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Abstract

This review analyzes Jesse Choper's theory of religious liberty, built on the principles of equality, neutrality, accommodationism, and separationism. Choper argues that government should permit innocuous displays of religion. Choper suggests that traditional bans on prayer and Bible reading in schools. Likewise, legislative chaplains and religious tax exemptions would be outlawed. However, Choper advocated that parochial schools and religious charities should be permitted. Choper recognizes that his ideas would not be easily received. However, he is firm in his belief that such an interpretation of the Religion Clause would best serve American society. His book should serve as a guide and enlighten courts regarding religious liberty.

Keywords: First Amendment; establishment; free exercise; separation of church and state; accommodation of religion; liberty; equality

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

By Jesse H. Choper

The University of Chicago Press, 198 pp., \$24.95

Deconstruction of the Supreme Court's First Amendment cases has become a favorite sport in recent years. Not only have the Court's recent decisions on the rights of Jews, Indians, Muslims, and other minorities evoked withering attacks in the popular and professional media. The Court's entire record on religious liberty has been vilified for its lack of consistent and coherent principles and its uncritical use of mechanical tests and empty metaphors.

Reconstruction of a more integrated and equitable framework for applying the First Amendment is a more daunting task. Jesse Choper of Berkeley law school is one of a handful of jurists equal to the task. This book, which draws together more than three decades of reflections, sets out "judicially-enforceable" principles designed to protect religious liberty--"the freedom to pursue (or not to choose) a religious faith."

Much of the book is an elegant argument for four interlocking principles of religious liberty. A "deliberate disadvantage principle" outlaws government action that intentionally prejudices individuals because of their (lack of) religious beliefs. An

"intentional advantage principle" outlaws government programs that unduly favor certain religious interests--in a manner that discriminates against other religions or threatens the regime of religious liberty. A "burdensome effect principle" requires exemptions or other accommodations from neutral or secular government programs that impair a person's sincerely-held, core religious practices. A reciprocal "independent impact principle" outlaws neutral or secular government programs that, in application, unduly benefit religious interests alone. These four principles, taken together, are designed to integrate the First Amendment's disparate concerns for equality, neutrality, accommodationism, and separationism.

Choper does not create these principles of religious liberty from whole cloth. He culls them from selected First Amendment cases and commentaries of the past two decades--with occasional forays into history and other constitutional doctrines. Though his analysis is terse, even cryptic at points, he does adumbrate his ideal regime of religious liberty with some concreteness. Like the Court, Choper would permit traditional Sunday closing laws, Christmas displays, and other innocuous accommodations of religion as well as traditional prohibitions against school prayer, Bible reading, and other overt religious acts sanctioned by government. Unlike the Court, however, Choper would outlaw legislative chaplains and religiously-based tax exemptions and would permit government's passive use of religious symbols and active aid to parochial schools and religious charities.

This book will stand as a critical restatement of the First Amendment religion clauses and as an important prototype along the way to developing "a more unified framework" for applying them. The book will not be received easily, however. Both the religiously devout and the religiously hostile will be unsatisfied with the application of Choper's principles. Historians will look askance at his rather casual treatment of First Amendment history. Group rights theorists will find too great a preoccupation with individual religious liberty, and too little attention to the thorny contests of corporate and individual free exercise rights. Exponents of both a "common law" method and a "states' rights" method of First Amendment application will resist so refined and universal a statement of religious liberty principles. Such criticisms, however, cast only small shadows on a shining little volume that will enlighten courts and commentators for years to come.

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