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Book Review and Commentary: What Price Freedom?

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BOOK REVIEW AND COMMENTARY

WHAT PRICE FREEDOM?

VINCENT A. WELLMAN[†]

WHAT ARE FREEDOMS FOR? By John H. Garvey. Cambridge, Massachusetts: Harvard University Press, 1996. Pp. 312. \$35.00.

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I. INTRODUCTION

Before I went to law school, I anticipated that my most exciting subject would be constitutional law. My interests had always run to the philosophical, and I imagined that discussions of the Constitution would involve deep questions of rights and freedom

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and the proper relationship between citizen and state. Alas, for me and many fellow students, our actual constitutional law courses were nothing like what we had imagined. Instead of arguing about the rights and duties of citizenship, we investigated, at very great length, *Marbury v. Madison*¹ and *McCulloch v. Maryland*.² We never assessed the morality of abortion or affirmative action, but we did discuss whether *Roe v. Wade*³ was, or was not, derived from Supreme Court decisions fifty years earlier about parents' decisions regarding their children's schooling.⁴ My time in law school preceded the emergence of some of the current debates about originalism and constitutional "moments," but the lesson is, I suspect, much the same for today's law students as it was for me—constitutional law wasn't fun in the way I had expected.

John Garvey has reminded me of the excitement I had hoped to find in constitutional law. His book, *What Are Freedoms For?*, returns to the kind of fundamental questions about the foundations of our legal system that are so easily lost in debates about the Negative Commerce Clause. As a result, his inquiry was a pleasure to read—full of thoughtful and challenging arguments, and written in a graceful yet informal style.

II. A DIFFERENT CONCEPTION OF CONSTITUTIONAL FREEDOMS

Garvey's central ambition is to overturn a conception of freedom that, he believes, has dominated our thinking about the Constitution and its role in securing various freedoms to the citizenry.⁵ That conception regards freedom as morally neutral,

1. 5 U.S. (1 Cranch) 137 (1803).

2. 17 U.S. (4 Wheat.) 316 (1819).

3. 410 U.S. 113 (1973).

4. See, e.g., *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

5. Freedoms, as Garvey is concerned with them, are the traditional categories of civil rights. Freedom of speech, press, religion, and assembly are incontrovertibly included, and association, privacy, and possibly travel clamor for inclusion. See JOHN H. GARVEY, *WHAT ARE FREEDOMS FOR?* 13 (1996). Freedoms are thus a subset of the larger category of legal rights. See *id.* at 123-26

serving only to delimit various arenas of individual choice about how to act, but without concern about the particular choices made. Instead, Garvey argues, our constitutional freedoms give us rights to *act* in certain ways which are deemed good and valuable, not rights to choose whether, or how, to act.

In pursuing this ambition, Garvey joins a chorus of writers who have sought to mine our public discourse about freedom and rights. Some of these writers argue that our political and legal relationships are distorted by certain paradigmatic ways of describing the relationship of citizen and state, and that we need to re-examine or even reconceptualize those ways of talking and thinking.⁶ Others contend that the current state of constitutional law is deficient because the Supreme Court regularly fails to fulfill the vision of political life embodied in the Constitution.⁷ Garvey is largely content with our current legal practice, at least as it is reflected in decisions of the Supreme Court. What he rejects is a set of assumptions that he believes has distorted our usual thinking about freedom and led us to misunderstand current Court doctrines and decisions. He aims to articulate an alternative theory of freedom that, on his view, underlies our actual legal practice, if not the rhetoric that so often attends it.

This is of course an ambitious undertaking, and I cannot do justice to the depth and detail of Garvey's argument. In this review, I focus primarily on his discussion of *Bowers v. Hardwick*.⁸ In *Bowers*, Michael Hardwick was charged with violating Georgia's sodomy statute for having oral sex with another man in his own bedroom,⁹ and even though the charges against him were dropped

(exploring the difference between group freedoms and group rights).

6. See, e.g., MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991).

7. See, e.g., RONALD DWORIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* (1996).

8. 478 U.S. 186 (1986).

9. The Georgia statute prohibited both oral and anal intercourse without ostensible regard to the offender's sexual orientation: "A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another." GA. CODE ANN.

sought a declaration that the Georgia law was unconstitutional.¹⁰ The trial court dismissed his complaint, and the Eleventh Circuit reversed, reinstating the action.¹¹ The Supreme Court narrowly upheld the state law. A five to four majority asserted that homosexual sodomy was not one of the “fundamental liberties” protected by the Fourteenth Amendment’s Due Process Clause and that as a result Georgia could forbid such acts simply because its voters thought them to be immoral.¹²

For many, this decision was outrageous. Prior cases, including *Griswold v. Connecticut*¹³ and *Roe v. Wade*,¹⁴ had seemed to guarantee that a married couple’s decisions about what to do in their own bedroom was their private concern and no business of the state. Since *Eisenstadt v. Baird*¹⁵ affirmed the same prerogatives for unmarried heterosexual couples, what could possibly justify a different treatment for homosexuals, other than prejudice about their sexual orientation? The Court wrongly decided *Bowers* on this line of reasoning, and the decision was deeply offensive in that it seemed to give a constitutional imprimatur to bigotry.

This sense of outrage was sharpened by the dreadful opinion for the majority by Justice White, accompanied by an even more dreadful concurrence by Chief Justice Burger. The majority opinion disingenuously characterized the central issue as “the claimed constitutional right of homosexuals to engage in acts of sodomy.”¹⁶ Styled that way, it is hard to imagine anyone taking the

§ 16-6-2 (Harrison 1994). A heterosexual Georgia couple sought to join in Hardwick’s suit against the state, but was dismissed by the trial court for lack of standing. See *Bowers*, 478 U.S. at 188 n.2.

10. See *Bowers*, 478 U.S. at 187-88.

11. See *id.* at 188-89.

12. See *id.* at 195-96.

13. 381 U.S. 479 (1965).

14. 410 U.S. 113 (1973).

15. 405 U.S. 438 (1972).

