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THE FREE EXERCISE CLAUSE: A VIEW FROM THE PUBLIC FORUM

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I. INTRODUCTION

As my comments on Dean Choper's cogent and insightful Article will no doubt make evident, I am not an "expert" or an "authority" on the religion clauses of the first amendment. This is not to say that I am unfamiliar with constitutional issues, or even with first amendment issues, but my work has been in the speech and press fields rather than with the religion clauses. After some considerable puzzling over my role in this Symposium, it occurred to me that I was invited to participate not in spite of my unfamiliarity with religion, but rather because of my interest in freedom of speech—the thought being that insights gleaned from attempts to understand what the Court has been doing with one set of problems might usefully be applied to a clearly analogous set of questions. What I will try to offer, therefore, is a view of free exercise doctrine from the public forum.

Any constitutional question worth discussing cannot be explored without encountering profound and complicated issues of political organization. A commentator's function on an occasion such as this is not to try to resolve, or even to address, the profound complexities. Rather, the task is to find a useful or perhaps even a provocative perspective from which to speculate about the principal Article, remembering that one's own analysis begins with another's ideas. I am exceedingly fortunate in having Dean Choper's rich store of ideas as my starting point.

Dean Choper's analysis raises the question of how to conceptualize the Court's essential task under the free exercise clause. This issue recurs time and again with respect to free speech issues, for it pervades constitutional law. In particular, Dean Choper's Article raises the question of how the Court's role should be perceived

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when secular regulations are challenged because they place indirect burdens on religious liberty. Can we learn anything about this issue by looking at what the Court has done when regulations have placed indirect burdens on freedom of speech?

When indirect burdens on religious liberty are at issue, Dean Choper implies that free exercise doctrine should be evaluated in terms of whether it "affords religious freedom the substantive protection it properly deserves."[1] This phrasing prompts further inquiry. How does the Court go about affording the substantive protection that religious liberty deserves? Should its doctrinal mission be to guarantee in every case that the religious liberty of individual citizens or of the citizenry in general is protected "enough," or should the doctrine evolve general rules that delineate the boundaries of government's regulatory power? Is the issue in free exercise cases where individual religious liberty ends, or is the issue where legislative authority stops? Does the fundamental controversy concern what persons of religious conviction must be permitted freely to do, or does it concern what the government may not do? The answer to each of these paired questions follows from the answer to the other. Either way the doctrinal task is conceptualized, all the questions will be answered; nevertheless, how the doctrinal task is conceptualized has important implications. It will affect not only the substance of the answers but also our confidence in the Court's ability to provide them.

Dean Choper's Article implies that the relevant normative issue is whether, in any challenge of an indirect burden, the Court's resolution protects the religious freedom of individual citizens "enough." His analysis acknowledges that whether there is "enough" religious freedom cannot be decided in isolation from questions of the substantiality of the government's secular pursuits in the particular case and the necessity for its choice of religiously burdensome means. He seems to assume, in principle, that it is not merely possible but appropriate for the Court to determine whether there will be "enough" religious liberty about in the land if it denies a religious exemption from the strictures of a particular regulation. In other words, he sees the proper inquiry as where in-

1. Choper, *The Free Exercise Clause: A Structural Overview and an Appraisal of Recent Developments*, 27 WM. & MARY L. REV. 943, 945 n.11 (1986).

dividual religious liberty ends rather than where governmental authority stops.

II. Areas of Concern

A. Judging the Extent of Interference With Religious Beliefs

Perhaps because I am only a novice to free exercise issues, I have difficulties with Dean Choper's implicit conceptualization. The assumption that, in principle, the Court's role encompasses determining in each case whether particular regulations interfere with religious liberty "too much" troubles me for two principal reasons.

First, the Court's mandate to discern or describe the norm of unburdened individual or denominational religious liberty against which the demands for conformity to secular norms are to be tested, in my opinion, is not clear. In theory, does any plausible assertion put forward by a well-trained lawyer on behalf of a sincere believer to the effect that religious beliefs are "burdened"—or coerced, compromised, or influenced[2]—by a governmental regulation entitle the claimant to put the government to its proof that its own interest is substantial, compelling, or important and that it cannot be achieved by some narrower alternative means? This is what the Court's announced test, of which Dean Choper approves, seems to say. Surely the alleged burden must meet some threshold level of intrusion on religious liberty before it evokes judicial concern, but how would such a threshold be expressed? Would it require that only *reasonable* sincere beliefs that assertedly were burdened, coerced, compromised, or influenced would trigger judicial evaluation of the government's interest?

