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William & Mary Law Review

Volume 27 | Issue 5 Article 12

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I. INTRODUCTION

Dean Choper, like virtually everyone who has thought about the religion clauses, finds the Supreme Court's treatment of religion clause issues unsatisfactory. Although I share that judgment, I believe that some of Dean Choper's points need elaboration and critique. In particular, his treatment of the role of purpose in religion clause jurisprudence is insufficiently sensitive to variations in context, and his discussion of the tension between the clauses is incomplete.

II. COERCION AND PURPOSE IN THE JURISPRUDENCE OF THE RELIGION CLAUSES

Many observers commenting on the Supreme Court's decisions regarding voluntary prayer in the public schools appear uncomfortable with the Court's simple view that voluntary prayers constitute an establishment of religion. They seem concerned that few people would object to a truly voluntary system of prayer, feeling that if children can just refrain from praying if they do not want to, why should the Constitution be interpreted to bar a system under which children who do want to pray are given an organized opportunity to do so? The objection to so-called voluntary prayer in public schools, however, is the suspicion that such organized prayers really are not voluntary.[1] Thus, coercion becomes an important part of the analysis of establishment clause questions.

At first this conclusion appears anomalous. The first amendment contains a provision that on its face deals with coercion—the free

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1. I put aside Justice Stewart's position concerning this issue, which would have recognized the possibility of coercion in this setting, but would have placed the burden of establishing that coercion existed on those challenging the practice. *See* Abington School Dist. v. Schempp, 374 U.S. 203, 318 (1963) (Stewart, J., dissenting).

exercise clause. If the pressure to participate in prayer is substantial enough, the practice would violate that clause. Why should pressure that is insufficient to create a free exercise violation nonetheless be relevant to determining whether the establishment clause has been violated?

Dean Choper offers an analysis that makes coercion relevant under both clauses. To make out an establishment clause violation, one must show that the practice at issue coerces—or compromises or influences religious beliefs in a way that endangers religious liberty—and that the practice has a religious purpose. To make out a free exercise violation, one must show that the practice at issue coerces and that it does not serve an overriding secular purpose. I see two general difficulties with this analysis.

A. The Analysis of Coercion

The first difficulty involves the definition of coercion. Coercion, compromise, and influence are troubling, in Dean Choper's analysis, because they can threaten religious liberty. In particular, Dean Choper emphasizes that the state coerces individuals into making tax payments, and that this practice violates the establishment clause when the taxes are used to support churches. Dean Choper relies on abundant historical evidence to support his conclusion that even the most modest tax support of programs with religious purposes violates the establishment clause. As Madison wrote, the expenditure of only three pence of tax money to support religion is a matter of concern.[2]

The extraction of money from taxpayers certainly is coercive, but why does this sort of coercion threaten religious liberty? Dean Choper rejects the argument that coercion of this sort threatens religious liberty because it causes discomfort or offense. What is left is the fact that, by taking money from individuals and using it for religious purposes, the government makes it relatively more difficult for those individuals to use their remaining money for purposes that they deem more worthy. Their wealth having diminished, the individuals have less discretionary money to use for such purposes.

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2. Madison, *A Memorial and Remonstrance* (circa June 20, 1785), *reprinted in* 2 WRITINGS OF JAMES MADISON 186 (G. Hunt ed. 1901).

It is not obvious, however, that this definition is sufficient to account for what ought to be troubling in certain interactions between religion and government. Most obviously, it seems to divert attention from the important aspects of *Lynch v. Donnelly*,[3] in which the Supreme Court found that municipal sponsorship of a creche does not violate the establishment clause, to make the decision depend entirely on the modest amount of tax funds that were spent in support of the creche.[4] Dean Choper's formulation would make this tax support the key to a finding of an establishment clause violation. I would not have been unhappy with the result that this analysis would have dictated in *Lynch*, but I have to say that something rather more important than the use of tax money was wrong with the City of Pawtucket's behavior in that case. If Dean Choper's theory would find Pawtucket's behavior, tax support aside, offensive without making that offense relevant to the constitutional issue, something is wrong with the theory.