16. *Bowers*, 478 U.S. at 190-91. “The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time.” *Id.* at 190.

dispute seriously; but, in that case, why did the Court grant certiorari? The Eleventh Circuit's characterization seemed more honest, as well as more compelling. The court stated: "The activity [Hardwick] hopes to engage in is quintessentially private and lies at the heart of an intimate association beyond the proper reach of state regulation."¹⁷ More powerful yet was the characterization in Justice Blackmun's dissent proclaiming that "this case is about 'the most comprehensive of rights and the right most valued by civilized men,' namely, 'the right to be let alone.'"¹⁸

Garvey argues that this outraged reaction is founded on a mistaken understanding of the rights in question, but not because he endorses gay-bashing. It is a mistake, he contends, to approach the issue in *Bowers*, and *Griswold* and *Roe*, as one of bedroom privacy, where what's protected is some realm of individual decision-making about the nature of one's sexual pleasures. To approach *Bowers* in that way is to accept the conception of freedom that he hopes to unseat. On that mistaken conception, freedom is taken to be the freedom to choose how to behave, without regard to the particular choice made. Instead, he contends, the Constitution protects freedoms to *act*. In *Bowers*, the important constitutional freedom is a *freedom to love*, which freedom is paradigmatically, but not exclusively, fulfilled in a marital relationship.

It follows from this claim that sexual gratification *per se* is not constitutionally protected. As a result, Garvey would accept as constitutionally acceptable the state prosecuting heterosexuals under the Georgia sodomy statute, just as it prosecuted Hardwick for his homosexual liaison.¹⁹ Conversely, however, he argues that

17. *Hardwick v. Bowers*, 760 F.2d 1202, 1212 (1985), *rev'd*, 478 U.S. 186 (1986). Justice Powell was one of the majority, but after his retirement from the Court he stated that he thought that *Bowers* was wrongly decided. See *DWORKIN, supra* note 7, at 152.

18. *Bowers*, 478 U.S. at 199 (Blackmun, J., dissenting) (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

19. However, in oral argument before the Court, the Georgia Attorney General conceded that the statute would violate the Constitution if applied to a married couple. See *id.* at 218 n.10 (Stevens, J., dissenting).

we must consider the possibility of homosexual marriages, and hence constitutional protection for the bedroom conduct of married homosexuals:

[S]urely gay lovers can satisfy other [non-sexual] needs for each other; can admire, appreciate, respect, esteem each other for their good qualities; can care for each other in a benevolent way; and so on.

If that is so, and if I am correct in saying that the right to freedom follows after the good of love, then there is a strong argument for protecting homosexual as well as heterosexual freedom to love. And if sexual activity is limited to married couples, the freedom to love leads inexorably to the freedom to marry.²⁰

But this kind of love, he notes, had little to do with Hardwick, or his partner. Hardwick's brief in the Supreme Court explicitly abjured any claim of a right to have a homosexual relationship "recognized as a marriage,"²¹ and as Garvey emphasizes any such claim on Hardwick's part would have been absurd, at least as regards to his companion for that fateful encounter. Garvey notes that:

Hardwick's sexual partner was a one-night stand—a schoolteacher from North Carolina who pleaded to reduced charges and left town. The courts showed little interest in him. Hardwick's complaint was equally casual. It merely declared that Hardwick was "a practicing homosexual who regularly engages in private homosexual acts and will do so in the future." The acts of sodomy were the focus; the identity of the other actor didn't matter. . . . What Hardwick's suit asked for was the freedom to reach an orgasm in the particular way that he favored.²²

20. GARVEY, *supra* note 5, at 38-39.

21. *Id.* at 25.

22. *Id.* at 24-25 (endnotes omitted).

That freedom, Garvey argues, is not protected by the Constitution. What's protected, instead, is the freedom to love—the freedom to build and nurture some more enduring kind of relationship—and not just the private sexual choices of consenting adults. On this reading of the Constitution, Hardwick's claim should not trigger constitutional protection, and *Bowers* was not only correct, it was an easy decision.

III. THE NATURAL RIGHTS THEME

This is heady and provocative stuff. To begin with, Garvey's reading of *Bowers* is novel, and strikingly so. Even though he agrees with the majority's conclusion, his argument is quite different from anything asserted in either Justice White's majority opinion or Chief Justice Burger's concurrence. Neither of those opinions mentioned anything like a freedom to love. By the same token, however, he completely rejects the dissent's perspective, which seems grounded in a well-accepted view of privacy as a right to be left alone, especially in one's own bedroom. Therefore, Garvey is arguing not only that the rights in question need to be recharacterized, but that the traditional perspective about privacy is completely wrong.

What, on his view, is so wrong with this traditional perspective on freedom, and if it is so wrong, how has it become as dominant as he seems to think? The answer to both these questions requires, I think, an excursion into moral and political theory.

A. Two Kinds of Justification

As I read it, Garvey's argument depends fundamentally on a distinction between two different ways to justify freedom.²³ One

23. I must be careful here. The distinction between instrumental and non-instrumental justifications for freedoms is presupposed but not expounded by Garvey. As I discuss later, Garvey's argument turns essentially on two claims. First, that our constitutional freedoms are freedoms to act in special ways. Second, that the freedom to act is protected because that kind of action is deemed

kind of justification is what philosophers standardly call *instrumental*.

When thought of instrumentally, freedoms are means to various ends that we, as a society, desire. In following this idea, one proceeds in something like the following steps: think of the society we most desire; contemplate the kind of individual activities that will, over time, lead to that desired society; and then posit certain freedoms—areas of conduct which are privileged to be free from governmental interference—because we think that privileging those areas of conduct will most likely promote the activities we wish to encourage.²⁴

In contrast, we can also understand *non-instrumental* justifications. Other terms to describe the non-instrumentalist family of justifications would include “de-ontological” and “absolutist.” Non-instrumentalist arguments, on the other hand, justify some action or course of conduct for its own sake and not as a means to other desired ends. Non-instrumental justifications for various freedoms typically invoke the “intrinsic” value of the conduct which is held to be privileged or assert the freedomholder’s *right* to be treated in a certain way. We should honor these freedoms, on this type of argument, because the persons involved are morally entitled to be free from any kind of interference, governmental or other. Hence, government intrusion would be wrong and illegitimate. Ronald Dworkin, among others, often sounds like he is offering a non-instrumental justification of freedoms: “[I]f someone has a right to something, then it is wrong for the government to deny it to him, even though it would be in the general interest to do so.”²⁵

intrinsically valuable. Thus, the instrumentalist approach to constitutional freedom is only half of the argument. See *infra* Part IV. But I think that describing his view as presupposing an instrumentalist conception of freedom is entirely consonant with his argument, and expresses his view in a way that can be appropriately succinct for a book review.