Second, the Court's doctrine, as presently announced, does not seem to contain in principle any mechanism by which courts can differentiate between burdens, compromises, and coercions of religion that merit concern and those that do not. Nor does it seem likely that such a mechanism can be devised, given the nonbeliever's inherent inability to empathize fully with a believer's convictions or to share his motivations, not to mention the Court's persistent and understandable unwillingness to confront directly

2. Choper, *supra* note 1, at 948.

the very basic question of defining religion.[3] Given the pervasiveness of government perceived by so many modern commentators, it hardly seems plausible—at least to this innocent observer—that every conceivable negative effect that a government regulation could have upon religious belief should be considered too great unless it serves a substantial governmental interest through the least restrictive means. Yet the logic of the "indirect burdens" doctrine seems to reach this far, and if the Court's task under the free exercise clause is conceptualized as assuring "enough" religious freedom, it is difficult to see how its reach could be limited.

B. Application of "Strict Scrutiny"

My second concern about the assumption in Dean Choper's Article regarding the function of free exercise doctrine is in large part a reflection of the doctrine's practically limitless reach. In addition, the concern stems from unease with the doctrine's implications for that ever-controversial institutional practice, judicial review. On its face, the compelling state interest/least restrictive means "test" of the constitutionality of any governmental action that indirectly burdens religious belief sounds familiar. Conceivably, one should begin with the assumption that the Court is equipped to apply the test in a principled manner, although some are not bothered by the overtly "political" nature of the interest-balancing judgments required by such a test. Surely, as a practical matter, one must accept "strict scrutiny" in some kinds of cases as the only means by which the Court can avoid the Hobson's choice of absolute rights on the one hand and no real "rights" at all on the other. In the public forum area, for example, strict scrutiny of content-based direct restrictions on explicitly communicative activity seems perfectly appropriate. The test says to the regulating government, in effect, "We are not prepared to say that regulation never may proceed, because we acknowledge the possibility of competing interests. In view, however, of the fact that content-based regulations present grave risks of improper motivations and of intentional

3. *See, e.g.*, United States v. Seeger, 380 U.S. 163 (1965); Torcaso v. Watkins, 367 U.S. 488 (1961); Fowler v. Rhode Island, 345 U.S. 67 (1953).

official viewpoint discrimination, we are going to try to make certain that this particular regulation is very much needed."[4]

The compelling state interest test seems more troublesome as a test of the validity of indirect burdens on religious freedoms. I will summarize the reasons, briefly and at considerable risk of oversimplification.

The first reason for concern in this context is a practical one. Because an individual's religious liberty can be "burdened" in countless unpredictable ways by government programs, neither legislators, administrators, nor regulators will be able *ex ante* to draft rules and regulations with confidence about whether their programs will be required to survive strict scrutiny. To withstand most other constitutional grounds for attack, regulations need only be reasonable to pass muster. Few would argue that reasonableness is not the appropriate general standard. Unless a regulatory scheme predictably burdens known rights, legislators should be able to trust that the products of reasonable political compromises need not survive strict scrutiny even though they do not serve "compelling interests" with the "least restrictive means." The compelling state interest test for indirect burdens on religious liberty, however, suggests that legislators never can proceed with such confidence. Even if they take the utmost care not to discriminate purposely against religious practice in general or any religion in particular, they neither can foresee nor forestall challenges by those who claim unexpectedly that the regulation imposes an indirect burden.

The second reason for concern arises from the problem of what competing interests are balanced.[5] If the compelling state interest test is applied to the claim of an individual who claims in effect a personal, religiously based exemption, the government's interest almost never would survive strict scrutiny. One rarely can argue that

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4. *Cf.* Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189 (1983). Not all commentators agree, of course, that the distinction between content-based and content-neutral regulations is defensible. *See, e.g.*, Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113 (1981); Stephan, *The First Amendment and Content Discrimination*, 68 VA. L. REV. 203 (1982).

