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# Comment On "The Free Exercise Clause: A Structural Overview and an Appraisal of Recent Developments"

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# COMMENT ON "THE FREE EXERCISE CLAUSE: A STRUCTURAL OVERVIEW AND AN APPRAISAL OF RECENT DEVELOPMENTS"

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Dean Choper identifies two main themes: first, that the Supreme Court has interpreted the free exercise clause "to provide a virtually unique protection for religion," and second, that under the decisions of the Burger Court, this protection has been held to be "markedly greater than the security that the Constitution provides for speech."[1] I do not find it surprising that the Supreme Court has found that religion is entitled to unique protection; I think that the conclusion is embedded in the structure of the Constitution and of the first amendment in particular. I believe, though, that it is a mistake to try to measure degrees of protection for speech and religion on the same thermometer. Religion *is* different.

At the same time as he acknowledges recent defeats for the proponents of free exercise claims such as *United States v. Lee*[2] and *Bob Jones University v. United States*,[3] Dean Choper portrays the free exercise clause as, in the Supreme Court's hands, something of a talisman in the face of which weighty governmental interests are routinely made to disappear.[4] He suggests, in particular, that the

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1. Choper, *The Free Exercise Clause: A Structural Overview and an Appraisal of Recent Developments*, 27 WM. & MARY L. REV. 943, 943 (1986).

2. 455 U.S. 252 (1982).

3. 461 U.S. 574 (1983).

4. To the ranks now may be added Goldman v. Weinberger, 106 S. Ct. 1310 (1986), in which the Court held that a psychologist in the Air Force who was an Orthodox Jew and an ordained rabbi could not wear his yarmulke inside the mental health clinic where he worked in the face of a regulation generally prohibiting the wearing of headgear indoors. For the five-vote majority, Justice Rehnquist wrote that the obviously strong free exercise interest could not prevail as against the Air Force's view that "such practices . . . would detract from the uniformity sought by the dress regulations." *Id.* at 1314. I could not agree more with Dean Choper that, under usual free exercise jurisprudence, the case should have gone the other way. As Justice Brennan remarked, when it comes to claims of military convenience or

free exercise clause possesses far greater magical powers in this regard than does the free speech clause. Inviting us to join him at ringside, he eagerly accepts sucker bets from anyone foolish enough to favor speech in a bout with religion in the arena at First and East Capitol Streets.

The reality is not so simple. Instead of Louis versus Palooka, the religion and speech clauses emerge from the Supreme Court's cases as partners in a kind of odd minuet, which, for reasons that remain obscure, find themselves now face-to-face, now out of each other's sight, now stumbling over each other's feet.

Take first the cases in which the free exercise claimants won not on religious grounds per se but precisely because application of the governmental regulations at issue were said to violate their *speech* rights. I refer to *West Virginia State Board of Education v. Barnette*[5] and *Wooley v. Maynard*,[6] which Dean Choper mentions in a somewhat different context.[7]

The plaintiffs in both *Barnette* and *Wooley* were Jehovah's Witnesses who contended that certain state regulations—requiring, respectively, school children to salute the flag and motorists to display New Hampshire's "Live Free or Die" motto on their license plates—violated sincerely held and deeply felt religious beliefs. Yet, as Dean Choper observes, the Court in both cases "did not rest on the free exercise clause, but rather on the *broader* first amendment protection of freedom of expression."[8]

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necessity, "[u]nabashed *ipse dixit* cannot outweigh a constitutional right." *Id.* at 1317-18 (Brennan, J., dissenting).

5. 319 U.S. 624 (1943).

6. 430 U.S. 705 (1977).

7. I am a bit surprised, for I thought it had long since been discredited, to see the credence Dean Choper gives to the famous dictum in *Cantwell* "distinguish[ing] between 'freedom to believe and freedom to act.'" Choper, *supra* note 1, at 943. For religious beliefs—or any other kind of beliefs—to be regulated directly verges on the impossible. The *Barnette* and *Wooley* decisions cited by Dean Choper certainly do not demonstrate otherwise, for, in those cases, the state regulated action. Neither West Virginia nor New Hampshire had a law telling the Jehovah's Witnesses what they could or could not believe. Nearly every regulation dealt with by the Court that has implicated the free exercise clause had affected action in one form or another.

