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Book Review

Using the Religion Clauses to Secure
Religious Liberty

*Securing Religious Liberty: Principles for Judicial
Interpretation of the Religion Clauses*

by Jesse Choper

University of Chicago Press (1995)

When the greatest laws are being undermined by bad human beings, who is a more appropriate defender [of the gods' existence] than the lawgiver?¹

When the religion of a people is destroyed, doubt gets hold of the higher powers of the intellect and half paralyzes all the others. Every man[s] . . . opinions are ill-defended and easily abandoned; and, in despair of ever solving by himself the hard problems respecting the destiny of man, he ignobly submits to think no more about them.

Such a condition cannot but enervate the soul, relax the springs of the will, and prepare a people for servitude. Not only does it happen in such a case that they allow their freedom to be taken away from them; they frequently surrender it themselves. . . . As everything is at sea in the sphere of the mind, they determine at least that the mechanism of society shall be firm and fixed; and as they cannot resume their ancient belief, they assume a master.²

1. PLATO, THE LAWS OF PLATO 288 (Thomas L. Pangle trans., Basic Books, Inc. 1980).

2. 2 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 21-22 (Phillips Bradley ed., Henry Reeve trans., Alfred A. Knopf, Inc. 1972) (1840).

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I. INTRODUCTION

People today sometimes assume that the Religion Clauses the Establishment and Free Exercise Clauses³ (the "Religion Clauses") are a wall protecting the state from religious influences⁴ but such was not always the case. Many Founders who voted for the Bill of Rights were deeply religious, and they demanded the adoption of the Religion Clauses in order to protect their religious liberty.⁵ Accordingly, the Religion Clauses were not neutral on the subject of religious liberty, nor were they included in the Constitution to protect the state from religion; they were included to protect "each from the other, in the service of the larger goal of preserving religious liberty."⁶

Jesse Choper's book, *Securing Religious Liberty: Principles for Judicial Interpretation of the Religion Clauses*, focuses on producing coherent principles for adjudicating the Religion Clauses.⁷ In Choper's view, the two Religion Clauses form a complimentary fortress for religious liberty, and to ignore either is to expose that liberty to the damaging forces of government.⁸ In providing substance to this fortress, Choper does not attempt to follow every Supreme Court opinion on the subject. Rather, as the title suggests, Choper has one set goal: securing religious liberty.⁹

Although the goal of securing religious liberty might not seem controversial at first glance, the potential results produced by Choper's efforts at securing religious liberty are controversial. As Choper admits, "I know of no one—including me—who does not disagree with some, if not many, of the results my approach produces."¹⁰ However, because I agree with

3. U.S. CONST. amend. I. The First Amendment reads in pertinent part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." *Id.*

4. See Stephen L. Carter, *The Resurrection of Religious Freedom?*, 107 HARV. L. REV. 118, 133-34 (1993) (noting that some recent school prayer decisions might lead some to believe that the Religion Clauses are "designed to protect the 'good' part of life—the state—against the 'bad' part—the church").

5. See Douglas Laycock, *The Benefits of the Establishment Clause*, 42 DEPAUL L. REV. 373, 374 (1992).

6. Carter, *supra* note 4, at 134.

7. See JESSE CHOPER, *SECURING RELIGIOUS LIBERTY: PRINCIPLES FOR JUDICIAL INTERPRETATION OF THE RELIGION CLAUSES* 1 (1995).

8. See *id.* at 13-14.

9. See *id.* at 11.

10. *Id.* at 189.

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Choper that a coherent and consistent application of the law that reduces judicial discretion is more desirable than absolute agreement with every result produced,¹¹ a few disagreeable results do not dissuade me from commending his approach. Accordingly, this Review will not attempt to analyze the desirability of every result reached by Choper, but it will analyze Choper's internal consistency and effectiveness in producing a coherent set of principles that will secure religious liberty.