24. Instrumentalist justification is often, but wrongly, conflated with utilitarian thinking. A better understanding recognizes that utilitarianism is a special kind of instrumentalist justification.

25. RONALD DWORIN, *TAKING RIGHTS SERIOUSLY* 269 (1977).

Garvey's argument entails that we should understand our freedoms in instrumental rather than non-instrumental ways. Return to his discussion of the freedom to love:

Freedom—at least the kind of freedom talked about in [the privacy] cases—is, I suggest, valuable for reasons having nothing to do with autonomy or politics. I think that we attach great value to certain kinds of love, and wish to be left free to pursue them. Love (the good) comes first, and the right to freedom follows after it.²⁶

In making this suggestion, he necessarily rejects a well-entrenched tradition of political discourse which leads to the assumption that freedoms must be thought of in non-instrumentalist terms.

B. The Natural Rights Paradigm

Within our western tradition of political theory, the most salient type of non-instrumental justification for freedoms has been based on some notion of natural rights. Consider the standard form of this argument, recognizable in the political philosophies of Hobbes and Locke. The starting point is to imagine what life would be like if there were no government, a lawless condition which is now famously termed the “state of nature.” In the state of nature, the argument goes, there could be no apparatus for law-making and, equally important, for law-enforcing. As a result, according to Hobbes, in the state of nature we would each have a full array of “rights” that entitled us to do entirely as we might desire.²⁷ Because such rights are ours in the pre-political state of nature, and because they are related in various ways to our nature as human beings, these rights are styled “natural.”²⁸

Hobbes and Locke are famous for recognizing that this

26. GARVEY, *supra* note 5, at 28.

27. See THOMAS HOBBS, *LEVIATHAN* 85 (Michael Oakeshott ed., MacMillan 1947).

28. See *id.* at 84-85.

condition of bountiful freedom would be not paradise but rather an unfortunate, even grim existence. Without laws, and the state to enforce them, we would all be prey to each other's whims and desires, without protection for ourselves, our families, or our property. Our relations to each other in the state of nature would be, as Hobbes phrased it, a continual conflict in which each of us was the enemy of everyone else, without rest or relaxation.²⁹ As a result, life in the state of nature would be, in his most famous phrase, "solitary, poor, nasty, brutish, and short."³⁰ Hobbes and Locke both contended that those who lived in the state of nature would be led by rational self-interest to give up most (as Locke argued) or all (as Hobbes argued) of their natural rights in exchange for the advantages of civil society. In particular, they claimed, we would be led to enter into a "social contract" under which we would surrender many, or all, of the freedoms we would "enjoy" in the state of nature on the condition that our fellow citizens would do the same as well, each of us agreeing to accept the rule-making and -enforcing authority of some kind of government.³¹

Although Locke and Hobbes began with a common appeal to the state of nature and the rationality of a social contract, they

29. *See id.* at 82.

Whatsoever therefore is consequent to a time of war, where every man is enemy to every man; the same is consequent to the time, wherein men live without other security, than what their own strength, and their own invention shall furnish them withal. In such condition, there is no place for industry; because the fruit thereof is uncertain: and consequently no culture of the earth; no navigation, nor use of the commodities that may be imported by sea; no commodious building; no instruments of moving, and removing such things as require much force; no knowledge of the face of the earth; no account of time; no arts; no letters; no society; and which is worst of all, continual fear, and danger of violent death; and the life of man, solitary, poor, nasty, brutish, and short.

Id.

30. *Id.*

31. *See id.* at 109-112; JOHN LOCKE, THE SECOND TREATISE OF CIVIL GOVERNMENT AND A LETTER CONCERNING TOLERATION 48-50 (J.W. Gough ed., MacMillan 1947).

diverged as to the sort of contract that each thought would be acceptable to those living in the state of nature. For Hobbes, the only form of government that could succeed in taming the citizenry's unruly and competing desires would be an absolute monarch, and so the only rationally acceptable contract would be one under which the citizens surrendered all their natural rights in exchange for the monarch's protection.³² Locke was more optimistic about our capacity for social living. He argued that we would need to surrender many, but not all, of the prerogatives we had in the state of nature and that we would choose instead to retain some of our "natural" rights as claims to be made against the government and as checks against its possible intrusions and abuses.³³

C. The Legacy of the Natural Rights Paradigm

Political theory has advanced considerably since these early versions of the social contract, but the hold of the natural rights idea can be seen still in the vision of freedom that Garvey hopes to unseat. If one thinks of freedoms as originating in the state of nature, then it seems almost automatic to suppose that they have two intrinsic characteristics. First, if freedoms are derived from natural rights they will need no particular justification. To the contrary, what must be justified is the state's intrusion into some otherwise private, and privileged, arena of individual choice. This presumption of validity follows from the retained-rights facet of the social contract argument. We begin, on that argument, with a bundle of rights which are ours "naturally" and which we retain in civil society unless we bargain them away as consideration for our safety and security. Thus, one must assume that our retained rights are legitimate, and the government must assume so as well.

It is easy to extend this conception of presumptively valid retained rights so as to embrace the claim that we have a right to be

32. See HOBBS, *supra* note 27, at 112.

33. See LOCKE, *supra* note 31, at 66-72.

free from governmental interference in our sexual choices. Under the natural rights paradigm, the more private or intimate the realm of conduct, the less appropriate it would be for the state to attempt to regulate it—an inference that would seem to apply in spades to our bedroom pleasures. In the first place, our intimate behavior seems so personal and so constitutive of our identities, that it is highly unlikely we would have agreed in a social contract to surrender our rights to do as we please in our own bedrooms. In the second place, private conduct between two consenting adults seems in general so unlikely to harm the body politic that the government could have no legitimate reason to try to regulate that conduct. Any attempt to control our sexual lives could only indicate that the government was hoping to increase, illegitimately, its power over us. The realm of private consensual sexuality would thus seem to be an arena in which we have retained our rights and into which the state cannot properly intrude. *Bowers* must be wrong, on this argument, because it accepts government intrusion into the bedroom, a conclusion that seems confirmed by the prior decisions in *Griswold*, *Eisenstadt*, and *Roe*.

