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Gerard V. Bradley

COMMENTARY ON WEST & GARVEY

GERARD V. BRADLEY*

This exchange was not vouchsafed auspicious timing. Just two days before Professors West and Garvey delivered these good and courageous papers, the Supreme Court issued its opinion in the case of *Frazee v. Illinois Department of Employment Security*.[1] Professing a stripped-down Bible Christianity, an out-of-work William Frazee refused otherwise suitable Sunday work because it sullied the Lord's day. For that he was administratively denied unemployment benefits, and he sought a free exercise judicial reversal of the decision. But unlike similarly situated claimants in *Sherbert*,[2] *Thomas*[3] and *Hobbie*,[4] Frazee belonged to neither sect nor church, and did not claim participation in any established religious doctrines. The Illinois courts rejected his free exercise claim. The Illinois appellate court said, "[t]he injunction against Sunday labor must be found in a tenet . . . of an established religious sect" in order to qualify for Free Exercise protection.[5] To the surprise of no one who follows its church-state jurisprudence, the Supreme Court reversed. The *Sherbert* "conduct exemption" attached to individual, sincerely-held religious belief, the Court said. Requiring affiliation with sect or dogma was "clearly erroneous."[6] The solitary conscience was the touchstone of religious freedom.

Frazee dealt major—though different—blows to West and Garvey. The Court reaffirmed precisely that interpretation of free exercise which it is the burden of West's paper to bury. West treats "church autonomy" as an effect of the *Sherbert* conduct exemption, and in his view the whole enterprise should be scuttled. Garvey gains access to "church autonomy" through the *Watson*[7] property dispute precedents, and he wants to suffuse free exercise analysis with a premium on religious groups

* Professor of Law, University of Illinois, College of Law.

1. 109 S. Ct. 1514 (1989).
2. Sherbert v. Verner, 374 U.S. 398 (1963).
3. Thomas v. Review Bd., 450 U.S. 707 (1981).
4. Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987).
5. 109 S. Ct. at 1516 (citing 111 Ill. Dec., 402, 403, 512 N.E.2d 790, 792 (1987)).
6. *Id.* at 1518.
7. Watson v. Jones, 80 U.S. (13 Wall.) 679 (1871).

and corporate belief. But *Frazee* championed the *summum bonum* of all church state jurisprudence: *individual* "autonomy" to "choose" religious beliefs in a completely "neutral" environment. Unfortunately, both blows caught me on the chin. I heartily agree with Garvey that real spiritual freedom requires more solicitude for group integrity than our constitutional law has provided; indeed, individual autonomy (as that term is now generally understood) has rather little, in my opinion, to do with religious liberty. I also agree with West: the conduct exemption is ill-founded and ought to be abandoned.

I. WEST'S VIEW OF CHURCH AUTONOMY

West puts the question squarely: Do churches, like individuals, sometimes have a right to be excused from laws that burden the exercise of their religion? West concludes: to some extent they do, but not as much as most commentators think and wish they do, and much more than Ellis West thinks they should. West is mainly interested in refuting the middle conclusion, the common view that "church autonomy" exemptions stem from the same understanding of free exercise that yielded individual exemptions for *Sherbert* and its progeny. Effectively gainsaying Garvey's organizing ideas, he regards "churches" the same as he does believing individuals. Neither is entitled to conduct exemptions.

His argument has two main parts. The first is a set of six arguments against religious exemptions as a constitutional right. The most cogent is his fifth, which subverts the conduct exemptions by killing its "gatekeeper." How? By precluding courts from examining the religious character of the activity for which protection is sought.[8] In other words, the regime's profession of doctrinal nonentanglements prevents this "religious" exemption from getting off the ground by making "religion" undefinable. Actually, the opposite has occurred. For better or for worse (and West thinks it for worse), courts have managed to get by without resolving doctrinal issues. In virtually all such cases the state has conceded a sincere religious belief, as it has in most church autonomy cases. In any event, where religion is defined, it is defined functionally, not doctrinally, as "ultimate concern."[9]

In pressing this fifth criticism West comes very close to arguing against *any* law of "church and state." He seems to

8. West, *The Case Against A Right to Religion-Based Exemptions*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 591, 609-11 (1990).