Part II of this Review analyzes Choper's principles for interpretation of the Religion Clauses. Part III discusses Choper's definition of religious liberty and analyzes its effect on Choper's principles. Part IV concludes that Choper's approach is not entirely consistent in its foundation or its application, but that a modified form of Choper's principles would effectively protect religious liberty.

II. CHOPER'S PRINCIPLES

Choper sets out four principles for courts to follow in interpreting the Religion Clauses—two principles for each clause. These principles attempt to yoke the Religion Clauses together in defending religious liberty.¹² This section will analyze particular problems in the application and interpretation of these principles.

A. *Principles for Applying the Free Exercise Clause*

1. *Deliberate disadvantage principle*

The deliberate disadvantage principle prevents government action rooted in prejudice for or against religious interests. This principle states, "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."¹³

The definition of "intentionally" poses two problems. First, a legislator's reasons for voting affirmatively may differ from what the legislator hopes the law itself will accomplish. In ad-

11. *See id.* at 1.

12. *See id.* at 35.

13. *Id.* at 41.

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addressing this problem, Choper states that courts should only look into what the legislators hoped the law itself would accomplish, rather than the reasons the legislators may have voted for the bill.¹⁴ Choper justifies this view of intent by noting the difficulty of discerning the wide array of possible reasons that someone might vote for a bill, such as a favor to a fellow legislator.¹⁵

Second, if Congress passes a bill, most likely the affirmative votes have been cast for a variety of reasons. Choper does not satisfactorily address this problem. He states only that a finding of intent under the deliberate disadvantage principle will be rare—seemingly, only when the intent is explicit or no other plausible explanation exists for the government action.¹⁶ Although this answer sidesteps the real problem of determining governmental intent, the determination is problematic in all areas of the law; to place the burden of resolving it on any one commentator would be unfair. Because intent is essentially the only requirement of the intentional disadvantage principle, once intent is shown the principle is quite broad.¹⁷ This is rightly so, since a government action that was intended to disadvantage individuals based on their religious beliefs is likely to damage their religious liberty.

2. *Burdensome effect principle*

The burdensome effect principle mandates exemptions from government regulations in some circumstances for those possessing religious beliefs that conflict with the actions required by the regulations. Choper states the principle as follows:

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 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 govern-

14. *See id.* at 45.

15. *See id.* at 46.

16. *See id.* at 48.

17. *See id.* at 41. The government can attempt to "demonstrate[] that the regulation is necessary to a compelling interest," *id.*, but this showing is extremely difficult.

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ment 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.¹⁸

The circumstances requiring an exemption to a generally applicable regulation are narrow. However, this seems appropriate because regulations that intentionally disadvantage particular individuals are covered by the broader deliberate disadvantage principle.¹⁹ Broad regulatory exemptions would motivate individuals to avoid regulations by changing their proclaimed beliefs. Even disbelievers would proclaim religious beliefs because of this burden on their religious liberty. For the most part, the burdensome effect principle exemption requirements are sound.

The requirements that there be cognizable injury to the individual, that the individual's beliefs are sincerely held, and that violation of those beliefs would entail extratemporal consequences are vital limitations on this principle. Cognizable injury does not include an assertion that a particular individual is offended by the governmental regulations.²⁰ Although this should already be a requirement for a party to have constitutional standing,²¹ its inclusion in the principle should serve as a reminder of the importance of such an injury.

The requirement that the individual's beliefs are sincerely held should deter individuals from asserting religious beliefs for the sole purpose of evading governmental regulations. If the beliefs have been trumped up for purposes of avoidance, the lack of sincerity should be readily apparent to the finder of fact in many cases.²² The requirement that violation of those beliefs

18. *Id.* at 54.

19. *See id.* at 41.

20. *See id.* at 86.

21. *See Campbell v. Louisiana*, 523 U.S. 392, 405 (1998) (Thomas, J., concurring in part and dissenting in part) (stating that a "perception of unfairness" does not satisfy the "injury in fact" requirement for constitutional standing).