The "belief-action" distinction does survive as a legal artifact, if not a legal fact. Its principal function these days seems to be that of a verbal crutch hauled out by government lawyers—and, sometimes, even by courts—seeking desperately to support what looks like an utterly unsupportable regulation.

8. *Id.* at 944 (emphasis added).

Not only that, but it is by no means clear that the plaintiffs would have done as well under a free exercise theory alone. Although *Barnette* was argued on the free exercise clause and on a free speech basis,[9] its predecessor, *Minersville School District v. Gobitis*,[10] in which the Court reached the opposite result, was argued exclusively on the free exercise clause.[11] The political atmosphere in 1943, when *Barnette* was decided, might have militated strongly against the Court's giving a preferred position to the Jehovah's Witnesses, whose religion widely was perceived as unpatriotic. For Justice Frankfurter in *Gobitis*, the question was whether the legislature had the right to make the judgment that school discipline would be too drastically undermined if, "though the ceremony may be required, exceptional immunity must be given to dissidents."[12] Justice Jackson's answer in *Barnette* was to avoid entirely that unpalatable inquiry by holding that its premise—that the flag salute could in general be required—was fatally flawed. To ground the decision on a free speech basis—courageous enough in itself, to be sure—may have been seen as a substantially less dangerous course than to accept the Witnesses' claim of religious exemption for themselves alone. The *Barnette* pattern is not unique.[13]

Dean Choper points out four apparent votes against the proposition that a religious injunction against "graven images" entitles the believer to a driver's license sans photograph.[14] In *Wooley*, May-

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9. 319 U.S. at 630.

10. 310 U.S. 586 (1940).

11. *See Barnette*, 319 U.S. at 635.

12. 310 U.S. at 599-600.

13. Free speech cases reaching as far back as Lovell v. City of Griffin, 303 U.S. 444 (1938), involved religiously compelled acts that could have been treated under a free exercise analysis.

14. *See* Choper, *supra* note 1, at 955 (discussing Quaring v. Peterson, 728 F.2d 1121 (8th Cir. 1984), *aff'd by an equally divided Court per curiam sub nom.* Jensen v. Quaring, 472 U.S. 478 (1985)). In Bowen v. Roy, 106 S. Ct. 2147 (1986), three justices, including Chief Justice Burger, who had authored what then seemed the rather routine majority opinion in Thomas v. Review Bd., 450 U.S. 707 (1981), seemed willfully to narrow the scope of *Thomas*. The three justices concluded that a "requirement for a government benefit" that is contrary to sincerely held religious beliefs is nevertheless valid as against the believer if it is simply "neutral and uniform in its application" and can be said to be "a reasonable means of promoting a legitimate public interest." 106 S. Ct. at 2156 (opinion of Burger, C.J., joined by Powell & Rehnquist, JJ.). *Thomas* had to be distinguished on a ground taken not from the rationale of the decision but, assertedly, from the briefs in that case. Although Chief

nard's claim, decided on free speech grounds, received seven favorable votes. In some cases, therefore, a religion-based claim may well receive a better judicial reception when clothed in free speech garb. On the other hand, although the religious context of *Wooley* did not enter explicitly into the decision, it may well have influenced the Court. I wonder how challenges to Maine's "Vacationland" or Minnesota's "10,000 Lakes" license plate slogans would fare.

In recent years, the Court has made clear the existence of another category of cases: those in which the free speech clause sets a *maximum* level of constitutional protection for a particular activity, even if it is carried out as part of a centrally important religious exercise. In *Heffron v. International Society for Krishna Consciousness, Inc.*,[15] a Hare Krishna group challenged the Minnesota State Fair's rule that required that the distribution of literature and the solicitation of donations take place only from a fixed location, or "booth."

The Krishna Consciousness religion imposes upon its members the duty to perform the religious ritual called *sankirtan*, which involves spreading to as many people as possible the glories of the Lord, Krishna, and the teachings of his disciples. As practiced in this country, *sankirtan* encompasses the distribution of religious literature and the solicitation of contributions; the latter not only serves to support the church, but also represents a step, in the view of the Krishna devotees, toward the spiritual rebirth of the donor. The affirmative message-spreading nature of *sankirtan* requires that the devotees make direct approaches to members of the public,[16] and courts therefore had recognized that it obviously could not be practiced from a "booth."

