

## Right Not to be John Garvey

Alan E. Brownstein

Follow this and additional works at: <http://scholarship.law.cornell.edu/clr>

 Part of the [Law Commons](#)

---

### Recommended Citation

Alan E. Brownstein, *Right Not to be John Garvey*, 83 Cornell L. Rev. 767 (1998)  
Available at: <http://scholarship.law.cornell.edu/clr/vol83/iss3/4>

This Book Review is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Review by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact [jmp8@cornell.edu](mailto:jmp8@cornell.edu).

## BOOK REVIEW

### THE RIGHT NOT TO BE JOHN GARVEY

*Alan E. Brownstein*†

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

INTRODUCTION .....	767
I. WHAT ARE FREEDOMS FOR? THE BIG PICTURE .....	768
II. PERSONAL AUTONOMY AND FREEDOM .....	770
A. The Right Not To Be John Garvey .....	771
B. Autonomy and Self-Defining Choices .....	774
III. POLITICAL JUSTIFICATIONS FOR FREEDOM .....	781
IV. RIGHTS AND FREEDOMS .....	783
A. Men Only .....	783
1. <i>Love Is Good</i> .....	783
2. <i>Male Friendship</i> .....	790
B. What Religious Liberty Is For .....	793
1. <i>The Purpose of Religious Freedom</i> .....	793
2. <i>A Response to Professor Garvey's Analysis</i> .....	796
a. <i>The Futility of Coercing Worship</i> .....	797
b. <i>The Progressive Revelation of Religious Dialogue</i> .....	802
c. <i>The Force of Religious Obligation</i> .....	805
C. What Religious Liberty Is Not For .....	806
1. <i>Justifying the Grant of Special Protection to Religion Under an Autonomy Model</i> .....	807
2. <i>Choosing the Right Participants in a Dialogue About the Purpose of Religious Freedom</i> .....	811
D. Choosing Between Competing Purposes .....	813
CONCLUSION .....	818

#### INTRODUCTION

John Garvey has written an important and extraordinarily thought-provoking book discussing the meaning of constitutionally

---

† Professor of Law, University of California, Davis, B.A. 1969, Antioch College; J.D. 1977, Harvard University. The author wishes to thank Vikram Amar and Douglas Laycock for reading drafts of this Review and for providing helpful criticism.

†† Professor of Law, University of Notre Dame, B.A. 1970, University of Notre Dame; J.D. 1974, Harvard University.

protected freedoms. Much of what he writes is controversial. Moreover, although Garvey deliberately and admirably struggles to make his arguments accessible to readers without legal background, this is not an easy book to understand. Many readers will have to go over chapters more than once, as I did, if they really want to understand what Garvey is saying.

The greatest obstacle to learning what this book has to teach, however, is not the effort it takes to understand Garvey's arguments. Rather, it is the unwillingness to confront the values that underlie them. Liberal readers might disagree so strongly with Garvey's basic premises and his conclusions that they might overlook many of the valuable insights the book offers along the way. Thus, for example, while I may disagree with a significant part of Garvey's explanation of the *meaning* of freedom, I believe he says some very important things about the *value* of freedom. Recognizing the value of freedom is no trivial matter. Freedoms are not cheap, and society needs continual reminders that they are worth the price that we pay for them.

Finally, Garvey's book is a challenge—an invitation to an intellectual duel. It is a well-mannered and thoughtful challenge, devoid of rancor and ill-will toward his adversary. But Garvey writes with conviction to persuade his audience. Contesting Garvey's ideas on the terrain he has chosen is an opportunity to test one's own values and understanding of constitutional rights against an analytically formidable alternative. The best part of his book is the effort it takes to explain to yourself why he is wrong.

## I

### WHAT ARE FREEDOMS FOR? THE BIG PICTURE

Despite the title, Garvey is really trying to answer two questions in this book, not just one. He wants to know what freedoms are for, but he is equally concerned with understanding what freedoms are *not* for. Garvey has a dual thesis to explain the meaning of constitutional rights.

Garvey's first thesis is a theory about why we protect certain freedoms or rights in the Constitution. He wants to convince us that freedoms serve a vision of what is good. Constitutional rights exist to enable people to "live good lives" by doing good things.<sup>1</sup> That is what freedoms are for. In the language of philosophers, "the good is prior to the right" and the latter is in the service of the former.<sup>2</sup>

---

<sup>1</sup> See JOHN H. GARVEY, *WHAT ARE FREEDOMS FOR?* 18-19, 39-41 (1996).

<sup>2</sup> See *id.* at 39-41. Many of the basic issues that Garvey discusses in his work—for example, the issue of whether the right comes before the good, or questions about the nature of the self—are matters of philosophy and ethics at least as much as they are questions about law. On occasion, Garvey refers to the philosophical foundation of his ideas,

Garvey's other thesis addresses what freedoms are *not* for. Freedoms are not for protecting personal autonomy. We do not protect rights to enable people to make self-defining decisions. Freedom does not exist to give people the choice to do what is good or what is bad.<sup>3</sup> Freedoms are not necessarily bilateral.<sup>4</sup> The Constitution may protect the right to engage in an action without protecting the right not to engage in the same activity.<sup>5</sup>

Garvey also recognizes that important auxiliary reasons underlie how we define constitutional rights. There are political justifications for protecting freedom, such as the need to promote social stability and avoid civil strife.<sup>6</sup> These political explanations for freedom also play an important supporting role in understanding the nature of rights. The theory that we protect freedoms to facilitate doing good is not the exclusive reason for protecting rights. Garvey concedes that freedoms can serve several overlapping interests.<sup>7</sup> His argument seems to reject only one justification for constitutionally protected freedoms: that of protecting personal autonomy.<sup>8</sup>

Of course, the nature of constitutional rights is more complicated than this. Sometimes we protect the right of people to do bad things. Moreover, recognizing that a person has a right to engage in an activity does not guarantee that government may never interfere with the individual's conduct. Sometimes the government has a sufficiently good reason to regulate or even prohibit the exercise of a right. Garvey carefully explains the way in which both of these complications fit into his general framework.

In the first instance, Garvey recognizes that the Constitution sometimes protects people's rights to perform particular immoral acts. The march of American Nazis through the streets of Skokie, Illinois to taunt Jewish holocaust survivors was an evil act, but the First Amendment still protected it. We allow such immoral acts, however, because they are subsumed within a larger understanding of how we

---

but this is primarily a book about law, not philosophy. The level of discourse is much closer to the common sense reasoning of traditional legal scholars, judges, and lawyers than it is to philosophical analysis.

I do not disparage this lack of philosophical sophistication. If anything, I emulate it. From my perspective, there is virtue in addressing legal issues in a thoughtful way that is intellectually accessible to the conventional actors and citizens whose understanding of the Constitution gives it operational meaning. I have written this Review at the same level of discussion as Garvey's work.

<sup>3</sup> See *id.* at 6-8, 18-19, 39-47.

<sup>4</sup> See *id.* at 17.

<sup>5</sup> See *id.* at 17-19.

<sup>6</sup> See *id.* at 10-12, 47-49.

<sup>7</sup> *Id.* at 10-12.

<sup>8</sup> *Id.* at 47 ("The autonomy theory is appealing in its simplicity. But it is too simple to explain the actual complexity of the law.").

can enable people to do good things.<sup>9</sup> The Constitution protects the good, but it does so in the context of a Constitution—not a detailed ethical code. Constitutional pictures are necessarily painted with a broad brush that will not always filter out specific wrongful acts from the general protection provided to rights.

In the second instance, Garvey distinguishes the question of whether the freedom to engage in certain conduct exists in general from the question of whether the state can prohibit a particular exercise of that freedom in a specific circumstance.<sup>10</sup> Establishing that a category of freedom exists because it enables individuals to do good, or because it furthers some political objective, does not conclusively determine whether the government may prohibit a particular action falling within that category.

Thus, we protect freedom of speech as a right for certain reasons. Speech that does not serve the goals of that right falls outside of its coverage and receives no constitutional protection.<sup>11</sup> Speech that falls within the scope of that right may also be prohibited, but for very different reasons. When the government has a sufficiently compelling justification for abridging the right to speak, it may restrict an individual's freedom to express a specific message.<sup>12</sup> It is critical to recognize that in these situations the freedom to speak still exists. An interest of greater value has simply outweighed that right.<sup>13</sup> Unlike those circumstances in which a person's conduct extends beyond the scope of a right, the individual suffers a loss of freedom here that must be taken into account whenever such government actions are evaluated.<sup>14</sup>

## II

### PERSONAL AUTONOMY AND FREEDOM

Garvey's repudiation of personal autonomy as a constitutional value is seriously flawed. Put simply, he underestimates the importance of personal autonomy as a foundation for constitutional rights. Garvey believes that constitutional freedoms can be adequately protected without any reference to autonomy under an alternative framework grounded on moral values.<sup>15</sup> Ultimately, as I argue below, his

---

<sup>9</sup> See *id.* at 14-15.

<sup>10</sup> *Id.*

<sup>11</sup> See *id.* at 65-77.

<sup>12</sup> See *id.* at 73; see also *id.* at 161-62 (discussing the government's interest in forbidding speech creating a "clear and present danger" of initiating unlawful action).

<sup>13</sup> See *id.* at 15.

<sup>14</sup> See *id.* at 14-15.

<sup>15</sup> *Id.* at 12.

framework is just not capable of doing the job that Garvey assigns to it.<sup>16</sup>

In part, Garvey's failure to appreciate the value of autonomy for constitutional purposes reflects a misunderstanding of how a respect for personal autonomy structures the relationship between the individual and the state. To Garvey, autonomy refers to the discretion to make choices.<sup>17</sup> From my perspective, autonomy asserts the independence and integrity of the self against the use of state power to define and transform a person against his will. The difference in our understanding of personal autonomy has substantial implications for Garvey's analysis of freedom.

#### A. The Right Not To Be John Garvey

I do not know John Garvey well. I have met him only twice, although I have read many of his articles and we have communicated by e-mail on several occasions. Despite my lack of personal knowledge, I am more than willing to assume that Garvey is a good person. While I think I am a fairly good person too, judged against the definition given in his book of what it means to live a good life, perhaps Garvey is a better person than I am. Perhaps he is closer to G-d on a spiritual level than I am, his writings are closer to the truth than mine, his love for his family is deeper and more meaningful.

I do not know that any of these things are true. But suppose a clear majority of Americans agrees that John Garvey is a better person than I am, and that the world would be a better place if it had more people like John Garvey and fewer people like Alan Brownstein. Suppose further that in response to the majority's sentiment, the state concludes that the first step toward making America a better place is to transform me into someone like John Garvey. Assuming that I obstinately insist on remaining myself despite all the evidence the state provides to establish that I would live a better life if I were more like John Garvey, should the state be able to forcibly arrange this transformation without my consent?

To be sure, the model of freedom that Garvey describes in his book would place certain obstacles in the state's path. For example, the state could neither force me to change my religion, nor prohibit me from speaking out to protest its actions. The government argues, however, that it has found a way to accomplish its goal notwithstanding these limitations on its power. The government is not going to coerce me into changing my religion. Instead, the government is going to change who I am. Through the use of hypnosis, psychotropic

---

<sup>16</sup> See *infra* Part II.A.

<sup>17</sup> GARVEY, *supra* note 1, at 6-12.

drugs, psychotherapy, and other means, it hopes to transform me into the kind of a person who *wants* to be more like Professor Garvey and less like my former self. I will remain free to say what I think, worship how I wish, and find love as I can, but my identity, the "I" that directs these thoughts and actions, will be reoriented to meet the state's objectives.<sup>18</sup>

It is not clear to me that Garvey's theory prevents government from attempting to achieve this kind of transformation. One might infer from his rejection of a right to autonomy or self-definition that he does not recognize a right "to be me." However, the issue is uncertain because of the way that Garvey defines autonomy.<sup>19</sup>

If personal autonomy refers to a range of important personal decisions that are more properly determined by the individual than by the state, an unwillingness to protect autonomy would seem to demonstrate an unwillingness to protect the integrity of the self. This conception of autonomy, however, presupposes that decisions of this kind exist. Garvey apparently rejects the very foundation of this understanding of autonomy. There do not appear to be any self-defining decisions in Garvey's world view that are important for reasons other than their moral worth. At least his book does not discuss decisions of this kind. All choices are either morally valuable, essentially trivial, or personally damaging. Accordingly, the autonomy to make decisions without regard to their moral significance is of little real

---

<sup>18</sup> *Pitcherskaia v. Immigration and Naturalization Service*, 118 F.3d 641 (9th Cir. 1997), provides a good example of this kind of state-mandated transformation of an individual. Pitcherskaia sought asylum in the United States on the basis that she feared persecution in her home country, Russia, because she was a lesbian. The Board of Immigration Appeals ("BIA") "defined 'persecution' as 'the infliction of harm or suffering by a government . . . to overcome a characteristic of the victim.'" *Id.* at 647 (quoting *In re Fauziya Kasinga*, Int. Dec. 3278 at 12 (BIA June 13, 1996) (en banc) (designated as precedent by the BIA)).

In support of her claim, petitioner expressed her fear that she would be sent to a psychiatric institution where she would be "subjected to electric shock treatments and other so-called 'therapies' in an effort to change her sexual orientation." *Id.* at 644. As a "suspected lesbian," she had already been required to attend therapy sessions at a local clinic. Sedative drugs were prescribed for her and the clinic psychiatrist attempted to hypnotize her. *Id.*

The BIA denied her petition for asylum on the ground that the Russian authorities were not punishing her for being a lesbian; they only intended to "cure" her of her current sexual orientation. Without establishing the authorities' intent to punish, Pitcherskaia could not establish that she was being persecuted. *See id.* at 645.

The Ninth Circuit reversed, holding that an intent to punish was not a necessary element of persecution. The fact that a persecutor believes that what he is doing is good for the victim does not undermine a finding that persecution exists. *See id.* at 648.

If an individual's freedom is limited to only those activities that constitute a good life, coerced therapy to change a person's sexual orientation would not appear to infringe on a gay person's freedom—assuming, of course, that society believed that homosexual feelings interfered with a person's ability to live a good life.

<sup>19</sup> GARVEY, *supra* note 1, at 6 (defining autonomy as "the ability each person has to make his own moral rules").

value to the individual, and nothing of importance is lost when this interest is ignored.

Given his limited view of autonomy, it is hard to know what inferences to draw from Garvey's repudiation of its protection as a purpose of freedom. Because Garvey never explicitly considers the possibility that autonomy has value, his failure to protect it must be interpreted cautiously. I doubt that Garvey would see any virtue in protecting the integrity of a morally compromised self (although I am not as sure of this as I would be if his book addressed and rejected a more meaningful understanding of autonomy). From Garvey's perspective, however, his analysis may not necessarily suggest a reluctance to protect the integrity of the self. Instead, it may reflect the belief that a morally compromised self, intent on perpetuating its dysfunctional identity, lacks any integrity worth protecting.

