kind upon a student who did not want to participate."¹¹⁹

III

PUBLIC FUNDING OF RELIGION

Choper takes public funding of religion considerably more seriously than government endorsement of religion. He argues that such funding "plainly coerces taxpayers either to contribute indirectly to their religions or, even worse, to support sectarian doctrines and causes that are antithetical to their own convictions" (p. 17). Moreover, citing statements by Jefferson, Madison, and others, he maintains that "[a]s a matter of both historical design and present constitutional policy," the Establishment Clause should be understood to prohibit "so basic an infringement of religious liberty" (pp. 17-18).

116. Jesse H. Choper, *Religion in the Public Schools: A Proposed Constitutional Standard*, 47 MINN. L. REV. 329, 408 (1963).

117. Choper notes that he was "persuaded to the contrary by Justice Kennedy's opinion for the Court in *Lee v. Weisman* [505 U.S. 577 (1992)]" (p. 142 n.134). In *Lee* the Court applied a coercion test. According to Choper, the "basic thrust" of the test applied in *Lee* "appears to come quite close to my thesis" (p. 34 n.135).

118. 374 U.S. 203 (1963).

119. *Id.* at 319 (Stewart, J., dissenting). The majority in *Schempp* expressly disclaimed the need to find coercion in order to find an Establishment Clause violation. *Id.* at 223. The Court framed the relevant constitutional inquiry in terms of whether the law under review has "a secular legislative purpose and a primary effect that neither advances nor inhibits religion," *id.* at 222—a test that became the first two prongs of the *Lemon* test, see *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

I agree wholeheartedly with Choper that public funding of religion presents an Establishment Clause problem of central concern. The Court has described it as one of the "three main evils against which the Establishment Clause was intended to afford protection,"¹²⁰ and rightly so. I suggest, however, that the particulars of Choper's approach to public funding of religion and his application of the approach fail to measure up to this recognition. In Section A, I identify and critique the ingredients of his approach. In Section B, I examine Choper's application of the approach to the issue of aid to parochial schools.

A. *The Basic Approach*

Under Choper's intentional advantage principle, a law that deliberately favors religion by funding it, unlike a law that deliberately favors religion by endorsing it, necessarily violates the Establishment Clause. While a law of the latter variety may well survive the applicable coercion test, a law of the former type cannot survive it, because Choper defines the coercion prohibited by his principle to include "compelling people to afford financial support either to their own religion or to that of others" (p. 118).

Choper's approach to public funding of religion is not as strict, however, as it initially may appear. First of all, the intentional advantage principle does not apply unless the funding law is adopted solely to favor religion. If the lawmakers acted with mixed motives—secular and religious—the law does not "deliberately" favor religion within the meaning of the principle (pp. 160-62). Thus, to use one of Choper's examples, assume that "an identifiable group of legislators voted to fund the refurbishing of Catholic missions only because they wanted to help their faith" (p. 163). As long as some legislators voted for the funding at least in part to "encourag[e] tourism" (p. 161) or to serve some other secular purpose, the funding law would fall outside the intentional advantage principle.

Second, if the intentional advantage principle does not apply, the only remaining Establishment Clause constraint under Choper's approach is the very narrow one supplied by his "independent impact" principle. This principle requires invalidating a law that, though not entirely religiously motivated, (1) "benefits religious interests," (2) "has no independent secular impact," and (3) "poses a meaningful danger to religious liberty" (p. 160).¹²¹ The first and third criteria are

120. *Lemon*, 403 U.S. at 612.

121. In full, the principle provides:

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).

met simply by showing that a funding law has an effect of financing religion. The second criterion, however, sharply limits the scope of the principle to only a small subset of the range of laws having an effect of financing religion. As explained by Choper, a law "has no independent secular impact" if it "accomplish[es its] secular goal only as a consequence of the prior achievement of a religious purpose" (p. 167). He offers a hypothetical to demonstrate the operation of this concept:

[A]s part of a state's mental health budget, funds might be granted to the Roman Catholic Church and the Protestant Episcopal Church to subsidize confession costs because of their therapeutic value. But the purported mental health benefit—a concededly secular result—would come about solely as a consequence of the penitent's having obtained spiritual satisfaction; the only *independent* effect is religious (pp. 167-68).