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Justice Burger's opinion announced the Court's judgment, five justices would have applied a more traditional analysis. *See id.* at 2160 (Blackmun, J., concurring in part); *id.* at 2165-69 (O'Connor, J., joined by Brennan & Marshall, JJ., concurring in part and dissenting in part); *id.* at 2169 (White, J., dissenting).

15. 452 U.S. 640 (1981). My firm was counsel for the plaintiffs in their successful appeal to the Minnesota Supreme Court, 299 N.W.2d 79 (Minn. 1980). After certiorari was granted, Professor Laurence H. Tribe became counsel of record, with my firm continuing on the brief.

16. Judge Kaufman's opinion for the United States Court of Appeals for the Second Circuit in International Soc'y for Krishna Consciousness, Inc. v. Barber, 650 F.2d 430 (2d Cir.

Using the ordinary *Sherbert v. Verner*[17] free exercise analysis, the Minnesota Supreme Court had little difficulty concluding that the "booth rule" could not constitutionally be applied to the Krishnas' practice of *sankirtan*. In the United States Supreme Court, however, the Krishnas grounded their claim on the free speech clause, under which the activities involved in *sankirtan* also were protected and under which they would have been protected entirely apart from their religious motivation and content. The Court, however, went out of its way to emphasize that, regardless of any potential special religious compulsion, religious organizations cannot achieve what the Court called "rights to communicate, distribute, and solicit superior to those of other organizations having social, political, or other ideological messages to proselytize."[18] In the Court's view, therefore, the free speech clause can and does place a heavy lid on what religious expression will be protected by the Constitution.[19]

A third aspect of the speech-religion interplay is exemplified by *Widmar v. Vincent*,[20] in which a student religious organization at the University of Missouri at Kansas City sought access to a university meeting room for purposes of "prayer, hymns, Bible commentary, and discussion of religious views and experiences."[21] The students were denied access pursuant to a policy prohibiting the use of university facilities "for purposes of religious worship or religious teaching."[22] Like *Heffron*, the case began as a challenge to the rule under both free exercise and free speech grounds and eventually narrowed to the latter.

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1981), also a case in which my firm represented the plaintiffs, provides a detailed and sensitive discussion of the theological bases and legal implications of the practice of *sankirtan*.

17. 374 U.S. 398 (1963). The Court in *Sherbert* held that the state needed to demonstrate a compelling state interest in order to overcome the burden on free exercise of religion. *Id.* at 406.

18. 452 U.S. at 652-53.

19. In my view, it is a failure of free exercise theory for a restriction applied to speech that is carried out under sincere religious compulsion not to be given stricter scrutiny than might otherwise be the case. I am hopeful, particularly given that the issue was not really tested in *Heffron*, that the Court may come to reexamine this point.

20. 454 U.S. 263 (1981).

21. *Id.* at 265 n.2.

22. *Id.* at 265 (footnote omitted).

In holding that the university policy constituted forbidden content discrimination under the free speech clause, the Court first had to conclude that the religious services the plaintiff group had in mind constituted speech. Indeed, it remarked, almost offhandedly, that religious worship is a form "of speech and association protected by the First Amendment."[23]

While the Court's conclusion may be unexceptionable, it also may portend a significant shift in free exercise jurisprudence. Justice White noted in dissent that if "religious worship *qua* speech is not different from any other variety of protected speech," then "the Religion Clauses would be emptied of any independent meaning in circumstances in which religious practice took the form of speech."[24] Given that "speech" includes many forms of behavior other than the spoken or written word, so long as they can be said to possess a modicum of communicative content—the display of symbolic objects;[25] the exhibition of works of art;[26] singing;[27] dancing;[28] and, of course, mere silence[29]—one easily can imagine the vast array of religious practices that the free speech clause may turn out to encompass. *Heffron* and *Widmar* demonstrate that the Court will by no means shy away from looking at the exercise of religion through a free speech lens.