Garvey's clearest description of "autonomy theory" and an "'autonomous' view of human nature" appears in his section on religious freedom:

If you scratch a person deep enough, the theory holds, you will find a kind of free-floating self. If you looked at the surface of my life you might say that I was a middle-class Irish Catholic, husband, father of five children, law professor, part-time musician, Celtics fan, and so on. I have naturally inherited a variety of moral convictions (those typical of bourgeois Catholics, or lawyers). I am also moved by various desires that arise from and act upon the details of my life (I want prestigious publishers for my books, money for my children's education, time with my wife).

But my essential self is able to rise above these details. It is unencumbered, unsituated. It can step back from my habitual convictions and desires (my first-order preferences), reflect critically on them, and change them to suit its own plan (second-order preferences) for what my life should be like. Exactly where I get my second-order preferences is a matter of some dispute. Some say that I am guided by reason to universally applicable principles. Others say that I just make them up. But everyone agrees that it's up to me—to my unencumbered self—to choose them, however I might find them.<sup>20</sup>

Under this theory, according to Garvey, no first- or second-order preference touches the self.<sup>21</sup> If a person decides to become a Catholic or a Jew, that choice has no influence on the self of the individual.<sup>22</sup> "The *real* me is able to step back from it, assume an agnostic stance, and make a fresh start."<sup>23</sup>

---

<sup>20</sup> *Id.* at 44 (footnotes omitted).

<sup>21</sup> *Id.*

<sup>22</sup> *See id.* at 44-45.

<sup>23</sup> *Id.* at 45.



I do not doubt that some people understand personal autonomy this way and that there is a tradition that supports this view of human nature.<sup>24</sup> But it is not the only way to understand personal autonomy. The picture of autonomy that Garvey paints rests on two related premises about the idea of autonomy and human nature that are open to challenge. First, the model presupposes that there is no reciprocal connection between a person's self and his choices and resulting behavior. The essential self exists in some special location from which it can control individual choices but cannot be affected by them. Under this understanding of autonomy, there is no such thing as a self-defining decision. No choice that a person makes, or that is made for a person, will influence his self in any way.<sup>25</sup>

Second, under this model of autonomy, there is no reason to protect any particular choice by an individual more than any other choice. The flavor of gum one chooses to chew is indistinguishable from the decision whether to have a baby or the decision to convert from one religion to another. Because all choices are merely reflections of a person's unchanging self, the state's interference with any and all personal decisions is equally problematic.<sup>26</sup> Any act of interference prevents the "authentic" manifestation of the individual's self, and requires a substitute choice that is a less legitimate expression of the self.

The problem with this understanding of autonomy is that it arguably protects the authenticity of manifestations of the self, but strangely provides no protection of the integrity of the self itself. Indeed, under this model, there does not seem to be any way that law can reach the self other than by ordering the execution of the individual and destroying it. This is an odd way to describe a theory that most of its proponents believe is concerned with the making of self-defining choices.

## B. Autonomy and Self-Defining Choices

An alternative view of autonomy does not accept the idea of an essential self—one that selects and changes preferences the way a per-

---

<sup>24</sup> For sophisticated discussions of the nature of the self and personal autonomy in Western philosophy, see MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 15-65 (1982); CHARLES TAYLOR, *SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY* (1989).

<sup>25</sup> See GARVEY, *supra* note 1, at 44-45.

<sup>26</sup> See *id.* If the choices a person makes do not influence her essential self, no choice can be characterized as more important than another because of its potential to transform the self.

A person might distinguish between morally insignificant and morally important manifestations of the self, and care more about the latter, but that presupposes a moral continuum, which Garvey might say is his whole point. Choices matter only if they are morally significant.

son puts on clothes—as the basis for protecting personal autonomy as a moral good and constitutional value. The self is not completely independent from all its choices. When I talk about protected autonomy choices, for example, the decision whether to have children, I am not talking about choices that a person can easily discard and replace. I take the idea of self-defining choices seriously and literally. Once such choices are made, the individual making the decision is no longer the same person in a very basic and important sense. Thus, choices have consequences for the self that makes them.<sup>27</sup>

A therapist I once knew described how one of his patients made an important breakthrough when he stopped saying, “I have a problem,” and began saying, “I am a problem.” The idea was that the patient could not improve until he recognized that he would have to change in central ways, even in some ways seemingly unrelated to his symptoms. He could not continue to be the person he was and solve his problems. I think of protected autonomy choices in the same way. Speaking personally, I cannot imagine who I would be if I were not Jewish, and I do not believe I am the same person I was before my children were born. In brief, certain autonomy choices can transform, or at least have the potential to transform, a person’s self. Those are the kinds of choices that I believe the Constitution protects.<sup>28</sup>

---

<sup>27</sup> I do not dispute the continuity of the self that undergoes transforming experiences. The view of autonomy that I propose understands the self to be capable of substantial changes to its nature while remaining part of an ongoing identity. Whether life experiences can be so transforming that the self becomes discontinuous such that its current status is devoid of any link to its former identity is an issue I leave to philosophers and psychologists who have thought about these issues far more than I have.

<sup>28</sup> Justice Brennan expressed something similar to this principle of autonomy in his opinion in *Eisenstadt v. Baird*, 405 U.S. 438 (1972). In discussing a person’s right to decide whether to have a child, Brennan wrote, “If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.” *Id.* at 453.

Ronald Dworkin makes a similar argument in support of a right of procreative autonomy that includes the decision to have an abortion. The state’s interference with the decision to have an abortion is different than other regulatory limits on personal decisions because of the impact a prohibition of this kind may have on pregnant women. Dworkin writes:

A woman who is forced by her community to bear a child she does not want is no longer in charge of her own body. It has been taken over for purposes she does not share . . . . The partial enslavement of a forced pregnancy is, moreover, only the beginning of the price a woman denied an abortion pays. Bearing a child destroys many women’s lives, because they will no longer be able to work or study or live as they believe they should, or because they will be unable to support that child. Adoption, even when available, may not reduce the injury. Many women would find it nearly intolerable to turn their child over to others to raise and love . . . .

. . . . A woman who must bear a child whose life will be stunted by deformity, or a child who is doomed to an impoverished childhood and an

One may reject this description of the relationship between the self and choices as inaccurate. I think the intuition in support of this understanding is powerful, but intuitions can be mistaken. If we do accept the proposition that an individual's personal decisions influence who he or she is, however, this conclusion will have important ramifications for our understanding of the nature of constitutional rights. If we forthrightly and knowingly refuse to protect self-transforming decisions, we necessarily reject the right to determine one's own identity. If no such rights exist, it would seem that the state is free to engage in activities designed to change a person's identity as long as it does not impede the individual from living a good life in other respects.

Garvey's response to this line of argument might be that I have placed the cart before the horse, as liberals are wont to do. The Constitution does protect self-transforming decisions to a considerable extent, Garvey might argue, but it does so because such decisions enable people to live good lives. A decision is only really important to one's sense of self if it has this kind of moral value. Other choices are superficial even if they seem to substantially influence personal behavior. Thus, a complex scheme of color-coordinated outfits that determines what a person wears may influence a great many daily choices, but it is still a superficial and unimportant kind of choice that does not warrant constitutional protection.<sup>29</sup> The number of choices that a decision influences does not make the decision worthy of constitutional protection; rather, it is the moral value of the decision that is important.

This response might be difficult to challenge if it was tailored to each individual's subjective value judgments. Most people, after all, want to be free to make their own decisions because they believe they will choose to live in a way that reflects their own beliefs about what is good and what is important. But that is not what Garvey means. He argues that we protect freedoms to promote an objective vision of the good.<sup>30</sup> The individual's own estimation of the value of the decision may or may not be relevant. Freedoms are not inherently bilateral. With respect to some choices, the individual should be free to act only

---

inadequate education, or a child whose existence will cripple the woman's own life, is not merely forced to make sacrifices for values she does not share. She is forced to act not just in the absence of, but in defiance of, her own beliefs about what respect for human life means and requires.

RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 98-99 (1996).

<sup>29</sup> Professor Garvey suggested this point to me in an e-mail message. Electronic Mail from John Garvey to Alan Brownstein (Dec. 31, 1996) (on file with author).

<sup>30</sup> GARVEY, *supra* note 1, at 19.

in one direction and not the other, regardless of the individual's beliefs about what is right and wrong, important and unimportant.

This understanding of freedom has serious limitations. One aspect of the problem is the constraint that it places on our understanding of what is good. Freedom for Garvey's purposes presupposes that the people drafting and ratifying the Constitution knew what was good, and that the purpose of the Constitution is to insure that what was once understood to be morally valued behavior remains protected activity. But surely the extraordinary effort the framers took to diffuse power and to permit alternative models of government and diverse political values within the various states—even with regard to such essential interests as the right to vote—provides support for a different and more humble interpretation of freedom.<sup>31</sup> The grand experiment of American democracy and the rights enshrined in its foundational document may attest more strongly to the formation of a government whose founders accepted significant uncertainty regarding the nature of the good and the need for continued, unfettered deliberation on moral questions than it does to a constitution that purports to protect established virtues.

Moreover, Garvey's model seems to substitute for the unencumbered, unsituated self, whose autonomy he rejects, a conception of the self that is similarly situated for everyone for moral purposes. There do not seem to be any differently situated selves in the world for whom Garvey's vision of the good may be unacceptable and simply

<sup>31</sup> *The Federalist Papers* themselves make it clear that the new government and the new Constitution were predicated on the inability of the people to identify and act to promote the public good. It was in the nature of liberty that a free society would develop competing factions, James Madison opined in *The Federalist No. 10*, because “[l]iberty is to faction what air is to fire.” THE FEDERALIST NO. 10, at 78 (James Madison) (Arlington House 1966). Indeed, “[t]he latent causes of faction are . . . sown in the nature of man.” *Id.* at 79. They are the convergence of the fallibility of human reason and the “unequal distribution of property.” *Id.* The ability of factions to undermine the public good might be tempered by governmental structures that reduce their influence, but any attempt to create a uniformity of interests and values among the people was folly. *See id.* at 78-79.

In *The Federalist No. 51*, Madison's analysis of the separation of powers system demonstrates an understanding of the reality of diverse values and interests reflected in the American polity. In Madison's terms,

Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature that such devices should be necessary to control the abuses of government. But what is government itself but the greatest of all reflections on human nature? . . .

This policy of supplying, by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public.

THE FEDERALIST NO. 51, at 322 (James Madison) (Arlington House 1966).

This milieu of competing factions and ambitions that Madison describes appears much more consistent with a diverse society in which the search for the good may freely occur than with a society that has officially established what is good and true.

wrong, and who, nonetheless, deserve constitutional protection for their contrary moral perspective. Given the cultural and religious heterogeneity of the American polity, freedom for many minorities—presumably some of the obviously intended beneficiaries of constitutional rights—might be far more usefully grounded on the recognition that the good life for the secular humanist, devout Catholic, and traditional Hindu may be very different, but still deserving of constitutional recognition.

Finally, even if we could reach some consensus on the nature of the good, for Garvey's thesis to be correct and for the Constitution to protect a person's sense of self, it must be true that all self-transforming choices that deserve constitutional protection move the individual toward the good. Any identity-influencing decisions, all important decisions, must reflect this basic objective. Important choices cannot be morally neutral or morally problematic. We are either in the world of color-coordinated clothing choices or morally significant decisions. There is nothing in between. The Constitution will protect the morally meaningful choices. Other choices, the kind of decisions that would receive protection if freedom served the purpose of promoting personal autonomy, are unprotected and may be monitored and directed by the state. But this exposure to state regulation is of little consequence. Nothing important to the self is at risk as long as the individual's ability to live a good life is protected.

But what if some important, self-transforming decisions exist that do not enable the actor to live a better life and are unrelated to that goal? Garvey's theory can not easily account for the existence of, and freedom to make, such choices. Either we must protect those decisions for reasons other than those that Garvey recognizes (to protect personal autonomy, for example), or we must concede that the state may constitutionally regulate identity by substituting itself for the individual in making self-defining decisions of this kind.

I do not think that we can resolve this issue in the abstract. To evaluate the argument that rights are always grounded on a conception of the good that assigns no value to personal autonomy in making self-defining decisions, we must consider the specific meaning of different rights and freedoms. This really represents the core of Garvey's book: it is a demonstration of how his theory works with regard to particular rights. It is also the focus of most of my Review.

There is some utility, however, in going beyond the rights that Garvey specifically addresses. To underscore just how difficult it is to ignore autonomy in justifying rights, let us consider one right that Garvey only alludes to in passing: the right to decide whether to become a parent. In the first section of his book, Garvey asks us to assume for the moment that one of the reasons we protect "acts like

conception and childbearing" is that we think "that new life is a wonderful thing."<sup>32</sup> I have no difficulty assuming that new life is a wonderful thing. I believe that it is. But I also believe that the decision *not* to have children is a constitutionally protected right. Like many choices, the decision not to have children may or may not be a good thing, but I think that decision is protected because it is an identity-defining choice. If there is a right not to have children under Garvey's analysis, however, it must be grounded on the morality of that decision.

Let us assume that *A* and *B* are successful business people. They are married and love each other. They make a very good living and enjoy many material luxuries. They like their life the way it is and do not want to have children. *A* and *B* know several other married couples who were somewhat self-centered before their kids were born but now are devoted parents. *A* and *B* think they too would change if they had children. They believe they would be good parents, but they simply do not want to have children. The parents of *A* and *B*, who would love to have grandchildren, told *A* and *B* that they are being selfish. "Maybe we are," *A* and *B* replied, "but it is our decision and we have a right to make it for ourselves."<sup>33</sup>

*A* and *B*'s decision need not implicate the right to have an abortion. They are taking appropriate steps to avoid conceiving a child and, thus far, their family planning has been successful. The state could change all of this by prohibiting *A* and *B* from taking any steps to avoid conception.

It is not immediately apparent to me how protecting *A* and *B*'s decision not to have children promotes the good. At best, the decision seems to me to be morally neutral. I concede that there may be a way to connect this decision to some understanding of the good life. Because I know of no objective way to identify what is good, a theory grounding rights on a conception of the good could justify protecting almost any activity. Conversely, of course, it is possible to define the good life in a way that clearly denies *A* and *B*'s choice constitutional protection.<sup>34</sup>

Garvey, to his credit, would reject any such after-the-fact inoralizing. The purpose of his book is not to demonstrate how many commonly accepted rights are justifiable by reference to some moral theory. Rather, Garvey believes, we must identify the good within a

---

<sup>32</sup> GARVEY, *supra* note 1, at 17.

<sup>33</sup> To add ideological color to this hypothetical, we might also assume that *A* and *B* are atheists and are militant members of Zero Population Growth. As a moral matter, they believe that new life is a "bad" thing.

<sup>34</sup> For example, Jewish tradition recognizes a duty to have children, and would view *A* and *B*'s decision to be immoral. See JOSEPH TELUSHKIN, *JEWISH WISDOM: ETHICAL, SPIRITUAL, AND HISTORICAL LESSONS FROM THE GREAT WORKS AND THINKERS* 143-46 (1994).

specific moral framework.<sup>35</sup> Determining what is good is not an open-ended intellectual exercise.