I suggest that, for all practical purposes, the independent impact principle adds little, if anything, of substance to the intentional advantage one. As I believe the confession-costs hypothetical illustrates, the only types of laws that this principle seems to pick up are ones that at most superficially fall outside the intentional advantage principle. The independent impact principle essentially does no more than prevent the state from cleverly circumventing the constraints of the intentional advantage principle by casting its purpose on a level of generality that makes it sound nonreligious. Rather than concede that the objective behind an obviously intentional funding of religion is to benefit religion, the state characterizes the funding of religion as a means to some broad nonreligious end, rather than as an end in itself.

I have two major objections to Choper's general approach to public funding of religion. First, although Choper rightly acknowledges that a purpose of supporting religion with public funds is impermissible under the Establishment Clause, his approach fails to take this recognition to its logical conclusion. Under his approach, a law based on a purpose of funding religion is unconstitutional only if it can be shown to be based entirely on that illicit objective. To require so strong a showing, however, clashes with what appears to be the basic rationale for invalidating illicitly motivated laws. As set forth by Paul Brest, that rationale is essentially as follows:

The fact that a decisionmaker gives weight to an illicit objective may determine the outcome of the decision. The decisionmaking process consists of weighing the foreseeable and desirable consequences of the proposed decision against its foreseeable costs To the extent that the decisionmaker is illicitly motivated, he treats as a desirable consequence one to which the law-

fully motivated decisionmaker would be indifferent or which he would view as undesirable.

... Assuming that a person has no legitimate complaint against a particular decision merely because it affects him adversely, he does have a legitimate complaint if it would not have been adopted but for the decisionmaker's consideration of illicit objectives [O]nly the political decisionmaker—and not the judiciary—has general authority to assess the utility and fairness of a decision. And, since the decisionmaker has (by hypothesis) assigned an incorrect value to a relevant factor, the party has been deprived of his only opportunity for a full, proper assessment.¹²²

In keeping with the above rendition of the rationale for invalidating illicitly motivated laws—a rendition later cited by the Court as authority for revising its approach in the equal protection area to illicit motivation¹²³—Choper should require the invalidation of any law that would not have been adopted but for the consideration of a purpose of funding religion, regardless of whether that purpose was exclusive, primary, or subordinate.¹²⁴

Choper suggests in essentially conclusory fashion that, if the inquiry into purpose is not limited to ascertaining an exclusive purpose of funding religion, the “judicial task” would be “both too difficult and too intrusive” (p. 164). I believe that the Brest article quoted above amply disposes of this sort of objection,¹²⁵ and I will not attempt to respond to it here myself. I note, however, that the objection is at odds with the approach to impermissible purpose taken by Choper himself when he discusses the application of his “deliberate disadvantage” principle.¹²⁶ This principle—one of Choper's two free exercise principles, along with the burdensome effect principle discussed in Part I above—essentially prohibits laws that target people for disadvantage out of antipathy for their religion. In explaining when courts should invali-

122. Paul Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95, 116-17 (footnotes omitted).

123. See *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 265-66 & n.12 (1977).

124. Although the Court in 1977 adopted an approach along these lines in the equal protection area, see *id.* at 265-66 & n.12, 270 n.21, it has continued in Establishment Clause cases to follow an approach of treating an impermissible purpose as a basis for invalidation only if the law under review is proven to rest virtually entirely on such a purpose. For the later approach, see *Bowen v. Kendrick*, 487 U.S. 589, 602 (1988); *Abington School Dist. v. Scheinpp*, 374 U.S. 203, 222 (1963). In disagreeing with Choper's view that a purpose of funding religion provides grounds for invalidation only when it is exclusive, I therefore also disagree with the Court. See *Simson*, *supra* note 89, at 908-11.

125. See Brest, *supra* note 122, at 119-124, 128-30.

126. The principle is quoted and briefly discussed *supra* note 12.

date a law rooted in an "illicit motive" of "harm[ing] persons or groups because of their religious beliefs" (pp. 52-53), Choper argues that courts should not require that the law be based exclusively on such a purpose. Rather, they should require only that the illicit purpose was a "material (or substantial) . . . factor in the legislative arena" (p. 53).