22. However, as Choper points out, this requirement is far from perfect, and some cases will not be so clear. It is often difficult to separate what is sincerely believed by the individual from what seems believable to the finder of fact. *See CHOPER, supra* note 7, at 91. Choper suggests that special rules distributing the burden of proof on this issue may alleviate this problem to some extent. *See id.* at 91-92.

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would entail extratemporal consequences seems, at first glance, to create an arbitrary distinction between different religious beliefs and even different religions. Choper includes this limitation to distinguish between the differing amounts of anguish experienced by different individuals as a result of violating their religious beliefs.²³ Choper claims that an individual will undergo more suffering as a result of violating a belief that has extratemporal consequences than one that does not.²⁴ However, within a particular religious faith, the distinction between those choices that have extratemporal consequences and those that do not is often unclear even for those familiar with the religion. Moreover, this distinction may create an incentive for believers to create extratemporal consequences for their beliefs even though they would not otherwise do so.

An example within the Judeo-Christian community is the commandment "honor thy father and thy mother: that thy days may be long upon the land which the Lord thy God giveth thee."²⁵ Literally interpreted, the violation of this commandment brings only a temporal consequence—a shortened life span. However, some Christians and Jews believe that every sin in this life, if not overcome by some type of cleansing process, will produce extratemporal consequences. Others do not share these beliefs. To say the least, a judge who is not familiar with this religion will have difficulty sorting out these differences. Moreover, if a governmental regulation would require a particular Christian or Jew to dishonor her parents, then the burdensome effect principle would motivate that individual to change her religious beliefs by including extratemporal consequences for violation of the commandment. However, the extratemporal consequences definition probably does not create any more incentive to change beliefs than would any other definition, nor would it confuse a judge more than alternatives such as "transcendent reality" or "ultimate concerns."²⁶

Choper also requires the government to impose an alternative burden upon the individual if one can be found that will not violate the individual's religious beliefs.²⁷ For example, this requirement would demand that those who object to military

23. *See id.* at 75.

24. *See id.*

25. *Exodus* 20:12.

26. *See* CHOPER, *supra* note 7, at 69-74, 80-85.

27. *See id.* at 92-93.

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service on religious grounds serve in other capacities.²⁸ This requirement alleviates much of the adverse incentive created by the extratemporal consequences requirement and the burdensome effect principle in general. An individual will not have a great incentive to change her beliefs solely to fit within the burdensome effect principle if the resulting exemption will only bring her another equally burdensome requirement.

B. Principles for Applying the Establishment Clause

1. Intentional advantage principle

The intentional advantage principle prohibits government actions or programs that intentionally give an advantage to individuals or groups because of their religious beliefs. The principle states,

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.²⁹

The intentional advantage principle, on its face, seems consistent with the goal of securing religious liberty because it prohibits actions or programs that favor religious interests. However, it only does so if there is a significant threat to religious liberty, including the situation of discriminatory actions or programs (those that treat similarly situated religions differently).³⁰

Choper's application of this principle, however, seems inconsistent with its text at times. For example, Choper concludes that if a government declared "Christianity is our religion," it would not violate the intentional advantage principle.³¹ Yet, any law containing such an official statement would certainly be part of a government program that intentionally fa-

28. See *id.* at 92 (noting that Congress has already created such a requirement for military objectors).

29. *Id.* at 97.

30. See *id.*

31. See *id.* at 157. However, Choper asserts that if the government expended tax funds in support of this statement or required some sort of action by its citizens, then it would violate the principle.

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vors religion, thus meeting the first prong of the intentional advantage principle. Moreover, the official statement treats Christianity differently than other similarly situated religions, making it discriminatory.³² It should thus be held to violate the intentional advantage principle.