There is a price to be paid for the honesty and rigor of this approach, however. Defining rights in terms of the good life may leave the status of arguably self-defining decisions, such as whether to have a child, largely indeterminate or unprotected even in situations in which the case in support of the transformative nature of the decision is extremely powerful. That indeterminacy will necessarily carry over to the question of whether the state can deliberately manipulate personal identity. As good a person as John Garvey may be, I would like greater assurance that the state cannot attempt to mold me into his image.

Despite this criticism, it should be clear that a commitment to personal autonomy as a basis for constitutional rights is not necessarily inconsistent with much of what Garvey thinks freedoms are for. That is why people who strongly believe that many constitutional freedoms are grounded on a right of personal autonomy may still improve their understanding of the nature of rights by reading Garvey's book. Rights can have multiple purposes that in many instances are mutually reinforcing. Even when the purposes of a right do not directly overlap, they can often both be vindicated by a sufficiently broad interpretation of the scope of a right. Only when specific goals are in conflict will courts need to rank the right's objectives and determine which purpose is controlling.

An equal protection analogy may help to illustrate this point. Under a political process model of the Equal Protection Clause, the courts will rigorously review laws that disadvantage discrete and insular minorities. The courts do not trust the results of the political process when the majority continually burdens powerless and historically victimized groups.<sup>36</sup> Laws disadvantaging racial minorities would receive rigorous scrutiny pursuant to this analysis. Laws disadvantaging racial majorities would not.<sup>37</sup>

A different equal protection framework insists that the Constitution is color-blind, and that courts must rigorously review all laws that classify on the basis of race. Under this view, government is prohibited from classifying on the basis of race because doing so results in

---

<sup>35</sup> The principles that comprise the specific moral framework Garvey endorses are stated in various chapters of his book. One principle, for example, affirms that "love is a good thing." GARVEY, *supra* note 1, at 28. God and religion are also good. *See id.* at 49.

<sup>36</sup> *See* *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-6 (2d ed. 1988). *See generally* Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985) (discussing *Carolene Products*'s operative terms and the need for doctrinal reorientation).

<sup>37</sup> *See* *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 324-25 (1978) (Brennan, J., concurring in part and dissenting in part).

numerous adverse and unacceptable sociopolitical consequences: racial classifications breed resentment and bitterness, fragment our society, reinforce racial stereotypes, and so on.<sup>38</sup>

It is not difficult to agree with both of these equal protection models at least to some extent. A person who concludes that a law disadvantaging black people should be struck down because prejudice and invidious motives are so likely to have influenced it might also agree that a law disadvantaging white people should be struck down because of its political consequences. One might consider both doctrinal models to be equally persuasive. Alternatively, one might consider political process failures to be particularly serious constitutional problems requiring very rigorous review, but still accept the enforcement of color-blind principles as an important purpose of equal protection doctrine. Only in certain cases, such as those involving affirmative action programs designed to remedy past discrimination against racial minorities, would there be a stark conflict that would require a court to choose one model over the other.<sup>39</sup>

The same argument can be made about the purposes of fundamental rights. We may protect the right to have a child both because new life is a wonderful thing, and because the decision to have a child is a self-defining choice that falls within a protected sphere of personal autonomy. We may protect the right not to conceive a child or to have an abortion on personal autonomy grounds alone. We may even conclude that the right to bear a child, because it serves multiple purposes, deserves more rigorous protection than the right to have an abortion. There is no clear conflict between these alternative explanations of what freedom is for unless one argues that new life is such a wonderful thing that it requires the sacrifice of a woman's choice to have an abortion. Although that argument is permissible, it does not necessarily follow from the premise that new life is good, and that decisions to create new life deserve protection from state interference.

### III

#### POLITICAL JUSTIFICATIONS FOR FREEDOM

The goal of avoiding civil strife is certainly a powerful justification for protecting certain freedoms. Religious freedom is an obvious example. The framers of the Constitution wanted to avoid the wars between religious sects that had plagued Europe for so long. This justification for religious freedom is not complete, however. Standing

---

<sup>38</sup> See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 222-25 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 494 (1989) (O'Connor, J., plurality opinion).

<sup>39</sup> Justice Brennan in *Bakke*, for example, still thought discrimination against whites was a serious enough problem to require intermediate level scrutiny. *Bakke*, 438 U.S. at 358-59.



alone, it provides inadequate support for protecting the freedom of small and easily oppressed minorities. But it is certainly part of the explanation for religious liberty. Garvey makes all of these points.<sup>40</sup>

There are other political justifications for protecting personal freedom, however, that Garvey ignores. One is particularly important because it resonates so strongly with the view that personal autonomy is an important source of constitutional freedoms: we protect individual freedom because it is intrinsic to popular sovereignty.

There is little doubt that the idea of popular sovereignty was part of the conceptual foundation of the United States Constitution. Government is subordinate to the people. Its legitimacy depends on their consent. "We the people"<sup>41</sup> are the boss. We are the ultimate source of governmental authority.

If the people collectively are to be sovereign over government, what relationship should exist between government and the individual? If the government can assert total sovereign authority over each individual, it is difficult to understand how the idea of popular sovereignty can have any real meaning. The people acting collectively cannot effectively control a government that determines who we are as individuals. Citizens programmed by the government are not likely to oppose its policies.

Of course, the government may respond that the molding of citizens is compatible with popular sovereignty as long as a majority of the people agree with the shape of the mold that the state employs. However, that response presupposes the power of one majority to freeze its vision of individual and public good by imposing that vision on future polities through the coercive power of the state. Popular sovereignty was not intended to apply solely to the first generation of constitutional pioneers. The Constitution presupposes changing populations and changing beliefs. "It is an experiment . . . based upon imperfect knowledge,"<sup>42</sup> and open to new catalysts and ideas—it is not a static model perpetuating orthodoxy.<sup>43</sup>

<sup>40</sup> GARVEY, *supra* note 1, at 47-49.

<sup>41</sup> U.S. CONST. preamble.

<sup>42</sup> *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

<sup>43</sup> In the final pages of his recent book, *Original Meanings: Politics and Ideas in the Making of the Constitution*, Jack Rakove describes the tension between Madison's appreciation for tradition and stability in a constitutional system and Jefferson's contempt for sanctimonious commitments to the past and his willingness to respect political change and the wisdom of new generations. Rakove concludes that:

In the end, it was Jefferson who better grasped the habits of democracy, Madison who better understood its perils. But perhaps Jefferson also saw more clearly than his friend what the experience of founding a republic finally meant, even to the conservative framers themselves. Having learned so much from the experience of a mere decade of self-government, and having celebrated their own ability to act from "reflection and choice," would they not find the idea that later generations could not improve upon

True popular sovereignty requires a private sector of human thought and belief that is immune from government control. It relies on private institutions, families, houses of worship, and the media, all interacting with people in the process of determining individual identity. Personal autonomy—the right to determine who we are and what we think and value—is the cornerstone of popular government. To borrow a phrase, if we want government to be “of the people, by the people, and for the people,” we must make sure that government is kept sufficiently separate from the people so that the state does not displace the development of private beliefs and values. This political justification for personal freedom may not be a complete foundation for the protection of constitutional rights, but it effectively explains much of our Free Exercise and Establishment Clause jurisprudence, including the commitment to a separation of church and state.

#### IV

#### RIGHTS AND FREEDOMS

##### A. Men Only

##### 1. *Love Is Good*

One cluster of rights that Garvey considers relates to personal associations, in particular, friendships, and sexual relationships, more specifically, homosexual sodomy. In discussing the latter subject, he evaluates the Supreme Court's decision in *Bowers v. Hardwick*.<sup>44</sup> *Bowers* is a relatively easy case for Garvey, and one that is clearly correctly decided on its facts.<sup>45</sup> The homosexual activity that Hardwick allegedly committed in violation of Georgia law was not part of a long-term meaningful relationship.<sup>46</sup> It was, in essence, a one night stand—a sexual act devoid of emotional attachment or intimacy.<sup>47</sup> The pleasure of sexual gratification resulting from such an activity, standing alone, is not of sufficient value to justify making its pursuit a constitutional right.<sup>48</sup>

What is of true value, and what the Constitution does protect, is love. Love “is an essential part of a good life.”<sup>49</sup> Love is not good

---

their discoveries incredible? How could those who wrote the Constitution possibly understand its meaning better than those who had the experience of observing and participating in its operation?

JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 367 (1996).

<sup>44</sup> 478 U.S. 186 (1986).

<sup>45</sup> GARVEY, *supra* note 1, at 37.

<sup>46</sup> *See id.* at 24-25.

<sup>47</sup> *See id.*

<sup>48</sup> *See id.* at 24-26, 36-37.

<sup>49</sup> *Id.* at 28.

because "people choose to see love as a good thing."<sup>50</sup> It simply "is a good thing."<sup>51</sup> "Love (the good) comes first, and the right to freedom follows after it."<sup>52</sup>

Defining love is no easy task. It is probably even harder for law professors than it is for most people. It is not a subject we spend a lot of time discussing. Still, Garvey does a very good job of trying to explain what love is. I cannot adequately summarize his discussion, but love involves in part "a sense of appreciation or admiration for the qualities that make the other person special."<sup>53</sup> Love is also a form of mutually benevolent caring and sharing.<sup>54</sup>

Garvey recognizes that erotic love is part of the good life that he is describing.<sup>55</sup> Erotic love, however, is much more than the physical sensation of sexual acts and the pleasure of having an orgasm. It is clear to Garvey that sex as an undifferentiated opportunity to have an orgasm is not something that the Constitution should protect for either homosexuals or heterosexuals.<sup>56</sup> To receive constitutional recognition, erotic love must be part of a long-term loving relationship. The difficult question for Garvey—the issue that the facts of *Bowers* did not present and that the Court did not resolve—is whether erotic love between people of the same sex should receive the same protection provided to erotic love between people of different sexes in the context of a long-term loving relationship.<sup>57</sup> The Defense of Marriage Act<sup>58</sup> raises far more serious constitutional problems than the prosecution of persons engaged in casual sex of any kind.

Garvey acknowledges that the kind of love that is worthy of constitutional recognition may exist between gay people.<sup>59</sup> Surely, he notes, "gay lovers can satisfy other [than 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."<sup>60</sup> The protection provided to homosexual relationships remains an open issue, however, not only because the Court in *Bowers* failed to resolve it,

<sup>50</sup> *Id.* at 29.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 28.

<sup>53</sup> *Id.* at 34.

<sup>54</sup> *See id.* at 34-35.

<sup>55</sup> *Id.* at 37.

<sup>56</sup> *Id.* at 36-38.

<sup>57</sup> *Id.* at 37.

<sup>58</sup> Pub. L. No. 104-199, 110 Stat. 2419 (1996). The Act not only provides a definition of marriage to be used in construing all Acts of Congress and any other federal regulations, *id.* (codified at 1 U.S.C.A. § 7 (West 1997)) (defining marriage as a "legal union between one man and one woman"), but also declares that no state shall be required to recognize another state's same-sex marriages, *see id.* (codified at 28 U.S.C.A. § 1738C (West Supp. 1997)).

<sup>59</sup> GARVEY, *supra* note 1, at 38.

<sup>60</sup> *Id.*

but also because there is a serious moral disagreement regarding this kind of erotic love.

Some people argue that homosexual love "is immoral or unnatural, that it is symptomatic of a psychological disorder, that it makes people less happy than heterosexual love, or that it is a sin forbidden by God."<sup>61</sup> To Garvey, the contentions other than the very last one, which the Establishment Clause may preclude, are arguably legitimate grounds "for withholding constitutional protection from homosexual marriage."<sup>62</sup> Before the Constitution can be invoked to protect long-term homosexual relationships, "public moral debate" on the issue must evaluate the merits of these arguments.<sup>63</sup>

After establishing what a right to marry or engage in erotic love may be for, Garvey makes it clear once again what this freedom is not for. It is not about personal autonomy. Justice Blackmun's dissent in *Bowers* is grounded on a right to "'define one's identity.'"<sup>64</sup> Blackmun argues, according to Garvey, that we value intimate sexual relationships "precisely because we can 'choose [their] form and nature.'"<sup>65</sup> That position, Garvey explains, is simply wrong. Indeed, it is more than wrong. It "puts the whole thing backward."<sup>66</sup> We do not "value erotic love because it involves a choice."<sup>67</sup> It is the person with whom we are in love and the relationship we have with him or her that we value. The process by which we identify the person we love is secondary at best.

I think this analysis of the right to sexual intimacy mischaracterizes both autonomy theory and Justice Blackmun's dissent in *Bowers*. Garvey's discussion of why choice is an important component of freedom describes a straw man adversary that is all too easily vanquished. Certainly, if my only options were to value erotic love solely because it involves a choice or to value erotic love because of the profound nature of this kind of human relationship, I would support Garvey's position. But autonomy theory does not suggest that we value intimate sexual relationships solely because we are involved in choosing their form and nature. And Justice Blackmun does not argue in his *Bowers* dissent that this is the reason we value intimate sexual relationships either.

Blackmun argues that sexual intimacy deserves protection as a right because it is "so central a part of an individual's life."<sup>68</sup>

---

61 *Id.* at 41.

62 *Id.*

63 *Id.*

64 *Id.* at 21.

65 *Id.* (alteration in original).

66 *Id.* at 36.

67 *Id.*

68 *Bowers*, 478 U.S. at 204 (Blackmun, J., dissenting).

"[S]exual intimacy is 'a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality.'"<sup>69</sup> The commonality of this kind of a relationship and the widespread recognition of its importance, however, cannot detract from its unique, individualized nature. Because people are different, because we have separate and distinct selves, there may be many different ways to arrange and conduct these relationships and make them meaningful to the individual. Thus, when Blackmun states that "much of the richness of a relationship will come from the freedom an individual has to *choose* the form and nature of these intensely personal bonds,"<sup>70</sup> he is not suggesting that the act of choosing in and of itself has intrinsic value. He is arguing that for this kind of a relationship to be meaningful and valuable to individual participants, each individual must freely choose the identity of the other person in the relationship and the nature of the couple's intimacy.

Thus, both Blackmun and Garvey assign value to intimate sexual relationships because of the nature of this kind of personal bonding. The difference between their two approaches, I suggest, has very little to do with how one values love and a great deal to do with how one values the integrity of the self and the dignity of the individual.

Consider the kind of debate that Garvey accepts as a foundation "for withholding constitutional protection from homosexual marriage."<sup>71</sup> "[P]ublic moral debate" must resolve the question.<sup>72</sup> Arguments that homosexual conduct is immoral, unnatural, symptomatic of psychological disorder, unlikely to produce as much happiness as heterosexual marriage, and perhaps, that it is forbidden by G-d are relevant to the case against the existence of a right for gay people to marry. But why are these even relevant concerns? What do they have to do with the value of erotic love as Garvey has previously described it? These arguments are not directly inconsistent with the idea of two gay people joining in a relationship of two mutually admiring, benevolently caring adults who want to spend their lives together.<sup>73</sup>

---

<sup>69</sup> *Id.* at 205 (Blackmun, J., dissenting) (quoting *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 63 (1973)).

<sup>70</sup> *Id.* (Blackmun, J., dissenting).

<sup>71</sup> GARVEY, *supra* note 1, at 41. Garvey is not describing the kinds of governmental justifications that might justify an abridgement of the right of gay people to marry. He is addressing the more fundamental question of whether they have this right in the first place.