9. *See* United States v. Seeger, 380 U.S. 163, 187 (1964).

hanker for a regime in which religion is juridically invisible, assimilated incognito into the legal corpus by private law, like that of contracts. At least this seems the cardinal virtue of his preferred regime, one bereft of special treatment for religion. In conclusion West *says* he does not argue for such a "strict neutrality," but admits immediately that even *he* is puzzled by this limp concession.[10] Also, elsewhere in the paper he concedes that the religion clauses say something about a distinct phenomenon called "religion," and that that something has to do with protecting "religion" (including churches) against hostile legislation. For example, West agrees that legislation which intentionally harms religion violates the Constitution. How would he recognize such an occasion without somehow deciding what "religion" is? Do laws against polygamy, for example, violate this constitutional prohibition? I suspect West would say no. But in arriving at that conclusion he must have implicitly performed a theologically-guided investigation of the law and legislative intent against some fleshy account of "religion." On top of all this, while West is demonstrably eager to challenge prevailing assumptions both in the corpus and in the commentary, he uncritically accepts the *Everson*[11] "no aid or encouragement" rendition of nonestablishment. With several scholarly refutations of that rendition now afoot, all employing West's preferred historical hermeneutic,[12] his failure to notice them is a major oversight.

To comment briefly on West's other arguments against religious exemptions: His first argument,[13] from neutrality, really cuts both ways. The purpose of conferring religious exemptions is generally to *restore de facto* government neutrality. In *Frazee*, for example, an otherwise neutral, valid law has worked a *de facto* disadvantage upon certain persons. Unlike religiously affiliated sabbatarians, Mr. Frazee cannot have his cake and eat it too, his religion and his benefits. West's "neutrality" is, therefore, strictly *de jure*. His sixth argument,[14] that the conduct exemption tends to produce arbitrary and incoherent law, is clearly right. His second argument[15]—the risk of

10. *Supra* note 8, at 634-35.

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

12. *See, e.g.*, G. BRADLEY, CHURCH-STATE RELATIONSHIPS IN AMERICA (1987); R. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION (1982); D. DREISBACH, REAL THREAT AND MERE SHADOW (1987).

13. West, *supra* note 8 at 600-02.

14. *Id.* at 611-12.

15. *Id.* at 602-03.

social divisiveness—is, for reasons I have elsewhere developed,[16] desperately in need of proper interment. His third reason[17]—the potential for fraudulent claims—is far too strong; it cuts against all entitlement programs, indeed all law, that generally creates incentives for people to make their conduct appear different from what it actually is. The fourth argument[18] correctly notes the anarchic potential of the conduct exemption rationale.

Now, the main play. West correctly says that most arguments for the conduct exemption are uncritically rooted in the free exercise text. He then critically seeks that clause's "correct" meaning, and looks for it in the plain meaning of the clause as understood by its makers. Unlike most contemporary judges and commentators, I do not quibble with West's methodology, but I would stress that "makers" means ratifiers. His sources are, however, a problem. He mentions works by Malbin[19] (a good but cursory treatment), Levy[20] (a long, bad book), and Miller[21] (a good book). But he relies mostly on Thomas Curry,[22] especially Curry's last chapter. That is problematic because that chapter is incoherent. It is internally inconsistent and inconsistent with the rest of the book, which is, by the way, excellent. West also makes the common but pernicious mistake of seeking the meaning of a familiar legal and constitutional phrase (and "free exercise" *was* a mainstay of the state constitutions) in the speculations of selected notables, *not* in the state regimes which created and maintained free exercise rights. In short, he gives us more intellectual history than "exegesis", in *his* sense of what the words meant in their original context.

Despite all that I have just said in criticism of West's *modus operandi*, I agree with West that the free exercise clause does *not* require the exemption, as of right, of individuals and churches from otherwise "neutral" laws. What did the free exercise clause originally mean? West seems to settle upon some form

16. *See* Bradley, *Dogmatomachy—A "Privatization" Theory of the Religion Clause Cases*, 30 ST. LOUIS L.J. 275, 301-09 (1986).

17. West, *supra* note 8, at 603-04.

18. *Id.* at 604-08.