In addition, to the extent that coercion affects liberty by restricting opportunities to use discretionary wealth, Dean Choper's theory does not seem to take account of what might be called "institutional coercion." Institutional coercion exists when the government creates a set of institutions, none of which individually have a religious purpose but all of which together create incentives that influence or, more strongly, coerce choice in religious matters. This phenomenon probably has as much of an effect on discretionary choices as does the restriction of income, and therefore it probably ought to be incorporated into an analysis like Dean Choper's. Unfortunately, an analysis of institutional coercion shows how difficult it is to link the coercion of tax payments to restrictions on religious liberty.

Two examples are prominent in discussions of the religion clauses. Supporters of public aid to religion have asserted that the government's system of subsidizing secular education in the public schools without subsidizing religious education, coupled with its requirement that children attend schools, has coercive effects, and

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3. 465 U.S. 668 (1984).

4. For a generation, one criterion for an acceptable constitutional theory has been whether that theory explains why the Court's decision in Brown v. Board of Education, 347 U.S. 483 (1954), was correct. In my view, a criterion for an acceptable theory of the religion clauses is whether that theory explains why the Court's decision in *Lynch* was wrong.

that a modest accommodation such as allowing organized prayers in public schools is necessary to offset this institutional coercion. Similarly, feminists have argued that the government's system of financing most medical services, coupled with its refusal to finance abortion services, has coercive effects—in this instance, the effect of inducing women to behave in ways consistent with particular moral-religious views, which, because of the psychological mechanism that leads people to reduce cognitive dissonance, thereby induces them to hold those views.

I do not wish to defend the view that institutional coercion exists in either of these instances. Rather, I merely want to show that institutional coercion is a phenomenon that an analysis that invokes coercion ought to address. Any interpretation of "coercion" that finds coercion in modest tax support for religious activities ought to have room for some form of institutional coercion as well. The difficulty, of course, is that the network of governmental activities is so dense that *every* practice could be subject to a powerful claim of institutional coercion. In that event, the concept would not be able to play any role in deciding religion clause questions.

B. The Analysis of Purpose

The second general difficulty with Dean Choper's theory arises from the other element of his analysis. His distinction between the two clauses would collapse if a religious purpose were routinely inferred from the fact that a practice had only a modest secular purpose. At first glance, that inference probably would not be made in most cases. After all, goals like preserving the fiscal stability of social insurance schemes surely are substantial secular purposes, and they seem largely unrelated to religious purposes.

A slight shift in perspective may make the problem more difficult. Suppose one asks, not whether the program as a whole has a secular purpose that is not insubstantial, but whether the refusal to exempt sincere religious believers from the program has such a secular purpose.[5] As far as I can tell, the only such purpose available for most programs is the administrative difficulty of making

5. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 855 (1978) (criticizing "the error of equating the state's interest in denying a religious exemption with the state's usually much greater interest in maintaining the underlying rule or program for unexceptionable cases").

determinations of sincerity.[6] Moreover, for many of those programs, a purpose to burden or to advance religion would be inferable from a state's failure to set up an appropriate administrative mechanism to sort the sincere from the insincere. Cases like *Sherbert v. Verner*[7] certainly seem like legislative oversights, or, perhaps more precisely, willful misinterpretations of ambiguous statutes in situations in which the motivation for the misreading may well be hostility to the religious claim.[8] One might treat the problem as susceptible to a constitutional "clear statement" analysis: perhaps legislatures do occasionally inadvertently fail to provide appropriate administrative mechanisms to avoid coercing religious belief or action. The courts should point out these mistakes to legislatures. But if a legislature persists in refusing to provide an exemption from a secular regulation, even though providing the exemption would entail no significant costs, the inference of a religious purpose would seem rather strong.[9] If this analysis is correct, Dean Choper's proposal ends up not truly distinguishing the