<sup>72</sup> *Id.*

<sup>73</sup> It is difficult to imagine a public debate on *this* issue—on the question of whether gay lovers in a long-term relationship have the capacity to deeply admire and care for one another. Presumably, even the most hopelessly homophobic critics of gay marriage would make that concession; and if they did not, what kind of argument or evidence would possibly change their minds?

In accepting that these arguments may justify withdrawing constitutional protection from homosexual marriage, Garvey makes clear that there is a moral dimension to the kind of love that he is willing to protect. It must not only be true love, but also good love.<sup>74</sup> Or perhaps under Garvey's analysis love cannot be true unless it is also good. In either case, the difference between this model and an autonomy approach to defining rights is apparent.

Garvey places the good before the right,<sup>75</sup> and the good is defined, for the most part, by objective moral goals. On an issue such as the right of gay people to marry, majoritarian normative preferences expressed in public debate determine objective moral goals. It is significant that Garvey does not require the community even to consider the effect of its moral restrictions on a gay person's opportunities for forming mutually admiring, benevolently caring relationships with others. If homosexual intimacy is not "good" enough to receive constitutional protection, gay people may be required either to refrain from all erotic love or to try to form long-term relationships with morally appropriate partners. The impact on the individual's identity and sense of self of being forced into surrendering choices like these to third parties or the state has no place in Garvey's constitutional analysis.<sup>76</sup>

Autonomy theory, by contrast, defines rights in terms of what is important, defining, or transforming to individuals. It does not measure these factors exclusively by evaluating the moral dimension of the direction of a choice. What makes a choice important is determined in part by the way we understand what it means to be a human person and in part by the uniqueness of the individual. When I have the right to make important decisions, the Constitution not only values the act of choosing, it also protects and affirms the inviolability and dignity of the "I" who is making the choice.

Under an autonomy theory, society today may not be willing to accept the goodness of a loving relationship between two gay people any more than it was willing to accept the goodness of interracial marriage forty years ago.<sup>77</sup> But moral disapproval alone would not undermine the status of marriage or other long-term loving relationships as a right that the Constitution protects.

To justify the protection of sexually intimate relationships from an autonomy perspective, I might supplement Blackmun's discussion

---

<sup>74</sup> See GARVEY, *supra* note 1, at 38-39.

<sup>75</sup> *Id.* at 19.

<sup>76</sup> To be sure, individuals can learn to subordinate their sense of who they are to the demands of external forces just as an indigenous people can adapt to the oppressive demands of an occupying force of outsiders. However, few people mistake either condition for freedom.

<sup>77</sup> See, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967).

in *Bowers* by emphasizing how much being in a relationship changes a person's identity by merging it with their partner's identity. The boundaries of who a person is become blurred as the self of each lover becomes formed by and with the association of the other. Just as relationships of this kind transform the participants, legal rules that force the dissolution of such relationships distort and redirect the identities of those involved. This analysis is probably not as eloquent as Garvey's description of love, but it does recognize that what merits constitutional protection here is a unique and special relationship of defining importance to individuals.<sup>78</sup>

Another possible difference between an autonomy approach to freedom and one that is grounded on traditional moral standards has to do with the protection of searching. If we are trying to protect the autonomy of the individual in making self-defining decisions, we ought to protect preliminary explorations aimed at gaining a better understanding of what the decision involves. Because the freedom to choose a marital partner, for example, is an important precondition for the achievement of a deep and lasting loving relationship, the individual ought to be free to meet and interact with many potential mates if that freedom is to be meaningfully exercised. An individual's pursuit may never ultimately be successful. Some people may go through life perpetually "searching for love in all the wrong places." But the attempt to find a meaningful relationship might be protected as an aspect of personal autonomy.

It is not clear to me that Garvey's conception of freedom for the purpose of doing good encompasses the protection of searching through, and experimenting with, bad choices in an attempt to discover the good. Garvey recognizes that there is a role for choice in a loving relationship, but it seems to come into play after, not before, love exists. He explains that "[c]hoice plays a very important part when we decide to make a go of it."<sup>79</sup> The deepest and most serious kind of love requires both the making of mutual commitments and the effort necessary to carry them out. "This kind of deeper love is not possible without choice."<sup>80</sup> But what about the role of choice in finding love in the first place? Garvey seems to recognize the need to make choices in associations as part of the process of developing

---

<sup>78</sup> I believe the same argument applies to other forms of love that Garvey recognizes as protected freedoms, such as familial love. Before I was married and had children, I defined myself in independent terms that focused primarily on my individual activities. I was a law student, or an attorney, or a professor. Today, in many, if not most, self-descriptions, I am Beth's husband or Ben or Meredith's dad. These descriptions define me much more accurately than any professional designation. The relationships that I am part of define the core of my identity.

<sup>79</sup> GARVEY, *supra* note 1, at 36.

<sup>80</sup> *Id.*

friendships. I will discuss his views on this issue shortly. However, he is strangely silent about the range of behavior that lies somewhere between casual sexual intimacy between partners who have no thought of, or regard for, emotional attachment and sexual intimacy between partners who are hoping, or are at least open to the possibility, that their interaction may grow into a loving relationship.

I recognize that deciding how much to protect the search for meaningful relationships will not be an easy determination. Given the difficulty of accurately determining the motives of people engaged in sexual interactions, any manageable constitutional standard attempting to protect the search for long-term relationships will have to employ presumptions and objective criteria. Any rule adopted will necessarily be under- or over-inclusive depending on where the line establishing the parameter of protected activity is drawn. Either some trivial encounters will receive protection or some potentially serious relationships will be vulnerable to regulation.<sup>81</sup>

This problem of matching the scope of a right with the reason why an activity is protected as a right is generic to fundamental rights jurisprudence. Certainly, the risk of under- or over-inclusive line-drawing in defining rights exists when rights are grounded on personal autonomy. It may be, however, that a model of freedom that justifies the protection of rights in terms of what is good includes a

---

<sup>81</sup> Garvey will protect unsuccessful searching with regard to the exercise of certain rights. He will, for example, protect the search for G-d even if the seeker takes several wrong steps in the process and follows false faiths. *Id.* at 51. However, I am not sure I understand why his framework protects the search for the good and whether it will always do so.

In discussing religious liberty, Garvey argues that for many religious people, their religious beliefs are not a matter of personal choice alone. "The individual does not have complete control over choosing the religious option. It is God who makes the choice." *Id.* at 46. It may not even matter that the individual does everything that he can to avoid G-d's voice. Jonah ran away from G-d, but did not escape His commands. All that resulted from Jonah's decision not to listen was that he ended up in the belly of a whale.

Garvey also suggests that we should protect the search for religious truth because "God's revelation is progressive," and open inquiry and discussion of religious matters will inevitably bring people closer to G-d. *Id.* at 51. Thus, seeking G-d is inherently a good thing even if, as individuals, we do a very poor job of it.

I admit that I am not sure how these two ideas fit together. If G-d will find us no matter how much we try to hide, and if whether we are found is essentially G-d's decision, then why do we care whether people who have not yet found G-d search for him or not? The progressivity of revelation presumably holds even if most people are not trying to find G-d and if they are neither prodded nor assisted in doing so.

I do not challenge these religious convictions and beliefs. I am simply not sure what lesson I should take from them with regard to the protection provided to searching for the good in the realm of other freedoms. There is a parallel of sorts in the way Garvey understands freedom of religion and freedom to love. Under Garvey's analysis, we do not choose love, it chooses us. The admiration that is the foundation for love "is an automatic reaction to qualities that [we] esteem." *Id.* at 36. That is why people talk about "falling" in love. Whether this similarity justifies the protection of searching for love in the same way that the search for religious truth is protected remains unclear.



predisposition to define rights narrowly to preclude the possibility of protecting immoral behavior. Garvey's silence on this issue leaves the question unresolved.

## 2. *Male Friendship*

In considering the scope of the freedom to associate, Garvey argues that there is a constitutional right to associate in "small, exclusive, congenial" clubs that accept only men or women as members.<sup>82</sup> The good that such associations further is the development of friendships. Membership in clubs of this kind fosters friendships because "friends are people we can talk to about what's important in life," and in order to fill that role, according to Garvey, "friends have to be people who are looking in the same direction as [we are]."<sup>83</sup> Exclusive clubs facilitate the forming of friendships by bringing people of the same sort together.<sup>84</sup> Accordingly, Garvey approves of Supreme Court decisions establishing that "'size, purpose, policies, selectivity, [and] congeniality' are relevant to the degree of constitutional protection a club gets."<sup>85</sup> Only those clubs promoting real friendship by bringing like-minded people together deserve special constitutional recognition.<sup>86</sup>

Small, selective clubs that allow only men to be members serve this purpose. They enable their members to live a good life by facilitating the formation of meaningful friendships. In response to the obvious rejoinder that men can form strong friendships with women too, Garvey explains that "same-sex friendships are often different from opposite-sex friendships; . . . they have valuable aspects that are worth preserving; and . . . they naturally arise more easily in same-sex environments."<sup>87</sup> He supports his arguments by discussing the work of feminist writers such as Carol Gilligan who have described the different moralities and views of reality that men and women hold.<sup>88</sup>

The distinctions between men and women that Gilligan identifies, however, do not seem to be essential to Garvey's argument. The thrust of his position, and his reference to clubs, such as the racially restricted Moose Lodge,<sup>89</sup> suggest that clubs with restrictive memberships based on race, national origin, or religion would be equally enti-

<sup>82</sup> *Id.* at 31.

<sup>83</sup> *Id.* at 30.

<sup>84</sup> *See id.* at 31.

<sup>85</sup> *Id.* at 31 (alteration in original) (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 620 (1984)).

<sup>86</sup> *See id.* at 27-33 (distinguishing large, unfocused organizations, such as the Jaycees, from clubs that carefully select members because of common beliefs and a probable interest in doing things together).

<sup>87</sup> *Id.* at 32.

<sup>88</sup> *Id.* at 32-33.

<sup>89</sup> *Id.* at 33 & n.49.

tled to constitutional protection. According to Garvey, the close-knit nature and friendship-fostering purpose of the club should be controlling, not the criteria that club members employ to identify like-minded individuals.<sup>90</sup>

I agree with Garvey, and the Supreme Court, that the Constitution protects the freedom to associate in small, exclusive social clubs. However, I am not at all convinced that connecting such associations to the formation of friendships—a part of the good life—rather than affirming the personal autonomy of the individual provides an adequate defense of this principle. Participating in clubs with restrictive membership policies may facilitate the forming of friendships in one sense, because all the club's members agree on at least one position: they are more likely to enjoy the company of people of the same race, gender, nationality, or religion. But in another sense, the individuals joining such clubs are cutting themselves off from the opportunity to discover that they may have much more in common with people of different backgrounds than they ever imagined.

To take one obvious example, for many of us, the friendships we formed at college were, and continue to be, powerful relationships. Yet the diversity of the student body we encountered there did nothing to detract from the number or meaningfulness of the friendships we developed. Coming from more restricted backgrounds, we may not have realized the potential that existed for forming friendships with “different” people when we first arrived, but that was in part what made the experience of going to college so valuable.<sup>91</sup>

The key point here is that the reason we may find it easier to make friends with people of a similar race, gender, nationality, or religion may have nothing to do with the common interests we actually share with other people or our potential to become good friends with them. It may have far more to do with our sense of our own identity and our unwillingness to modify preconceived notions of who we are and what other people are like. That sense of who we are and what kinds of people are enough like us to be our friends, however, may be unreasonably narrow. By limiting our social activities to clubs with

---

<sup>90</sup> *Id.* at 32. Certainly, the Court has never suggested that “size, purpose, policies, selectivity, [and] congeniality,” *see supra* note 85 and accompanying text, can justify the protection of exclusive club membership requirements based only on gender and on no other racial, ethnic, or religious criteria.

<sup>91</sup> I still remember that over 30 years ago as I was preparing to leave home and go to college in Ohio, my grandmother asked me if there would be many other Jewish students at the school I was attending. I assured her that there would be other Jewish students there, but there would also be many non-Jewish students. Upon hearing this, my grandmother explained that if any non-Jewish students should come over and say “hello,” it was perfectly all right for me to say “hello” back. Far from countenancing friendships with non-Jews, she simply wanted to make sure that I did not take the obvious and proper course of sticking to my own kind to unreasonable lengths.

like-minded members, we may end up living far less of a good life than we would if we were open to more varied experiences.

Maybe my vision of the possibilities of friendship is mistaken. Maybe people who join clubs with more diverse members end up having fewer friends and less meaningful friendships. But suppose I am right and the majority of Americans agrees with me. Moreover, suppose the majority and I believe that if people did join integrated social clubs, their understanding of the possibilities of friendship with people of different backgrounds would expand dramatically. Nor are we willing to leave this possibility to chance. We intend to use the coercive power of law to channel people's social behavior in a way that will alter their self-image. From now on, people will be prohibited from joining exclusive clubs and may even be required to join clubs with a diverse membership. As a result of this new policy, we believe that people will develop a new and more open sense of themselves. Further, as a result of this change in their identity, they will make more and better friends, and will be more likely to live good lives. Moreover, as a positive by-product of these new friendships, the racial, national origin, and gender fragmentation of American society will dissipate.

I think these new laws regulating social associations would be unconstitutional. However, they would not be unconstitutional because they prevent individuals from forming meaningful friendships. I am not at all certain that if laws of this kind were obeyed, people would stop making friends. They might even end up making more and better friends. But I do not need to know the impact of such laws on the fostering of friendships to argue that they are unconstitutional. I would strike down these laws because they deny individuals the autonomy to determine their own identity through the associations and social relationships they choose to form with others. The right to join small, exclusive clubs in order to form friendships is a right that is predicated on my autonomy to remain who I am and to control the direction in which my associations will influence my identity.<sup>92</sup>

---

<sup>92</sup> If, as Garvey argues, the good comes before the right, if the reason we protect the right to form private clubs with restricted memberships is to promote the good of friendship, and if homogeneity in club memberships facilitates more and better friendships than heterogeneity in memberships, then we must ask whether the Constitution protects small, selective clubs that are deliberately interfaith and interracial in their membership. Suppose a small dinner club has ten members with defined quotas for different racial or religious groups. There are always to be two African-Americans, two Hispanics, two Jews, and so on. Would such a club's ethnic membership requirements receive constitutional protection under Garvey's analysis despite the members' erroneous belief that they would form more and stronger friendships by participating in a club with diverse members?

If freedom of association is based on personal autonomy, this question is easy to answer. The intimacy of the club would be the controlling factor because intimate social choices are self-defining regardless of the moral goals they further or fail to further.

