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Is There a Principle of Religious Liberty?

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SECURING RELIGIOUS LIBERTY: PRINCIPLES FOR JUDICIAL INTERPRETATION OF THE RELIGION CLAUSES. By *Jesse H. Choper.* Chicago: University of Chicago Press. 1995. Pp. xiii, 198. $24.95.

FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM. By *Steven D. Smith.* New York: Oxford University Press. 1995. Pp. ix, 174. $35.

There is something undeniably alluring about this corner of the First Amendment. One reason for its attraction is that the primary legal materials are, or seem to be, compact and self-contained. There is the language of the First Amendment,[1] 178 cases,[2] and an odd statute or two.[3] Cognate areas of constitutional law — like the Speech and Press Clauses — have less influence than they maybe should, so you safely can feel like you've got a grip on the whole field. A second thing is that the law as it now stands has some thorny problems built into it. Solving these would be like proving Fermat's last theorem. You could make a name for yourself by doing it. A third is that the principle of religious liberty matters a lot to people who are religiously serious. Many (though certainly not all) of the leading scholars in the field care about it because religion plays an important part in their own lives.

Jesse Choper and Steven Smith have written two wonderful books about the quest for a principle of religious liberty — two books that ought to be sold as a set. Choper thinks he has found such a principle (more precisely, four of them); Smith thinks this is demonstrably impossible. Of course they're both wrong, but I wish I could make as convincing a case for this proposition as each of them does for his.

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1. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." U.S. CONST. amend I.

2. I take the number from a list privately circulated by Carl Esbeck, entitled U.S. Supreme Court Decisions Relating to Religious Liberty (April 1995). This includes memorandum decisions, affirmances by an equally divided court, and some statutory cases (Title VII, Wagner Act, etc.).

3. *See, e.g.,* Religious Freedom Restoration Act, 42 U.S.C. § 2000bb (1993).

I

Choper is an old-fashioned legal scholar who reads cases carefully and worries about neutral principles, workable rules, strong rights, and legal process. His ilk have made great treatise writers, ALI reporters, and casebook writers (he himself has written a couple of best-sellers). Until the 1970s it generally was agreed that this is what it meant to be a good legal academic. There is disagreement about this now, and less appreciation than there ought to be for the qualities that Choper displays in his writing. From the beginning of his career he has worried about the place of religion in constitutional law.[4] He has given the problem a lot of thought.

His book is an attempt to improve First Amendment law by restating it in a few clear rules. The rules should be coherent with one another and clear enough to solve particular cases. Choper offers four — two for each of the religion clauses. Here's a way to keep them in mind:

Free Exercise	**1.** Intentional disadvantage	**2.** Burdensome effects
Establishment	**3.** Intentional advantage	**4.** Beneficial effects

The main question is whether the government's action threatens religious liberty. If it does, it (speaking very generally) will be be unconstitutional. Actions that burden religion pose a greater danger of this than actions that benefit it, so we can treat free exercise and establishment differently. Intended effects are more worrisome than unintended ones (for reasons I'll get to), so we can further subdivide the free exercise and establishment rules along those lines. That's the big picture. Laws get progressively easier to defend as you go from Rule 1 to Rule 4. Intentional harm is almost automatically invalid (Rule 1). Burdensome effects warrant relief if they're of a certain kind, and if an exemption is not too costly, and if the claimant does alternative service, and so on. (Rule 2). Programs that intentionally favor religion are OK unless they threaten religious liberty (Rule 3). Accidental benefits to religion are OK even if they *do* threaten religious liberty, unless they have no secular effects (Rule 4).

This scheme would require some changes in the law. The Free Exercise Clause would provide more protection than it does: Rule 2 requires some exemptions from neutral laws that burden religious

4. His "tenure piece" at the University of Minnesota was *Religion in the Public Schools: A Proposed Constitutional Standard*, 47 MINN. L. REV. 329 (1963).

claimants.[5] The Establishment Clause on the whole would be more permissive than it is: Rule 3 allows some official acknowledgment of religion; Rule 4 permits more aid to parochial schools.[6]

Opinions vary about whether these would be salutary changes. I think they would. Politics aside, Choper's rules have this clear advantage over the current law — they are more consistent. Fifteen years ago the situation was worse than it is now. The courts applied a free exercise rule of accommodation and an establishment rule of separation, so that the same practice simultaneously might be required and forbidden.[7] Recently the law under both clauses has been converging on a principle of neutrality, but it's not clear to me what we mean by neutrality, and there are still lots of cases that don't conform to any such principle. Choper, by contrast, never loses sight of the goal of religious liberty.