My second major difficulty with Choper's approach to public funding of religion is that it assigns far too little significance to effects of funding religion. His independent impact principle basically assigns importance to such effects only if they are the result of laws transparently designed solely to favor religion. As discussed elsewhere, I believe that it is appropriate to assume that (1) the Establishment Clause is essentially aimed at laws based on an intent to bring about one of the "three main evils" that the Clause was designed to guard against, and (2) there is good reason to suspect that laws with a substantial effect of producing one of these evils are based on such an intent.¹²⁷ In keeping with these assumptions, I believe that a law that has a substantial effect of funding religion should be struck down unless the law is necessary to serve a substantial governmental interest.¹²⁸ If a court determines that a law is, as this standard of review requires, the best available means of serving a lawful goal deserving of serious attention, then, in my view, the inference of illicit motive arising from its substantial effect of funding religion has been dispelled.¹²⁹

B. Aid to Parochial Schools

The great majority of Establishment Clause cases in which public funding of religion is at issue are cases involving aid to parochial schools. In the past thirty years, the Supreme Court has decided many such cases, upholding some forms of aid, invalidating others, and altogether producing a set of outcomes that no one would be tempted to hold up as a model of consistency. Since 1971 the Court has used the three-prong test of *Lemon v. Kurtzman*¹³⁰ to decide parochial aid cases and, in doing so, has focused for the most part on either or both of two questions. First, does the aid provided—salary supplements for teachers

127. See Simson, *supra* note 89, at 922-23.

128. See *id.* at 923.

129. See *id.* When I proposed this approach in 1987 to laws having a substantial effect of funding religion, I represented that it conformed closely to the actual operation and underlying logic of the Supreme Court's approach under *Lemon v. Kurtzman*, 403 U.S. 602 (1971), to laws having such effects. See Simson, *supra* note 89, at 922. Particularly in light of the Court's recent decision in *Rosenberger v. Rector & Visitors of Univ. of Va.*, 115 S. Ct. 2510 (1995), see *infra* note 148 and accompanying text, I would be slow to claim such a relationship between my approach and the Court's approach today.

130. 403 U.S. at 612-13 ("First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'") (citations omitted).

of secular subjects,¹³¹ remedial instruction on parochial school premises by public school personnel,¹³² grants for heating and maintenance costs,¹³³ etc.—directly and substantially support the schools' religious instruction or other religious activities? Second, even if the aid is not necessarily being put to sectarian use, is there, absent a degree of government surveillance that itself would be constitutionally objectionable, at least a substantial risk that the aid is being, or will be, so used? If the Court concluded, as it did for the three forms of aid listed above, that the answer to either of the above questions was "yes," it would strike down the law.

Applying his basic approach for public funding of religion, Choper would sustain all the forms of parochial school aid that have been reviewed by the Court. In his view, the only relevant concern is that the aid granted to a parochial school not exceed the value of the secular educational services provided by the school (pp. 176-79). He equates this value with the sum that it would cost the public school system to provide the secular services offered by the parochial school (p. 178). If the parochial school is able to provide these services more cheaply than the public school system could manage, Choper has no objection to paying the parochial school the full value of the services (p. 179). Although the only secular educational service that Choper specifically discusses in *Securing Religious Liberty* is secular instruction, he makes clear in his principal article on parochial school aid that "secular educational services," as he is using the term, includes any service provided by the school that relates only to the school's secular functions or that simultaneously serves the school's secular and religious functions.¹³⁴ Thus, bus transportation to the school would qualify for state support as a "secular educational service," as would building and maintaining classrooms that are used at least part of the time for secular instruction.

Choper explains as follows why aid to parochial schools should be allowed as long as it does not exceed the value of the secular educational services provided:

Parochial schools, virtually everyone would agree, perform a dual function, providing both religious and secular education. Since spending public funds for sectarian purposes violates the religious freedom of taxpayers, the logical thrust of the inten-

131. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

132. *Aguilar v. Felton*, 473 U.S. 402 (1985); *Grand Rapids School Dist. v. Ball*, 473 U.S. 373 (1985).

133. *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756 (1973).

134. See Jesse H. Choper, *The Establishment Clause and Aid to Parochial Schools*, 56 CALIF. L. REV. 260, 303-04 (1968).

tional advantage principle would forbid government aid to church-related schools as long as it was clear to the legislators that the money would inevitably be used for religious ends, that is, in support of an ideology that would be constitutionally forbidden if taught in the public schools. Even the strongest advocates of government assistance for church-related schools agree that "it is just and proper for the government to refuse to pay the incremental cost of religious components of the education, in light of the conscientious objection many taxpayers have toward mandatory support for religious instruction." If it could be shown, however, that the state receives full secular value for its money regardless of any benefit to religion (as in purchasing wine from [a winery run for profit by a religious group]), then its expenditure would have an independent secular effect. There would be no danger to religious liberty, and there would be no violation of either the intentional advantage or the independent impact principle.