A second feature of freedom, as conceived under the natural rights paradigm, follows from the first. In the state of nature we are free to act as we desire, but also free to not act if that is our preference. Therefore, our freedoms are both complete and exclusive. Our course of action is entirely ours to determine, and there is no a priori reason to value one choice over any other. By extension, when we move to civil society, our retained rights are still complete and exclusive, and there would still be no a priori reason to value one choice over another.³⁴

This sense of completeness and exclusivity that attaches to our retained rights means, among other things, that each individual must be left free to determine the dimensions, and direction, of his or her own sexuality. I alone am entitled to choose whether I will

34. Garvey quotes from Bentham's infamous credo that, as far as utilitarianism is concerned, "the game of push-pin is of equal value with the arts and sciences of music and poetry." GARVEY, *supra* note 5, at 6 (quoting JEREMY BENTHAM, *THE RATIONALE OF REWARD* 206 (1825)).

have sex, and with whom, and neither the state nor my fellow citizens have any grounds for objecting to my choice of sexual positions or partners, so long as they are adult, competent, and consenting. For this reason, the decision in *Bowers* seems so profoundly offensive because it accepts the state's claim that it can regulate my choice of pleasures.

In sum, the natural rights paradigm leads easily and naturally to a kind of non-instrumentalist view of sexual privacy—so naturally and so easily, in fact, that it sometimes becomes hard to think about freedom in any other way.

D. Rejecting the Paradigm

No matter how “natural” it might seem to think of our freedoms as derived from retained rights, there are ample reasons to reject the social contract argument as it is standardly formulated and, concomitantly, to reject the legacy of that argument as it has shaped our thinking about rights. To begin with, the argument's basic presuppositions fail. Few, if any, of us were in a state of nature before deciding to join the body politic, and so the social contract, if there is one, can't be understood in terms of any actual agreement that we made with the state or our fellow citizens.³⁵

35. Some have sought to revise the social contract argument so as to defend it in terms of some “hypothetical” agreement we would have accepted had we been naturally “free” in the way hypothesized by Hobbes and Locke. Unfortunately, this variant is no more tenable than the original. The weakness of arguing in terms of some such hypothetical agreement can be illustrated by the following example. If I had been stranded in the desert for several days, then I would undoubtedly be willing to pay a very large sum of money for a drink of water. But even the most rapacious vendor knows that there are limits to what I can be expected to pay for water when I'm not in the desert and drinking water is easily available, and no one would expect to convince me that I was somehow obligated to pay the same price I would have accepted when I was actually in the desert and racked by thirst. What I would have done had conditions been different simply does not, by itself, give rise to any obligation to act in a certain way now, when conditions are as they are.

The hypothetical agreement idea is actually a disguised version of a quite different argument. What I would have done, had the conditions been different,

Therefore, the retained rights idea needs, at the very least, some further justification, and in any event, should not be supposed to be the only way to think about the relationship of citizen and state.

The state of nature idea seems particularly inapposite when considering our own constitutional beginnings. When our forefathers joined together in founding the Republic, they exchanged one form of government for another, and struggled mightily to agree on our particular Constitution, ultimately choosing it from among many divergent possibilities. How could some notion of retained rights derive from that situation? Rather, it makes more sense to suppose instead that in our founding we “bargained” for a form of government in ways more like one bargains for services, or a car. In some contracts, like purchase of a car, we confront various packages of options which we might or might not want to include and then decide, on balance, to pay a particular price for a specified make, model, and style of government. In others, like choosing the family doctor, we commit ourselves to an open-ended arrangement, in which the details of the services we will receive will be decided in the future as our needs become more clear.

On either of these alternative assumptions about our constitutional beginnings, the retained rights paradigm loses whatever grounding it might have had. As a result, we can challenge any supposition that our freedoms are justified in some non-instrumental way. Instead, we can ask quite cogently, what is the instrumental justification of some asserted freedom, or of some asserted interpretation or extension of an already recognized freedom?³⁶ What, in other words, is the value to us of some

only reveals certain facts about my tastes and preferences. Once those preferences are revealed, I can perhaps be held accountable for actions which are inconsistent with those tastes, but not obligated to act as I would have, had my lot been different than it is.

36. A further important feature of the traditional social contract argument is that it views the “terms” of the social contract as frozen and necessarily unmodifiable, once the contract is consummated. This is most easily seen as a corollary of Hobbes’ version of the argument. Because the only rationally acceptable contract is for Hobbes, one in which the citizenry foreswear all their

particular freedom which we “bought” as part of the Constitution?

Returning to the issues of sexual privacy, one can now better appreciate Garvey’s argument that *Bowers* was not really about some right to have orgasms in the way one desires; it was instead about the freedom to love. For Garvey, the value of any supposed freedom of intimate association is the value of love. He states: “There is general agreement in our society that entering a heterosexual marriage is a very good thing, and for that reason we protect the freedom to do it.”³⁷ This freedom to love would have to be extended to marriage between homosexuals, if such marriage

natural rights in exchange for the protection of an absolute monarch, there is no room in the argument for a modification of the contract. There aren’t any other versions of the social contract which would, on his view, be rationally acceptable.

Much the same result occurs under Locke’s version as well. There is an ambiguity in the Lockean argument as to whether the social contract is entered into between the people, on the one hand, and the monarch, on the other, or instead between each of the citizens and each other citizen. Either argument means that a change in the social contract could be validated only by a modification accepted by each of the parties. As a result, the logistics of a valid modification are insurmountable. Suppose that the contract is between each citizen and all the rest. The contract could be modified validly only if all the contracting parties agreed to the same modification at the same time. Similarly, if the contract is between each of the citizens and the monarch, no citizen would agree to any modification of her contract with the monarch unless she got as good a deal, or better, than any other citizen got in his renegotiation. In other words, each of the contracting parties could veto the proposed modification. Securing that unanimous consent, when each of the potential modifying parties knows that it can kill the deal by refusing to go along, would be daunting, to say the least.

In contrast, if we abandon the idea that the government was formed in some kind of social contract, we can think more optimistically about the prospect that the body politic could validly agree to amend the governmental “bargain.” Moreover, if the body can amend, then it can ask sensibly of each term of the contract, what is the value of that term? Does the benefit from retaining some freedom outweigh the potential gain that might be realized by negotiating away that freedom in exchange for some other? Thus, the capacity to amend leads us to think in instrumental terms about the value of each freedom which is protected by the Constitution.