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6. One common objection to such exemptions is that people have incentives to claim exemptions from certain programs, such as taxing systems, while they lack such incentives when other programs are involved. This is one basis upon which Wisconsin v. Yoder, 406 U.S. 205 (1972) (considering the need for an exemption from a state's compulsory education requirement for adolescents to accommodate individuals with religious objections to such education), can be distinguished from United States v. Lee, 455 U.S. 127 (1982) (considering the need for an exemption from compulsory participation in the Social Security system to accommodate individuals with religious objections to the system). In addition to the fact, to which Dean Choper directs our attention, that the person seeking an exemption in *Lee* also disclaimed any intention to seek social insurance benefits, and thus might have lacked the asserted incentive, the situation in *Lee* also involved the difficult determination of the sincerity of the claimant. Thus, the fundamental problem is not one of identifying incentives, but one of determining sincerity. In other contexts, the Court has expressed no qualms about the ability of the government to determine sincerity. *See, e.g.*, United States v. Seeger, 380 U.S. 163 (1965).

7. 374 U.S. 398 (1963).

8. In this connection one should note, as the Court did in *Sherbert*, that prior to the decision of the South Carolina Supreme Court in *Sherbert* no court had interpreted its state's unemployment benefit statutes to bar payments to people in Sherbert's position. *Id.* at 407 n.7.

9. The alternative view of the problem is that *Sherbert* and *Yoder* are aberrations and that the free exercise clause requires no accommodation to religious beliefs in secular programs. Under this view, however, it is difficult to see what the free exercise clause contributes to the Constitution that the free speech clause does not. *See* Marshall, *Solving the Free Exercise Dilemma: Free Exercise as Expression*, 67 MINN. L. REV. 545 (1983).

two religion clauses: both require coercion, and both require the presence of a religious or anti-religious purpose.[10]

III. Alternatives to the Use of Purpose in Religion Clause Jurisprudence

One difficulty with discussions of the religion clauses is that commentators have been captivated by the attractions of the three-part test in *Lemon v. Kurtzman*.[11] Not that people agree that all three prongs are equally sensible, that the Court has applied the test in a coherent way, or even that the test should be regarded as anything more than a sensible way to start one's thinking about the religion clauses; but people do tend to take the test's reliance on "purpose" as canonical. I believe that this is misleading. Although the Court has invoked the "purpose" prong in a relatively undifferentiated way, it in fact uses a more complex analytical scheme. In addition, treating "purpose" as a unitary concept is unlikely to provide helpful normative guidance in resolving religion clause problems.

Perhaps our understanding would be deepened by expressly drawing attention to other areas of constitutional law in which "purpose" plays a role, such as the dormant commerce clause and the equal protection clause.[12] Both of those other areas, for example, provide useful analogues to the problem in *Larson v. Valente*,[13] the case involving Minnesota's selective effort to regulate solicitation by members of the Unification Church. That case seems to involve a classic gerrymander—that is, a facially-neutral statute with inclusions and exclusions that give rise to an irresistible inference of an intent, or purpose, to disadvantage a particular

10. If the establishment clause protects religious liberty to the extent that the free exercise clause does, and the free exercise clause protects religious liberty to the extent that the free speech clause does, *see supra* note 9, one wonders what James Madison thought he was doing in drafting the religion clauses of the first amendment.

11. 403 U.S. 602, 612-13 (1971).

12. *See* Hunter v. Underwood, 471 U.S. 222 (1985) (equal protection); Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333 (1977) (commerce clause).

13. 456 U.S. 228 (1982).

group.[14] Unlike Dean Choper, then, I believe that ordinary purpose analysis is perfectly acceptable in *Larson*.