Using tax funds to support the concededly secular aspects of parochial education is no different analytically from the state's judgment either to provide funds for parochial school pupils if they attended existing public schools or to establish additional public schools at various sites for all students at present attending parochial schools, neither of which would raise a colorable constitutional objection (pp. 176-77).¹³⁵

After considerable thought, I am unsure whether the above logic reflects a misapplication of Choper's basic approach to public funding of religion or simply illustrates the inadequacy of that approach. For the reasons discussed below, however, I firmly believe that it is untenable.

First of all, if the government subsidizes parochial education to the extent that Choper would allow, I have difficulty understanding why his intentional advantage principle would not be violated. Choper concedes that the "logical thrust" of that principle would bar aid "as long as it was clear to the legislators that the money would inevitably be used for religious ends" (pp. 176-77). He assumes, however, that money is only being used for religious ends if it is targeted to cover the cost of one or more of the "religious components of the education" (p. 177). He essentially fails to acknowledge that it is a "religious end" to seek to benefit the operations of an institution that exists for the very purpose of inculcating religious values. If legislators provide for the type of massive subsidization of parochial schools that Choper would allow, I cannot imagine that it would not be "clear" to them that the money

135. Quoting Michael W. McConnell, *The Selective Funding Problem: Abortions and Religious Schools*, 104 HARV. L. REV. 989, 1018 (1991).

would "inevitably" be used for the religious end of benefiting the operations of religious institutions.

Second, assuming for purposes of argument that Choper's intentional advantage principle is not violated by such sizable outlays, it seems apparent that his independent impact principle would be. Choper does not deny that such aid benefits religious interests and therefore meets the first prerequisite for finding a violation of the independent impact principle.¹³⁶ He denies, however, that it meets the additional prerequisites of posing a meaningful danger to religious liberty and having no independent secular impact. According to Choper, as long as the aid is supporting secular aspects of parochial education, there is "no danger to religious liberty" (p. 177). In other words, in Choper's view, the aid is not "compelling people to afford financial support either to their own religion or to that of others" (p. 118). The aid is not compelling people in this way, however, only if one makes the untenable assumption that subsidizing the operation of a religious institution does not "afford financial support" to religion.

Choper's assertion that the aid "would have an independent secular effect" (p. 177) is equally problematic. To have such an effect, a law must not "accomplish [its] secular goal only as a consequence of the prior achievement of a religious purpose" (p. 167). This appears, however, to be precisely what the type of aid law approved by Choper would do. By broadly covering the secular educational expenses of parochial education, the law would serve the secular purpose of ensuring that all students enjoy a good secular education. Yet, it would "accomplish" this secular purpose "only as a consequence" of achieving the religious purpose of ensuring the financial health and continued existence of a religious institution.

Third, assuming *arguendo* that neither of Choper's principles is violated by the type of aid he endorses, I suggest that the conclusions that he reaches when he applies his principles to problems of parochial school aid are potent evidence that his basic approach is unsound. Choper agrees that one of the principal evils that the Establishment Clause was designed to prevent is government financial support of religion. It is hard to imagine, however, that this concept of the Clause is honored by any approach that tolerates massive infusions of state aid to religious institutions. Even conceding that such subsidies may fairly be characterized as resting on mixed motives—a religious one of seeking to benefit the operations of a religious institution, and a secular one of seeking to ensure that all children receive a good secular education—they cannot sensibly be understood as anything other than intentional efforts to fund religion. An approach that accommodates such subsi-

136. For the principle, see *supra* note 121.

dies authorizes the government to take us along the road to an established religion not only a step at a time¹³⁷—which would be bad enough—but by giant leaps.¹³⁸

I close this discussion by underlining the distressing air of unreality that marks Choper's analysis of this vital and often hotly contested subject. As already noted, his analysis of parochial school aid tacitly treats as irrelevant the fact that massive aid to parochial schools for "secular educational services" enormously benefits the operations of institutions devoted to inculcating religious values. His comment that such aid "is no different analytically" (p. 177) from the use of state money to provide a *public* education for children now in parochial schools epitomizes his refusal to recognize that the infusion of aid to the parochial school serves the distinctive function of helping to ensure the continued existence and good health of parochial schools.