37. GARVEY, *supra* note 5, at 40.

becomes legally recognized, but it need not be extended to casual promiscuity between adult partners, whatever their sexual orientation.

IV. AN ELEGANT ANALYSIS

I am persuaded that we should think instrumentally in analyzing our constitutional freedoms. As a result, one part of Garvey's enterprise—to justify instrumental as opposed to non-instrumental thinking about constitutional freedoms—seems well-taken. But Garvey aims at far more than just this conceptual claim; he also hopes to illuminate the particular instrumental justification for various of our freedoms. Viewed from this perspective, the analysis of *Bowers* and the privacy cases is admirable. As I noted, his reading of the privacy cases is novel—the freedom to love was not articulated by any of the opinions which were rendered. Indeed, I find Garvey's discussion more respectable than the majority opinion. As a result, I am now more optimistic that there might be some principle to be articulated in support of the Court's decisions and am correspondingly less disappointed with the Supreme Court than I had been.

A. Other Freedoms, Other Values

However, there is a great deal more to Garvey's argument. His analysis of *Bowers* and the privacy cases is just one part of his analysis of our constitutional freedoms.³⁸ Other freedoms, speech and religion in particular, are similarly examined and

38. I am frustrated that, even in a review as long as this, I cannot do justice to the elegance of Garvey's argument. Subtle and sophisticated twists spice up his discussion at various points. For example, in re-examining *Bowers* and the marital privacy decisions, he turns, by way of contrast, to the Court's decisions about men's clubs, especially those organizations like the Jaycees, which in their self-description purport to be both professional growth organizations and yet in litigation would present themselves as safe harbors for personal and private relationships among the members.

recharacterized in ways that illuminate the value of some freedom to act, instead of a freedom to choose. Indeed, while I am ultimately unsatisfied with Garvey's argument, I must applaud the careful and elegant way in which he has developed and defended his thesis.

Consider, for instance, his analysis of freedom of speech. This freedom is commonly described as protecting some kind of "market place" in which ideas are somehow the subject of commerce, each finding its appropriate value in so far—but only in so far—as it is prized by the citizenry. As Garvey notes, however, the image of ideas being "exchanged" on the market is plainly wrong-headed. Suppose I sell you my book. After the transaction, you have my book, and I don't; in exchange, you paid me money, which I now have and you don't. However, our traffic in ideas doesn't operate in any manner comparable to this kind of transaction. If I "sell" you my ideas, then after the "transaction" is completed we haven't exchanged positions. To the contrary, we end up with the same perspective; my ideas have been added to your stock of beliefs, not substituted for them.

The pattern of Garvey's argument should, by now, be predictable. First, the traditional way of thinking about the freedom in question is challenged: "The market metaphor is wrong in its assumptions about value and the market. . . . Freedom of speech is not just a process for maximizing individual self-interest, but a rule for protecting an important human good."³⁹

Then, in its place is offered an alternative view which begins with a more fundamental value, such that the freedom is constitutionally enshrined in order to advance that value: "One of the most important reasons why we protect freedom of speech is that speech—assertion, conversation, debate, publication—is *the pursuit of knowledge*, an activity that is intrinsically good."⁴⁰

If freedom of speech is indeed founded on the value of the pursuit of knowledge then we can reflect in a more insightful way on the dimensions of constitutional protection which has, and has

39. GARVEY, *supra* note 5, at 65.

40. *Id.* (emphasis added).

not, been afforded to different forms of speech-related conduct. Garvey states:

Suppose that what I have just said about the pursuit of knowledge is true. What, if anything, does that show about freedom of speech? Here I argue that speech is the way we pursue knowledge, just as climbing is the way we ascend mountains. In addition to making that point, I will qualify it in two ways. First, I will argue that not all speech counts as the pursuit of knowledge. That is one reason why some forms of speech do not get first amendment protection. Second, I will argue that sometimes we pursue knowledge by acts other than speech, and that when we do so they deserve the same freedom we allow for speech.⁴¹

Thus, on Garvey's view, neither pornography nor much of what has been termed "commercial" speech is entitled to the same kind of constitutional protection as other, more central, forms of speech because the former don't involve the pursuit of knowledge. Instead, they simply serve to stimulate a desire in the listener—a desire to buy the offered services or goods. While those desires, and their satisfaction, may be important to the economy, they don't involve the good associated with the pursuit of knowledge, and accordingly don't deserve the same constitutional protection.

His analysis of freedom of religion proceeds along similar lines. He rejects the leading theories of such freedom and offers instead an instrumental justification of the freedom, based on an assumption of the value of religion and religious practice. In particular, he notes: "The best reasons for protecting religious freedom rest on the assumption that religion is a good thing. Our Constitution guarantees religious freedom because religious people want to practice their faith."⁴²

This argument, in turn, helps to explain certain anomalies in the

41. *Id.* at 69.

42. *Id.* at 49.

scope of protection accorded to religious and near-religious practices. Religious freedom, on this argument, is only available to those who are committed to certain practices and positions because of their religions; it is not similarly available to those who act out of commitment to some non-religious principle, no matter how deeply held.

B. Freedom Is a Many Splendored Thing

Garvey's analyses of these different freedoms are each interesting and thoughtfully argued. Any one of them would be deserving of longer discussion. But, to my mind, what's more important than the artfulness of the individual analyses is the depth of his larger argument about the nature of constitutional freedom. The different recharacterizations of freedoms of speech, religion, and association are offered up as a package which, taken together, provide wide-ranging support for Garvey's claim that we have systematically misunderstood the Constitution's freedoms. His claim for an instrumental view of constitutional freedom gains support to the extent that he can offer plausible readings of a variety of freedoms; the more comprehensive his theory, the more plausible it becomes.

Moreover, the recharacterization of constitutional freedoms is, even taken as a whole, only a part of Garvey's overall argument. Over the course of his discussion, what emerges is a subtle four-part theory about the nature and scope of our freedoms—consisting of (1) acts, (2) actors, (3) constraints, and (4) the state—which together support his understanding of freedoms in a non-traditional, instrumental way. With this multi-part analysis, Garvey can explain diverse and surprising facets of constitutional law.