Nevertheless, I agree with Dean Choper concerning the existence of a special category of problems for which, as he puts it, "strict scrutiny" is necessary. Dean Choper would include statutes dealing expressly with religion in that category. As I have suggested, virtually all statutes dealing expressly with religion are susceptible to ordinary purpose analysis, but another sort of problem, illustrated by *Epperson v. Arkansas*[15] and other evolution/creation science cases,[16] exists. These cases involve statutes that deal expressly with the curriculum of the public schools, rather than with religion, yet everyone knows that religion is the real issue. I suggest that these cases involve what might be called "religion-sensitive" subjects, and it may be that the best way to understand *Epperson* is to view it as invoking a rule that statutes dealing with religion-sensitive subjects must survive strict scrutiny.[17]

Difficulties would arise with this category as well—most notably, the difficulty in determining what counts as a religion-sensitive subject. Everyone probably would agree that creation science is such a subject, but what about abortion?[18] More generally, the

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14. Compare the similar expressions about motivation relied on in Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 352 (1977) ("glaring" statement by state official regarding his desire to "have the sentiment from our apple producers since they were mainly responsible for this legislation being passed"), and *Larson*, 456 U.S. at 255 (legislator's statement that he was "not sure why we're so hot to regulate the Moonies anyway").

15. 393 U.S. 97 (1968).

16. *See, e.g.*, McLean v. Arkansas Bd. of Educ., 529 F. Supp. 1255 (E.D. Ark. 1982), *aff'd*, 723 F.2d 45 (8th Cir. 1983).

17. At least this avoids the notorious difficulties that arise when one tries to understand these cases in more conventional terms, as Justice Black's concurring opinion in *Epperson* made abundantly clear. *See* 393 U.S. at 113-14 (Black, J., concurring).

18. Professor Tribe initially argued that statutes restricting the availability of abortion were unconstitutional because they were motivated largely by a particular, and particularly religious, view about when human life begins. *See* Tribe, *The Supreme Court 1972 Term—Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 18-25 (1973). "[O]n reflection," however, Professor Tribe concluded that this view "give[s] too little weight to the value of allowing religious groups freely to express their convictions in the political process." L. TRIBE, *supra* note 5, at 928 (footnote omitted). Professor Tribe's initial suggestion was that the religious component of the controversy required courts to remit the abortion decision to pregnant women; this Comment suggests that the religion-sensitive nature of the issue authorizes courts to determine on their own the proper balance between the various interests.

subjects that can be termed religion-sensitive are likely to change substantially over time, as society becomes attuned to different aspects of religious belief and conflict. Drawing constitutional doctrine in this manner makes it unstable from the beginning, which may not be desirable, yet cases such as *Epperson* do seem to involve something special that is not captured by a more straightforward analysis of legislative purpose.

Another set of cases not readily susceptible to analysis under the ordinary *Lemon* approach to purpose involves what Dean Choper calls "deeply ingrained practices" such as legislative prayer. Once again, however, I believe that the difficulties arise from a misguided effort to use the *Lemon* approach, rather than from difficulties inherent in the quest for purpose. Years ago, Mark DeWolfe Howe argued that such practices, which he called "de facto establishments," had to be analyzed in a special way.[19] These practices plainly have religious purposes, and no good is done by pretending, as the Court came close to doing in *Lynch*, that the ordinary understanding of "purpose" somehow allows a holding that the practices do not have religious purposes.[20] As Howe suggested, however, it is unclear why the establishment clause should be interpreted to prohibit these de facto establishments. The Court's recent behavior confirms that, whatever the doctrinal rubric, such practices are almost certain to be found constitutional anyway. One might as well candidly acknowledge, in our doctrinal structure, that de facto establishments are constitutionally permissible.

As before, this suggestion does not resolve all problems; one still must decide what makes a practice a de facto establishment. One characteristic, suggested by Dean Choper, is that de facto establishments have a long pedigree.[21] One legitimately may ask, however, how long is long enough? A casual survey of the citizenry probably would reveal that most people believe that public celebrations of Christmas date back to medieval times. Justice Bren-

19. M. HOWE, THE GARDEN AND THE WILDERNESS 11-12 (1965).

20. *See, e.g.*, Lynch v. Donnelly, 465 U.S. 668, 679 (1984) (creche must be evaluated "in its context"); *id.* at 727 (Blackmun, J., dissenting) (Court "relegate[s]" creche "to the role of a neutral harbinger of the holiday season, useful for commercial purposes, but devoid of any inherent meaning").