There are some internal inconsistencies. One that puzzles me is that Choper defines the term "religion" differently for different rules (Choper, pp. 64, 103-05). This is not an original sin. Laurence Tribe did it some time ago because it had a neutralizing effect on *other* inconsistencies in the old regime, which he favored. A broad free exercise definition excused many people from obedience to laws they found offensive; a narrow establishment definition reduced the attendant friction between the two clauses (which stood for the conflicting principles of accommodation and separation).[8] But this doesn't explain Choper's behavior. He gives religion a *narrow* meaning for exemption purposes.[9] And his theory does not rest on inconsistent principles — he does not believe in separation. I think Choper is driven to this inconsistency by a deeper problem in his theory, to which I will turn next. For the moment I will just say that it's odd to find this sort of wrinkle in a book that makes such a virtue of consistency. The First Amendment uses the word

5. *See* Employment Div. v. Smith, 494 U.S. 872 (1990) (eliminating exemptions). Choper simply would not reinstate the prior regime. He believes that Sherbert v. Verner, 374 U.S. 398 (1963), is unconstitutional because it provides tax support for religious claimants. *See* p. 121.

6. I'm glossing over many subtleties. You must understand that this is not a set of conservative principles masquerading as a theory. Quite the contrary. Choper rejects some forms of aid to religion that we long have been accustomed to. He would abolish tax exemptions for churches, and chaplains in the army and the legislature. *See* pp. 37, 123. Further, he is uncomfortable with some of the sectarian support he would allow, but feels driven to it by his theory. *See* pp. 157-58, 189-90.

7. *Compare* Sherbert v. Verner, 374 U.S. 398 (1963) *with* Thornton v. Caldor, Inc., 472 U.S. 703 (1985).

8. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-6 (1978). Tribe abandoned the idea in the second edition of his treatise. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-6 (2d ed. 1988).

9. Choper argues that a belief is religious for purposes of Rule 2 if and only if it has (in the believer's eyes) extratemporal consequences. *See* pp. 74-80.

"religion" only once.[10] We should try pretty hard to give it one meaning.

Let me step back from these details, now, and look at the deeper problem. The thing that bothers me most about Choper's book is how strangely disembodied his principle of religious liberty is. You might suppose that it's self-explanatory: the point of religious liberty is to let people practice their religion, just as freedom of speech lets them speak. We might see then some discussion about why religion is important, as in free speech books we inevitably see a theory about why speech is important. It's a pretty close analogy. But Choper instead uses the pattern of race discrimination. This is why intent plays such an important role (as it does in equal protection theory), and why we have to think separately about laws that give believers an advantage (the issue of affirmative action, transposed).

Are race and religion alike? Here is the argument Choper makes for Rule 1:

> Perhaps the strongest justification for strict judicial scrutiny of any official attempt to accord persons less than equal respect and dignity because of their religious beliefs or race rests in the fact that both throughout history and during more recent times, efforts to do so have been similarly rooted in "hate, prejudice, vengeance, [and] hostility." . . . [B]oth traits have been the strikingly similar objects of public (and private) stereotyping, stigma, subordination, and persecution. . . . [This behavior rests] on assumptions of the "differential worth" of religious and racial groups, including judgments of their odiousness or inferiority. [pp. 42-43; footnotes omitted]

There is certainly something in this. The two types of prejudice often run together. Think about African slaves, Asian Buddhists, Eastern European Jews, Mediterranean Catholics, and Caribbean practitioners of Santeria. It may be difficult to say which of the two — race or religion — has been the greater cause of their unpopularity. I see nothing wrong with taking account of this in making legal rules.