Consider, in this connection, the constitutional status of children and the mentally disabled. Children are, of course, a notorious constitutional anomaly in that they enjoy some, but not all, of the freedoms accorded adults, and any respectable theory of Supreme Court decisions must be able to explain the anomalies as well as the central and paradigm cases. So it is for Garvey's analysis.

Constitutional freedoms are freedoms to act in certain ways which our society deems intrinsically valuable. But “actions” surely involve more than just behavior. Behavior must have certain characteristics in order to qualify as action; then, and only then, can we ask if it is valuable. Understanding the criteria for actions leads, in turn, to an understanding of the nature of the actors. In the usual case, the actors are individual, adult citizens who have the capacity to deliberate about their lives and the values they seek to fulfill, and the citizens’ actions are taken in an effort to fulfill those values.

An actor, in other words, must have the capacity to engage in full-fledged practical reasoning in order to produce for society the kind of value for which constitutional protection is intended. However, children and the mentally deficient characteristically lack some part of this capacity to engage in practical reasoning, and so their actions generate less of the value which is expected to result from constitutional protection. Thus, the apparent anomaly regarding children is explained as follows: the actions of children, and the mentally deficient, don’t produce the same value that we expect from the actions of adults, and therefore they are entitled to less in the way of constitutional protection.

Garvey’s four-fold analysis of the nature of freedoms is both subtle and far-reaching and allows him to integrate diverse realms of constitutional law, some of which are far removed from the usual topics of civil rights law. In the first place, this analysis promotes a theoretical insight about the dynamic of constitutional freedoms. It seems simple and straightforward to recognize that if constitutional freedoms are freedoms to act in certain valuable ways, then constitutional law must focus on both the acts and the actors. It is less obvious, but no less important, to recognize that if the Constitution protects various freedoms to act from governmental interference, then constitutional law must also focus on the nature of the government and its constraints. Garvey writes: “Freedom is a game played on both sides of the ball, just like football. In constitutional law the team on the other side of the ball

is the government.”⁴³ Scholarship about constitutional freedoms has not commonly recognized the significance of that other “team.” Garvey points out:

It has always struck me as odd that although we have a fairly refined set of categories for protected acts . . . we seldom think about constraints . . . in these terms. There are lots of cases holding that x is (or is not) “speech” in the first amendment sense. There are hardly any holding that y is (or is not) an “abridgment.” There are also lots of cases holding that x_1 , x_2 , and x_3 are different categories of speech with different rules and (sometimes) different levels of protection. But we don’t hear courts say that y_1 , y_2 , and y_3 are different categories of abridgment with different rules and levels of prohibition.⁴⁴

Garvey, of course, can’t rectify that imbalance by himself, but he spends a substantial portion of the book investigating and illuminating the complexities both of government constraints on freedom, like taxes and regulation,⁴⁵ and of the government itself,

43. *Id.* at 157.

44. *Id.* at 164.

45. For example, one of the parts of constitutional law that has always left me perplexed, and frustrated, has been the doctrines regarding the government’s prerogative to withhold certain benefits. Governments, both national and local, can hire and fire various employees, assist the poor and infirm, and subsidize commercial benefits. The state need do none of these things and could therefore choose to withdraw these benefits. However, can a government withdraw these benefits in a way that depends on the recipient compromising some important right? Can, for example, a government fire an employee for campaigning for political office?

For some time, the Supreme Court’s decisions seem to have been dominated by a particular theory which is often expressed in terms of “greater” and “lesser” powers. Garvey sketches this theory in a few easy strokes:

Government benefits often come with conditions attached. Even when the conditions are unpleasant the government will justify them by arguing that the greater power includes the lesser: “Everyone agrees that we can absolutely refuse to give you B (the greater power). We are not

as it might impinge on freedom's exercise.

V. SOME METHODOLOGICAL DISCONTENT

These investigations are rich and thought-provoking. But, however much I admire Garvey's breadth and elegance, I am ultimately unpersuaded by his argument. To illustrate my disagreement, I return to the problem of privacy. In my view, *Bowers* was a terrible result because I want to keep the government out of my bedroom. This is not just a matter of my personal preferences when it comes to bedroom pleasures. I happen to believe that no good could ever come of the state meddling with my sex life, nor with anyone else's. I therefore regard it as a fundamental premise of sound political organization that my intimate decisions, as well as those of other competent adults, should be protected as our own private business.

I can, by the way, provide a completely instrumental justification for this position. Reserving a large arena of individual privacy, free from governmental scrutiny, will provide the best opportunity for individual citizens to develop their own lives, as they see fit, and ensure the greatest respect for the different choices they make as part of that development. Similarly, keeping the government from regulating my most intimate choices will limit the power of the state and make it more likely that the state must secure my genuine consent in order to retain its authority. Therefore, I don't need any assumptions about the citizenry's "retained rights" in order to conclude that a limited state is preferable to a more intrusive one when it comes to intimate matters and that our laws should restrict the government's power by protecting my "right" of privacy.

While keeping the state out of the bedroom is part of what I think *ought* to be the reigning theory of constitutional law, I must

so hardhearted. We will give you *B* if you will do *C* (the lesser power).

How can you complain about that?"

Id. at 199-200. He also recognizes the theory's troubling consequences, and then disposes of it.

acknowledge that my view does not accord with the current state of the law. My view isn't entirely foreign. After all, one of the most attractive features of our Constitution is just its general adherence to the premise of limited government, and my credo of what ought to be the law is an extension of that premise into a realm where, unfortunately, many of our forefathers thought it appropriate to meddle. However, it is clear that the Supreme Court's decisions simply don't follow my thinking.

For Garvey, this discrepancy is fatal. His fundamental goal, in this book, is to develop a theory which agrees with and makes sense of the Court's decisions. In this respect, his effort is most aptly compared to that of a scientist who advances a hypothesis that he thinks will match the recorded data. Garvey's view of bedroom privacy should be accepted, he would contend, and my view should be rejected, because his view accords with the "data," and mine does not.