5. For an analysis of the importance of balancing commensurate interests in the free speech context, see Fried, *Two Concepts of Interest: Some Reflections on the Supreme Court's Balancing Test*, 76 HARV. L. REV. 755 (1963).

granting one exemption would severely undermine even a program in which the government has a compelling state interest. On the other hand, the cumulative effect of many exemptions could devastate, or at least deter, many government programs, so that the individual's interest in an exemption can pale too easily by comparison. The Court has been sensitive to the problem of cumulative effects,[6] though it is not clear that the Court always weighs commensurate interests.[7]

The Court's lack of precision about the nature of the competing interests undergoing strict scrutiny brings into focus a third reason for concern with the compelling state interest test: in cases in which individual interests are balanced against cumulative effects, the actual level of scrutiny tends to depart from from the announced level. Strict scrutiny becomes a less careful, less demanding, almost pro forma exercise in validating governmental programs. Dean Choper notes that, even when supposedly applying strict scrutiny, "[i]n almost every Term since the high-water mark for the free exercise clause was reached in 1981 [in *Thomas v. Review Board*, the Court has treated religious freedom claims much less charitably . . . [and the Court] has found adequate government interests under the free exercise clause."[8] As Dean Choper suggests, the Court may have reached the "correct" result in some of these cases; nevertheless, both the credibility and usefulness of the Court's decisions suffer from announcing a very tough test and applying a very lenient one.

A fourth reason for concern with expanding the application of the compelling state interest test, particularly when strict scrutiny is not necessarily synonymous with invalidation, is the sheer impossibility of consistently correct application. I refer not merely to

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6. *See, e.g.*, United States v. Lee, 455 U.S. 252, 260 (1982) (free exercise challenge to Amish refusal to pay Social Security tax rejected, in part because Court feared that "[t]he tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief").

7. In Goldman v. Weinberger, 106 S. Ct. 1310 (1986), for example, the Court apparently weighed Captain Goldman's individual religious interest in wearing his yarmulke against the whole military establishment's interest in uniformity and discipline.

8. Choper, *supra* note 1, at 951 (footnote omitted).

the "radical indeterminancy"[9] of the test or to its utter uselessness as a predictive or analytical tool. I refer as well to the impossibility of knowing, even after a case has been decided, whether it has been decided "correctly." For example, consider the Court's recent decision in *Goldman v. Weinberger*.[10] In the first draft of his Article, which was prepared and circulated before the case was decided, Dean Choper predicted the outcome:

> It seems to me that the question presented in *Goldman*, whether the Air Force may prohibit an Orthodox Jewish psychologist from wearing a yarmulke—"an unobtrusive skull-cap that is part of his religious observance"—while in uniform on duty at a military hospital, can only be answered in favor of the individual under the test of "strict scrutiny"—unless the Court puts the case in a special "military affairs" category.

Although this is just about precisely what the Court did, it is important to note that Dean Choper was guessing when he ventured to suggest that the Court might do it. More fundamentally, even now that the Court has decided the case, whether Captain Goldman's religious liberty has been protected "enough" remains unclear. For a mind-numbing variety of reasons, four members of the Court certainly do not think so;[11] moreover, I cannot say that

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9. The phrase is borrowed from Professor Johnson's insightful article. Johnson, *Concepts and Compromise in First Amendment Religious Doctrine*, 72 CALIF. L. REV. 817, 820 (1984) ("First Amendment religion doctrine is radically indeterminate. . . .").

10. 106 S. Ct. 1310 (1986).

11. Justices Brennan, Marshall, Blackmun, and O'Connor dissented in *Goldman*. Justice Brennan, joined by Justice Marshall, thought that the regulation imposed a more significant burden on Captain Goldman's religious beliefs than did the majority. He also believed that the professional judgment of the military authorities enjoyed too much deference. He would have required at least a "rational foundation for assertions of military necessity when they interfere with the free exercise of religion." 106 S. Ct. at 1321 (Brennan, J., dissenting). Justice Blackmun was convinced that the Air Force could consider both the costs of permitting an exemption for Captain Goldman and the cumulative costs of "accommodating constitutionally indistinguishable requests for religious exemptions." *Id.* at 1322 (Blackmun, J., dissenting). He disagreed with the majority, however, concerning whether the government had carried its burden of demonstrating that either set of costs was significant. *Id.* Justice O'Connor, joined by Justice Marshall, applied a test that included an inquiry into whether "granting an exemption of the type requested by the individual [would] do substantial harm to [an] especially important governmental interest." *Id.* at 1325-26 (O'Connor, J., dissenting). She was convinced that the need for military discipline was "especially important," but she did not think this interest would be harmed substantially by allowing Captain Goldman to conform to his religious beliefs. *Id.*

they reached the wrong conclusion if they were asking the right question. Maybe, however, they were not asking the right question, or at least not the same question that then-Associate Justice Rehnquist in truth was posing. At this point, a look at and an attempt to explain what the Court has been doing in the public forum cases might be helpful.