Nevertheless, under the intentional advantage principle, Choper would invalidate most forms of school release time for students to participate in forms of religious education.³³ It seems obvious that such programs do intentionally favor religious interests. However, such programs typically are not discriminatory—students are allowed to attend classes from any religion that is willing to sponsor such classes. Choper argues that release time programs are a significant threat to religious liberty because they encourage students to attend religious meetings when they would otherwise not do so. Choper admits this encouragement would come, not from the governmental action, but from the peer pressure by other students.³⁴ Under Choper's reasoning, the government actions would be held invalid because of the independent actions of the students. The religious influence can be causally traced back to the government, but that influence depends on an intermediate independent actor. Because the threat to religious liberty is not a result of the government action, it should be held not to violate the intentional advantage principle.

2. *Independent impact principle*

The independent impact principle prohibits government actions that unintentionally benefit religions if those actions provide no secular benefits and endanger religious liberty. The principle states, "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."³⁵

The most interesting situation analyzed by Choper under this principle is government aid to parochial schools. Choper

32. See *id.* at 112 (stating that the discrimination requirement is met if religions that are "similarly situated religiously" are treated differently by the government).

33. See *id.* at 140-45.

34. See *id.*

35. *Id.* at 160.

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states that such aid poses a meaningful danger to religious liberty only if the funds are used for religious purposes.³⁶ However, determining whether the funds are used for religious purposes becomes sticky. Choper states that there is no meaningful danger to religious liberty if the state receives full secular value for its money, regardless of whether religious interests are also furthered.³⁷ Choper then suggests that courts determine which portions of a school's funds go to secular aspects and which go to religious aspects.³⁸ As a measuring stick for this determination, Choper suggests comparing the time spent on secular education within the parochial school to the time spent on education in public schools.³⁹

As Choper admits, this analysis creates problems in practical application. It is quite difficult to determine when time is being spent on religious education and when it is spent on secular education.⁴⁰ However, Choper uses the public schools as a benchmark for this determination: "When a public school action is found to be religious, the court must enjoin it; when a parochial school practice is held to be religious, the court must forbid its public subsidy."⁴¹ Although this determination is sticky, it is no more so than determining whether an action is forbidden in public schools.⁴²

III. RELIGIOUS LIBERTY DEFINED

A. *Group Religious Liberty*

Choper states that "the paramount concern of both Religion Clauses is to protect religious liberty—the freedom to pursue (or not to choose) a religious faith."⁴³ Throughout most of the

36. *See id.* at 176-77.

37. *See id.* at 177.

38. *See id.* at 181.

39. *See id.* at 182-83.

40. *See id.* at 182 ("This would involve courts in the unwelcome task of 'separating the secular from the religious in education [which] is one of magnitude, intricacy and delicacy.' " (quoting *McCullum v. Board of Educ.*, 333 U.S. 203, 237 (1948) (Jackson, J., concurring))).

41. *Id.* at 183.

42. *See id.* at 182-83. It is likely that the issue would arise more often in parochial schools because they have a greater incentive to incorporate religion into their curriculum. Nevertheless, courts are adequately equipped to deal with the issue using precedents from public school decisions.

43. *Id.* at 11.

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book, Choper limits the scope of protection to individual religious liberty.⁴⁴ Although, as Choper asserts, it is almost universally agreed that the purpose of the Religion Clauses is to secure religious liberty,⁴⁵ it is not agreed that the scope of the Religion Clauses should be limited to individual liberty. Several commentators in recent years have argued that the religious liberty of groups, particularly religious groups, should also be protected by the Religion Clauses, and moreover, that where individual and group liberties clash, the liberty of the group should be favored.⁴⁶

If Choper's overall definition of Religious Liberty were broadened in this way, many of his results would remain unchanged.⁴⁷ However, a few undesirable results reached by the principles could be changed. For example, Choper's most shocking result is that a government could officially pronounce "Christianity is our religion," and if nothing more were done the pronouncement would not violate the Religion Clauses.⁴⁸ Presumably, this is true because the pronouncement alone would not be a significant threat to any individual's religious liberty.⁴⁹ However, such a pronouncement would likely create a significant threat to the religious liberty of a competing religious group.⁵⁰ It is quite possible that such a pronouncement would deplete the membership of competing religious groups and motivate them to conform their beliefs with Christian groups.