19. M. MALBIN, RELIGION AND POLITICS: THE INTENTIONS OF THE AUTHORS OF THE FIRST AMENDMENT (1978).

20. L.W. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT (1986).

21. W.M. MILLER, THE FIRST LIBERTY: RELIGION AND THE AMERICAN REPUBLIC (1986).

22. T.J. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT (1986).

of no direct or intentional harm to religion. Whatever that might mean, I suggest the following "plain meaning, historically recovered": no conduct otherwise permitted could be proscribed because it occurred in the context of worship. Put differently, free exercise guaranteed freedom of worship in the specific sense of protecting worship from hostile legal treatment. To take a modern example, only if snake handling or peyote use are generally proscribed may they validly be denied to worshippers. You might say, that's not much. Maybe so, but it *was* an advance for the founding generation and, well, maybe the first amendment is not such a big deal after all. This plain meaning, historically recovered, still speaks profoundly to present constitutional problems, for it shears free exercise of its present individualistic gloss. Worship is a collective activity, and *it* is the subject of free exercise; the solitary conscience is not.

II. GARVEY'S GROUPS

The reading of the free exercise clause that I just proposed may itself provide enough fuel to put John Garvey's central claim aloft. That claim is as follows: group freedom should prevail over individual freedom in cases where the two conflict.[23] Garvey has the *Watson* property dispute scenario in mind, and treats those cases almost exclusively, despite their origin in a sort of federal common law. Garvey does not produce the kind of close exegesis West does, and it is unclear how he comes out on West's textual verdict against exemptions. That is, Garvey does not examine church exemption from otherwise neutral laws, as presented in cases like *Dayton Christian Schools*[24] and *Bob Jones*.[25]

How then does Garvey justify this priority for groups, a priority which flies in the face of the contemporary regime's commitment to individual autonomy? He offers four reasons. One is what I call the missing Federalist paper argument. If republican institutions presuppose a virtuous citizenry, as Publius maintained, how shall the citizens be kept virtuous?[26] Publius did not say, but the founders definitely considered religion the bulwark of virtue. Garvey makes this point and a second,

23. Garvey, *Churches and the Free Exercise of Religion*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 567 (1990).

24. Ohio Civil Rights Comm'n v. Dayton Christian Schools, 477 U.S. 619 (1986).

25. Bob Jones University v. United States, 461 U.S. 574 (1983).

26. Garvey, *supra* note 23, at 587-88.

related one: religious commitments, especially when institutionalized, limit the totalist tendencies of the modern state.[27] This I call the missing Constitution argument, meaning that it serves to limit government in the way a written Constitution is supposed to. While I think that both points are essentially accurate, I doubt they are Garvey's strongest arguments. To the latter his critics will point to an independent judiciary enforcing the Bill of Rights. To the former they will cite the potential *threat* to republican stability posed by religious belief. There is *no* doubting the present hegemony of the opinion that religion taken seriously threatens democracy. Third, Garvey argues that, paradoxically, autonomy is served by the preference for group freedom over individual freedom in cases of conflict.[28] Individuals want the best interests, so to speak, of the group to prevail. Garvey means that this commitment is actualized even as the group prevails over the (now aggrieved) individual. This argument is probably too strained. Disputants often share a commitment to the best interests of the group; they happen to have different conceptions of what those interests are. To take a recent example, Fr. Curran no doubt sees *his* account of church authority, one which permits a range of dissent, as best for the Roman Catholic Church, notwithstanding Cardinal Ratzinger's contrary views on the subject.[29]

Garvey's last reason—the one he most stresses and develops—is that for many believers, faith has a necessary ecclesial dimension.[30] As Garvey would say, individual autonomy is *not* the objective or the stuff of belief. With this I could hardly agree more. Unlike Garvey's missing Federalist and Constitution arguments, it is non-instrumental. Moreover, it accords with what I previously suggested is the "group" thrust of the first amendment. Finally, it accords with the basic differentiation of orders which we label "church and state."[31] Those virtues warrant accepting Garvey's preference for group freedom.

Garvey now proposes to implement this preference by preferring the legal rule of "deference" over "neutral principles."[32] A rehearsal of some fundamentals may clarify this move. *Watson* stated a general requirement of religious free-

27. *Id.*

28. *Id.* at 587.

29. *See* Letter from Ratzinger to Curran (Apr. 13, 1984), *reprinted in* C. CURRAN, FAITHFUL DISSENT 227 (1986).

30. Garvey, *supra* note 23, at 588.

31. *See* Bradley, *Church Autonomy in the constitutional Orders: The End of Church and State?*, 49 LA. L. REV. 1057 (1989).