But if you look at religion from the inside (if you take the believer's perspective), this similarity is a coincidence. From the inside religion is not a sociological marker but a way of life. The worst thing about legal constraints is not that they imply a lack of equal respect and dignity, though those are nice to have. It is that they make it hard to live the way one ought to. Religion, unlike race, is something that people *do,* and for that reason it has an inherent, not just a comparative, value. If religion were really like race, then equal treatment always would be constitutional, even if it were bad treatment.

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10. *See* U.S. CONST. amend I.

And that is the rule the Supreme Court laid down in *Employment Division v. Smith.*[11] But Choper would overturn *Smith* and forbid burdensome effects (Rule 2). By way of explanation he argues that there *is* this difference between race and religion: in effects cases racial minorities are burdened accidentally and haphazardly. (Blacks are hurt disproportionately by welfare cuts because they are represented disproportionately among the poor. But the cuts are not tied to skin color.) By contrast:

> Religion-neutral laws that have the effect of burdening a particular religious practice do injure persons *because* of their religion: even though these laws have a fully legitimate public purpose and achieve beneficial results generally, *all* persons who suffer the special operative consequences adverse to their belief system are necessarily members of that religion, and *all* members of the religion suffer the special operative adverse consequences. [p. 60]

Practitioners of the Native American religion are especially hurt by a ban on peyote because that is a rite they all observe. The ban is tied to a practice that they consider religious.

This is an odd argument. The difference that Choper points out is real. As I said before, religion, unlike race, is something that people *do*. So a law against doing x is going to be a very accurate way of sorting out people whose religion commends x. Sikhs will grow their hair, the Amish will skip school, Quakers won't swear, Jehovah's Witnesses won't salute. But these groups don't object to laws against x because they are harmed in proportionately higher numbers than other sociological groups. Nor do they claim that the government is out to get them, or that it has broken some agreement by forbidding[12] x. Their real complaint is that the law prevents them from living as they should. It has to do with the value of doing x. Choper seems to miss this point.

Or maybe he feels it but doesn't see it — this is also the place where Choper introduces his second definition of religion. Under Rule 1 religion is a broad and amorphous category: "the deliberate disadvantage principle could just as readily be grounded in the First Amendment freedoms of speech and association, which . . . protect a broad range of ideological convictions including religion; as a consequence, the principle requires no judicial definition of 'religion' " (p. 44; footnote omitted). Under Rule 2 religion is a narrower and sharper idea. An action x is religious if it has extratemporal consequences — if its results may "extend in some meaningful way beyond [the actor's lifetime,] either by affecting [her] eternal existence or by producing a permanent and everlasting significance and place in reality for all persons that follow" (p. 77; footnote

11. 494 U.S. 872 (1990).

12. Or commanding. I'll just say forbidding for the sake of simplicity.

omitted). You can see why a person would insist on doing something like that. If the government forbids x, it's not just a matter of equal respect; x is intrinsically important.

Why doesn't Choper make more of this insight? Why not carry it forward into Rule 1 and back into Rule 3?[13] I think he would improve the argument if he did this and dropped the race analogy, which strikes me as a rather artificial way of looking at religion. The reason he hesitates is probably this: the theory of extratemporal consequences, though it is a useful shibboleth, leaves out some pretty clearly religious actors and actions. Strict Calvinists believe that our actions don't affect our chances of salvation. They get no exemptions under Choper's Rule 2 (p. 75). If we use one definition throughout, Calvinists also would be beyond the reach of Rule 3. To put it plainly, the government then could establish strict Calvinism as the official religion of the United States, support it with tax dollars, and say Calvinist prayers in the public schools (pp. 103-04). To avoid this, Choper introduces his expanded definition of religion. I think he would do better to improve the narrower one, and use it throughout.

One last point — this one about what the First Amendment forbids, rather than what it protects. At the beginning of the book Choper identifies two principal threats to religious liberty. The first (no surprise) is discrimination. The second is " 'forcing [people] to pay taxes in support of a religious establishment or religious activities' " (p. 16; footnote omitted). As you might suppose, this is a concern Choper draws straight from Jefferson's Bill for Religious Liberty and Madison's *Memorial and Remonstrance against Religious Assessments.* It is one that he takes very seriously. It leads him to oppose military chaplains, tax exemptions for churches, unemployment compensation for sabbatarians, and a number of other widely accepted practices (pp. 37, 121, 123).