Frederick Gedicks and others assert that recognition of group religious liberty would strengthen individual religious

44. See generally *id.*

45. See *id.* at 11-12.

46. See, e.g., Frederick Mark Gedicks, *Toward a Constitutional Jurisprudence of Religious Group Rights*, 1989 WIS. L. REV. 99.

47. For example, Choper states that employment discrimination by religious groups based on tenets of faith should be allowed under the consent principle. See CHOPER, *supra* note 7, at 133-40. Broadening the definition of religious liberty to include groups would only serve to strengthen this position.

48. See *id.* at 157-58.

49. Although I believe such a statement is discriminatory and should thus violate the intentional advantage principle, see *supra* notes 31-32 and accompanying text, for purposes of this discussion I will assume it is not discriminatory so that it will only violate the principle if it poses a significant threat to religious liberty.

50. It is also possible, if the pronouncement had an influential effect on individuals in deciding which, if any, religion to join, that it would create a threat to their religious liberty. Choper does not discuss this argument in his book, presumably because the threat is too tenuous.

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liberty, which is threatened by the increasingly-powerful modern government.⁵¹ Gedicks asserts that the founders could not have envisioned the power of the modern government and thus that they could not have envisioned the safeguards necessary to guard our individual liberty against the modern government.⁵² Furthermore, Gedicks claims that religious groups protect individual liberty by challenging the power of the state,⁵³ and that they need the freedom to define themselves as a group and to represent their members.⁵⁴ In fact, the importance of these groups is so great that the liberty of the group should actually trump the liberty of the individual if the two conflict.⁵⁵

An alternative to Gedicks's utilitarian argument lies in tacit consent theory, which is often used as a justification for the rule of law. This theory, first explicated in Plato's *Crito*, posits that if the individual voluntarily lives within a society ruled by laws and benefits from those laws, that individual has also consented to be ruled by those laws.⁵⁶ In so doing, the individuals consent to give up that portion of their rights and powers necessary for the proper functioning of the laws. Thus, the laws gain their power, authority, and rights from the tacit consent of the individuals living under them. In the same way, a group can be said to gain power, authority, and rights from the tacit consent of its members. Surely within a religious group this tacit consent would include that portion of the individual's right to religious liberty that is necessary for the proper functioning of the group. Although this theory confers rights upon groups, it does not fully answer the question of whether the retained rights of the individual or the conferred rights of the group should prevail when they conflict.

In answer to this conflict, Choper asserts that the individ-

51. See Gedicks, *supra* note 46, at 169.

52. See *id.*

53. See *id.* at 99.

54. See *id. passim.*

55. See *id.* at 159-68 (recommending a categorical right of groups to define themselves by imposing definitional choices on their members).

56. See Plato, *Crito*, in *FOUR TEXTS ON SOCRATES* 99, 110-11 (Thomas G. West & Grace Starry West trans., 1984). In *Crito*, Socrates is waiting in prison to be executed when Crito comes to break him out and have him flee from the land. See *id.* at 101. However, Socrates refuses because he has made a binding agreement with the laws to obey them. This agreement was made because Socrates voluntarily remained in the land ruled by those laws—in essence he tacitly consented to be bound by them. See *id.* at 110-11.

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ual has surrendered a portion of her religious liberty rights to the religious group, and not having retained that portion, cannot assert it against that group.⁵⁷ This result is consistent with tacit consent theory because, if an individual tacitly consents to confer a right upon the group, it is inconsistent to later allow that individual, after reaping the benefits of group membership, to reclaim those rights and assert them against the group. For example, in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, the Church of Jesus Christ of Latter-Day Saints fired a building engineer because he had not maintained church membership in good standing.⁵⁸ This action by the church would have violated Title VII of the Civil Rights Act, but the church fell within a statutory exemption for religious organizations.⁵⁹ The issue in that case was whether the statutory exemption violated the Establishment Clause.⁶⁰ Under tacit consent theory, even if the exemption otherwise violated the Establishment Clause, Amos would not have been able to assert his religious liberty rights against the church because he had previously consented to the rules of the church by becoming and remaining a member.