I find Dean Choper's treatment of the free exercise case quite interesting, but also somewhat puzzling. In his view, *Wisconsin v. Yoder*[30] was right and *Sherbert v. Verner*[31] was wrong.[32] In support of the first conclusion, he writes that "[p]eople were not lining up to join the Old Order Amish so they could get their children out of school before the age of sixteen," and that, "[i]n the absence of

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23. *Id.* at 269.

24. *Id.* at 285 (White, J., dissenting).

25. Spence v. Washington, 418 U.S. 405 (1974) (peace symbol affixed to American flag).

26. Sefick v. City of Chicago, 485 F. Supp. 644 (N.D. Ill. 1979) ("tableau" sculpture of Mayor and Mrs. Bilandic).

27. Goldstein v. Town of Nantucket, 477 F. Supp. 606 (D. Mass. 1979) (itinerant folk singing by self-styled "Troubadour of Nantucket").

28. Salem Inn, Inc. v. Frank, 501 F.2d 18 (2d Cir. 1974) (topless dancing), *aff'd in part, rev'd in part sub nom.* Doran v. Salem Inn, Inc., 422 U.S. 922 (1975).

29. Brown v. Louisiana, 383 U.S. 131 (1966) (silent sit-in in public library).

30. 406 U.S. 205 (1972).

31. 374 U.S. 398 (1963).

32. Choper, *supra* note 1, at 948-50.

proof of this kind, the exemption posed no danger to religious liberty, even though it served a religious purpose."[33] As for *Sherbert*, he points out that the exemption was granted only on a religious basis; Sherbert's claim would have failed had her refusal to work on Saturdays been the result of a purely secular commitment to the family. Thus, Dean Choper concludes, "[t]he Court granted an exemption in *Sherbet* for religion alone."[34]

I doubt strongly, however, that the years since 1963 have seen the ranks of the Seventh Day Adventists swell with those looking for easy Monday-to-Friday jobs. Moreover, I certainly take it that Dean Choper would not disagree with the observation that *Yoder*, too, would not have been decided as it was had the parents' claim openly been founded "just" on ethnic tradition, not on "religion."[35]

Arguing against the result in *Sherbert*, Dean Choper asserts that "for government to give a taxpayer's money to religion . . . is a pristine violation of the establishment clause," and that he "cannot distinguish the payment of funds to Sherbert from the grant of a million dollars to support the the Presbyterian Church."[36] First, from a practical standpoint, things are not all that pristine to begin with. I am not aware that anyone has argued seriously that churches should not be provided with such humdrum, but necessary and expensive, government services as sanitation and fire and police protection. Churches' tax-exempt status constitutes even greater and more direct enforced public financial support, a notion

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33. *Id.* at 948.

34. *Id.* at 949.

35. Indeed, exactly how "religious" the convictions of the Amish parents were in *Yoder* is unclear to me. Many insular ethnic groups exist that would prefer to keep their children out of the public schools to prevent them from being seduced by the mainstream of secular culture. The "how do you keep 'em down on the farm" syndrome has been particularly impressed on me recently as a result of my firm's work with members of the Gypsy or, more properly, the Romani community. *See* Spiritual Psychic Science Church of Truth v. City of Azusa, 39 Cal. 3d 501, 703 P.2d 1119, 217 Cal. Rptr. 225 (1985) (holding fortune telling to be protected speech under the California Constitution). The issue raises, as Justice Douglas perceived, serious questions as to what happens to the rights of the children who, by their parents' choice and the acquiescence of the state through the nation's highest judicial body, are kept out of school. In a sense, in *Yoder* the Court "established" the Old Amish faith for these children, whose ability to leave that faith and community was—for lack of the minimal credential of a high school or trade school diploma—sharply limited were they to contemplate employment outside the agricultural society of their parents.

36. Choper, *supra* note 1, at 949.

blessed by the Supreme Court in *Walz v. Tax Commission.*[37] I must add, though, that I assume Dean Choper believes *Walz* to have been wrongly decided.