I have no quarrel with the idea that the First Amendment forbids religious assessments. But I think that Choper oversimplifies that idea for the sake of fitting it into his theory, and that this leads him to make mistakes in peripheral cases. He assumes that tax support is always a violation of religious liberty. I am not so sure. Some people object to religious taxes because they will influence the religious practices of recipients. Choper is concerned with the religious liberty of taxpayers rather than recipients: "public subsidy of religion . . . coerces taxpayers either to contribute indirectly to their religions or, even worse, to support sectarian doctrines and

13. With Rule 3 Choper reverts to a broad, amorphous definition. In fact, he says, we really don't need a specific definition of "religion," because the rule — such as it is — against intentional advantages applies to all "narrow partisan ideologies." Here the freedoms of religion, speech, and association all do the same work. Pp. 107, 103-08.

causes that are antithetical to their own convictions" (p. 17). This makes sense when we are talking about assessments — taxes collected and paid for a specific purpose, like the Medicare part of the social security tax. But the pain becomes abstract when we come to the portion of my income taxes that goes to support military chaplains. We do not say that the government violates my freedom when it spends my tax dollars to support abortion, or capital punishment, or nuclear weapons. I think the principle of coercion ought to work alike in both sets of cases.[14]

I want to stress that I am talking about coercion. The Establishment Clause might be understood to forbid tax support for religion even when it is not coercive. We might say that its purpose is to forbid institutional arrangements that are unhealthy over the long run, as we know religious assessments to be. But this is a more flexible principle than the right to religious liberty. Consider the case put by Donald Giannella: imagine a society so thoroughly socialized that the government owned all the land, taxed the citizens at 100%, and gave people income and property according to their needs. In such a society there would be no churches or religious support unless it came from the government, and the First Amendment sensibly might be said to require tax support.[15] The case is different from the one Madison and Jefferson complained about because the political and market institutions are so different from theirs. Our society is not like Giannella's; but neither is it any longer like Madison's and Jefferson's. This has some bearing on problems like the support of military chaplains, payment of unemployment compensation, and tax exemptions for churches. I think Choper oversimplifies them.

II

Steven Smith thinks that Choper (along with a whole lot of other people) is barking up the wrong tree. He asserts that Choper's project is:

(1) To find principles of religious liberty that will be neutral in the sense that they are acceptable to all citizens.

(a) In the search for these principles, history can furnish us with a "major premise" (Smith, p. 6).

(b) Scholars like Choper can supply the rest (p. 1).

14. As my cousin once observed, we otherwise end up with this incongruous rule: It is unconstitutional for the government to pay for putting up a creche at Christmas — unless it's in a beaker of urine, in which case the government must pay for it. (He was referring to an exhibit by Andres Serrano that was supported by the National Endowment for the Arts. I discuss the problem in *Black and White Images*, 56 LAW & CONTEMP. PROBS., Autumn 1993, at 189).

15. *See* Donald A. Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development Part II. The Nonestablishment Principle*, 81 HARV. L. REV. 513, 522-23 (1968).

(2) To have courts enforce these principles on judicial review (pp. xii, 1).
(3) Through a process of "reasoned elaboration" that will give us clear and consistent rules (pp. 1, 7).

Smith dissents on every point. Specifically, he argues that:

(1) There are no neutral principles of religious liberty (Chapter Six).
  (a) History actually repudiates the idea (Chapters Two and Three).
  (b) Scholars can't save us either (Chapters Seven and Eight).
(2) Courts and judicial review may have no place here (pp. 125-27).
(3) It might be best to develop rules in a prudential way, rather than through reasoned elaboration (pp. 57-61).