For just this reason, Garvey rejects what are standardly called *autonomy* theories about constitutional privacy. Such theories, as Garvey observes, stress

the idea that each person is an end in himself, a kind of sovereign over a kingdom of one. This is the most basic fact about the moral world. . . . All of us are equal and free to shape our own destinies. And it is good for us to do so.⁴⁶

Autonomy theories are frequently advanced to explain other freedoms—speech and religion among them—and one might well be drawn to such a theory in connection with privacy as well. But, as Garvey argues, such theories simply don't accommodate all the "data" of the Supreme Court's cases on privacy and choice:

The most serious flaw in the idea that freedom is at the service of choice is that it explains too much. It suggests that the law should respect a great variety of choices. But in our

46. *Id.* at 23.

system some choices get more protection than others. Consider this simple fact. If Hardwick had been caught engaging in the practice of optometry rather than sodomy, and if Georgia had had a law against it, there is scarcely a judge in America who would have defended his freedom to act as he did.⁴⁷

Thus, an autonomy theory, without more, fails in Garvey's eyes as a satisfactory theory of our constitutional freedoms because it cannot explain those areas of individual choice which do not receive constitutional protection. Put differently, an adequate theory of constitutional freedoms must ultimately explain why some, but not all, desirable freedoms are protected by the Constitution.

However, this constraint about the adequacy of a theory of constitutional freedoms highlights my problems with Garvey's approach. Garvey makes two fundamental claims in arguing that we should re-think and recharacterize our constitutional freedoms. First, he argues that each freedom is accorded constitutional protection because that freedom, properly understood, is a freedom to act in a special way. Second, the freedom to act in that special way is protected because that kind of action is deemed intrinsically valuable. So the instrumentalist approach to constitutional freedom is only half of the central argument. The other half is a claim about values—namely, about the values he thinks our freedoms will advance. Recall his central claims about the value of love, religion, and the pursuit of knowledge:

There is general agreement in our society that entering a heterosexual marriage is a very good thing, and for that reason we protect the freedom to do it.⁴⁸

The best reasons for protecting religious freedom rest on the assumption that religion is a good thing. Our Constitution

47. *Id.* at 24.

48. *Id.* at 40.

guarantees religious freedom because religious people want to practice their faith.⁴⁹

One of the most important reasons why we protect freedom of speech is that speech—assertion, conversation, debate, publication—is the pursuit of knowledge, an activity that is intrinsically good.⁵⁰

These passages confirm that Garvey's thesis depends on both claims—an instrumentalist understanding of freedoms *and* a claim about the value of the special kinds of action. However, they also reveal a fundamental and quite troubling ambiguity in Garvey's argument.⁵¹ Just whose beliefs count in this formulation? This is a

49. *Id.* at 49.

50. *Id.* at 65.

51. There is, upon inspection, another ambiguity in this way of thinking about constitutional freedom. Does the Constitution protect certain freedoms because they advance values which *are* intrinsically good, or does it instead protect those freedoms because they serve values which are *believed* to be intrinsically good? The difference between these two possibilities is quite significant, and they need significantly different kinds of arguments in support if we are to be persuaded that either can ground an adequate and appealing theory of constitutional law.

In many respects, it seems that Garvey would like to advance a claim that our constitutional freedoms protect activities which *are* intrinsically good. At times, he says as much. The pursuit of knowledge, he contends, is intrinsically good and hence speech, as the way of carrying out that pursuit, deserves constitutional protection. Similarly, he asserts that "love is a good thing. It is an essential part of a good life. One who lived without loving and being loved would be less than human." *Id.* at 28.

But, however much it might agree with the rest of Garvey's enterprise to argue that constitutional freedoms protect the intrinsically valuable, there are two fatal objections to reading him in this way. First, at no point does Garvey provide anything like a theory of intrinsic goodness. He makes no claim about what things are, or are not, intrinsically good, or how we might recognize those that are, other than to assert freedom of speech, religion, and love are good. In this connection, his argument could be linked to the work of John Finnis who has argued that certain kinds of basic activities are fundamentally, and inarguably good. See JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980). Finnis argues that life, knowledge, play, aesthetic experience, sociability, practical

central, but unaddressed question, and it doesn't seem that Garvey can answer it in a satisfactory way.

One way to answer this question, common in discussions of constitutional law, links our understanding of the Constitution to the beliefs, attitudes, or purposes of those who were involved in the drafting and enactment of the Constitution. The most common version of such an argument, for example, depends on claims about the "intent" of the Constitution's "framers."⁵² For Garvey to take this approach would mean developing his argument in the following way: certain freedoms receive constitutional protection because protecting them secures the rights of the citizenry to act in ways that our founding fathers thought intrinsically good.

This move seems plausible enough to explain why there is constitutional protection for freedom of speech and religion, because they each receive distinct and explicit notice in the document's text. However, freedom to love, which Garvey claims underlies the right of private association, is a far more troublesome case for this kind of argument. Privacy, unlike speech and religion, is not mentioned in the Constitution. In the now standard, but unsatisfying terminology, privacy is an "unenumerated" right.⁵³ In

reasonableness and religion are all "basic goods," in that every reasonable human being must, he contends, accept their value as the objects of individual striving. *See id.* at 59-99. But, while Garvey may well find Finnis' argument congenial, he has failed to advance it, as any other grounds for our accepting the claim that knowledge, love, or religion *are* intrinsically good.

Secondly, Garvey is advancing a theory of constitutional law which is, in particular tried to the decisions of the United States Supreme Court. Whatever theory of intrinsic goodness Garvey might provide, he would also have to establish that the Court's decisions can be plausibly regarded as reliably connected to those intrinsically good things. That argument would be more than Herculean. Accordingly, I focus in the text on the connection between the Court's decisions and values which are believed to be good.

52. I happen to think that arguments of this kind are silly, and misguided as a way to understand the Constitution or to appreciate its significance. However, that is well beyond the scope of this review.

53. I regard the distinction between "enumerated" and "unenumerated" rights as completely specious when applied to debates about constitutional adjudication. As Ronald Dworkin notes, constitutional controversies do not

a notorious passage of the majority opinion in *Griswold*, Justice Douglas asserted that the right of privacy is to be found in “emanations” from “penumbras” of the Constitution’s explicit language.⁵⁴ The invocation of emanations and penumbras, like some witch’s familiars, is necessary precisely because the Constitution at no place asserts a right of privacy.