## B. What Religious Liberty Is For

### 1. *The Purpose of Religious Freedom*

As he did with the right to sexual intimacy, Garvey defines the purpose of religious liberty in terms of the good. Thus, he explains, "The best reasons for protecting religious freedom rest on the assumption that religion is a good thing."<sup>93</sup> Religion, like love, is a "complex phenomenon," however, and it will require considerable explanation before we can properly evaluate the reasons for protecting religious freedom.<sup>94</sup>

Notwithstanding their common grounding on moral worth, there is an immediate and obvious distinction between Garvey's arguments about freedom to love and his contentions regarding religious liberty. Garvey spends a considerable amount of time describing what love is, but he says very little defending his conclusion that love is good, or explaining why we would want to be free to pursue it. He simply presents as a self-evident truth that love "is an essential part of a good life."<sup>95</sup>

Garvey's analysis of religious freedom is different. He does not attempt to describe what religion is at all. He only alludes to characteristics of religion when he is discussing aspects of religious liberty. Thus, freedom of religion involves the right to perform ritual acts of worship and prayer.<sup>96</sup> Worship and prayer presuppose a belief in either "a supreme being"<sup>97</sup> or "a transcendent reality."<sup>98</sup> Freedom of religion also involves the right to obey a moral code enforced through "supernatural sanction"<sup>99</sup> and the liberty to spread religious knowledge.<sup>100</sup> However, Garvey never clarifies whether these characteristics are essential to the nature of religion or whether they are merely illustrative of common religions.<sup>101</sup>

<sup>93</sup> GARVEY, *supra* note 1, at 49.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 28.

<sup>96</sup> *See id.* at 49-50.

<sup>97</sup> *Id.* at 50.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 52.

<sup>100</sup> *See id.* at 51.

<sup>101</sup> To be sure, whatever purpose we assign to freedom of religion is going to require some definition of what it is that is being protected. This will be as true for a justification of religious liberty based on a commitment to personal autonomy as it is for a justification of religious liberty grounded on the belief that religion is good. Further, defining religion has proven to be a particularly difficult task for courts and academic commentators. I know of no generally accepted answer to the question, "What constitutes religion for First Amendment purposes?"

Still, it may be that uncertainty as to what constitutes religion is more problematic for a theory predicated on religion being good than it is for a theory resting on personal autonomy. If we protect freedom of religion as a self-defining choice, the cost of errors due to overinclusiveness may be relatively slight. Nonreligious belief systems that play the

Moreover, Garvey spends a great deal of time justifying why these various religious activities deserve constitutional protection. But why do we need to justify protecting religious action of any kind? We did not need to independently justify why we would want to protect the pursuit of love. We simply recognized love as intrinsically valuable and essential to leading a good life.<sup>102</sup> Although Garvey never explicitly provides an answer to this question, I think the reason is clear. Love is a separate and distinct activity for each individual. I may be deeply in love with Beth, while you could not even imagine yourself having a loving relationship with her, and love someone else. Our different feelings about the persons each of us loves do not matter. We both can still value love despite the different objects of our feelings. The truth of love is understood to be personal to each individual.

Religion is different. The truth of religion purports to describe a universal reality that should be the same for everyone. If I believe in one concept of G-d or transcendent reality, and you have a different understanding, the inconsistency of our beliefs may matter a great deal. You may believe there is only one G-d, only one vision of religious truth, and my contrary beliefs may range from mere error to heresy or even blasphemy. If that is the case, why should you be willing to protect my right to practice or proselytize a false faith, a faith that is not merely in error, but one that has the capacity to lead people away from G-d? To put it another way, how and why are all religions good when the principles of different faiths may be starkly in conflict with each other?

Garvey's response to these questions varies depending on the form of religious activity that is at issue. In each case, however, he attempts to justify the protection of the activity on the basis of some normative principle rooted in our religious traditions. That election itself is interesting, and I will comment on it shortly. For the moment, however, let us focus on the specific reasons why, according to Garvey, particular religious activities deserve constitutional protection.

Garvey argues that one form of religious activity—ritual acts including worship, prayer, dietary rules, and the observance of sacred times such as the Sabbath—is protected because it would be futile to

---

same, or almost the same, role in a person's life as religious belief systems are probably almost as worthy of protection on autonomy grounds as are religious beliefs and practices.

The same argument may not be as available if we protect religion because it is good. It may be that nonreligious belief systems, no matter how important or all-consuming they are to the individual, are simply not "almost as good" as religious beliefs. If there is far less of a reason to protect nonreligious beliefs and practices under a "religion is good" framework, the cost to society of its apparent inability to precisely define what constitutes religion for constitutional purposes will be higher and more troublesome.

<sup>102</sup> See *supra* text accompanying notes 49-52.

try to coerce people to perform such acts.<sup>103</sup> In some ways, this may appear to be a very curious basis for protecting the right to engage in religious rituals. First, a futility rationale only protects people against the state's attempt to force them to perform rituals in which they do not want to participate. It provides no protection to believers who are prohibited from participating in their own religious rituals by the state, but who are not required to practice the rituals of some other faith.<sup>104</sup>

Second, the argument on its face is empirically false. People do conform to religious orthodoxy to avoid punishment and persecution. We sanctify the memory of martyrs who refuse to be coerced into performing the rituals of a foreign faith not only because we honor their courage, but also because we recognize that not all of us would have the strength and faith to be so steadfast in our beliefs.

This second challenge to the argument about the futility of coercion, however, is misleading in an important sense. When Garvey talks about futility, he is not referring to the outward appearance of conformity to mandated rituals. He is speaking of ritual as a meaningful religious experience.

Thus, Garvey explains that "[c]oerced ritual is futile because it cannot put the soul in touch with God. The individual cannot hear God unless he has faith. And faith does not come to people just because they go through the ritual motions."<sup>105</sup> If coercion is intended to actually force individuals to develop a closer relationship with G-d, it will always fail in its objective. At best, it manipulates the form of religious activity. The substance of meaningful prayer and worship is beyond the control of secular authorities.

Another form of protected activity involves religious expression and proselytizing.<sup>106</sup> Once again, the difficulty is justifying free advocacy of a religious faith that we believe to be false. The protection provided to the proselytizing of false faiths is justified by the argument that "God's revelation is progressive."<sup>107</sup> Freedom to discuss religious ideas, no matter how mistaken they may be, will ultimately result in more people finding their way to spiritual truth.<sup>108</sup> "Individual thinkers may wander astray, but the net social effect of freedom is to bring us closer to God."<sup>109</sup>

---

<sup>103</sup> GARVEY, *supra* note 1, at 49-51.

<sup>104</sup> Garvey argues that the right of religious individuals to perform religious rituals required by G-d serves the same purposes as the right of religious individuals to be free to obey G-d's moral commands. *Id.* at 49-54.

<sup>105</sup> *Id.* at 50.

<sup>106</sup> *See id.* at 51-52.

<sup>107</sup> *Id.* at 51.

<sup>108</sup> *See id.* at 51-52.

<sup>109</sup> *Id.* at 51.

Finally, we protect the right to obey religiously mandated moral commands.<sup>110</sup> Justifying the freedom to comply with religious obligations is more problematic than justifying other religious activities because of what Garvey refers to as "the split-level character of free exercise law."<sup>111</sup> Arguments explaining the futility of coercion and the progressive nature of revelation protect both believers and the irreligious.<sup>112</sup> It is as futile to coerce an atheist as it is to coerce a Moslem to recite a Christian prayer. Neither is brought closer to G-d by such compulsion. Similarly, we protect people who do not believe in G-d in their search for spiritual meaning because all searchers' dialogues will eventually lead to religious truth.<sup>113</sup>

Freedom from state interference with the obligation to comply with religious duties is different because it is a right that is available only to people of faith. Adherents of secular philosophies do not receive comparable protection for acts of conscience. According to Garvey, the special constitutional concern for the predicament of religious individuals faced with laws that require them to violate their faith is grounded on the unique suffering such a conflict creates for the devout individual.<sup>114</sup> In comparison to the secular moralist required to violate his ethical code, "[t]he harm threatening the believer is more serious (loss of heavenly comforts, not domestic ones) and more lasting (eternal, not temporary)."<sup>115</sup>

## 2. *A Response to Professor Garvey's Analysis*

Garvey's analysis is thoughtful and provocative. He examines religious freedom from a perspective that is clearly worthy of consideration. In describing the religious basis for protecting the liberty to seek G-d in one's own way, he reminds us of the role and value of traditional faiths in promoting liberty. Further, in a world that commonly assigns modern motivations to historical figures who operated in a different normative and cultural milieu, there is something to be said for

---

Garvey never explains why we should be concerned only with the "net social effect" of freedom of religious expression. This emphasis on the collective understanding of the community may make sense in the context of political discourse and public policy debate. In a public policy context, freedom of speech may pose only limited risks to people leading good lives, if we believe that the truth will ultimately prevail in any contest between true and false political ideas. But religious speech is often directed at individuals. Whatever its net social effect may ultimately be, the promotion of wrongheaded religious ideas may confuse particular people and undermine their faith. Surely it is no minor matter that for these individuals, false faiths may win the day and mislead believers into moving further away from G-d.

<sup>110</sup> See *id.* at 52-54.

<sup>111</sup> *Id.* at 54.

<sup>112</sup> See *id.* at 53-54.

<sup>113</sup> See *id.* at 51-52.

<sup>114</sup> *Id.* at 52-53.

<sup>115</sup> *Id.* at 53.

thinking about religious freedom in a way that may help to explain how and why our forefathers were so committed to the idea. Notwithstanding these positive aspects of Garvey's analysis, I am still not convinced that his explanation of the purpose of religious liberty can successfully support the protection of free exercise rights. Leaving aside matters of philosophy, what is wrong with Garvey's analysis of religious freedom is that it does not work.

a. *The Futility of Coercing Worship*

Consider Garvey's reasoning regarding religious ritual. The state is prohibited from coercing people to engage in acts of worship or prayer against their will because it would be futile to do so.<sup>116</sup> This futility rationale represents at best a limited and inadequate foundation for the constitutional principle protecting nonbelievers against religious coercion. Even as a check on private behavior, pointing out to someone the futility of conduct is a fairly modest attempt at influencing his actions. Telling me that what I am doing is evil or unreasonably hurtful to someone else will give me pause. Informing me that my conduct will not accomplish my objective is far less inhibiting. I often do arguably futile things (voting for a candidate who is clearly going to lose is an obvious example), and I am particularly prone to do so if I am acting in what I perceive to be a good cause.

Governments are even more likely than individuals to ignore the futility of their decisions. In part, this is because government officials want to appear to be doing something to solve a problem even when they recognize that their actions are unlikely to have any positive effect. Moreover, governments sometimes act for nonutilitarian reasons. Some official acts are largely symbolic and are ordered to communicate a message about what the general community believes is important. When a public school requires children to participate in a patriotic or a religious ceremony, the school's purpose may have little to do with how each child will be influenced by his or her participation in the event and a lot to do with the community's appreciation of this reaffirmation of its basic values.

Indeed, government often acts out of multiple motives. If a student does not want to sing *Silent Night* in the school chorus because it is essentially a prayer set to music, the teacher may respond that this is also a beautiful song and there are other nonreligious reasons for wanting the chorus to sing it. In all the cases in which mandating religious observance by nonbelievers results in an incidental and positive, but nonreligious effect, the state's requirements would appear to fall outside of the futility orbit. As long as compelling participation in

---

<sup>116</sup> See *supra* text accompanying note 103.



religious rituals furthered some legitimate objective (other than bringing the nonbeliever closer to G-d), the state's nonreligious goal would justify its action. Garvey's model suggests no alternative constitutional purpose that is furthered by freeing the nonbeliever from compliance with such edicts.<sup>117</sup> His analysis does not explain why it might be hurtful and therefore wrongful to force nonbelievers to participate in acts of worship against their consent.

It is not even clear that a futility rationale effectively prevents the state from coercing nonbelievers to participate in religious rituals for blatantly religious reasons. Mandating the performance of religious conduct directly or achieving that goal indirectly through the persecution of alternative beliefs may not bring an adult nonbeliever closer to G-d on a voluntary basis. However, if the nonbeliever raises his children according to the prescribed faith in response to state pressure, one may certainly argue that the children themselves have voluntarily moved closer to G-d.<sup>118</sup>

Grounding freedom from religious coercion on the spiritual futility of such constraints is problematic not only because the state may seek to accomplish other objectives with its religious mandate that have a higher likelihood of success than the goal of sincere conversion by the nonbeliever. Another difficulty with this argument relates to the "voluntary" nature of religious decisions. Many laws, other forms of state action, and a considerable amount of private conduct may make life difficult for religious or secular minorities, and may create incentives for adopting a majoritarian faith that have nothing to do with the individual's true acceptance of the majority's religious beliefs. There is a continuum of pressures that apply to an individual holding minority beliefs who lives in a complex social environment. These

---

<sup>117</sup> Garvey himself concedes that his political justification for religious freedom—the need to maintain civil peace—is an inadequate basis for protecting small and weak minorities. *Id.* at 48-49.

<sup>118</sup> Our current Secretary of State, Madeleine Albright, may be a good example of this phenomenon. Albright, who was raised Catholic by her parents and later became an Episcopalian learned several months ago that her parents had been born Jews in Czechoslovakia and that many of her relatives who had remained behind had died in concentration camps during the war. See Michael Dobbs, *Albright's Family Tragedy Comes to Light*, WASH. POST, Feb. 4, 1997, at A1.

Ms. Albright herself clearly recognized that this information had affected her deeply.

"To the many values and many facets that make up who I am . . . I now add the knowledge that my grandparents and members of my family perished in the worst catastrophe in human history. So I leave here tonight with the certainty that this new part of my identity adds something stronger, sadder, and richer to my life."

R.W. Apple Jr., *Albright Visits a Past She Lost, Then Found and Now Embraces*, N.Y. TIMES, July 14, 1997, at A1. Should Albright be considered an involuntary Christian whose relationship to G-d is somehow suspect or unsatisfactory because of what was done to her parents? State action may target more than one generation. Regulations that are futile for a parent's generation may be brutally effective with regard to their children's beliefs.

pressures range from direct and deliberate coercion enforced through legal sanction, to indirect burdens resulting from the likelihood that members of the majoritarian faith will achieve disproportionate economic, political, and professional success, to the purely social pressures that any minority group member confronts with regard to the normal desire to be one of the crowd, and to have one's beliefs and practices reinforced by community approval.

I do not suggest that the Constitution requires the elimination of all such incentives and burdens. My point is that, in real life, the notion of purely voluntary adoption of religious beliefs may be more of an abstract goal than a practical reality. If we accept the adoption of majoritarian beliefs within the context of numerous and varied pressures as nonetheless voluntary, the argument that more direct coercion must be rejected because of its lack of spiritual effectiveness loses some of its force. In the real world, pressures outside of the domain of religious truth and conviction influence all voluntary choices.

My final objection to Garvey's futility argument relates to its limited application to worship, prayer, and ritual. The nonbeliever is protected from coerced participation in religiously mandated ritual requirements because it is futile to impose these requirements on him. But he is not similarly protected or excused from obeying religiously motivated moral commands.

There are two problems here. One is the practical difficulty of distinguishing between these two kinds of religious acts and mandates. The other involves explaining how a distinction between mandated rituals and moral commands can be justified.