C. Strict Scrutiny in the Public Forum Context

Dean Choper has expressed some concern that "the Court's benevolence [toward indirect burden free exercise claims] may be substantially spent."[12] More to point, he has discerned the "justices' discomfort with their own doctrine."[13] Several years ago, the Court began a similar shift in its attitude toward regulations of uses of public property that had indirect or unintended effects on communicative activity. For a time, it appeared as though the Court might be headed toward a strict scrutiny, case-by-case, highly individuated balancing approach to first amendment claims for exemption from such regulations.[14] Had this approach proceeded along its then-projected course, the Court certainly would have granted more speech access claims in the last few Terms than it has in fact done[15] and, even more definitely, neither the limits to protection nor the contexts in which protection would be demanded would have been anywhere in sight.

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12. Choper, *supra* note 1, at 951.

13. *Id.* at 953.

14. A history of the tortured development of the "public forum" doctrine is far beyond the scope of this brief Comment. The literature is in any event already extensive. *See, e.g.*, Farber & Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219 (1984); Kalven, *The Concept of the Public Forum:* Cox v. Louisiana, 1965 SUP. CT. REV. 1; Note, *A Unitary Approach to Claims of First Amendment Access to Publicly Owned Property*, 35 STAN. L. REV. 121 (1982).

The statement in text refers to the line of cases exemplified by Spence v. Washington, 418 U.S. 405 (1974), Street v. New York, 394 U.S. 576 (1969), Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969), and Brown v. Louisiana, 383 U.S. 131 (1966).

15. Many speech access claims have been denied in the last few Terms. *See, e.g.*, Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984); City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984); United States Postal Serv. v. Greenburgh Civic Ass'ns, 453 U.S. 114 (1981); Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640 (1981).

Instead, the Court shifted its doctrinal course,[16] moving away from strict scrutiny in every case. It embraced a series of rules and categories, the application of which seems intended to reserve strict scrutiny for relatively few regulations.[17] Only regulations that restrict access to a very few traditional public forums, or that discriminate on the basis of content among applicants to "limited" public forums, are certain to receive the Court's close attention. With respect to other publicly owned property, the government is not required, as it once apparently was, to permit any expressive activity if it is not "basically incompatible with the normal activity of a particular place at a particular time."[18] Instead, the government is allowed to prohibit expressive activity as long as the prohibition is "reasonable."

The regulations affecting speech uses of public property that continue to arouse the Court's concern are those that seem likely to have arisen from improper motivations rather than those with the effect of reducing the quantity of first amendment activity that takes place within society. In other words, the Court seems to see judicial review in this area as an occasion to prevent the evil that flows from intentional viewpoint discrimination by government officials rather than as an opportunity to enhance the good accruing to individuals from engaging in expressive activity.[19]

Some illicitly motivated, content-discriminating rules no doubt continue to fall through the cracks, because the Court's categories of cases for strict review do not serve perfectly to identify all regulations that are motivated by government officials' dislike, distaste, or fear of particular points of view. Moreover, the Court makes no serious effort to scrutinize carefully programs that have differential

16. The case that most clearly signaled the shift, though it certainly did not clearly announce it, is Lehman v. City of Shaker Heights, 418 U.S. 298 (1974).

17. The clearest articulation of the Court's current doctrinal approach is Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983).

18. Grayned v. City of Rockford, 408 U.S. 104, 116 (1972).

19. *See, e.g.*, Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 105 S. Ct. 3439 (1985). In its public forum decisions, the Court seems to have adopted a perspective akin to what Professor Schauer has called the negative view of the first amendment. *See, e.g.*, Schauer, *Must Speech Be Special?*, 78 NW. U.L. REV. 1284 (1983). Other commentators also have emphasized that the search for illicit motives plays a dominant role in the Court's doctrinal structure. See, for example, Professor Stone's perceptive analysis in Stone, *supra* note 4.

impacts on unpopular speakers. Finally, the rhetorical tone of sensitivity to and regard for communicative activities as a positive good is absent from recent opinions. It has been replaced by a sometimes apparently uncritical deference to the needs of government.