21. *Cf.* Marsh v. Chambers, 463 U.S. 783 (1983) (upholding use of chaplains in legislatures because of historically unique record of acceptance of this practice).

nan's dissent in *Lynch*, however, demonstrated that in the United States such celebrations are only slightly more than a century old.[22] Similarly, the practice of organized prayer in the public schools probably seemed well-established in the early 1960's, but it too was then barely a hundred years old.

Another candidate for a characteristic to identify de facto establishments is that the religious content of de facto establishments, while undeniably present, is relatively slight. Sunday closing laws, or statutes requiring businesses to open no earlier than noon on Sundays, the time when church services traditionally end, do have some connection to religion, but not much. Public celebrations of Christmas have become relatively secularized, though, as *Lynch* shows, they still contain some religious elements.[23]

One advantage of developing a differentiated approach to questions of purpose under the religion clauses, which identifies religion-sensitive topics, de facto establishments, and perhaps additional categories, is that this approach can direct attention to the operation of the political process on matters of religion. The ordinary operation of politics these days does not seem likely to produce legislation that "threatens those consequences which the Framers deeply feared,"[24] because pluralist politics operate as to religion much as they do to any other subject. Differences among religious denominations' views about the proper stance of government toward religion, which range from advocacy of strict separation to advocacy of benevolent neutrality and beyond, make it difficult to achieve the sort of consensus on particular programs that is necessary before a legislature will act. This is particularly true in the present day when, in addition to the denominational differ-

22. 465 U.S. at 720-23 (Brennan, J., dissenting).

23. *See id.* at 685-86. One difficulty with using this characteristic to identify de facto establishments is that, as an initial matter, one would think that something like the New York Regents' prayer in Engel v. Vitale, 370 U.S. 421 (1962), would have such slight religious content as to be a de facto establishment under this approach. The content of the prayer may have been almost nonreligious, but the fact that it was a prayer probably gave it sufficient religious content to eliminate the possibility of classifying the activity as a permissible de facto establishment.

24. Abington School Dist. v. Schempp, 374 U.S. 203, 236 (1963) (Brennan, J., concurring); *see also* Wolman v. Walter, 433 U.S. 229, 263 (1977) (opinion of Powell, J.) ("[W]e are quite far removed from the dangers that prompted the Framers to include the Establishment Clause in the Bill of Rights." (footnote omitted)).

ences, a strong and highly secularized elite, represented, for example, by scholars of constitutional law, oppose substantial interaction between government and religion.[25] Taken together, these aspects of the political process probably will prevent anything more than the most innocuous and ritualized invocations of religion from emerging from the political process.

This rosy picture, of course, must be qualified. In our federal system, denominations that favor substantial interaction between government and religion may have such control over the political process in some places that pluralism does not function particularly well. In addition, some practices, perhaps typified by the creche at issue in *Lynch*, may be innocuous to a very substantial proportion of the population but deeply offensive to a proportion small enough to be dealt out of the pluralist bargaining process.

On the level of strict analysis, I believe that these arguments are answerable in several ways.[26] One response, however, is more general and more important. The qualifications enumerated above suggest that, while the general operation of the pluralist political process on matters of religion may be acceptable, the process sometimes breaks down. Adopting Vincent Blasi's image, the courts perhaps should adopt a "pathological perspective" of the religion clauses,[27] developing a doctrine that provides the maximum support for religious liberty when these serious malfunctions occur.

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25. An analogy may be drawn between this issue and discussions of Congress' power to restrict the Supreme Court's jurisdiction, in which the strong scholarly consensus supporting limitations on that power acts as a political force impeding the enactment of jurisdiction-restricting statutes. *See* Tushnet & Jaff, *Why the Debate over Congress' Power to Restrict the Jurisdiction of the Federal Courts is Unending*, 72 GEO. L.J. 1311, 1325-27 (1984).