Scholars and judges (Smith says) have taken two different approaches to find the elusive principle of religious freedom — historical and theoretical. Consider history first: what it really shows is that the framers of the Constitution consciously decided *not* to adopt any principle of religious freedom. This is an observation several people have made about the Establishment Clause. When it says that "Congress shall make no law respecting an establishment of religion," it means that Congress should not mess with the religious establishments existing in some states (Massachusetts) and rejected in others (Virginia). In a word, its purpose is federalist rather than libertarian.[16]

You can make a pretty good case for this proposition. It hasn't made much difference to constitutional theorists because even if it cancels out the Establishment Clause, there still may be a principle of religious liberty embedded in the Free Exercise Clause. Smith says there isn't — the Free Exercise Clause too has a federalist purpose. This sounds funny, because we are used to thinking of the two clauses as distinct, maybe even conflicting. (Free exercise protects religion; the Establishment Clause protects us *against* religion.) The text of the First Amendment also makes free exercise sound like a right — a libertarian kind of principle. It closely parallels the Free Speech Clause. Thus, Congress shall make no law

> prohibiting the free exercise [of religion]; or
> abridging the freedom of speech.

So it seems as though the Free Exercise Clause stands for a principle of religious liberty even if the Establishment Clause does not.

Smith replies that one cannot refute his position simply by showing that the Free Exercise Clause imposes substantive limita-

16. *See* GERARD V. BRADLEY, CHURCH-STATE RELATIONSHIPS IN AMERICA 69-81 (1987); MARK DEWOLFE HOWE, THE GARDEN AND THE WILDERNESS 1-31 (1965); Akhil Reed Amar, *The Bill of Rights as a Constitution,* 100 YALE L.J. 1131, 1158-59 (1991); Daniel O. Conkle, *Toward a General Theory of the Establishment Clause,* 82 NW. U. L. REV. 1113, 1133 (1988); Joseph M. Snee, *Religious Disestablishment and the Fourteenth Amendment,* 1954 WASH. U. L.Q. 371, 389.

tions on the power of Congress. Imagine an amendment that said "Congress shall make no law regulating school curriculums." That too is a substantive limit, but the point might be to leave education to the states, not to enshrine a principle of academic freedom. Smith does not dispute that the libertarian interpretation is textually plausible. But he thinks it unlikely that the framers, having put in the Establishment Clause because they were unable to agree about the proper relation of religion and government, would in the next breath adopt a principle to govern that relation. If Smith is right about all this, then the current path of constitutional theory is a repudiation of original meaning. Since *Cantwell*[17] and *Everson*,[18] the federal courts have made federal law for the states. The point of the First Amendment, though, may have been to rely on state law and limit federal action.

Consider now the effort to construct a principle of religious liberty through theory. Smith argues that this is actually an *impossible* task:

> The problem, simply put, is that theories of religious freedom seek to reconcile or to mediate among competing religious and secular positions within a society, but those competing positions disagree about the very background beliefs on which a theory of religious freedom must rest. [p. 68]

Take Locke's influential argument in *A Letter Concerning Toleration.* Locke maintains that religion is not the business of civil government because the magistrate's power "consists only in outward force: but true and saving religion consists in the inward persuasion of the mind, without which nothing can be acceptable to God."[19] Locke's argument rests on several controversial premises: that there is such a thing as salvation; that it is only achieved by voluntary faith; that individuals are more or less self-sufficient; that civil government has few proper functions and a laissez-faire attitude; etc. If we don't accept these, the argument fails. And we don't. People in our society make a whole range of assumptions about God, human nature, and the business of government.

Suppose that Smith is right on both points — we won't find a principle of religious liberty either in history or in theory. In that case it becomes difficult for the courts to enforce the First Amendment in any meaningful way. Judges decide cases by reasoning from given premises. Here there are none to push off from. What we might expect to see instead is a lot of floundering and inconsistency. And of course that's what we do see. We have a rule that

17. Cantwell v. Connecticut, 310 U.S. 296 (1940).

18. Everson v. Board of Educ., 330 U.S. 1 (1947).

19. JOHN LOCKE, A LETTER CONCERNING TOLERATION 18 (2d ed., Liberal Arts Press 1955) (1689).

the government can give parochial schools books but not maps.[20] It can give parochial school parents tax deductions but not tax credits.[21] It is required to pay unemployment compensation to workers who are fired because they can't work on the sabbath; but it can't ask employers to give people the sabbath off.[22]

The usual observation about this state of affairs is that it's a mess. It's not, really. It's the kind of rulemaking we get from legislatures. Statutes are not drawn by reasoned elaboration from accepted premises. They don't form a coherent whole. Think how it is, Smith says, when you go to the movies. You might see *Babe* one week and *Casino* the next. There is no theory that unites these choices. This is not to say that the choices are irrational or arbitrary; you have a reason for each one — it's just that the reasons don't follow from the same premise (pp. 57-59). That is how legislatures behave. And since there is no principle of religious liberty, it's something we should get more comfortable with in this part of the law.