In the eyes of some, of course, this omission is dispositive—if the Constitution doesn’t mention the purported right then it’s no right at all. But Garvey is not troubled on this score. He still regards private association, and the freedom to love, as a proper part of the Constitution. He says as much,⁵⁵ and even if he didn’t say it, he would be compelled on pain of inconsistency to regard privacy as a legitimate constitutional right. As I’ve noted, he undertakes to explain and rationalize the Supreme Court’s decisions as they have been propounded. Those decisions are the data his theory seeks to explain and rationalize. As a result, he must accept both *Griswold* and *Roe*, as well as *Bowers*, and so must accept that a right of privacy is properly part of our Constitution, whether or not the text mentions any such right.

Still, accepting privacy as a legitimate constitutional freedom raises great difficulties for any argument that grounds constitutional protection on the beliefs of the country’s founders. If our freedoms are constitutionally protected because they were believed by the founders to ensure certain intrinsically valuable activities, how is it possible that the founders failed to enumerate either privacy or love as one of the rights worthy of constitutional protection? The issue, again, is not just whether the founders thought privacy valuable, but whether they thought it worthy of *constitutional* protection,

arise about whether we have a freedom of speech, but rather about whether we have a “right” to burn the flag in some protest. See DWORKIN, *supra* note 7, at 79-80. The Constitution certainly doesn’t articulate any such right of flag-burning, and so the conclusion that flag-burning is protected under the guarantee of free speech involves going beyond the text in one or more important ways. Would it then follow that the “right” to burn the flag is “unenumerated”?

54. See *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

55. See GARVEY, *supra* note 5, at 13-14.

and their failure to mention the right indicates instead that they—the very drafters of the text—did not regard it as important. Yet, it is the founders' intent that is crucial on this type of argument. Thus, their failure to esteem the right in question entails that it's not worthy of constitutional protection.

Garvey can't have it both ways. He can't base his argument about the value of our freedoms on some claim about the founders' beliefs and also conform to his self-imposed desideratum that his theory explains the existing set of Supreme Court decisions. He must instead provide some other grounding for the Supreme Court's judgments about the intrinsic value of the actions which our freedoms protect.

As an alternative, he could argue that the Supreme Court's decisions enforce our own, roughly contemporaneous, judgments about what is intrinsically valuable. Various aspects of Garvey's analysis suggest that this is, indeed, the underlying idea. For example, in discussing the freedom to love, he claims: "There is general agreement *in our society* that entering a heterosexual marriage is a very good thing"⁵⁶ As an added bonus, this move could avoid the troubling lack of evidence about the founders' beliefs by depending instead on our own current beliefs about the freedoms that deserve constitutional protection.

Nevertheless, however promising it might seem at first glance, this alternative is unavailing as well. Return again to *Bowers* and the problem of sexual privacy. Garvey argues that the fundamental issue in this case is the freedom to love, which freedom might have been implicated if Hardwick had claimed to be impeded from developing a lasting emotional attachment, but was not at issue in a one-night stand. On this alternative understanding of the Constitution and its protections, those freedoms which are constitutionally protected are those which the Supreme Court discerns as being fundamentally agreed-upon intrinsic values. Therefore, on this argument, the freedom to love receives constitutional protection because the Court concludes that we all

56. *Id.* at 40 (emphasis added).

accept love as a fundamental value.

In short, this grounding for our constitutional freedoms depends on the Court's being as an arbiter, and ultimately an enforcer, of social values as it perceives them. But, as is reflected in *Bowers*, ascribing this role to the Court is extremely nervous-making. It is possible to identify at least three different statements of the supposedly agreed-upon values at issue in that case. The dissent emphasized the traditional understanding of the value of privacy—the right to be let alone. Garvey maintains a different value, which he describes as the value of love. Yet the majority accepted neither of these, and focused instead on the traditional repugnance towards homosexuals and homosexuality. If Garvey's argument depends essentially on the idea that the Supreme Court will identify and effectuate intrinsic values, then the evidence supplied by *Bowers* is that the values which were identified and effectuated in that case were those of homophobia.

This is a problem of general scope. Consider the decision in *Brown v. Board of Education*,⁵⁷ in which the Court invalidated as unconstitutional separate-but-equal public education. Although this case is not within the scope of Garvey's argument, I would presume that, to be consistent, Garvey would have to construe that decision as founded on some agreed-upon value of racial equality. Yet our view of those times seems to indicate that racial equality was most plainly *not* an agreed-upon value and that, to the contrary, racism was the order of the day. Indeed, even if *Brown* can be reconciled with this argument, what of *Plessy v. Ferguson*?⁵⁸ Moreover, without appealing to blatantly racist premises, it was possible in 1954 to argue that integration should be avoided because it would prompt unwanted social and political unrest. Therefore, it seems hard to justify the Court's decision in *Brown* as one in which agreed-upon intrinsic values were protected. In sum, why should the reactions of nine Justices be held dispositive in matters of great social controversy when those reactions may very well change over time?

57. 347 U.S. 483 (1954).

58. 163 U.S. 537 (1896), *overruled by* *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

Recall, in this connection, that Justice Powell later regarded his vote in *Bowers* as an error, and the case mistaken. This grounding for our freedoms seems like a fragile and unstable foundation for something so important.

This role for the Court is especially unsettling when applied to questions of *constitutional* freedom. We begin our appreciation of the Bill of Rights with the proposition that these freedoms are bulwarks against an overly intrusive majority. Hence, the constitutional protection for some rights, rather than others, seems to involve some recognition that those rights are not only profoundly important, but also particularly vulnerable to oppression. An argument that constitutional freedoms protect actions which are perceived by the Court as intrinsically valuable seems to miss this other half of the notion of constitutional freedoms—that they are constitutionally protected so as to be secure against the changing tides of social fashion.

VI. CONCLUSION

In the end, there is a deep irony to the drift of my criticism. My doubts about Garvey's view of freedom lead me to raise fundamental questions about the role which he expects the Supreme Court to fulfill in protecting our constitutional freedoms, and such questions are ones which, in a standard class in constitutional law, are introduced by the study of *Marbury* and *McCulloch*. Garvey has argued about our freedoms in a way that raises deep and important issues of constitutional law, and I wish that he had addressed them in a more systematic way. But my disappointment in this regard is based on my keen appreciation for all that he has done. *What Are Freedoms For?* is a rich and challenging book, with a fresh and rewarding view of issues that I wish were more central to constitutional law.