The practical difficulty of distinguishing between ritual and moral mandates is important because Garvey posits different rules for each type of activity. The nonbeliever is protected against coerced participation in religious rituals, but he is not protected against religiously motivated moral requirements. The religious believer is protected in both contexts. Garvey repeatedly refers to this split-level character of free exercise rights in his analysis.<sup>119</sup>

Thus, for nonbelievers at least, because the concern about futility extends only to rituals, worship, and prayer, it is critical that we differentiate between such activities and moral obligations. But how do we do that? Garvey describes the observance of dietary rules and sacred times (holy days) as ritual.<sup>120</sup> He does not explain, however, why he believes that the requirement of a day of rest on the Sabbath has no moral implications. With regard to a related ritual, Jews and non-Jews often debate the moral significance of the dietary laws that Jews obey.

---

<sup>119</sup> See *supra* text accompanying notes 111-15.

<sup>120</sup> GARVEY, *supra* note 1, at 49-50.

Some Jews think there is a moral dimension to these laws;<sup>121</sup> other religious people disagree.<sup>122</sup> If a state with a Jewish majority passed a

---

<sup>121</sup> Some of the various dietary laws that some Jews obey have obvious moral implications. Others are more difficult to understand in ethical terms.

The rules regarding ritual slaughter are clearly ethical principles. To avoid the infliction of gratuitous pain on creatures killed for food, "an animal was permitted as food only if it was slaughtered with one quick stroke that caused instantaneous death. Any prolongation of the animal's death agony rendered its meat *treif* (forbidden)." TELUSHKIN, *supra* note 34, at 448. Other dietary restrictions are more difficult to explain. Jews who keep kosher may not eat meat with milk. Moreover, "the only animals designated by the Torah as kosher are those that have cloven hooves and that regurgitate their food." JOSEPH TELUSHKIN, *JEWISH LITERACY: THE MOST IMPORTANT THINGS TO KNOW ABOUT THE JEWISH RELIGION, ITS PEOPLE, AND ITS HISTORY* 634 (1991). In addition, "[a]mong fish, only those with fins and scales are designated kosher [and] no reason is given for this law." *Id.* at 635 (citations omitted). It is not immediately apparent that any moral foundation underlies these restrictions, but that does not mean that ethical explanations for the Jewish dietary laws do not exist.

Consider Rabbi Kushner's popular analysis of the requirements that Jews eat only kosher food:

One of the fundamental teachings of Judaism is that the search for holiness, for the encounter with God, is not confined to the synagogue . . . . The goal of Judaism is not to teach us how to escape from the profane world to the cleansing presence of God, but to teach us how to bring God into the world, how to take the ordinary and make it holy.

HAROLD S. KUSHNER, *TO LIFE! A CELEBRATION OF JEWISH BEING AND THINKING* 49 (1993).

Dietary restrictions implement this goal in two ways. First, rules, such as those that limit what a person may eat, are:

spiritual calisthenics, designed to teach us to control the most basic instincts of our lives—hunger, sex, anger, acquisitiveness, and so on. We are not directed to deny or stifle them, but to control them, to rule them rather than let them rule us, and to sanctify them by dedicating our living of them to God's purposes. The freedom the Torah offers us is the freedom to say no to appetite.

*Id.* at 51-52.

Second, and more specifically:

The major Jewish dietary laws rest on a single premise: *Eating meat is a moral compromise*. There is a difference between eating a hamburger and eating a bowl of cereal. For one of them, a living creature had to be killed. Should we ever become so casual about the eating of meat that we lose sight of that distinction, a part of our humanity will have shriveled and died.

*Id.* at 56.

The prohibition against drinking milk while eating meat tracks this rationale.

We who buy our meat wrapped in cellophane and our milk in wax cartons have forgotten where those foods come from. Nature creates milk in the udders of mother animals to nourish their newborn young and keep them alive. To kill a young animal for meat is already a concession to human appetite. To combine that meat with the milk its mother produced to feed it is to compound the cruelty.

*Id.* at 59.

<sup>122</sup> The point is not simply that many ostensible rituals have moral foundations, but more importantly, that there is serious disagreement about whether this is so. Kushner illustrates this disagreement with a story about a debate in which he participated on a cable television show. Kushner's opponent, a professor of theology from a Baptist seminary, defined his position as believing in the inerrancy of Scripture, that every word of the Bible was of God, and he chided [Kushner] for being selective as to which verses [Kushner] would accept as of divine origin. [Kushner] responded by asking him, "In that case, how come you eat pork chops and I

law prohibiting anyone from eating milk and meat together,<sup>123</sup> would nonreligious individuals have a constitutional right to be exempt from this requirement under Garvey's theory?

More importantly, why should we distinguish between these two kinds of mandates? For constitutional purposes, why is doing what G-d wants us to do regarding when we work and what and how we eat different from doing what G-d wants us to do regarding acts of charity or avoiding wrongdoing? I do not doubt that different faiths may recognize a variety of theological grounds for drawing this distinction, but surely there is a problem with grounding constitutional freedoms on such particular and sectarian religious foundations.

A conventional answer to this general problem might be that there is often a nonreligious basis for most moral commands that the law enforces. Therefore, even if the nonbeliever was exempted from having to conform his conduct to religious standards of morality, he would still be subject to all those laws that are alternatively supported by secular moral principles. Although this response is probably accurate, it does not successfully distinguish between moral and ritual requirements. It is equally true that many legal requirements mandating compliance with religious rituals also further secular goals. For example, a ban on eating pork is justifiable on health-related grounds, a day of rest can serve nonreligious purposes, and even the recitation of a prayer can further aesthetic goals. As noted previously, if the existence of an alternative secular purpose is sufficient to justify requiring nonbelievers to obey religious mandates, the freedom Garvey posits is largely illusory.<sup>124</sup>

An argument for religious freedom grounded on autonomy resolves this issue more persuasively because it focuses on the experience of the individual being burdened as opposed to the spiritual futility of the law's effect. Mandated prayer and acts of worship are

---

don't, when the eleventh chapter of Leviticus specifically forbids it and you believe that those are God's words?" He answered, "Because I believe that our Lord Jesus Christ came to liberate us from the ritual commandments and left only the ethical ones as binding." [Kushner] challenged him again: "Even if that were the case, why do you define the dietary laws of Leviticus as ritual, not ethical? What is a more important ethical issue in today's world than teaching people to control their appetites?"

KUSHNER, *supra* note 121, at 52-53.

It is difficult for me to understand how these questions can be answered as a matter of constitutional law.

<sup>123</sup> I use this example because it involves a Jewish dietary restriction with which non-Jews might be familiar. However, many of the commandments that Jews must obey are not considered to be binding on gentiles by Jewish tradition. See TELUSHKIN, *supra* note 121, at 509-10. A better example, involving a less commonly known rule, would be a law prohibiting eating an animal's blood. "A Torah law, addressed to all mankind, and not just Jews, forbids consuming an animal's blood." *Id.* at 635 (citations omitted).

<sup>124</sup> See *supra* text accompanying note 117.

unconstitutional because they force the secular individual to represent a false image of who he is and what he believes. Forcing an individual to engage in unauthentic expressive acts creates a special kind of dissonance for him. Other forms of conduct, such as our choice of diet, appear to be much less integral to our identity. The Establishment Clause aside, a religiously motivated law prohibiting the eating of pork does not inherently infringe constitutionally protected liberty by undermining the autonomy of the individual. For most people, the ability to choose a ham and cheese sandwich for lunch is not a central aspect of their identity.

A law requiring individuals to eat religiously forbidden food, however, would violate the free exercise right of believers under an autonomy model. Unlike the nonbeliever, for whom dietary choices are a matter of personal taste unrelated in any significant way to her identity, the religious individual defines herself fundamentally with regard to her obedience of G-d's commands.<sup>125</sup> Forcing a religious person to violate the obligation of her faith is a serious intrusion into her sense of self, and constitutes a great offense to her personal integrity.

#### b. *The Progressive Revelation of Religious Dialogue*

Garvey suggests that as a matter of religious conviction, free inquiry into, and discussion about, religion will result in a better understanding of G-d. Certainly, I have no standing to challenge the merit of this religious belief and I do not intend to make such a challenge. As I noted earlier, however, I believe that Garvey's argument would be more persuasive if he had more carefully described the link between unfettered discussion and the progressive nature of revelation.<sup>126</sup> Garvey explains in this section of his book that "[t]he individual does not have complete control over choosing the religious option. It is God who makes the choice."<sup>127</sup> However, he does not explain how the progressive nature of revelation relates to freedom. If G-d can

---

<sup>125</sup> Rabbi Harold Kushner writes:

There is nothing intrinsically wicked about eating pork or lobster, and there is nothing intrinsically moral about eating cheese or chicken instead. But what the Jewish way of life does by imposing rules on our eating, sleeping, and working habits is to take the most common and mundane activities and invest them with deeper meaning, turning every one of them into an occasion for obeying (or disobeying) God. If a gentile walks into a fast-food establishment and orders a cheeseburger, he is just having lunch. But if a Jew does the same thing, he is making a theological statement. He is declaring that he does not accept the rules of the Jewish dietary system as binding upon him. But heeded or violated, the rules lift the act of having lunch out of the ordinary and make it a religious matter. If you can do that to the process of eating, you have done something important.

KUSHNER, *supra* note 121, at 54-55.

<sup>126</sup> See *supra* text accompanying notes 106-12.

<sup>127</sup> GARVEY, *supra* note 1, at 46.

find us no matter how hard we may try to avoid divine attention, it is unclear why revelation does not remain progressive in spite of any of the obstacles that governmental restrictions on religious speech might put in the way of our understanding of religious truth.

The lack of an extended explanation of this point is hardly critical. The reader can still accept Garvey's argument in the spirit in which it is offered—as a religious truth supported by one's faith. My primary question is whether this belief is an adequate basis for our constitutional commitment to religious freedom. Once again, I am unsure that it is.

Garvey's argument appears to contain an internal contradiction. Freedom of religious expression is protected because it is a necessary condition for bringing people closer to G-d. We also know, as a matter of religious truth, that it is futile to try to coerce anyone into participating wholeheartedly in a religious ritual.

If we can be fairly certain what constitutes religious truth, these arguments provide us with a strong foundation for protecting constitutional rights. Conversely, if we are uncertain about what constitutes religious truth, then this foundation is unstable, and we may want to consider alternative justifications for religious freedom. It is obviously important that the essential principles on which our commitment to religious liberty rests are stable, long-standing, and difficult to challenge. We cannot build enduring constitutional doctrine on uncertain assumptions.

Thus, the merit of Garvey's argument depends in significant part on just how much confidence we have in the truth of the principles that underlie it. That confidence, however, may be lacking. Indeed, Garvey's principles arguably contain the seeds of doubt within them. More specifically, our recognition that we must allow unfettered discussion of all religious beliefs in order to determine what constitutes religious truth suggests that we have considerable residual uncertainty as to what is or is not true in religious doctrine. The value of debate implies uncertainty as to outcome. For issues on which we are certain that we know the truth—that the earth is round and not flat, for example—there is little utility in ongoing inquiry and discussion.

I understand that the idea of progressive revelation may not mean that we know nothing about G-d. We may know a great deal about a subject or a person, but still concede that we have much more to learn. It may take us all our lives to truly understand another individual.<sup>128</sup> Surely, the task we confront in trying to understand a supreme being is much more difficult.

---

<sup>128</sup> Professor Garvey suggested this to me in an e-mail message. Electronic Mail from John Garvey to Alan Brownstein (Dec. 31, 1996) (on file with author).

However, if our belief in progressive revelation means that there are some religious truths of which we are certain, but there are many other questions of faith that remain unresolved, that understanding should influence the protection we give religious expression. We cannot restrict speech discussing issues that are still unanswered because doing so would impede our discovery of the truth. But why should we allow the expression of religious falsehoods that directly contradict what we know to be the truth? How does hearing what we know to be false bring us closer to the truth? Unless the futility of coercion and the progressive nature of revelation are the only religious truths of which we are certain, Garvey's model of religious freedom ought to be consistent with the suppression of at least some religious falsehoods.

Alternatively, of course, the nature of progressive revelation may be such that we can never be certain that we know the truth about G-d, and there really is no such thing as religious truth. If that is the case, then I am much less comfortable with the idea that religious liberty stands or falls on our commitment to the kinds of principles that Garvey proposes. If claims to religious truth are of uncertain accuracy and might eventually be determined to be erroneous, we should have some other basis for defending the theory on which the constitutional guarantee of religious freedom depends. But Garvey does not provide us with an alternative defense of the principles on which he grounds his arguments. Garvey states the futility of coercion and progressive revelation as religious truths.<sup>129</sup> He furnishes us no other support for these convictions.

Can a constitutional theory based on personal autonomy provide a better defense of protected freedoms? I think it can, although it relies more on pragmatic value judgments than on an objective vision of transcendent reality. Personal autonomy is a political statement about what we value and how we want government to treat us. Its only claim to truth is that it represents an enduring attitude of the American polity.

Of course, grounding constitutional rights on value judgments is still not that much of a guarantee. Popular values can change over time, and ultimately the meaning of the Constitution will change with them. As I will argue shortly, the generality and utility of personal autonomy as a constitutional value may contribute to the permanence of the doctrine it supports.<sup>130</sup> Although this contention, and the lack of contradiction in grounding rights on personal autonomy, may not provide us as secure a foundation for constitutional rights as we would hope to have, it may be the best that we can do.

---

129 GARVEY, *supra* note 1, at 53-54.

130 See *infra* Part IV.D.

c. *The Force of Religious Obligation*

I have far fewer concerns about Garvey's justification for exempting religious individuals from laws that require them to violate the obligations of their faith. Garvey defends such exemptions by pointing to the special suffering religious persons will experience if the government forces them to choose between state burdens and divine retribution.<sup>131</sup> An angry secular conscience is not to be feared as much as an angry G-d.

I have considerable sympathy for this position. My primary quarrel with it is that it understates the strength and nobility of the secular conscience. While it is true that a religious individual who succumbs to governmental coercion and violates his duty to G-d risks eternal punishment, it is also true that the religious person who defies the state to sanctify the name and moral authority of G-d may receive transcendent rewards. The secular moralist risks less, but receives far less of a reward for his courage and fortitude. Both his gains and losses are measured in terms of self-respect.

Moreover, for the steadfast person who refuses to yield to the government's demands, the source of the moral code she obeys is largely irrelevant. Both the religious and secular moralist will pay the same price. They will both suffer whatever sanction the law imposes. The religious individual experiences greater suffering only if she cannot withstand the state's pressures. In circumstances in which relatively limited burdens are imposed for breaking the law in the name of G-d or conscience, where both the secular and religious person are likely to stand on their convictions, the distinction between each individual's constitutional claim to escape such sanctions may be hard to draw.

Still, I would protect the religious individual more than her secular counterpart for three reasons. First, the text of the Constitution supports such a distinction. Second, protecting religious liberty more than secular acts of conscience is defensible on administrability grounds. It is difficult enough to determine what constitutes a religion for First Amendment purposes. Allowing all sincere acts of conscience some immunity from general regulation would create an unmanageable system that could not survive in any complex society. Finally, and not surprisingly, I think the religious individual has a stronger claim to personal autonomy. For most seriously religious persons, religion provides a center to their identity for which there is no secular counterpart. Political beliefs, for example, are not so central to an individual's identity. They do not determine how one will understand, or relate to, so many important events and aspects of life.