So one conclusion is that this is a better job for legislatures than for courts. We also, Smith says, may be *safer* leaving religious matters to the legislature. Recent history provides some support for this suggestion. The Supreme Court reduced the protection the Free Exercise Clause gives us in *Employment Division v. Smith.* Congress restored it in the Religious Freedom Restoration Act. More generally:

> The most significant accommodations to religious freedom are found in state and federal tax exemptions, in the military conscription law, and in federal employment statutes — all legislatively adopted. Indeed, courts [seem] more inclined to invalidate legislatively mandated accommodation on establishment grounds than to order such accommodation on free exercise grounds. [p. 126]

There is a lot to like about Smith's book. He does not follow the herd. His argument is honest and unpretentious, and for that reason it invites belief. And there are a lot of things that I think he is right about. I am not sold on the argument that the Establishment Clause has a federalist purpose. But it's a better argument than most people suppose, and Smith makes no bones about it. I like the suggestion that First Amendment law should not follow a theory. I have said so myself, at least so far as the Establishment

20. *Compare* Board of Educ. v. Allen, 392 U.S. 236 (1968) *with* Meek v. Pittenger, 421 U.S. 349 (1975).

21. *Compare* Mueller v. Allen, 463 U.S. 388 (1983) *with* Committee for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973).

22. *See supra* note 7.

Clause is concerned.[23] And as an empirical matter he's right when he says that legislatures give religion more protection than courts do. That result probably depends on your religion, but it works for most people.

My chief objection concerns Smith's argument about the impossibility of theory. His point, again, is that any theory of religious freedom (I used Locke as an example) will rest on controversial premises that some people won't accept. If the premises are in dispute, so will be the conclusion — there can be no universally acceptable principle of religious freedom. This is a powerful argument, and Smith articulates it very well. In fact, the argument is so powerful that it appears capable of undermining not just the religion clauses, but the rest of the First Amendment — indeed all of our constitutional liberties. Consider Milton's argument, often used to defend the freedom of speech: "let [Truth] and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter?"[24] This too rests on controversial premises: about the nature of human reasoning, the marketplace of ideas, the costs of regulation, etc. Or take the case of reproductive freedom. It rests on the controversial premise that life has a lower value at conception than at birth. Any theory of freedom worth fighting for will make assumptions about what human beings are like and how they ought to behave.

Let us suppose, as I do, that all this is true. Smith draws from it the conclusion that there can be no genuine theory of religious liberty because (he says) any such theory would have to be neutral as among competing religious and secular positions, and there can be no such thing (Chapter Six). But why does a genuine theory have to be neutral? It might be more accurate to say that any *liberal* theory of freedom aspires to be neutral. In liberal theory, as Rawls says, the right is prior to the good.[25] This means that we hand out the right to freedom before we decide what it's for. Freedom is a right to make choices. We call reproductive freedom "freedom of choice" because it allows a woman to decide whether to give birth or not. The freedom of speech protects speakers and people who choose not to speak.[26] So too with religious freedom. Liberal theory purports to be neutral among all these choices.

Critics of liberalism have argued that it is not really value-free, as it pretends to be. Liberals have their own ideas about human

23. *See* John H. Garvey, *A Comment on Church and State in Seventeenth and Eighteenth Century America,* 7 J.L. & REL. 275, 277-80 (1989); John H. Garvey, *Another Way of Looking at School Aid,* 1985 SUP. CT. REV. 61.

24. JOHN MILTON, AREOPAGITICA 58 (Richard C. Jebb ed., 1918) (1644).

25. *See* JOHN RAWLS, A THEORY OF JUSTICE 31 (1971).