Choper's detailed discussion of how to calculate "the quantum of secular learning provided by church-related schools in light of the permeation issue" (p. 179) is similarly exasperating. As the Supreme Court has recognized and Choper appears to acknowledge, a central part of the mission of parochial schools typically is to imbue secular instruction with religious values.¹³⁹ As a result, when secular subjects are taught, the time commonly is not devoted strictly to secular instruction. Since, under Choper's approach, the state may only pay parochial schools for the value of the secular services provided, it is crucial under his approach to separate out the "quantum of secular learning provided."

Going so far as to characterize this problem as "[t]he most complicated matter concerning public financial assistance to parochial education" (p. 179), Choper ultimately suggests using "time spent" as the measure of secular learning provided (p. 182). He then proceeds to discuss possible difficulties in determining how much time has been

137. See *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) ("A given law might not *establish* a state religion but nevertheless be one 'respecting' that end in the sense of being a step that could lead to such establishment. . .").

138. As indicated above, see *supra* text accompanying notes 122-129, I believe that questions of public funding of religion are appropriately resolved by an approach that requires the invalidation of any law that either (1) would not have been adopted but for the consideration of a purpose of funding religion, or (2) has a substantial effect of funding religion and is not necessary to a substantial governmental interest. In seeking to honor the purposes behind the Establishment Clause by weeding out laws that are proven to rest on an illicit purpose of funding religion or that there is good reason to suspect rest on such a purpose, this approach is far less permissive of aid to parochial schools than Choper's approach. However, as discussed in Simson, *supra* note 89, at 929-32, it does allow for some forms of parochial school aid.

139. See, e.g., *Grand Rapids School Dist. v. Ball*, 473 U.S. 373, 384 (1985); *Meek v. Pittenger*, 421 U.S. 349, 366 (1975).

spent on secular instruction.¹⁴⁰ Under Choper's approach, instruction is secular and fully compensable if "full secular value has been obtained for the time and resources expended, despite the fact that religious interests may also have been served" (p. 184). Thus, in Choper's view, there is no problem with the state's fully funding an hour of arithmetic in which the teacher uses "sectarian characters, illustrations, or examples, phrasing arithmetic problems in terms of rosary beads instead of apples" (pp. 183-84). On the other hand, it would be inappropriate to give full credit for time in which "the quantity of religious perspective has deprived the course of full secular educational value, or the quality of sectarian permeation has so slanted the material as to partially undermine or even fully destroy its secular content" (p. 186). Accordingly, subtle judgments may often be involved:

In a parochial school biology text or course, after a full explanation of the theory of evolution, the church's perspective on the matter might also be fully articulated. Or in the civics class, the concept of racial equality might be amplified by presenting the relevant secular and also theological sources. Despite the concurrent religious educational value, and despite the fact that these matters might never be mentioned in the average public school setting, they might still have significant secular educational value. Even a parochial school course in "religion" itself might so qualify *if properly handled* (p. 184).

Choper's discussion of how to implement a time-spent criterion downplays what seem to me almost mind-boggling difficulties in application. However, whether or not using time spent is indeed the best way of calculating "the quantum of secular learning provided," I question more basically whether the whole exercise of trying to calculate this quantum of learning has any real logic to it. It strikes me as artificial in the extreme. The entire endeavor is predicated on the assumption that the state is not subsidizing religion, but only secular education, if it partly subsidizes courses in which a conscious effort is made to infuse secular learning with religious values. To so assume, however, seems as unrealistic as assuming that the state is not subsidizing the consumption of mayonnaise but only tuna fish if it partly subsidizes the purchase of tuna salad sandwiches.

140. As Choper acknowledges, another complication in implementing a time-spent criterion is how to convert an hour total into a monetary one. A number of methods are conceivable. The state might, for example, "compare the number of hours of secular teaching in the parochial school with the total hours of instruction in the jurisdiction's public schools and pay the parochial school no more than that fraction of the per capita student cost in the public schools" (p. 183). In some instances, however, this and other possible methods may result in paying more than the value of secular services rendered, which, under Choper's approach, would violate the Establishment Clause.

Finally, perhaps the clearest example of Choper's refusal to deal with the realities of parochial school aid is the way in which he resolves the question of whether the state may ever pay parochial schools more than their cost of providing secular educational services. According to Choper, parochial schools may be paid for their secular services whatever the public school system would have to pay to provide the same services. If, perhaps because of lower teacher salaries, the parochial schools are able to furnish the services at a lower cost than the public schools could manage, Choper sees no reason why the parochial schools may not be paid the higher amount. After all, "no more tax funds are being expended than would be if the pupils were in public schools" (p. 179). The very real possibility that the above-cost payments would be used to pay for crucifixes, stars of David, prayer books, or other wholly religious aspects of the parochial school enterprise is apparently, for Choper, beside the point. I cannot imagine how it could be.