---

131 GARVEY, *supra* note 1, at 47-48.



Religion addresses our most human concerns—love, marriage, parenthood, birth, and death—far more deeply, profoundly, and comprehensively than secular belief systems do. Therefore, out of respect for the autonomy of the individual, we assign special protection to the development and maintenance of religious beliefs and practices.<sup>132</sup>

### C. What Religious Liberty Is Not For

The reader of this Review will probably be able to predict Professor Garvey's view on this issue. The purpose of religious freedom is not to protect personal autonomy. Several difficulties with grounding a constitutional commitment to religious liberty on personal autonomy make personal autonomy an inappropriate foundation for free exercise rights.

First, Garvey argues, there is nothing unique about religious autonomy.<sup>133</sup> As a choice, joining a religious faith is no different than choosing an ice cream flavor. All choices have an equal claim to protection under an autonomy theory; there is no basis for singling out religion for special treatment, as the First Amendment obviously does.<sup>134</sup>

Second, Garvey argues, the very text of the First Amendment suggests that the decision to believe in and practice a religious faith is distinguishable from a contrary decision to renounce religion.<sup>135</sup> One does not exercise a nonbelief. The phrase "free exercise of religion" points in only one direction, while an autonomy right would be bilateral in orientation.<sup>136</sup>

More importantly, the case law accepts the one-way directional signal of the constitutional text. As a general matter, we only protect the practice of religious belief systems. Nonexpressive conduct associated with secular beliefs receives no comparable constitutional recognition. Similarly, while we may honor acts of secular conscience out of respect for the moral integrity of the individual's conduct, we do not exempt such acts from sanction if they transgress legal standards. Autonomy theory cannot explain this "split-level" quality of free exercise doctrine.<sup>137</sup>

Finally, Garvey argues that autonomy theory is unacceptable as the foundation of free exercise rights because it lacks support among

---

<sup>132</sup> See Alan E. Brownstein, *Harmonizing the Heavenly and Earthly Spheres: The Fragmentation and Synthesis of Religion, Equality, and Speech in the Constitution*, 51 OHIO ST. L.J. 89, 95-102 (1990).

<sup>133</sup> GARVEY, *supra* note 1, at 45.

<sup>134</sup> See *id.* at 45.

<sup>135</sup> *Id.* at 43.

<sup>136</sup> See *id.* at 42-44.

<sup>137</sup> *Id.* at 55-57.

religious practitioners, and it cannot explain the inclusion of religious freedom in the First Amendment as a distinct constitutional value.<sup>138</sup> The second part of this argument is an inferential spin-off of an original intent claim. The unique protection provided to religion in the Bill of Rights strongly suggests that the framers recognized some special value in religion. "Skeptics" who were unimpressed with the moral worth of religious beliefs would have been much less likely to enshrine spiritual freedom in the Constitution.<sup>139</sup>

The first part of the argument is more interesting. Whom should we ask, Garvey wonders, to determine the purpose of free exercise rights? Certainly the class of people for whom this right is particularly important would be an extremely valuable source of information. Moreover, among this class of beneficiaries, the idea of autonomy is not only mistaken, according to Garvey, it is also sacrilegious.<sup>140</sup> To ground religious freedom on an argument that has no legitimacy among believers would be bizarre.

1. *Justifying the Grant of Special Protection to Religion Under an Autonomy Model*

Once again, I suggest that Garvey overstates the difficulty with grounding religious freedom on an autonomy model and understates the model's explanatory value. His first challenge to the utility of an autonomy model—that, for autonomy purposes, there is nothing special about religion<sup>141</sup>—is the easiest to refute, assuming that one accepts the meaning of autonomy I have described.<sup>142</sup> For serious believers, religion is one of the most self-defining and transformative decisions of human existence. Religious beliefs affect virtually all of the defining decisions of personhood. They influence whom we will marry and what that union represents, the birth of our children, our interactions with family members, the way we deal with death, the ethics of our professional conduct, and many other aspects of our lives. Almost any other individual decision pales in comparison to the serious commitment to religious faith.

But a reader might reply, "Isn't that what Garvey is arguing? Aren't you conceding that religion is special? Moreover, under your analysis, why should we protect the decision to reject religion? All of the examples you have given apply only to religious believers, they do not encompass the autonomy choices of nonbelievers."

<sup>138</sup> *Id.* at 45-46, 56-57.

<sup>139</sup> *Id.* at 57. See generally Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313, 337-47 (1996) (describing the role of religious groups in the adoption of the religion clauses).

<sup>140</sup> GARVEY, *supra* note 1, at 56.

<sup>141</sup> See *supra* text accompanying notes 133-34.

<sup>142</sup> See *supra* Part II.

These contentions are true to some extent. I do think religion is special. All self-defining decisions are special to the person who makes them. There is a difference, however, between arguing that a decision is special because it is important and arguing that a decision is special because the choice that one has made is good. Religion is important. It is very important to individuals. I do not need to recognize all religious beliefs and practices as good to justify protecting decisions of this importance under an autonomy theory. I leave it to others who are far more capable than I to evaluate the moral worth of the religions of the world.

With respect to the unidirectional nature of religious freedom that Garvey posits,<sup>143</sup> I think he is basically correct. I think there is a split-level character to free exercise rights. The justification for this attribute of religious liberty is more complicated than Garvey suggests, however, and it can be grounded on personal autonomy.

Religious freedom is bilateral in one primary sense. The decision not to be religious, not to adopt a religious persuasion, is fully protected. The state cannot order everyone to join a religion of their choice because the refusal to accept any religion is a profound personal decision. The election to be morally eclectic is obviously self-defining, as is the decision to confront major life events such as marriage, birth, parenthood, and death without the unifying perspective that religious faith provides. The decision to go it alone without G-d or a religious community to provide guidance and support is an autonomy choice of great personal significance.

Once a person makes that essential decision, however, most of the individual choices he makes throughout his life are separate and unrelated. Some may be of sufficient significance that they are independently recognized as a protected personal liberty, such as the right to marry.<sup>144</sup> For many other choices, such as the decision to rest on the Sabbath, a secular individual will view the question of what to do on Saturday as a relatively trivial one, while an orthodox Jew will see this choice as a significant aspect of his religious identity.<sup>145</sup> It is not difficult to understand why we would treat these decisions differently under a system of rights that is grounded on respect for personal autonomy.

This answer carries us only so far down the field. For if we think about the range of belief systems a person may adopt along a continuum of choices, obviously there are many beliefs that are not so pervasive and foundational as religious faith, but are still more unified and cohesive than isolated decisions about how to spend one's weekend.

---

<sup>143</sup> See *supra* text accompanying notes 110-13, 135-36.

<sup>144</sup> See *Zablocki v. Redhail*, 434 U.S. 374, 383-87 (1978).

<sup>145</sup> See *TELUSHKIN*, *supra* note 121, at 599-600.

Why do we protect only the practice or exercise of religious beliefs? It is certainly a fair question. One answer is that the Constitution occasionally does protect nonreligious beliefs, as the Supreme Court's conscientious objector decisions demonstrate.<sup>146</sup> Another response is that we often do not protect religious practices; and one reason we do not do so is that it would be unacceptably unfair to provide too much of a preference to religious believers over nonbelievers.<sup>147</sup> A third answer might focus on expediency and the practical difficulty encountered in protecting generic acts of conscience.

There is also a fairly complicated political explanation for drawing the line where we do. I will only sketch it here. The Constitution serves a multitude of purposes, and sometimes it serves one purpose in several different ways. We protect individual liberty, for example, not only through the identification of particular rights, but also by structuring government in ways that reduce the potential for oppression. Federalism and separation of powers requirements also promote individual freedom, albeit indirectly, by diffusing governmental power.<sup>148</sup>

Moreover, the Constitution promotes other values besides personal liberty. Equality is also a critically important value. Democracy is another. Basic fairness or justice is yet another.

In looking at the religion clauses of the First Amendment as part of a holistic framework, we must consider the Free Exercise Clause and the Establishment Clause together. The constitutional language directed at religion arguably serves several goals. Protecting religious liberty is clearly one objective. Religious equality may be another purpose; the Establishment Clause is essential to furthering religious equality. It does so by preventing government from endorsing one favored faith to the detriment of minority religions. As I suggested earlier, another Establishment Clause precept, the separation of church and state, is an important mechanism for diffusing power and avoiding its consolidation.<sup>149</sup>

The Free Exercise Clause and the Establishment Clause, taken together, also represent a careful balance of interests that attempts to do justice to both religious and nonreligious individuals, and to pro-

---

<sup>146</sup> See, e.g., *Gillette v. United States*, 401 U.S. 437 (1971); *Welsh v. United States*, 398 U.S. 333 (1970); *United States v. Seeger*, 380 U.S. 163 (1965).

<sup>147</sup> See *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709-11 (1985) (striking down a law requiring employers to excuse employees from having to work on the day an employee observes as the Sabbath on the grounds that it completely subordinates the interests of the employer and secular employees to the needs of religious workers).

<sup>148</sup> See, e.g., *Printz v. United States*, 117 S. Ct. 2365, 2378 (1997) (noting that the federalist system "is one of the Constitution's structural protections of liberty"); *INS v. Chadha*, 462 U.S. 919, 946-51 (1983) (discussing the significance of the separation of powers for personal liberty).

<sup>149</sup> See *supra* Part III.

mote the fair participation of both in a democratic system. Protecting religious freedom more aggressively than we protect the activities of those holding secular beliefs creates an imbalance that raises serious concerns about fairness in general and about the fair functioning of democracy.

It is easy to understand why those who strongly believe in a secular philosophy may feel that the rigorous enforcement of free exercise principles treats them unjustly. They have an argument under both Garvey's "religion is good" model and my "religious liberty as an autonomy right" approach. In either case, the secular believer argues, why should only religious liberty receive protection? Even if my beliefs are not quite as "good" as religious beliefs, they are still worth something from a constitutional value perspective. Similarly, even if decisions grounded on secular beliefs are not as self-defining as religious obligations, my secular moral code and philosophy of life may still be reasonably comprehensive. Surely it deserves some respect as an aspect of my identity. Yet under constitutional doctrine prior to *Department of Human Resources v. Smith*,<sup>150</sup> or pursuant to the Religious Freedom Restoration Act of 1993,<sup>151</sup> laws abridging religious liberty receive rigorous scrutiny, while laws infringing on secular belief systems receive no serious scrutiny at all, not even some form of intermediate level review.<sup>152</sup> Where is the justice in such an all-or-nothing approach?

Nor is the secular believer's argument solely one of abstract fairness. The one-sided protection of religious liberty has important ramifications for the operation of a democratic system of government. Ritual reinforces beliefs and solidifies communal solidarity. Institutional autonomy and independence is a source of political power. In a society in which religious and secular beliefs vie for the hearts and minds of the citizenry, the protection provided religious liberty is a relative advantage in ideological struggles over the direction of government.

The mandates of the Establishment Clause correct (some would say overcorrect) that imbalance. The limitations that the Establishment Clause imposes on governmental support of religion give secu-

---

<sup>150</sup> 494 U.S. 872 (1990).

<sup>151</sup> 42 U.S.C. § 2000bb (1994) (struck down in *City of Boerne v. Flores*, 117 S. Ct. 2157, 2170-72 (1997)).

<sup>152</sup> As a result of the Court's decisions in *Smith* and *Boerne*, religiously motivated conduct receives no greater protection against state laws of general applicability than does conduct motivated by secular beliefs, at least as a matter of federal constitutional or statutory law. Some states, however, are considering the enactment of state religious freedom restoration acts. See, e.g., Assembly 1617, 1997-1998 Reg. Sess. (Cal. 1998). State laws of this kind would restore the split-level character of religious liberty that Garvey describes and to which this Review refers.

lar belief systems an edge. There are no restrictions on government's power to endorse or promote secular beliefs that act as a counterpart to Establishment Clause requirements.

I do not suggest that achieving fairness between the religious and the secular individual or the goal of equalizing the effect of the religion clauses on democratic decisionmaking is a core purpose of either the Free Exercise Clause or the Establishment Clause. Each clause has different primary functions. I do contend that fairness and democratic balance have a significant role to play in determining the contours of Free Exercise Clause and Establishment Clause doctrine. There is an intrinsic split-level dimension to both clauses. These political concerns influence the degree to which we accept and justify this characteristic of both clauses. Thus, one response to the individual, who holds secular beliefs and receives no constitutional protection for practices associated with them, is that the failure to provide him the same level of constitutional immunity from regulation that a religious person receives is part of the attempt to achieve some degree of balance within the operation of both religion clauses. The relatively unfavorable treatment of the secular believer under Free Exercise Clause doctrine is offset by the relatively unfavorable treatment afforded religious beliefs under the Establishment Clause.<sup>153</sup>

## 2. *Choosing the Right Participants in a Dialogue About the Purpose of Religious Freedom*

Garvey's challenge to an autonomy model of religious liberty on the grounds that it is unlikely to be persuasive to religious believers<sup>154</sup> raises a host of interesting issues. On the one hand, there is a powerful common sense logic to this argument. Who, after all, ought to know more about the reasons it is important to protect religious liberty than religious people? True, not all religious people may be as uncomfortable with the idea of personal autonomy<sup>155</sup> nor as committed to the

---

<sup>153</sup> It is critical to reiterate here that the religion clauses reflect multiple purposes. The function of the Establishment Clause in promoting political equilibrium between religious and nonreligious groups described in the text represents only one thread in a complex pattern. In many respects, the Establishment Clause protects religious liberty and promotes religious equality. In that sense, it has a profoundly powerful and positive impact on religion generally and on the freedom and status of minority faiths in particular. The Establishment Clause can be said to disfavor religion when one compares the isolated and relative effect of both religion clauses on the perceived allocation of power between the followers of religious and secular belief systems. That is only a single chapter in a far longer and more complicated story.

<sup>154</sup> GARVEY, *supra* note 1, at 56-57.

<sup>155</sup> Many Eastern religions, as well as a few Western ones, favor, if they do not outright proclaim, the importance of personal autonomy in religious life. The Unitarian Universalists regard the search for G-d as an intensely personal spiritual journey that requires each person to discover his own truth. See JOHN A. BUEHRENS & F. FORRESTER CHURCH, *OUR CHOSEN FAITH: AN INTRODUCTION TO UNITARIAN UNIVERSALISM* 161 (1989). Many Hindus

Christian doctrine of original sin (the antithesis of a personal autonomy principle) as Garvey suggests,<sup>156</sup> but to be fair, Garvey is attempting to explain the meaning of religious liberty in terms of American history, culture, and law.<sup>157</sup> In that context, his argument is sufficiently general to avoid criticism on this ground alone. In any case, for the purposes of further discussion, let us assume that his description of religious reactions to grounding rights on personal autonomy has some support.

On the other hand, there is something counterintuitive about Garvey's approach to defining and understanding rights, particularly if we recognize one of the functions of rights to be the protection of political minorities. It is, after all, hardly surprising to discover that if you ask someone for whom an interest is very important why we should protect that interest as a right, the answer that you receive is very likely to say something positive about the value of the interest in question. Seriously religious people will argue that religion is important and good and deserves constitutional protection; people with vast property holdings will argue that property is important and good and deserves constitutional protection; and artists will argue that art is good and important and deserves to be constitutionally protected as speech. I do not suggest that the arguments that the beneficiaries of a right make are irrelevant to the meaning or purpose of the right. I simply do not think that this can be the whole story. Indeed, because protecting the exercise of a right typically ends up costing the rest of society something, there may be something to be said for asking the people who do *not* benefit from the identification of an interest as a right why that interest deserves constitutional recognition.