32. Garvey, *supra* note 23, at 585.

dom: "The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect."[33] This regulative aspiration produced a rule of "deference": "[W]henever questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest . . . church judicator[y] to which the matter has been carried, the [civil] legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them."[34] The second, much more recent, strategy for implementing *Watson's* religious freedom requirement is the "neutral principles" approach found in *Jones v. Wolf*.[35] That approach serves the *Watson* objective not by deference to ecclesiastical authority but by resolving the case entirely on "neutral" principles, where "neutral" denotes applicable civil principles. Even though it, like *Watson*'s "deference" rule, grew out of and was intended to settle church property disputes, the "neutral principles" approach is not so analytically confined. And, while Garvey limits his discussion to the property dispute contexts, the *Jones* court expressly contemplated its application to other church practices, including employment decisions like the *Curran* case. Its virtue is "the peculiar genius of private-law systems in general—flexibility in ordering private rights and obligations to reflect the intentions of the parties."[36] *Watson's* "neutrality" and "nonentanglement" in doctrinal controversies are "preserved" by overlaying a regime of voluntarism or "autonomy." *Jones* holds that where there is implementation of agreement, there is "neutrality."

In *Jones* the Supreme Court effectively invited lower courts to choose between "deference" and "neutral principles," supposing them each consistent with *Watson*. But one may allow that each approach is consistent with *Watson* without allowing that they are equally so. Even in church property disputes, "church autonomy" (here defined as "doctrinal" "neutrality") is better insured by deference on the ownership question. In other words, courts should enforce the decision of church authorities whenever those authorities have taken a discernible position on that issue. Second, the Supreme Court in *Jones* too easily presumed the availability of suitably "neutral" principles. Rules of ecclesiastical governance simply may not translate into civil law terms. Suppose, Garvey suggests, that a church consti-

33. Watson v. Jones, 80 U.S. (13 Wall.) 679, 728 (1871).
34. *Id.* at 727.
35. 443 U.S. 595 (1979).
36. *Id.* at 603.

tution directs its governing body to order "whatever pertains to the spiritual welfare" of those under its care. Is property management an aspect of "spiritual welfare?" Is that not itself a theological concept? How would "neutral principles" resolve that question?[37]

It cannot. "Neutral principles" is therefore (at most) an incomplete approach in need of a complement, probably from "deference." The *Curran* opinion qualified *its* "neutral principles" with "due regard for the right of the Church . . . to decide for itself matters of church polity and doctrine."[38] And Judge Weisberg narrowly escaped importing enormous amounts of deference only by Fr. Curran's concession that the withdrawal of his canonical mission was both "substantively and procedurally correct."[39] What if Fr. Curran had contested either, or both? Then the Court would have faced something like this question: who is more "Catholic," Cardinal Ratzinger or Fr. Curran? "Neutral principles" of civil law cannot resolve that question.

The important point is that the "neutral principles" approach taken by itself is neither "neutral" nor wholly efficacious. The tensions are deepest between the "private order" of a hierarchically-organized church and the "neutral principles" of civil law. This tension may best be illustrated by the role assigned to "agreement" *now*, to govern situations arising *later*, which is the earmark and purpose of contract law. As Garvey makes clear, contract principles simply do not explain the unity of many churches.

The divide here is perhaps more thoroughgoing and decisive than even Garvey contends. The *Jones* court aspired to a regime of complete judicial abstention, consummated by perfect planning *now* for *future* disputes. But is the analytical infrastructure of "neutral principles" truly "neutral" when it comes to the central dogma of modernity: individual autonomy, usually connoting a subjectivist or "emotivist" moral theory against religious, moral and to a lesser extent political authority? I submit that it is not. Even casual re-examination of *Jones'* commitment to "private ordering" reveals its source in the animating impulse of contemporary American legal reflection on religious freedom: the autonomous individual's "choice" of belief. "Churches" become "religious organizations" and pos-

37. Garvey, *supra* note 23, at 569-70.

38. Curran v. Catholic Univ. of Am., No. 1562-87, slip op. at 8-9 (D.C. Super. Ct. Feb. 27, 1987).

39. *Id.* at 19.

sess no intrinsic order other than that chosen by freely associating individuals. This presupposition is hardly "neutral" where faith is presumed to include an essential ecclesial dimension. This brings us back to Garvey's main query about religious freedom: is it really about groups or individuals? I think it the central question before us, and upon it no neutrality is possible.