26. For example, one could redescribe the assertedly troubling exclusion from the bargaining table as one dimension of the diversity that characterizes our federal system, which is usually considered a virtue. Those who are dealt out of the hand can move to other, more hospitable jurisdictions, and the threat that they will do so gives incentives to the dominant majority not to ignore the minority completely. Further, the minority that is ignored locally need not be ignored at the next higher level of the jurisdictional structure. People harmed by city ordinances, for example, can appeal to state legislatures for relief, and the fact that they are not important enough to deal with on the local level does not mean that they lack sufficient political resources to strike a deal at the state or national level.

27. Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449 (1985).

This pathological perspective, however, has two problems. First, it imposes substantial costs on the courts. To preserve the possibility of invoking a restrictive doctrine when it is really needed, the courts would have to invoke the doctrine under circumstances that are, by definition, not pathological. At the least, this would appear rather silly, resulting in the deployment of big constitutional guns against what concededly are insubstantial targets. Second, the pathological perspective assumes that the courts' insulation from the political process is great enough to ensure, even during times of stress, that they will be sufficiently steadfast to enforce the restrictive doctrines. Courts, however, in many ways surely are not that different from other political institutions. To make the point most crudely, one can hardly be confident about the Supreme Court's ability to stand up to political heat when, in a time when the Court was not particularly constrained by political considerations, it managed to decide *Lynch* as it did.

IV. Purpose and the Asserted Conflict Between the Religion Clauses

Dean Choper asserts, as did Justice Stewart,[28] that the Supreme Court has managed to interpret the free exercise clause in a way that places the clause in logical conflict with the Court's interpretation of the establishment clause. In this way, too, Dean Choper is beguiled by a unitary definition of purpose.

As an initial matter, one easily can define the religion clauses so that they do not conflict. Suppose, for example, that the free exercise clause is interpreted to require, under some circumstances, that religious exemptions from secular regulations be granted. One then could interpret the establishment clause to prohibit all statutes that have a religious purpose, except for statutes with the purpose of accommodating religion in ways required by the free exercise clause. Surely the conflict that Dean Choper discerns occurs only because he believes that the concept of purpose for establishment clause purposes cannot be subdivided as this formulation suggests. No logical impediment exists, however, to the suggested definition of the clauses.

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28. Sherbert v. Verner, 374 U.S. 398, 414 (Stewart, J., concurring).

This suggestion may have practical problems. For example, one formulation might be to permit under the establishment clause only those statutory accommodations that are required by the free exercise clause, and to hold unconstitutional all other efforts to promote "free exercise values." Under this formulation, however, legislatures would have little incentive to enact statutory accommodations. If they failed to enact a required accommodation, the courts would create one, and if they enacted something more than what the courts would require independently, their efforts would go for naught.

This problem could be addressed by introducing some slight flexibility into the establishment clause standard, which could be interpreted to allow legislatures some maneuvering room on the fringes of required accommodations. The courts then would uphold statutory accommodations that reasonably promoted free exercise values without unduly impairing establishment clause values.[29] Regardless of how one deals with the problems of defining precisely the relationship between the religion clauses, however, avoidance of a logical conflict is simple enough, so long as one avoids thinking that a single concept of purpose must be employed to analyze problems under both clauses.

IV. Conclusion

The jurisprudence of the religion clauses is a mess, but not, I think, for the reasons Dean Choper gives. Dean Choper is too concerned about the way the concepts of coercion and purpose operate in that jurisprudence. The concerns, as he has stated them, could be alleviated by developing more refined definitions of those concepts. Indeed, I have suggested that the jurisprudence of the religion clauses is less of a mess, or is a different sort of mess, precisely because the Court has operative definitions of those concepts that differ from Dean Choper's. As I have argued elsewhere,[30] the jurisprudence of the religion clauses is a mess not because we do

29. This approach is consistent with some so-called "remedial" views of Katzenbach v. Morgan, 384 U.S. 641 (1966). *See* G. Stone, L. Seidman, C. Sunstein & M. Tushnet, Constitutional Law 239-41 (1986).

30. Tushnet, *The Constitution of Religion*, 18 Conn. L. Rev. 701 (1986).

not understand the Constitution, but because we do not understand religion.