This tacit consent theory, when combined with Choper's consent theory, yields similar results to Gedicks's utilitarian argument in situations, such as in *Amos*, where the religious liberty of a group and one of its members comes into conflict. But what of the situation where a government pronounces "Christianity is our religion"? It seems that a group could assert a concrete harm to its religious liberty rights, which have been conferred upon it by the tacit consent of the group's members, as discussed above. Moreover, it does not even seem likely that the religious liberty of the group would conflict with the liberty of its members in such a situation. Thus, a competing religion could have the government enjoined from making such a proclamation.

57. See CHOPER, *supra* note 7, at 137.

58. 483 U.S. 327, 330 (1987).

59. 42 U.S.C. § 2000e-1(a) (1994).

60. See *Amos*, 483 U.S. 327 *passim*. The Supreme Court held the exemption did not violate the Establishment Clause under the *Lemon* test. See *id.* at 339-40.

907] BOOK REVIEW: *SECURING RELIGIOUS LIBERTY* 919*B. Defining "Religion"*

Another problem with Choper's definition of religious liberty is his inconsistent definition of "religion." Under the burdensome effect principle Choper defines religion as beliefs the violation of which have extratemporal consequences.⁶¹ Choper asserts that this narrow definition of religion is necessary in this context because of the danger of people adopting religious beliefs for the sole purpose of fitting within an exemption to a government regulation.⁶² However, under the intentional advantage principle, religion is defined with reference to the speech and association provisions of the First Amendment to include, not only beliefs with extratemporal consequences, but all "narrow partison ideologies."⁶³ Choper argues that a less inclusive definition would allow government to favor religious ideologies over nonreligious ideologies.⁶⁴ Although these differing definitions of religion may serve to produce results considered by Choper to be desirable, we must ask ourselves: What is the religious liberty that Choper is so adamantly defending? Is it only the freedom to choose or refrain from choosing a set of beliefs having extratemporal consequences, or is it the freedom to choose or refrain from choosing any set of "narrow partison ideologies?"

Choper claims to produce an analytically consistent thesis, but this inconsistency in defining religion divides the very foundation of Choper's thesis, which is aimed at protecting religious liberty. A consistent thesis should choose a definition for religious liberty and should protect it using both Religion Clauses, and each of the principles set forth.⁶⁵

IV. CONCLUSION

I agree with the text of Choper's principles; I also agree that if courts applied these principles, jurisprudence under the Religion Clauses would vastly improve. However, I disagree with

61. See CHOPER, *supra* note 7, at 86.

62. See *id.* at 64 (stating that the role of the burdensome effect principle should be precisely restricted and that the chosen definition in this context should only be used under the burdensome effect principle).

63. *Id.* at 108, 116.

64. See *id.*

65. Defining religious liberty is a complex task, requiring extensive analysis. Such analysis is beyond the scope of this Review. Accordingly, this Review asserts only that the definition should be consistent.

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some of Choper's application of the principles, mainly because of internal inconsistencies. Foremost among those inconsistencies is the definition of religion. To refuse to consistently define religion is to strip religious liberty of meaning and to deny force to those principles that would protect it.

For the most part, the book's principles are analytically consistent and are an effective protection for religious liberty. However, any consistent set of principles used to adjudicate the Religion Clauses will sometimes produce disagreeable results. If this is the price of certainty in constitutional jurisprudence, then so be it. A slightly modified interpretation of Choper's principles will better protect religion and government from each other, thereby protecting religious liberty so that "the greatest laws" will not be "undermined by bad human beings,"⁶⁶ as Plato, de Tocqueville, and many of the Founders feared.

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66. PLATO, *supra* note 1, at 288.