IV

AN UNTIMELY CONTRIBUTION

Securing Religious Liberty appears at a time of serious danger to the freedoms that the authors of the Religion Clauses sought to secure. Interest groups devoted to enhancing government involvement in religion have become a major political force, with seemingly rapidly growing influence on policy making at all levels of government.¹⁴¹ In late 1995, two constitutional amendments were proposed in Congress to remove important constraints that the Supreme Court's Establishment Clause precedents place on government support of religion.¹⁴² Among other things, one of the proposals would expressly restore organized prayer to public school classrooms,¹⁴³ and the other could easily be interpreted as doing so.¹⁴⁴ Fundamental limits imposed by Supreme Court precedent on parochial school aid have been challenged by two states' enactment in 1995 of the first voucher plans covering sectarian schools.¹⁴⁵ Similar legislation has been proposed in Congress,¹⁴⁶ and in

141. See, e.g., *Biblical Values*, *supra* note 115; Richard L. Berke, *Conservative Christian Group Ends Conference With a Dual Identity*, N.Y. TIMES, Sept. 10, 1995, § 1, at 25; *Christian Group Coaches School Board Candidates*, N.Y. TIMES, June 14, 1995, at B8.

142. See Bill Broadway, *Schism Over School Prayer*, WASH. POST, Dec. 2, 1995, at B7.

143. See *id.* (providing text of proposed Religious Liberties Amendment).

144. See Gary J. Simson, *Neutrality Isn't Always Even-Handed Policy*, NAT'L L.J., Apr. 1, 1996, at A19 (discussing proposed Religious Equality Amendment).

145. See Drew Lindsay, *Wisconsin, Ohio Back Vouchers for Religious Schools*, EDUC. WK., July 12, 1995, at 1.

146. See 141 CONG. REC. S4582-85 (daily ed. Mar. 24, 1995). In addition, one of the proposed constitutional amendments could be interpreted to require states to fund parochial schools equally with public ones. See Cody Lowe, *It's a Fervent Debate*, ROANOKE TIMES & WORLD NEWS, Dec. 3, 1995, at A1.

light of strong gubernatorial support, serious consideration of voucher plans is almost certain in a number of additional states.¹⁴⁷ The Court's longstanding opposition to the direct use of public funds for religious ends seems to be eroding. In a 1995 decision, the Court held that, based on the First Amendment's Free Speech Clause and notwithstanding that amendment's Establishment Clause, a state university must give a student publication with highly sectarian themes the same access as secular student publications to a student activities fund.¹⁴⁸ The bar on free exercise exemptions created in 1990 by *Employment Division v. Smith*¹⁴⁹ is waiting in the wings, ready to return—to the particular disadvantage of religious minorities—if the Supreme Court ultimately agrees with those claiming that the Religious Freedom Restoration Act exceeds constitutional bounds.¹⁵⁰ And the list goes on.

Strong voices are needed to remind courts, legislatures, and society in general of the vital protections that the Religion Clauses were designed to afford. Early in *Securing Religious Liberty* Choper offers readers reason to believe that he might in this book provide such a voice:

Since the essential function of judicial review, in my opinion, is to protect personal liberty, especially for minorities who do not receive vigorous representation in the political process, and since the most frequent threats to religious freedom will be made against groups outside the mainstream, I propose an energetic role for the Court in this area (p. 9).

Unfortunately, however, as I have attempted to show, the voice provided is far more equivocal than this passage suggests. Indeed, more than lend support to "groups outside the mainstream," *Securing Religious Liberty*, with its solicitude for majoritarian values and familiar beliefs, lends support to the move afoot to further marginalize those groups.

147. See, e.g., *California Chief Proposes School-Choice Plan*, N.Y. TIMES, Jan. 10, 1996, at A13; *Conn., Pa. Governors Renew Push for Vouchers*, EDUC. WK., Nov. 15, 1995, at 22; Dane Smith, *GOP Forms Panel on School Vouchers*, STAR TRIB. (Minneapolis), Oct. 24, 1995, at B3.

148. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 115 S. Ct. 2510 (1995).

149. 494 U.S. 872 (1990).

150. See *supra* notes 3-11 and accompanying text.