26. *See* Wooley v. Maynard, 430 U.S. 705 (1977); Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977); Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).

nature, the good life, and our relations with God and one another. These ideas are the premises on which the theory rests. Neutrality is just as unattainable for liberals as it is for the rest of us.

But, to repeat the question I asked a moment ago, why does a genuine theory of freedom have to be neutral? Consider this example. The world in which my children live is different from the world of my childhood. The girls play soccer; the boys swim (on teams). None of them know how to throw "like a boy," as we used to say. I begin to worry that there will come a time when baseball is no longer the national pastime. Schools will not field teams; towns will not vie for minor league franchises; zoning laws will make it difficult to build fields; coaches will forbid their soccer players to play because it dulls their foot skills; etc. Next thing you know exercise gurus, and then the President's Commission on Fitness, will preach against it as a deviant form of sport (the way Soviet art critics used to rail against impressionism). Suppose we decide to head off this unhappy prospect by enacting a constitutional amendment, the Twenty-Eighth, enshrining the freedom to play baseball. (I know this is a little hysterical, but it could happen.) It would be odd to think of this as a neutral right — to say that it took no position on whether it was actually a good thing to play baseball. The very premise of this new amendment is that baseball is a glorious thing — a better thing, in fact, than soccer or swimming or tai chi or any of these new-fangled games.

This is how it is with our other freedoms, too. Mark DeWolfe Howe made the same observation about religious liberty: "Though it would be possible, of course, that men who were deeply skeptical in religious matters should demand a constitutional prohibition against abridgments of religious liberty, surely it is more probable that the demand should come from those who themselves were believers."[27] More generally, we might say that freedoms are rights to do things that we deem it especially good or important to do. They do not necessarily (as the liberal view would have us believe) protect the right *not* to do these things, or the right to do *other* things. Suppose, after the Twenty-Eighth Amendment was ratified, that the local public grade school taught baseball in gym class. We would not allow children to sit the class out and claim that they had a constitutional right *not* to play baseball. It simply doesn't follow that because *x* is a good thing, *not-x* also must be. Indeed we might presume the contrary. Because baseball is such a good thing, it is a cause for regret that any child should grow up without learning how to play.

If we think of freedoms in this way — as rights to do certain acts, rather than as rights to make choices — they will not appeal to

27. MARK DEWOLFE HOWE, THE GARDEN AND THE WILDERNESS 15 (1965).

all people. Those who don't care about baseball will have no use for the Twenty-Eighth Amendment. But that doesn't make them any more controversial than liberal freedoms. Reproductive freedom protects contradictory choices about childbirth (for and against), and it's very unpopular for precisely that reason. What we need to decide about all such rights — religious freedom, reproductive freedom, freedom of speech, freedom of association, freedom to play baseball — is whether they rest on the *right* principle, not whether everyone agrees with it.

Let me recapitulate. Smith argues that theories of religious freedom are doomed to failure: they must be neutral, but they all rest on controversial premises. I wonder why a theory of religious freedom (or any other kind of freedom) must be neutral. I think that nonneutral theories do a better job of explaining why, in real life, people support rights to do certain things and not others. I also think that neutral theories are no less controversial than nonneutral ones. And finally, I don't think it's fatal to our rights that some people dissent. Unanimous consent, like neutrality, is an aspiration of liberal theory, which often employs the device of the social contract. But this unanimity is imaginary, like the contract itself. We don't need neutrality, unanimity, or a contract to have rights. All we need is pretty general and enduring agreement that the government shouldn't regulate certain kinds of behavior. Theories of freedom try to explain why we feel that way.

were to find during that reexamination that the starting premises of the New Deal generation, premises that so decisively altered the boundary between the public and private spheres of American life, were themselves as historically contingent as the traditional premises about governance that they supplanted? Then we might no longer have the inspiring example of the New Deal and its accompanying constitutional revolution to serve as a guide for the resolution of contemporary political and legal issues, but we also might have begun to cabin the New Deal in time. We might then learn something more about ourselves and how we currently want to govern and to be governed.