Still, whether one thinks the Court is reaching the right answers in the "speech uses of public property" cases depends on what one contemplates as the right questions. If the appropriate conception of the Court's role under the free speech clause is to assure "enough" speech, then recent decisions are no doubt unsettling. For this same reason, Dean Choper finds some of the free exercise decisions unsettling; he believes that the Court's benevolence toward speech uses of public property seems to have been spent. If, however, one conceives the Court's role somewhat differently, the developments may be viewed in a more sympathetic light. The first amendment may be thought of less as a provision that tells individuals what they may do, and more as a provision that tells government what it may not do. The corollary is to conceive of the Court's role not as guarantor of the "right" amount of speech, but as rulemaker for government decisionmakers. The Court's drift toward a more categorical approach to the question of when to invoke strict scrutiny thus becomes more understandable. A strict scrutiny test for any regulation that has an unintended effect on communicative activity is hopelessly inadequate as a rule to tell decisionmakers anything useful about the limits of their authority. Its unpredictable impact, its plasticity, its susceptibility to capricious invocations, and its total absence of meaningful criteria of lawfulness all leave legislative and administrative decisionmakers in the dark about what they must or must not do, unless they are simply to read the test as the equivalent of a one-way ratchet for free speech claims. In this view, the Court's recent pattern of "speech use of public property" decisions, which at least attempts useful generalizations, becomes explicable at least in part as an effort to guide and to limit the conduct of the official decisionmakers to whom, in this view, the Court's decisions are principally addressed.

III. The Relationship of Free Speech and Free Exercise

Now comes the hardest question, which involves the implications of the preceding free speech analysis for free exercise doctrine and, in particular, the most troublesome aspect of free exercise doctrine—indirect burdens on religious freedom. Let me offer two tentative thoughts.

First, as Dean Choper has suggested, the justices presently are in a state of discomfort, not to say agitation, with their own doctrine as it concerns indirect burdens. What my free speech analysis suggests is that an explanation for their discomfort may not lie either with their relative lack of sympathy for religion or with their too-willing submission to claims of governmental necessity. The justices may no longer see their task as protecting individual claimants on an ad hoc, case-by-case basis. Instead, perhaps, they see their job as delineating useful criteria for official decisionmakers. Such a conception of their task still would be consistent with the notion that the ultimate end of the first amendment is to protect individual rights to religious liberty. It merely would rest on a different premise than does current doctrine about the Court's function in bringing that end into view.

Second, if one looks at the free exercise clause principally as a constraint on lawmaking power instead of principally as a guarantor of a certain quantum of individual liberty, the question becomes what the government may *not* do. Could suspect categories of regulation be devised, as they have been in the free speech area, in which strict scrutiny would be mandated simply because of the categorical risk that the lawmakers had wandered into forbidden territory? I cannot attempt in the compass of these comments to provide answers to these questions. I was intrigued by Dean Choper's suggestion that "[l]aws that explicitly deal with the subject of religion, and result in a preference of some religions over others, . . . ought to be treated under the free exercise clause."[20] I would be inclined to think that strict scrutiny for such laws would indeed be appropriate on the same theory that strict scrutiny of laws that are not "content-neutral" is justified—namely, the theory that the risk of improper motivation against particular reli-

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

gions is presented by such laws to an unacceptable degree. I also am inclined to believe that the Court should preserve strict scrutiny in cases such as *Wisconsin v. Yoder*,[21] in which government regulations predictably interfere with "practices central to a well-established organized religion."[22] My theory is that the more rules interfere with practices that are known to be central to a well-established religion, the more likely that the impact was foreseeable and that it actually was foreseen and, indeed, desired by the legislators.

IV. Conclusion

These speculations are unforgivably sketchy and tentative, and I provide them only to hint at the direction toward which a conception of the free exercise clause analogous to the conception that may be driving the Court in its "public forum" decisions might lead. I realize that I have not spoken to all the questions addressed by Dean Choper. I have not hinted at how the logical difficulty he notes with regard to the establishment clause might be resolved; nor have I suggested where the lines between permissible, prohibited, and required accommodations to religion should be drawn. All I really have tried to do is suggest a different formulation of the free exercise question. Because I know so little about religion, I am happy to let others suggest the answers.

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21. 406 U.S. 205 (1972).

22. Schauer, *Cuban Cigars, Cuban Books, and the Problem of Incidental Restrictions on Communications*, 26 Wm. & Mary L. Rev. 779, 789 (1985).