To put the question another way, if religious people made up only a small fraction of the population of the United States, I would still think that religious liberty deserves constitutional protection, and I am sure that Garvey would agree. In that kind of a polity, however, the reason why religious people might believe that religious freedom deserves protection would not be dispositive of the right's meaning. We would need to know why the rest of the population should agree to provide protection to this "minority" interest.

Moreover, there is an even more important reason why we should be dubious about the limited class of persons to whom Garvey addresses his inquiry about the purpose of religious liberty. If we are

---

believe that there are four paths to G-d: knowledge, love, work, and psychophysical exercises. Having the freedom to choose the path that works best for the individual is critical to the success of these paths. See HUSTON SMITH, *THE WORLD'S RELIGIONS* 26-50 (1991). The very essence of Zen Buddhism lies in the individual breaking free of the "word-barrier" to find the truth on the other side. *Id.* at 132.

<sup>156</sup> GARVEY, *supra* note 1, at 45.

<sup>157</sup> *Id.* at 42-57.

trying to understand the purpose of constitutional rights, perhaps we should not be looking at each right separately. Rights may be doctrinally distinct. That is, the way we define the specific nature of a right, the kinds of government actions we recognize as infringements of the right, the standard of review we apply to abridgements of the right, and the government interests we will and will not accept as justifying violations of the right all may develop independently of the way that other rights are understood.

But if we are focusing on why we have rights and what purpose they serve, there may be something important to be gained by looking at rights more generally. Each right may be an idiosyncratic description of an interest that we value enough to protect. Yet we can also ask whether there are foundational principles that help to explain why the Constitution protects a whole series of particular interests. The specific rights enumerated in the first eight amendments may be explicit manifestations of some such underlying principles. Indeed, the framework of personal liberty that the Constitution protects may be unified and made more coherent if principles of this kind can be identified.

What kind of principle, for example, explains the protection provided to noninstrumental speech, such as abstract art, that does not contribute to public policy debate? What is the source of the right to marry and the right of reproductive autonomy? What explains the dignitary dimension of procedural due process? Why should we require the payment of just compensation for even a minor physical invasion of property when restrictions on the use of property causing substantial diminution of market value go uncompensated? Why should we care whether someone is denied the right to vote for a losing candidate or to worship a faith that the great majority of us believe to be false? You have probably guessed the answer. We extend constitutional protection to all these rights because they protect the autonomy of the individual and the dignity and integrity of the self. Looking at constitutional rights this way, as a group of protected interests that may have something to do with each other, suggests that the population to ask about the purpose of rights should extend more broadly than the beneficiaries of any specific interest that the Constitution protects.

#### D. Choosing Between Competing Purposes

Most of the arguments I have marshaled above respond to Garvey's thesis about religious freedom. They do not go beyond it. They merely offer a competing vision, challenging the virtues Garvey attributes to his framework and the criticisms Garvey directs at an autonomy model. There is a separate set of issues that I have not yet



addressed, however, that may bear on the competition between these different ways of understanding religious liberty.

Suppose we ask this question: How does our understanding of the purpose of a right relate to the likelihood that the right will receive rigorous protection as a matter of constitutional law? If John Garvey and I both agree that the Free Exercise Clause should rigorously and equally protect the beliefs and activities of all the religious faiths practiced in the United States, what purpose of religious freedom best secures this right against challenges that might be brought against it? What meaning of religious freedom provides the best guarantee that the right will be defined broadly and fairly? How do we avoid or mitigate attempts to reduce its scope or the rigor with which it will be enforced?

I think an autonomy model provides a superior answer to these questions. Put simply, I would argue that a model of religious freedom grounded on the moral virtue of religious belief is a model at war with itself that cannot withstand the friction that its own internal contradictions create.

For the most part, religious beliefs are closed systems that identify their own tenets and traditions with religious truth. There is no requirement that religions operate this way. One can easily imagine a religious person who believes that because G-d is divine and infinite in his power, he is also unknowable to humankind. Indeed, one might argue that human limitations so distort the mortal perspective of G-d that, at best, what we claim to know of G-d are viewpoints of an infinite being perceived from such different and limited perspectives that we cannot help but disagree about G-d's nature. Thus, the disagreements among myriad faiths about the nature of G-d are not only understandable, but could not be otherwise. There is no right way to perceive G-d. Indeed, under this theory, of all the claims of religious truth that people have made throughout human history, this is the only one that is true in an objective sense. All religious beliefs are nothing more than the attempts of mere mortals to understand the unknowable. As such, all religions are equally accurate and equally inaccurate in the beliefs that they espouse.

I understand and have some intellectual sympathy for this position. However, I do not believe that it describes the reality of religious belief in the United States, or anywhere else for that matter. Religious people believe in the truth of their faith. To a considerable extent, they believe in the error of competing faiths. They may disagree about the consequences of this error. Not everyone believes that the proponent of a false faith is damned for eternity. But most religious individuals believe in the truth of their convictions and the falsehood

of contrary beliefs. The first of the Ten Commandments<sup>158</sup> that Moses brought down from Mount Sinai is meant to be taken seriously.<sup>159</sup>

If I understand Garvey correctly, he argues that we should protect the right to practice religious beliefs that we hold to be false because we recognize that they may be true.<sup>160</sup> We cannot know that they are false. I do not think that his argument accurately describes the reason there is such a strong consensus in support of religious freedom in this country. I also do not believe that his argument accurately describes the reality of religious experience here. Most importantly, I think that telling people that the primary reason we protect the practices of other faiths is the potential truth of religious beliefs that are contrary to their own will create a powerful disincentive against religious freedom.

Let me use a freedom-of-speech and then a freedom-of-religion example to illustrate this point. When the Nazis wanted to march through the streets of Skokie, Illinois,<sup>161</sup> many people who were committed to freedom of speech struggled with the conflict that the situation created. It is not easy to protect the speech we hate, particularly when it is expressed in such a loathsome manner. I believe that the courts were correct in upholding the right of the Nazis to conduct their march. But I can hold that belief under my understanding of First Amendment doctrine without conceding for a moment that the Nazi marchers were anything other than the deceitful purveyors of falsehood and evil that I take them to be.

If I were told that by upholding the claim of the Nazis to march, I was even implicitly recognizing that the racist and anti-Semitic message they were conveying may be truthful, what had been a difficult moral dilemma would become an impossible one. The same argument applies to any other form of hate speech. It is hard enough to ask citizens to protect the right to communicate evil when constitutional theory allows the polity to distance itself completely from the subject matter of the communication.<sup>162</sup> Insisting that freedom of

<sup>158</sup> *Exodus* 20:3 ("Thou shalt have no other gods before Me.") (Menorah Press 1960).

<sup>159</sup> See Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. PA. L. REV. 555, 598-99 & n.142 (1991) (discussing the various translations of the First Commandment and the issues involved in acknowledging and incorporating it into a political system).

<sup>160</sup> GARVEY, *supra* note 1, at 51-53.

<sup>161</sup> See *Smith v. Collin*, 439 U.S. 916 (1978) (Blackmun, J., dissenting to denial of certiorari).

<sup>162</sup> The comments of both the Supreme Court in *R.A.V. v. City of St. Paul*, 505 U.S. 377, 396 (1992) (clarifying that "there [must] be no mistake about our belief that burning a cross in someone's front yard is reprehensible"), and the Seventh Circuit in *Collin v. Smith*, 578 F.2d 1197, 1200 (1978) (stating that "[w]e would hopefully surprise no one by confessing personal views that [the National Socialist Party of America]'s beliefs and goals are

speech for hatemongers presupposes some commitment to the possible truth of their statements may place a burden on the citizenry that no polity can bear.

The same analysis applies to religious freedom. Some time ago, I served as a member of the Human Relations Subcommittee on Religious Understanding of the Davis Unified School District. The committee had an open membership, and many people of diverse faiths participated in its proceedings. After months of work, the Davis School Board approved the committee's recommendations. The recommended policy stated:

The environment of the Davis Joint Unified School District will be one in which the students of all religious faiths participate in the District's educational program on the basis of equal worth and mutual respect.

The schools of the District will provide a climate in which students:

- a. are aware of religious diversity,
- b. are respectful of those with differing beliefs, and
- c. respect the right of the individual to his/her own beliefs.<sup>163</sup>

This policy statement underwent numerous drafts. The resulting language was very carefully worded. If one looks at the language throughout the statement, it becomes clear that the school district, the teaching staff, and the student body are committed to respecting individuals who hold differing religious beliefs. They are not required to respect the religious beliefs themselves, however. Thus, the district will provide a climate in which students "are respectful of those with differing beliefs."<sup>164</sup> The district is not required to provide a climate in which students "are respectful of the beliefs of others."

That language choice was deliberate. Many committee members were clear that while they respected the right of other individuals to hold differing religious beliefs, they did not necessarily respect the substance of what other people believed. Nor did a commitment to religious freedom require them to do so. Committee members over time were willing to stand in the shoes of a child of another faith and appreciate why the district should be attentive to that child's needs. That did not mean, however, that they were willing to accept the legitimacy of the child's or his parents' beliefs. I was no different than anyone else in that regard. In developing the compromises that were necessary as we worked out procedures to implement the district's policy, I found myself often finding common ground with people who

---

repugnant to the core values held generally by residents of this country"), demonstrate that even the courts sometimes feel the need to distance themselves from the messages they allow to be heard.

<sup>163</sup> Davis, Cal., Davis Joint Unified School District Board Policy § 3.19-3 (June 6, 1991).

<sup>164</sup> *Id.*

objected to their children's participation in holiday activities that I considered to be completely innocent (and which my own children enjoyed a great deal). I developed considerable empathy for their children's situation, but my attitude toward their beliefs remained the same.

These illustrations support an important principle. Ultimately, no constitutional doctrine has intrinsic permanence. As long as the political branches of government control the appointment of judges and justices and people do not live forever, the Constitution over time can mean only what the polity is willing to allow it to mean. Constitutional doctrine eventually depends on political will. I do not think that we can count on the continuing "will" to protect religious freedom if we require people to undermine their commitment to the unique truth of their own religious beliefs. Yet we do just that by insisting that protecting the free exercise of other faiths is grounded on the possibility of the truth of contrary beliefs. Thus, one of the great virtues of grounding constitutional rights on the foundation of personal autonomy is that it allows one person to respect the rights of another without implicitly affirming the moral value of the way the person exercises the right.

An autonomy foundation for religious freedom has other virtues over a model grounded on the moral value of religion. By generalizing the purpose of religious freedom so that it resonates with the purpose of other rights, we create a firmer foundation for a range of rights. Both religious and nonreligious individuals stand to lose valuable protection if the "protecting personal autonomy" purpose of the several rights linked to this objective is challenged. Not only is the security of the right strengthened by linking it to other interests that diverse political groups value, but the justification for the right becomes more persuasive as the principle underlying it is broadened.

In determining whether protecting a right truly furthers the public good, arguments in favor of protecting an interest as a right by the group receiving the benefit from that designation in terms of that group's own well-being are always open to challenge. The self-serving testimony of a witness is always suspect. One can explain and discount the support that religious individuals give to religious freedom as nothing more than self-interested constitutional politics.

A defense of religious freedom that lays the groundwork for also protecting nonreligious self-defining activities is different. Here the costs and benefits of protecting personal autonomy are not so one-sided, and religious believers will bear some of the costs of nonbelievers' autonomous decisions just as nonbelievers will bear some of the costs intrinsic to protecting religious liberty. We trust the results of

the political and the constitutional process more when the costs of liberty are spread more broadly.

Finally, we must ask how the judicial and political process will define the scope of religious freedom if we elect to protect religious freedom primarily because religion is good. In discussing the protection that might be provided to homosexual marriage, Garvey raised a variety of questions that might properly be addressed in public moral debate to determine whether we should withdraw constitutional protection from this kind of a loving relationship.<sup>165</sup> Would that same kind of commentary either in judicial opinions or the legislature dispositively determine whether a claimed religion is a "religion" for constitutional purposes?

I have little difficulty imagining an insensitive majority concluding that various religious practices and belief systems are unnatural, immoral, sinful, or symptomatic of a psychological disorder. We can see arguments of this kind already in public debates about so-called religious cults.<sup>166</sup> Exactly what protection does Garvey's model provide the minority if the majority can isolate particular faiths or rituals that most people do not practice or understand (and of which many people may be more than a little afraid) and conclude that these practices and beliefs are not good, natural, or psychologically normal enough to constitute real religion? This risk also exists with regard to autonomy rights, but it is more pronounced if the foundation of a right represents the moral worth of the activity.

#### CONCLUSION

Despite my obvious disagreements with its author, I hope that *What Are Freedoms For?* is widely read. My reasons are entirely selfish. I value freedom. I believe that constitutional rights serve more and different purposes than John Garvey believes they serve, but, as is sometimes true of my reaction to judicial opinions, I can approve of the holding of a case while criticizing the majority's reasoning. This book reaffirms the value of freedom and that is always a good thing to do.

Garvey's book speaks more convincingly to conservatives than liberals, but that audience, at least as much as any other, needs a con-

---

<sup>165</sup> See *supra* Part IV.A.1.

<sup>166</sup> See, e.g., *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). A group practicing Santeria sought to perform ritual animal sacrifices as part of their religion. See *id.* at 526. The city council passed a resolution specifically targeted at the Santeria group to prevent them from opening their church and practicing their religion as they wished. See *id.* at 527-28. At the city council meeting at which the council passed the resolution prohibiting ritual sacrifice, one councilman stated "that Santeria devotees at the Church are in violation of everything this country stands for." *Id.* at 541. The city attorney said the resolution was designed to show that "[t]his community will not tolerate religious practices which are abhorrent to its citizens." *Id.* at 542.

stant reminder that constitutional rights are worth the price that society pays for them. In an era when Constitution-bashing has become fashionable in the name of conservative values, it is helpful when thoughtful conservatives remind their colleagues of why freedoms are good.

The value of the book for liberals is that it forces the reader who disagrees with Garvey's thesis to think and to think hard about the basis of that disagreement. Too many books on controversial issues today are self-consciously directed at only one side of the political spectrum. Opponents of the author's view are characterized as fools or villains. Not surprisingly, readers characterized in this way are unlikely to read a book with an open mind, assuming that they are willing to read it at all.

Garvey is entirely committed to the arguments he makes in his work, but there is no malevolent arrogance in his discussion of rights and wrongs. That makes his work accessible and provocative to those who may forcefully challenge his conclusions. I found that too much of a temptation to turn down, and spent weeks thinking about all the reasons why I was right and Garvey was wrong. I have not thought about issues with so much intellectual gusto in a long time.<sup>167</sup>

---

<sup>167</sup> This Review covers only a few sections of *What Are Freedoms For?*. There are more than enough issues and arguments that I did not address to keep any reader thinking and developing responses to Garvey's positions for many days.