Beyond this, however, surely a distinction can be drawn between a judicial decision to preserve and implement an individual freedom granted explicitly by the Bill of Rights that may result in a marginal depletion of the government treasury and an outright grant of funds by the legislative and executive branches to a religious organization, for reasons, one assumes, of political convenience. Apart from the difference between a payment to an individual for unemployment compensation on the one hand and a payment to a church organization for furtherance of its religious mission on the other, in a situation such as *Sherbert* the government has not made a conscious choice to support any particular religion, but, as is sometimes said, merely has accommodated the exercise of religion by its citizens, a right protected by the Constitution. A direct grant to the Presbyterian Church would seem to be in a different category.

The dialectic of free exercise and anti-establishmentarianism cannot be eliminated entirely from constitutional decisionmaking. The tension, the contradiction, or whatever one chooses to call it, is inherent in the history, the text, and the application of the first amendment. The undeniable necessity of drawing lines, however, does not entail that any given line derives from absolute truth. Dean Choper's line in *Sherbert* is defensible, but so is Justice Brennan's. We must subsist with that ambiguity.

A word, finally, about *Larson v. Valente*,[38] a case Dean Choper treats in some detail, is appropriate. Because my firm initiated the case and litigated it through the Supreme Court stage—a point at which we were delighted to be joined by Professor Stone, whose contribution to the cause was immeasurable—I find it difficult to be entirely objective about it, but for the same reason find it equally difficult to resist saying something. Dean Choper would prefer to view *Larson* as a free exercise rather than an establishment case. It was indeed fortuitous that the case turned out the way that it did.

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37. 397 U.S. 664 (1970).
38. 456 U.S. 228 (1982).

In *Larson*, the Minnesota Attorney General's office had threatened the Unification Church with enforcement of a recently enacted, and onerous, amendment to the State's charitable solicitations law. A complaint and motion for preliminary injunction were quickly put together, challenging the constitutionality of the statute on as many grounds as possible. The establishment clause theory, for which not a great deal of direct precedent was available, was devised at the last minute and was far from being the centerpiece of the case as presented initially.

A number of these issues were discussed when Magistrate—now Judge—Robert Renner recommended issuance of the preliminary injunction. The State's litigation tactics thereafter obliged us to move ahead quickly with a motion for summary judgment, which, again, encompassed a wide spectrum of claims. In his recommendation that, essentially, the motion be granted, Magistrate Renner, to our considerable surprise, narrowed the case down to the novel establishment clause theory. As a result, it was that issue alone—although we continued to try to reassert the others—that was considered on appeal by both the United States Court of Appeals for the Eighth Circuit and the United States Supreme Court.

That being so, although I think the case could have been decided along the free exercise lines that Dean Choper suggests, I am not sure that the Court was necessarily wrong in the path it did choose. I concur readily in Dean Choper's observation that a law that "expressly deal[s] with the subject of religion, and [results] in favoring some and disfavoring others" should be "as vulnerable . . . as a general, neutral law that says nothing about religion but that happens to have an adverse impact on some faiths."[39] It does not follow inexorably, however, that the two cases must be subsumed in the same analytical framework, especially when, as in *Larson*, the law does more than "result" in disparate treatment of churches, but has such treatment as its explicit raison d'être. This kind of law, I believe, does implicate basic establishment clause, as well as free exercise, values, regardless of whether it fits neatly into the "three-part test." That test, after all, is not the clause itself.

I do not believe this result would be disturbed even if, as Dean Choper suggests, the Court applied an improperly lenient test in

39. Choper, *supra* note 1, at 959-60.

its prior decision in *Gillette v. United States*.[40] I happen to agree that it did, and I am pleased to see that Dean Choper believes that "[t]he *Gillette* doctrine . . . effectively has been abandoned."[41] I hope he is right, but in any event the fact that a misguided test was applied in *Gillette* under the establishment clause does not mean necessarily that the Court was wrong to apply the establishment clause in the first instance.

In conclusion, I would like to thank Dean Choper because, without his creative energy, we would not have had the opportunity to think about the interesting questions he raises. It is a pleasure for me to be set free from the adversary system for a change, and to share opinions without worrying about how they might affect a particular client. In my imagination I think of law professors as being free to seek the truth, while we practicing lawyers find that for our clients the truth is sometimes—to put it delicately—inconvenient. This Symposium has given me the opportunity to join for once in a higher good: the search for the path to individual liberty for all.

40. 401 U.S. 437 (1971).

41. Choper, *supra* note 1, at 961.